

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT (CH D)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 October 2020

Before :

Tom Leech QC (sitting as a Judge of the Chancery Division)

Between :

- (1) ANTHONY KING
(2) JAMES PATRICK KING
(3) SUSAN MAY KING

Petitioners

-- and --

- (1) KINGS SOLUTIONS GROUP LIMITED
(2) PRIMEKINGS HOLDING LIMITED
(3) ROBIN FISHER
(4) BARRY STIEFEL
(5) GEOFFREY ZEIDLER
(6) KINGS SECURITY SYSTEMS LIMITED

Respondents

Ms Catherine Addy QC and Mr Joseph Sullivan (instructed by **Macfarlanes LLP**) for the
Respondents

Mr Christopher Newman (instructed by **Claremont Litigation Limited**) for the **Petitioners**

Hearing dates: 7 and 8 October 2020

Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 4 pm on 17th September 2020.

Tom Leech QC :**I. Introduction**

1. By Application Notice dated 20 December 2019 the Second to Fifth Respondents apply to strike out parts of the Points of Claim served in proceedings under section 994 of the Companies Act 2006 (“**section 994**”). By a petition presented on 19 March 2018 (the “**Petition**”) Mr Anthony King and his parents, Mr James King and Mrs Susan King, claim relief in relation to the affairs of the First Respondent, Kings Solutions Group Ltd (the “**Company**”), which is not an active party and played no part in this application. The Sixth Respondent, Kings Security Systems Ltd (“**KSSL**”), is the operating subsidiary of the Company.
2. In this judgment, I will refer to the three petitioners together as the “**Petitioners**” and to them individually as “**Anthony**”, “**James**” and “**Susan**”. I do so for ease of reference and without intending any disrespect to them. I will also refer to the Second to Fifth Respondents as the “**Applicants**”. In their Skeleton Argument and throughout the hearing Ms Catherine Addy QC, who appeared with Mr Joseph Sullivan on behalf of the Applicants, referred to them as the “**Active Respondents**” in contrast to KSSL, which she submitted should not be treated as an active party. Mr Christopher Newman, who appeared on behalf of the Petitioners, did not accept this characterisation. In the event, it was unnecessary for me to decide whether KSSL is – or should be treated as – an active party. But I prefer to employ the neutral expression the “**Applicants**” to refer to the Second to Fifth Respondents.
3. The Petition is one of a number of sets of proceedings involving the parties (or a number of them) and it is necessary for me to explain those proceedings briefly as part of the background to the present application. The other proceedings have been issued either under CPR Part 7 or CPR Part 8 and for ease of reference I will use the umbrella term the “**Claims**” to refer to them collectively. In the following sections of this judgment I deal with the following topics in the following order:

Section II: Background: [5] to [17]

Section III: The Claims: [18] to [47].

Section IV: The Petition (the allegations): [48] to [72].

Section V: The Petition (procedural chronology): [73] to [79].

Section VI: Legal Principles: [80] to [113]

Section VII: Decision: [114] to [138].

Section VIII: KSSL: [139].

Section IX: Disposal: [140].

4. In the Appendix I set out the extracts from the Points of Claim served by the Petitioners which the Respondents have challenged on this application (rather than set them out in the body of this judgment below). I briefly summarise those extracts in section IV (below). Those summaries are no more than that and in deciding this application I have had full regard to the detailed wording of the relevant extracts themselves.

II. Background

The Petitioners

5. The Company is a holding company for a group of operating companies which provide security and fire services to domestic and commercial customers. Before 20 December 2013 the Petitioners and a family trust called the JPK No 1 Discretionary Settlement (Trust) (the “**Trust**”) owned the entire issued share capital of the Company. Anthony and the Trust still own ordinary shares whilst James and Susan now hold six non-voting B shares.

The Applicants

6. The Second Respondent, Primekings Holding Ltd (“**Primekings**”), holds all the other issued ordinary shares in the Company. The Third Respondent, Mr Robin Fisher, and the Fourth Respondent, Mr Barry Stiefel, are directors of the Company, KSSL and Primekings. The Fifth Respondent, Mr Geoffrey Zeidler, is the Chairman of the board of directors of both the Company and KSSL. The

Petition and the Claims all arise out of the investment by Primekings in the Company which was completed on 20 December 2013.

The Transaction

7. By a share purchase agreement dated 20 December 2013 (the “**SPA**”) and made between James and Susan (1) and Primekings (2), Primekings agreed to purchase the 402 ordinary shares in the Company for £2,000,000. £750,000 of the purchase price was payable immediately. The balance of £1,250,000 was to be paid whenever and as soon as Primekings acting reasonably and in good faith determined that the Company could lend or distribute sufficient funds to pay this sum but with the intention of paying it entirely by the third anniversary of completion.
8. By a second agreement also dated 20 December 2013 (the “**Subscription Agreement**”) and made between Primekings (1), Anthony and the Trust (2) and the Company (3) Primekings agreed to subscribe for a further 1,507 ordinary shares at a total subscription price of £1,000,000. Clause 10 of the Subscription Agreement contained both put and call options. In clause 10.1 the Trust granted an option to Primekings to acquire its 402 shares in the Company. In clause 10.3 Primekings also granted Anthony an option to require it to acquire up to 50% of his shares on or after the third anniversary of the date of completion.
9. Schedule 5 to the Subscription Agreement set out the terms on which Anthony could require Primekings to acquire his shares (defined as the “**AK Option Shares**”). Paragraph 2.2 provided that the consideration was to be their fair value calculated in accordance with paragraph 4. Paragraph 3.3 provided that on completion Anthony was required to deliver stock transfer forms, share certificates and a waiver of any applicable pre-emption rights duly signed by (or on behalf of) all members of the Company. Paragraph 4.1 provided as follows:

“The ‘fair value’ of the AK Option Shares shall be (as agreed between AK and the Investor [Primekings] or, in the absence of such agreement, as calculated by an independent accountant appointed by the board under paragraph 5) of the AK Option Shares shall be valued on the following assumptions.....”

10. For present purposes, it is unnecessary for me to set out the assumptions on which the independent accountant was to value the AK Option Shares and it is enough to note that he or she was to be appointed by the Company's board of directors. Paragraph 5 provided for the appointment of the independent accountant who was to act as an expert and not an arbitrator. Paragraph 5.3 provided that the fees of the appointed accountant should be borne equally by the parties.
11. On completion James and Susan were allotted six B shares which carried no voting rights. Article 31 of the Company's Articles of Association provided that those shares were to be redeemable over a period of three years at £500,000 per share if the EBITDA of the Company was equal to or greater than £3,000,000 or in accordance with a detailed formula if the EBITDA of the Company was less than that figure. The Company's obligation to redeem the shares was, however, dependent upon the Company having sufficient distributable profits to do so (or other monies which could lawfully applied for their redemption): see Article 31.10.
12. The effect of the Subscription Agreement was that Primekings became the owner of c. 76% of the share capital of the Company and Anthony and the Trust retained approximately c. 24%. In November 2014 Primekings voluntarily agreed to reduce its shareholding from c. 76% to c. 60% and also agreed to reduce the number of the Trust's shares subject to the call option from 402 to 242 ordinary shares. The Company did not have sufficient funds to pay the additional £1,250,000 to James and Susan. But Primekings voluntarily paid this sum to them making the final instalment on 31 March 2015. I was taken to an email dated 24 October 2014 in which Anthony expressed real gratitude to Mr Fisher and Mr Stiefel.
13. The Applicants described the investment in the Company as a rescue package and the agreements signed and completed on 20 December 2013 as the "**Rescue Package Agreements**". Again, it is unnecessary for me to decide the extent to which Primekings' investment had this effect and I will use the neutral term the "**Transaction**" to describe the whole package or suite of documents which were completed on that day.

The Shares

14. After the Transaction had been completed and the voluntary reduction by Primekings of its shareholding in the Company the parties held the following shares in the Company:
- i) Anthony held 201 ordinary shares;
 - ii) The Trust held 402 ordinary shares;
 - iii) Primekings held 904 ordinary shares; and
 - iv) James and Susan held six B shares.
15. Ki Finance SARL (“**KI Finance**”) which had provided additional finance to strengthen the Company’s capital base also held 200m preferred shares of 1p each. It was the Applicants’ evidence that further finance was necessary and that the Company is currently indebted to Primekings for £2,700,000 and to KI Finance for £3,895,000.

The Directors

16. After the Transaction James and Susan resigned as directors of the Company and were replaced by Mr Fisher and Mr Stiefel. Mr Peter Swain was also appointed to be a director at the same time. Anthony remained a director of the Company until 20 September 2017. He also acted as the managing director of KSSL.
17. On 23 April 2014 Mr Swain resigned as a director and on 28 July 2015 the Fifth Respondent, Mr Geoffrey Zeidler, also became a director of the Company. He was later appointed to be a director of KSSL and the Chairman of the boards of directors of both companies.

III. The Claims

The Misrepresentation Claim

18. On 15 July 2015 (and shortly after the final instalment had been paid to James and Susan) the Petitioners issued proceedings against Primekings, Ki Finance,

Mr Fisher and Mr Swain (the “**Misrepresentation Claim**”). James was also a claimant in his capacity as a trustee of the Trust. DWF LLP (“**DWF**”), who had acted for the Petitioners in relation to the Transaction, also acted on their behalf in relation to the claim.

19. On 10 February 2016 the Petitioners discontinued the Misrepresentation Claim against Ki Finance and it ceased to be a defendant. I will refer to the remaining defendants as “**Primekings**” or the “**Primekings Parties**” (depending on the context). In the Amended Particulars of Claim dated 17 March 2016 the Petitioners made the following allegations against them:

- i) In about August 2013 the Company moved the group’s banking arrangements back to its former bankers, GE Money (“**GE**”). But from October 2013 GE began to renege on its funding arrangements: see paragraphs 16 and 17.
- ii) On 7 December 2013 the parties reached agreement under which Primekings would acquire 60% of the shares in the Company, it would pay £1,000,000 to the Company to subscribe for an additional 503 shares and it would pay James and Susan initial consideration of £2,000,000 and a further £3,000,000 payable over three years in instalments of £1,000,000 per year (described as the “**Original Deal**”): see paragraph 23.
- iii) On 18 December 2013 the parties travelled to the offices of Teacher Stern LLP (“**Teacher Stern**”), Primekings’ solicitors, for the completion meeting. Mr Swain and Ms Alison Lord of Allegra Ltd, a firm of financial advisers, travelled to meet GE by prior arrangement. Mr Stephen Evans, the Company’s financial director, also travelled to the meeting. However, as he was about to arrive, Ms Gaynor Kehoe, the Company’s secretary, told him that she had spoken to Mr Swain by telephone and he had told her that GE did not want Mr Evans to attend the meeting. This was a lie: see paragraph 26.
- iv) In the course of the completion meeting Mr Fisher spoke to Mr Swain who made the following statements (see paragraph 28):

- a) That all of the Company's accounts were frozen;
 - b) That GE had lost complete faith in the management of the Company and the group (and on that basis GE had excluded Mr Evans from participation in the meeting and would not let him in the building); and
 - c) That GE was no longer prepared to support the Company and the group and there would be no further funding.
- v) Those statements were untrue. The Primekings Parties owed the Petitioners a duty of care and they made the statements either negligently or fraudulently: see paragraphs 30 to 33.
- vi) The Primekings Parties also combined to induce the Petitioners to alter the terms of the Transaction adversely by unlawful means, namely, by deceit and economic duress: see paragraphs 34 to 36 and 38. The Petitioners also reserved their rights against Mr Stiefel in the following terms (see paragraph 37):

“The [Petitioners] also suspect, but do not at this stage advance a positive case to the effect (but reserve the right to plead one a later stage), that Mr Stiefel may also have known about and participated in the deception of the [Petitioners] either at the time the Statements were made to them or soon afterwards (prior to completion). His involvement in negotiations and arranging for the necessary funding was such that it would be surprising if he was not fully appraised of what Mr Swain and Mr Fisher intended to do or had done on behalf of Primekings, whether before, at the time, or soon afterwards.”

- vii) On 20 December 2013 the parties completed the Transaction. After completion, Mr Stiefel acting on behalf of Primekings gave indications that it would seek “to be generous” and restore trust by reverting to the Original Deal: see paragraph 42. In particular, at a visit to the Company's offices over 29 and 30 January 2014 also attended by Mr Fisher, Mr Stiefel told James and Anthony that the Primekings Parties “were big

enough and ugly enough to tear up the agreement and start again”: see paragraph 42.2.

- viii) Although the shareholder levels were restored to 60% for Primekings and 40% for Anthony and the Trust in October 2014, the additional consideration was only paid in April 2015 following receipt of a letter before action. Despite assurances, the Original Deal was not restored and the Primekings Parties gave further indications that they did not intend to restore it: see paragraph 43.
 - ix) The Petitioners claimed rescission of the SPA and the Subscription Agreement: see paragraphs 44 and 45. In the alternative, the Petitioners claimed damages: see paragraph 46.
20. In their Amended Defence dated 6 May 2016 the Primekings Parties denied the allegations that they owed a duty of care to the Petitioners or that they made negligent or fraudulent misrepresentations or that they were liable for economic duress and unlawful means conspiracy. For present purposes, it is enough to note that they advanced a positive case that the statements which Mr Swain made on 18 December 2013 were true. In particular, their defence was as follows:
- i) Mr Swain spoke on the telephone with GE and told them that Mr Evans would not be attending the meeting and he telephoned Mr Evans and told him that his presence was not required. He did not tell Mr Evans that GE had decided that he should not be at the meeting but made it clear that the decision was his: see paragraph 26e.
 - ii) The gist of the statements made by Mr Swain at the meeting itself were admitted. However, Mr Swain stated that GE had told him that the Company’s account was frozen and would remain frozen until a deal was done. He did not say that GE had excluded Mr Evans from participation in the meeting and would not let him in the building. He also stated that GE had told him that there would be no further funding support unless a deal was done to inject cash into the business: see paragraphs 28a. to c.

- iii) Mr Swain’s statements were true and in all material respects represented the position which GE had taken with him at the meeting: see paragraph 28.
 - iv) For the avoidance of doubt, Mr Stiefel was not involved in any deception or conspiracy: see paragraph 37.
 - v) On 29 January 2014 Mr Stiefel made the statement that “we are big enough and ugly enough to tear up the agreement and start again”. He simply meant that the investors would not necessarily insist upon strict performance of the contractual mechanism for changing the shareholding split to 60/40. However, he also made it clear that the contractual mechanism (the EBITDA targets) would remain in place: see paragraph 42f.
21. On 28 April 2017 the trial of the action began before Mr Justice Marcus Smith. The transcript records that the judge raised a concern about the extent of the alleged conspiracy and that the Petitioners’ counsel stated as follows:
- “My Lord, part of the consideration of whether to add any further conspirators is that, firstly, it’s highly unlikely we would add them as a party because we are unlikely to be seeking a remedy against anyone other than these defendants. The principal remedy sought by my clients, as you will have seen, is rescission.”
22. On Thursday 4 May 2017 and in the course of his cross-examination Anthony was asked about an email to DWF in which he had said the following: “If this deal doesn’t happen tomorrow GE will cease to advance us anymore monies.” On Friday 5 May 2017 he was also asked about an attendance note in which the following statement was recorded: “GE frozen --- unless pay tax and do deal...”. On Monday 8 May 2017 and after reflecting over the weekend Anthony gave evidence that the words “unless a deal is done” were used but by Mr Fisher not by Mr Swain:

“What happened was Robin left the room and he goes out after this big bombshell has been dropped on us, he goes out of the room. Then he comes back in, I don’t – I can’t recall whether it was half an hour or 45 minutes later, and he says he’s spoken to

GE and he's – what Peter has said is true but he's managed to convince them to stay with us and, if we do a deal, if we do a deal, it will be okay, but he can't possibly do it now on these same terms.”

23. Shortly after this passage Anthony also gave evidence that he believed that Mr Stiefel had been a party to the fraud:

“Barry Stiefel absolutely knew what happened. I'm convinced of that now, absolutely. Not - - whether he knew it on the night, I'm not sure, but on 27 January when he went to GE with Robin, he knew we were complaining about what Peter was saying and what he had said and it wasn't true, and he went to GE knowing that and he'll have asked GE. When he comes to see us on the 29th and 30th he makes no mention of that meeting with GE, none at all. He could have quite easily have killed it at that point, said: Anthony, I've been to GE two days ago and they said everything that Peter said was true, what you are complaining about is nonsense. But he never said a word to us.

What he did say to us: mistakes have been made and we are big enough and ugly enough to tear up the contract and start again. He was struggling with what he now had in his hands. He knew – I believe he knew this was a fraudulent transaction but how does he deal with it. How does he now deal with it.

So he became party to it, if you like. I don't know the legalities around that, but he became party to it at that point, and for three and a half years these men have sat on a lie, they've sat on a lie knowing it's a lie, just for a few – they should have taken my offer, sir, when I was broken, and taken the business for a pound and I'd have never found out. I would have never found out. I have wept this weekend believing that human beings can do this to each other.”

24. Mr Newman stressed that there was a real difference between the defence that GE had frozen the Company's accounts unless a deal was done and Anthony's evidence that Mr Fisher told him that GE would continue to provide funding if a deal was done. At all events, at the end of that day leading counsel for Primekings raised the point that Anthony was now advancing a new case which had not been pleaded.
25. On Tuesday 9 May 2017 Mr Thomas Weedall of GE gave evidence. Subject to some qualifications he accepted that if a deal could not be concluded by 20 December 2013 GE could not provide additional payments. On Monday 15 May

2017 when they had closed their case (apart from expert evidence), the Petitioners discontinued the Misrepresentation Claim. Their counsel made the following apology on their behalf:

“The Kings accept that the order for costs should be that they pay the costs, to be assessed on the indemnity basis if not agreed. However, in light of the seriousness of this claim and the allegations made in it, the Kings and we felt that it is also right to say something specific and in open court by way of apology. Although there is some residual concern about the way in which Mr Swain went about things, GE’s evidence was that he did not fraudulently misrepresent GE’s position on that day.

James and Anthony’s reluctance to call Mr Stiefel and Mr Fisher liars or fraudsters in court was evident for all to see, but they would now like to go further and apologise unreservedly for the allegations made in the claim and in court. Their conclusion, in light of the evidence as it has developed, is that they got it wrong, and that unfortunately has soured their relationship with the defendants and the Kirsh interests ever since. This claim made serious allegations, but those allegations and the assault on the reputations of those involved are unreservedly withdrawn.”

26. On 15 May 2017 Mr Justice Marcus Smith made an order recording that the Petitioners had filed and served a notice of discontinuance. In paragraph 1 the judge ordered the Petitioners to pay the costs of the claim on an indemnity basis to be assessed (if not agreed). In paragraph 2 he ordered them to pay the sum of £1,700,000 on account of costs by 4 pm on 12 June 2017. I will refer to the order in paragraph 2 as the “**Interim Costs Order**”.
27. The Petitioners failed to comply with the Interim Costs Order and on 3 August 2017 Deputy Master Cousins granted final charging orders over their shares in the Company and a number of properties. He also issued stop notices preventing the Petitioners from dealing with their shares.
28. On 24 August 2017 Deputy Master Linwood also made orders requiring each of the Petitioners to attend for oral examination under CPR Part 71. On 11 October 2017 those oral examinations took place before him and he ordered that they should be adjourned generally with liberty to restore.
29. On 2 April 2019 the Primekings Parties applied to Court for detailed assessment of the costs of the Misrepresentation Claim. The notice of commencement stated

that their bill of costs totalled £2,452,657.51. I was told that the detailed assessment has been listed for final hearing on 12 November 2020 with a time estimate of seven days.

The Bribery Claim

30. On 19 May 2017 and following the conclusion of the Misrepresentation Claim, Anthony entered into an agreement with KSSL under which he agreed that his employment was terminated with immediate effect and to accept £70,000 (less PAYE deductions) within 14 days. In compliance with the relevant employment legislation, Anthony confirmed that he had received independent advice and his solicitors also provided a certificate to that effect.
31. KSSL did not pay the sum of £70,000 to Anthony within 14 days. On 15 August 2017 KSSL commenced proceedings (the “**Bribery Claim**”) against Anthony and Mr Evans claiming that TC Harrison 1960 Ltd (trading as “**TCH Leasing**”) had agreed with Mr Evans to provide two range rovers as a bribe to keep KSSL’s share of the profits on the resale of certain vehicles. KSSL claimed a number of remedies including rescission of the agreement terminating Anthony’s employment. On 20 September 2017 Anthony was also removed as a director of the Company and KSSL.
32. By a Tomlin order dated 11 September 2018 KSSL and Mr Evans agreed to settle the claim against him and by letter dated 24 August 2018 he admitted that he was involved in financial transactions which were not in KSSL’s best interests which should have been disclosed to – and approved by – the full board of directors.
33. The Bribery Claim against Anthony has not yet been determined and is listed for trial in November 2020. There have been a number of interim applications but, subject to one point, it is unnecessary for me to set out the history of the claim. On 21 November 2018 Deputy Master Arkush granted permission to Anthony to re-amend his Defence and to bring a counterclaim for damages for the tort of abuse of process.

34. Mr Newman placed particular reliance on the Deputy Master's observations at [100] where he expressed "a lingering sense of unease about the real reasons why these proceedings have been launched". His reasons for that unease were set out at [93] and [94]:

"Therefore, what you have on the face of the particulars of claim as issued, is a claim for something like £42,000 and certainly when I read it for the first time, it did raise my eyebrows as to why so much money seems to have been spent, and is expected to be spent in the future, on proceedings for a relatively minor sum. It is true that subsequently the claimant has sought to bolster that sum by higher amounts, but it is notably vague what these sums are, and it is not at all clear to me whether those sums were thought of at the time or whether in fact they were an afterthought designed to resist the application. Against the value of the claim on its face, the costs associated in bringing the claim must viewed as completely disproportionate."

The Part 8 Claim

35. By Claim Form dated 27 October 2017 the Primekings Parties applied under CPR Part 8 for an order for sale of the Petitioners' shares in the Company (the "**Part 8 Claim**"). On 23 March 2018 a disposal hearing took place before Deputy Master Cousins at which he made an order for sale. In a judgment dated 23 May 2018 he reviewed and then confirmed his earlier decisions and directed that the parties should attempt to agree directions for enforcement. There was no application for permission to appeal against that judgment.
36. At the hearing before the Deputy Master, Anthony appeared in person and represented James and Susan. In paragraph 9 the Deputy Master recorded that Primekings had commissioned a share valuation report from Mr Nigel Eastaway OBE, a recognised expert on share valuations. In paragraph 17 he recorded the following about Anthony's oral submissions (original emphasis):

"Mr King expressed considerable distress and concern as to the valuation placed upon the Shares by Mr Eastaway, and the method proposed by the Claimants for the Sale of the Shares, which he expressed as creating a "*windfall*", and being, in effect a "*takeover*" of KSGL. He made a number of submissions in relation to this. His principal concern was that the Shares were grossly undervalued by Mr Eastaway. He referred to the fact that the previous year the Shares were valued at £11.7m. He also

submitted that Mr Eastaway was not sufficiently independent, and that he, Mr King, had been unable to provide any input to Mr Eastaway prior to the making of the Valuation Report. This had been commissioned by the Claimants' own solicitors, namely, Teacher Stern LLP, and there had been no sight of the letter of instruction. He also expressed strong concern as to the unconscionability, and unfairness, and the fact that the circumstances did not produce a level playing field."

37. In paragraphs 22 to 31 the Deputy Master also recorded that at the hearing he had refused an application to adjourn on the basis that the Petition had been issued shortly before (on 19 March 2018). In paragraph 43 he also recorded Anthony's oral submissions in relation to the order for sale:

"Insofar as the Defendants are concerned, Mr King made a number of detailed submissions on the perceived unfairness and unconscionability of making the Order for Sale in the circumstances. He emphasised the fact that such an order would severely disadvantage the Defendants without there being a full and proper valuation of the current value of the Shares. He was also very concerned that the Shares would in effect be transferred to the Claimants, which would place the Defendants under a considerable disadvantage, especially if there had not been due process of the true and proper assessment of their worth, particularly given the value placed upon the Shares by Mr Eastaway in the Valuation Report. Mr King submitted that the Valuation Report was not a truly independent report, as it had been commissioned by Teacher Stern LLP, and that the letter of instruction had never been disclosed."

38. The Deputy Master made it clear that at the hearing he had rejected these arguments. One reason which he gave was that the Petition should not be allowed to stand in the way of the Part 8 Claim: see paragraph 48(4). He then dealt with the principles upon which it was permissible for him to review his earlier decisions to reject the adjournment application and to make the order for sale and concluded that he should do so. Having reviewed them, he confirmed his decisions and gave directions for enforcement.
39. The parties were unable to agree directions and a further hearing took place at which the Petitioners were represented by leading and junior counsel. In a second detailed judgment dated 6 August 2018 the Deputy Master refused to

stay the order for sale pending the hearing of the Petition. He recorded the following submissions by leading counsel:

“20. However, the thrust of the Defendants’ submissions is that as a matter of practicality the Order for Sale should be stayed pending the consideration of the Section 994 Petition. In paragraph 18 of Leading Counsel’s written submissions, it stated that the valuation issues can only justly, and without duplication, be resolved within the context of the Section 994 proceedings. By doing so it is submitted that such a course of action causes no material prejudice to the Claimants’ legitimate interests as a judgment creditor for all the reasons set out in paragraph 38 of Leading Counsel’s written submissions

Stifling of the Defendants’ Rights

21. Thus, a crucial element of the Defendants’ case is that the Order for Sale, and in particular the facilitation of the sale process, stifles the Defendants’ rights and is therefore sought for an improper purpose. It is said that the Claimants seek to destroy the rights of Mr King under the put-option (“*the Put Option*”) arising under Clause 10 of the Shareholders’ Agreement. Mr King asserted during the course of the Disposal Hearing, and Leading Counsel continues to make the submission, that Mr King was/is entitled to exercise the Put-Option and sell the Option Shares at a price to be determined in accordance with Part 1 of Schedule 5 of the Shareholders’ Agreement.”

40. The Deputy Master rejected these submissions and held that it was appropriate to direct the order for sale to proceed: see paragraph 35. He gave a number of reasons for this decision in paragraph 36. Two of those reasons are relevant to the issues which I have to decide:

“(8) Further, it is somewhat challenging to understand how the Costs Order the subject matter of Final Charging Orders, upon which the Order for Sale was founded, can somehow be the subject matter of consideration during the course of the hearing of the Section 994 Petition, absent any appeal. It is possible that the Companies Court may find some difficulty in being seised of this issue when the Final Charging Orders have never been the subject matter of an application for permission to appeal, and permission to appeal has been refused in so far as the Order for Sale is concerned. The principles of *res judicata* must apply unless and until the Final Charging Orders and/or the Order for Sale of the Shares are/is overturned on appeal.....

(11) I also agree entirely with Leading Counsel for the Claimants that it cannot remotely be successfully asserted that in pursuing the Claimants’ desire to seek satisfaction of the large Costs

Order, which still remains unpaid, in some way the Claimants have acted unfairly, or there is an abuse of process, or they are seeking some form of collateral advantage, or stifling of the Defendants' case. The Claimants have been pursuing their legitimate interests in seeking such satisfaction. Insofar as the assertion made that there is a "*real goal*" behind the Claimants' aims, it is perfectly legitimate for the Court to Order a Sale of the Shares in the present circumstances in accordance with the terms laid down by the Articles. In effect, the Shares are to be transferred to the First Claimant in accordance with the procedure laid down in the Articles, subject to a fair valuation."

41. It is important to note, however, that although he dismissed the application for a stay, the Deputy Master directed that an independent valuer be appointed in order to avoid any perceived taint of unfairness. He also directed the parties to prepare directions for the parties to agree a letter of instruction: see paragraphs 38 and 39.
42. Directions were never agreed and the order for sale was never carried into effect because on 10 October 2018 the Petitioners' solicitors, who were then Reynolds Porter Chamberlain LLP ("**RPC**"), paid the sum of £1,881,200 in satisfaction of the Interim Costs Order. In paragraph 195 of the Points of Claim the Petitioners pleaded that this payment was funded by DWF's insurers and Mr Newman confirmed that this was correct.
43. It remained necessary, however, for the Deputy Master to decide the incidence of costs in relation to the Part 8 Claim. In a third judgment dated 18 December 2018 he ordered the Petitioners to pay the costs of the Part 8 Claim on an indemnity basis. In paragraph 48 of his judgment the Deputy Master explained that he considered that it was "eminently a case where indemnity costs should lie" for the following reason:

"From the commencement of the Part 8 Claim and throughout the Part 8 Proceedings the Defendants opposed the Part 8 Claim in its entirety and made repeated applications for a stay and/or an adjournment of the Part 8 Proceedings. There were many attempts to raise, and re-address, issues which had already been determined in the Judgment and Further Judgment."
44. On 21 May 2019 the Primekings Parties applied to Court for detailed assessment of the costs of the Part 8 Claim. The notice of commencement stated that their

bill of costs totalled £363,295.46. I was told that the detailed assessment of the costs of the Part 8 Claim has been listed with the detailed assessment of the costs of the Misrepresentation Claim on 12 November 2020.

The Professional Negligence Claim

45. By Claim Form dated 6 December 2019 the Petitioners commenced proceedings against DWF for breach of contract, negligence and breach of fiduciary duty in relation to the conduct of the Misrepresentation Claim (the “**Professional Negligence Claim**”). The Claim Form asserted that: “the chance to win an overwhelmingly strong case was thrown away by the negligence and breach of duty of DWF”. I was told by Mr Newman that counsel had been joined as parties to the claim. Mr Newman also offered to show me the statements of case in the Professional Negligence Claim but I considered it unnecessary for the purposes of deciding the issues on this application.

The Conspiracy Claim

46. Finally, by Claim Form dated 5 February 2020 the Petitioners commenced proceedings (the “**Conspiracy Claim**”) alleging an unlawful means conspiracy against Mr Stiefel, Mr Fisher, Mr Swain, Primekings, the individual solicitors and leading counsel who had acted for them in the Misrepresentation Claim and also against Teacher Stern. In the Particulars of Claim dated 19 March 2020 the Petitioners allege that nine of the ten Defendants had a common design to achieve a number of goals including the following (see paragraph 16.1):

“Placing pressure on the Kings and their legal team to discontinue the case (thus avoiding a fair adjudication on the facts) by (i) misleading the Kings into believing that if they did not discontinue then they might ultimately become liable to Primekings for an amount of legal costs which in fact Primekings knew it would not incur (ii) using threatening conduct to intimidate the Kings and their lawyers for that purpose.”

47. The Petitioners also allege that a number of the Defendants made fraudulent misrepresentations to them about the amount of costs billed by Teacher Stern to Primekings: see paragraphs 48 to 60.

IV. The Petition (the Allegations)

48. Both parties have served detailed Points of Claim and Defence in the Petition (and I set out the relevant procedural chronology below). The Points of Claim are dated 20 January 2019 and are divided in twenty sections. Section I contained formal information, section II explained the relationship between the Company and KSSL and section III set out the statutory duties of the directors.

(1) Post-deal events and restoration of original terms

49. Section IV set out the details of the Transaction. In paragraph 33 the Petitioners gave particulars of the meeting on 18 December 2013 and pleaded that “Primekings introduced certain changes to the terms of the deal”. The first extract which the Applicants challenge is in paragraphs 35 to 40 under the heading “Post-deal events and restoration of original terms”. In that extract the Petitioners allege that after the Transaction had been completed they discovered facts which led them to believe that their agreement to those changed terms had been induced by representations which were untrue.

50. They also allege that this caused them to lose trust in Primekings and that Mr Stiefel assured them that the terms of the deal (as originally contemplated) would be restored. In particular, they allege that in January 2014 he stated that the Kirsh Parties (as defined) were “big enough and ugly enough to tear up the agreement and start again”.

51. Paragraph 40 sets out the reduction in Primekings’ shareholding from 76% to 60% and the payment of £1,250,000 to James and Susan. Paragraph 41 also sets out the additional rights conferred on the Petitioners as minority shareholders under the Subscription Agreement.

(2) Proposed Acquisition of Cougar/DSSL

52. In Section V the Petitioners allege that soon after completion Mr Stiefel and Mr Fisher started acting in ways calculated or likely to promote the interests of Primekings or themselves at the expense of the Company. In paragraphs 43 to 48 they plead the proposed acquisition of two companies DSSL and Cougar

which had been contemplated in the Subscription Agreement but which did not proceed. This is the second extract which the Applicants challenge.

(3) *The commencement of the Misrepresentation Claim*

53. Thirdly, the Applicants challenge most of paragraphs 72 to 77 which deal with the commencement of the Misrepresentation Claim. In that extract the Petitioners allege that in February 2015 they concluded that the assurances which they had been given by Mr Stiefel that the terms of the 2013 Transaction would be restored to the terms originally contemplated, would not be honoured in full. They also plead that they instructed DWF to explore what action could be taken and then commenced the claim.

(4) *Conduct Relating to the B Shares and EBITDA*

54. In Section VII the Petitioners make a number of allegations about the conduct of Mr Stiefel and Mr Fisher in relation to the redemption of the B shares. The fourth extract which the Applicants challenge is paragraph 96(e) which looks forward to the allegations made about the Part 8 Claim.

(5) *Trial and Discontinuance of Misrepresentation Claim*

55. Fifthly, the Applicants challenge most of paragraphs 97 to 105 which deal with the conduct of the Misrepresentation Claim. Those paragraphs set out the rival contentions of the parties, the evidence given by the lead partner at DWF both in his witness statement and in cross-examination and then the discontinuance of the claim. They also deal with the application for the Interim Costs Order where it is alleged that Primekings made a tactical decision not to assert that it had incurred costs of more than £1.872m when it applied for the order.

(6) *June 2017 – obstruction of exercise of put option*

56. In Section IX the Petitioners allege that following the discontinuance of the Misrepresentation Claim (and quite possibly much earlier) Primekings, Mr Fisher and Mr Stiefel decided that they were going to take steps to obtain the Petitioners' shares, deliberately exclude them from the business and as far as possible deprive them of the ability to vindicate their legal rights under the

Company's Articles, the Subscription Agreement and the general law "including by depriving them of funds": see paragraph 106.

57. The Petitioners also allege that the pursuit of those goals (which they define as the "**Campaign**") amounted to unfairly prejudicial conduct of the affairs of the Company for a number of reasons. Detailed particulars of the Campaign are set out in paragraphs 108 to 203. The Respondents do not challenge the general allegation that there was such a Campaign or all of the particulars of it although Ms Addy was at pains to point out that the Respondents strongly deny these allegations and do not accept that they have a real prospect of success.
58. The first passage of these particulars and the sixth extract from the Points of Claim which the Applicants challenge is contained in paragraphs 127 to 136 where the Petitioners allege that the Respondents obstructed Anthony from exercising his put option to require Primekings to acquire the AK Option Shares.

(7) *June Charging orders*

59. Seventhly, the Applicants challenge paragraphs 137 to 139 in which the Petitioners allege that the Primekings Parties applied for and obtained charging orders over their shares with a view to obtaining an order that the charged shares be sold to them at the lowest possible valuation.

(8) *Service of papers*

60. Eighthly, the Applicants challenge paragraphs 168 to 171 in which the Petitioners allege that James was served personally with the order requiring him to attend for personal examination under CPR Part 71 to increase pressure on the King family ahead of a possible meeting with Primekings.

(9) *11 and 12 October 2017 questioning*

61. Ninthly, the Applicants challenge paragraphs 175 and 176 in which the Petitioners allege that their oral examination and a statement made by leading counsel after the hearing formed part of the Campaign.

(10) *Pressure exerted by threat of further costs in respect of the Misrepresentation Action*

62. Tenthly, the Applicants challenge paragraphs 182 and 183 in which the Petitioners allege that the Primekings Parties did not commence detailed assessment of the costs of the Misrepresentation Claim because they believed that the recoverable costs were likely to be no greater than the Interim Costs Order of £1.7m. The Petitioners assert that the threat of detailed assessment was used as part of the Campaign.

(11) Part 8 Claim aimed at expropriating shares at an undervalue

63. The eleventh passage which the Applicants challenge is paragraphs 184 to 191 in which the Petitioners allege that the Part 8 Claim was structured and pursued to result in an expropriation of their shares on unfair terms.

(12) Payment of the Payment on Account Debt

64. The twelfth passage which the Applicants challenge is paragraph 196 in which the Petitioners plead the payment by DWF's insurers to satisfy the Interim Costs Order.

(13) Letter asserting more money owed

65. The thirteenth extract which the Applicants challenge relates to a letter dated 30 October 2018 from Teacher Stern to Anthony which the Petitioners allege amounted to harassment.

(14) Costs of the Part 8 Claim

66. The fourteenth and final extract which the Applicants challenge is paragraphs 198 to 203 in which the Petitioners allege that the claims for costs which the Primekings Parties made in the Part 8 Claim represented an improper attempt to exert pressure on them.

67. In Section X the Petitioners allege that they have been wrongfully excluded from the Company's business in breach of their rights as shareholders and in Sections XI and XII they also plead that threats were made to apply for an injunction and to claim a debt of £50,493 from James.

68. In Section XIII the Petitioners allege that a number of steps have been taken to minimise the possibility that they would be able to vindicate their legal rights. This section includes the allegation that the Respondents prevented Mr King from exercising his put option in June 2017. This sentence was not included in the application but Ms Addy asked me to strike it out on the basis that it was parasitic on extract (6) (above). For this reason, I have included it in the Appendix.
69. In Section XIV, paragraph 233 the Petitioners allege that the Campaign had serious consequences for the Company's business. Because of the significance which I attribute to this paragraph I set out the relevant parts:

“233. The Campaign has had *serious* consequences for the business and has very significantly contributed to any decline in its fortunes:

a. Money and management time that could have been spent on investment, servicing customers, and business development, has been squandered on the Campaign. Expenditure on legal expenses has fed through (it is to be inferred) into increased borrowing from from Mr Kirsh's vehicles, at interest rates of circa 9%.....

c. The concerted and unjustified efforts of the Respondents (via the Campaign) to damage the reputation of Mr King will, it is to be inferred, have seriously damaged the reputation of the Company itself because of the close association between the Company and the Kings, as its founders. Likewise, the exclusion of the Kings from the Company and the attempt to distance the business from the King family by rebranding it has deprived the Company of the positive benefits to be derived from the Company's association with the King family, from its longevity as a business, and from the benefit of Anthony King's skills and reputation.

d. It is to be inferred from the matters set out herein, including the Respondents' wilful disregard of the best interests of the Company in failing to file accounts on time, their pursuit of the “Campaign at the expense of the Company, and in their own reliance on the recent asserted poor financial performance of the Company as supporting a low valuation for the Petitioners' shares, that the Respondents have in other respects damaged at least the short term financial position of the business in ways that are unfairly prejudicial to the Petitioners. The Petitioners reserve the right to amend following disclosure and the taking of an equitable account.”

70. In Section XV, paragraph 234 the Petitioners contend that the matters set out in Sections V, VII, IX, X, XI, XII, XIII and XIV constitute unfairly prejudicial conduct of the affairs of the Company. In paragraph 235 they also allege that where the matters pleaded relate to events which did not ultimately occur, the Petitioners rely on those events as:
- i) Demonstrating improper and/or unnecessary use of company money;
 - ii) Providing similar fact evidence in supports of those matters where the attempt did succeed and
 - iii) Supporting the existence of the Campaign.
71. In the prayer for relief the Petitioners seek an order that the Respondents (including KSSL) be jointly and severally liable to purchase their ordinary shares at a fair value to be determined by the Court (and, in the alternative, an order that they purchase the 60% shares held by Primekings). They also seek an order that the Petitioners be jointly and severally liable to purchase their B shares for £2,133,000 and an order that all money expended on the Campaign be reimbursed to the Company.
72. Finally, I add that it is a key part of the Petitioners' case that the Campaign has been intended to keep them short of funds and to deny them access to justice. In his witness statement dated 20 March 2020 Anthony stated in paragraph 51.1:

“I should mention that I am only able to have representation due to the kindness of a number of legal professionals who have been willing to act for me on a conditional basis which does not require payment at the outset. Primekings calculates that if I have no money, then I will not be able to pay the sort of adverse costs orders which occur during most pieces of litigation given the ‘pay as you go’ principle, which will eventually (they calculate) stop this claim in its tracks, even though it is overwhelmingly strong on the facts.”

V. The Petition (procedural history)

73. On 19 March 2018 the Petition was presented (as I have stated). On 31 May 2018 it was stayed until 21 August 2018 to permit compliance with the relevant

Pre-Action Protocol and to enable the parties to attempt to agree directions. By a consent order dated 22 January 2019 the Court ordered the Petitioners to serve Points of Claim by 20 January 2019 and the Respondents (other than the Company and KSSL) to serve Points of Defence by 22 March 2019.

74. On 20 January 2019 the Petitioners served their Points of Claim. On 27 March 2019 the Court extended time for service of the Points of Defence and on 18 April the Applicants served their Points of Defence. By letter dated 18 June 2019 RPC informed Macfarlanes LLP (“**Macfarlanes**”), who were acting for the Applicants, that they had not filed a Reply because there were likely to be significant amendments to the Points of Claim.
75. By letter dated 26 June 2019 Macfarlanes put RPC on notice that the Applicants intended to apply to strike out parts of the Points of Claim but stated that they would hold back the application pending receipt of the draft Amended Points of Claim. In letters dated 12 July 2019 and 16 August 2019 Macfarlanes chased for the amendments. In their second letter Macfarlanes asked for confirmation that RPC would provide the draft Amended Points of Claim by 20 September 2019 or they would proceed with preparing a strike out application.
76. By letter dated 16 September 2019 RPC confirmed that any amendments which the Petitioners intended to make would add to the Points of Claim rather than withdraw any aspect of them. They also stated that it seemed unlikely that the threatened strike out application would be affected by the amendments and that any such application would be doomed to failure.
77. On 20 December 2019 the Applicants issued the Application Notice. The Costs and Case Management Conference for the Petition which had originally been listed for hearing on 5 and 6 March 2020 was then adjourned pending the determination of the present application.
78. By letter dated 29 April 2020 Macfarlanes wrote to Claremont Litigation Ltd (“**Claremont**”), who were by now acting for the Petitioners, stating that the Applicants vehemently denied that there had been any Campaign. However, they also stated that in circumstances where the relationship between the parties had irretrievably broken down, the Applicants wished to find a way in which

the parties could go their separate ways and the Petitioners could recover any value in their shareholdings in a fair manner.

79. In their letter Macfarlanes proposed that Primekings should purchase the Petitioners' shares at a value to be determined by an independent valuer (acting as an expert) on detailed terms which dealt with the possible date of valuation, information to be provided and the process of expert valuation. By letter dated 16 June 2020 Claremont replied rejecting the offer. They stated:

“In light of the above, our clients take the entirely reasonable and justified view that if your clients (and their advisers) are willing to make false representations to the Court in an attempt to secure financial advantage they can have no confidence at all that your clients will not try to do the same again and mislead and influence any Valuer in order to achieve an outcome which suits them commercially. This is particularly so where any valuation would be binding on the parties and would not be subject to the Court's scrutiny. For these reasons our clients are not, under any circumstances, willing to consent to a valuation process taking place outside the normal trial processes of the High Court, because such a process involves too much risk of an unfair and unjust outcome.”

VI. Legal Principles

The Companies Act 2006

80. Part 30 of the Companies Act 2006 (the “Act”) is headed “Protection of Members against Unfair Prejudice”. Section 994 provides that a member may petition the Court for an order under that Part (and section 996 sets out the powers of the Court to grant relief). Although the section is very familiar, it is important in the present case that I should set out:

“994 Petition by company member

(1) A member of a company may apply to the court by petition for an order under this Part on the ground – (a) that the

company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.”

81. In *Loveridge v Loveridge* [2020] EWCA Civ 1104 Floyd LJ recently set out the following propositions which apply to a petition issued under section 994 at [41]:

“A number of uncontroversial propositions can be derived from the authorities cited to this court:

- i) For a petition to be well founded the acts or omissions of which the petitioner complains must consist of the conduct of the affairs of the company: *Hawkes & Cuddy (No 2)* [2007] EWHC 2999 at [202] per Lewison J;
- ii) The conduct of those affairs must have caused prejudice to the interests of the petitioner as a shareholder: *ibid*;
- iii) The prejudice so caused must be unfair: *ibid*;
- iv) A minority shareholder cannot normally complain of conduct which is in accordance with the company's constitution unless he can establish a breach of the rules on which it is agreed that the affairs of the company should be conducted, or the use of those rules in a way which equity would regard as contrary to good faith: *O'Neill v Phillips* [1999] 1 WLR 1092 at 1099 A-B per Lord Hoffmann;
- v) Although the term "legitimate expectation" has been used in connection with establishing equitable restraint on the exercise of constitutional power, that expression does not have "a life of its own", supplanting traditional equitable principles: *ibid* at 1102 B-F.”-

82. Section 994(1) consists of two limbs. To invoke limb (a) the petitioner must establish that “the company’s affairs” are being or have been conducted in a manner which is unfairly prejudicial. To invoke limb (b) the petitioner must establish that an act or omission of the Company is or would be prejudicial. In *Graham v Every* [2015] 1 BCLC 41 Arden LJ (as she then was) explained the difference at [37]:

“The requirement in section 994 for an “act or omission of the company” means that the petitioner must identify something which the company does or fails to do. The alternative

requirement — that “the company's affairs are being or have been conducted in a manner that is unfairly prejudicial” to members or the petitioner — does not contain the same stipulation. Mr Graham can rely on the actions of some other persons, including his fellow shareholders. But the actions must still amount to the conduct of the company's affairs.”

83. Limb (a) is, therefore, wider than limb (b) but the petitioner must still show that the actions of the individuals upon which he or she relies can be attributed to the company itself. In the Points of Claim the Petitioners rely for the most part on limb (a) rather than limb (b): see paragraph 234.
84. The present application also gives rise to two particular issues: First, when it is appropriate for the Court to consider whether the conduct complained of amounts to conduct of Company's affairs; and, secondly, whether a petitioner may rely on conduct which cannot be attributed to the company in support of an unfair prejudice petition.
85. As for the first question, there are a number of authorities in which it has been emphasised that the Court should exercise control over the matters which a party can raise in an unfair prejudice petition before the trial. In *Re Unisoft Ltd (No 3)* [1994] 1 BCLC 609 Harman J struck out large parts of a petition on the grounds that the conduct alleged was not conduct of the affairs of the company or did not affect the petitioner as a member. He stated this at 611 e-g:

“Petitions under s. 459 have become notorious to the judges of this court – and I think also to the Bar—for their length, their unpredictability of management, and the enormous and appalling costs which are incurred upon them particularly by reason of the volume of documents liable to be produced. By way of example on this petition there are before me upwards of thirty lever-arch files of documents. In those circumstances it befits the court, in my view, to be extremely careful to ensure that oppression is not caused to parties, respondents to such petitions or, indeed, petitioners upon such petitions, by allowing the parties to trawl through facts which have given rise to grievances but which are not relevant conduct within even the very wide words of the section.

The section requires there to have been conduct of the company's affairs, or an act or omission of the company, so one has to look and see that the activity complained of is an activity in the course of conduct of the company's affairs or is by the company, so that

the petitioner can show that the affairs have been conducted in a manner prejudicial to the interests of the members. The requirement of prejudice means that the conduct must be shown to have done the members harm and I believe harm in a commercial sense, not in a merely emotional sense. The further requirement that the prejudice is ‘unfair’ is a more uncertain but necessary thing to show, but before the fairness or unfairness of the conduct or act is considered ‘prejudice’ – that is harm or damage – must be shown. Those requirements set out the basic rules that the court must in my view be careful to insist upon to restrain this procedure from breaking all reasonable bounds.”

86. In *Graham v Every* (above) Arden LJ referred to *Unisoft* with approval. She also referred to the earlier decision of the Court of Appeal (of which she had been a member) in *Re Coroin Ltd (No 2)* [2013] EWCA Civ 781. In that case, she had encouraged pro-active case management by concentrating on the statutory requirements:

“13. The requirements relevant to this appeal are that (1) there is an act or omission on the part of the company and (2) that act or omission is unfairly prejudicial to Mr McKillen. 14. These requirements are cumulative. If the court concludes that the first requirement is not satisfied, the second requirement does not arise. Moreover there is nothing to stop the court considering the requirements on the basis most favourable to Mr McKillen and, if it concludes that the case could not succeed on that basis, restricting its consideration of other issues raised. Cases under section 994(1) can be very resource-intensive. This case is an example of a heavy section 994(1) petition since the trial below occupied 30 days of court time. Courts must, where possible, find ways and means of reducing the hearing times for these cases. In this case it may have been possible for significant amounts of court time to have been saved by focusing on the statutory requirements for an act or omission of Coroin which is unfairly prejudicial.”

87. As for the second question, in *Re a company (No 001761 of 1986)* [1987] BCLC 141 at 146b-g Harman J gave the following examples of conduct which he did not consider to be conduct of the company:

“Paragraph 7, it is conceded by counsel for the petitioners, is mere narrative and no act by the respondent is averred in it. Paragraph 8 alleges the service on the company of a notice under s 518 requiring repayment of a loan of £75,000 and that the notice was of no effect. As it seems to me, the observation of counsel for the respondent that the allegation is self-cancelling

in itself is well-founded. The service of a notice which is of no effect seems to me to be incapable of being unfairly prejudicial or prejudicial to anybody. Secondly, the act of serving or procuring the service of a notice in respect of a loan seems to me to be an act entirely adverse to the company and plainly not taken by the respondent in the course of or as in any way part of the company's business. It is the opposite of being part of the company's business; it is a demand for a personal benefit; personal repayment, in this case, of a loan to the respondent's father. As it seems to me, such an allegation is incapable of being within the section at all. It is not conduct of or in the company's affairs.

Paragraph 9 alleges a board meeting at which the respondent's personal solicitor, plainly acting in her personal interest and plainly not acting in any sense in the company's affairs, asked the petitioners in this petition in their personal and individual capacity to transfer their shares to the respondent and to resign as directors. That seems to me plainly a matter which is not in the course of the conduct of the company's business. It would be an extraordinary thing if one cannot ask for a transfer of shares without being held to be conducting the company's business and, it seems to me, it is, on the face of it, quite incapable of being prejudicial, let alone unfairly prejudicial, to anybody to make such a request.

The final two sentences of that paragraph allege further things said by the solicitor which quite plainly are nothing to do with the company's affairs; they are to do with the conduct, good or bad as it may be, of the petitioners personally and not in any other sense.

Paragraph 10 is conceded by counsel for the petitioners (Mr Hollington) to be narrative, properly there but in no sense conduct of the company's affairs which could be unfairly prejudicial to anybody.”

88. In *Re Unisoft Ltd (No 3)* (above) Harman J also held that the acts of the members themselves (such as voting at a general meeting) are not acts of the company nor are they part of the conduct of its affairs: see 611e-g. In *Re Coroin Ltd (No 2)* (above) Moore-Bick and Rimer LJJ took a similar view in relation to the failure by a shareholder to comply with rights of pre-emption and to comply with an obligation of good faith in a shareholders' agreement: see, in particular, [145], [150] and [168] to [170].
89. In both *Re Unisoft Ltd (No 3)* and *Re Coroin Ltd (No 2)* the Court was prepared to strike out the allegations which did not relate to the affairs of the Company.

However, Mr Newman placed significant reliance on the decision in *Graham v Every* (above) as authority for the proposition that conduct by a shareholder may give rise to actionable unfair prejudice either indirectly or combined with other conduct on the part of the company. In that case the petitioner had been a director and shareholder of a company running a restaurant. In 2009 he was removed as a director and issued an unfair prejudice petition. One of the allegations which he made was that the other shareholders had transferred their shares to the respondent, Mr Every, without complying with a pre-emption provision in Heads of Agreement which required them to be offered pro rata to the other shareholders.

90. Arden LJ accepted that in the normal case the failure to comply with pre-emption provisions fell outside section 994(1) but she distinguished both *Re Unisoft (No 3)* and *Re Coroin Ltd (No 2)* on the following basis:

“40. In the normal way, pre-emption agreements fall outside s 994(1) but in the present case the directors were, as I have explained, not to be remunerated by salary but by way of dividend. Thus the size of a director's shareholding would dictate his reward for his work on the Company's business. How directors were to be remunerated and the Company's distributions policy are within the conduct of the Company's affairs. So, by denying Mr Graham's pre-emption right at a time when Mr Graham was still a director, Mr Every was arguably interfering with the way in which the parties had agreed that the Company would remunerate its directors.

41. On this basis, there is sufficient for this court to allow the allegation to stand on the basis that Mr Graham provides proper particulars to justify Mr Stewart's submission to us that the non-compliant share purchase allegation is an allegation that the affairs of the Company have been or are being conducted in a manner which is unfairly prejudicial to the interest of Mr Graham as a member. There is a possibility that he will be able to do so. The point is important because Mr Graham seeks an order that his present shareholding ought to be valued on the basis that he could have acquired the impugned shares. However, Mr Stewart's submission to us can only be made good if there is an appropriate link between the impugned share sale allegation, the conduct of the Company's affairs, unfair prejudice to Mr Graham and the relief.”

91. Mr Newman relied on the judgment of McCombe LJ who prefaced his conclusions by stating that one of the problems which has long beset litigation

under section 994 and its predecessors, has been the tendency for parties to engage in satellite litigation by applying to strike out petitions on pre-conceived technicalities. After citing from *O'Neill v Phillips* he reached the following conclusion at [73]:

“In cases of this sort, I regard the factual context as being of great significance. On Mr Graham's case the affairs of the Company, which he contends were conducted in an unfairly prejudicial manner, consisted of his exclusion from the management in breach of a collateral agreement between shareholders. On his case, the transaction in issue was an important aspect of the campaign. I do not see it is necessary thereafter to point to some subsequent use of the changed shareholding as an aspect of the impugned conduct, for the transaction to be a relevant aspect for the purpose of s 994. It is to me striking that the effect of the dealing was to put the other shareholders, at Mr Graham's expense, into a position in which those others might pass a special resolution against Mr Graham's opposition, which, if Mr Graham had acquired the additional shares to which he says he was entitled under the pre-emption agreement, they could not have done.”

92. Vos LJ (as he then was) was the third member of the Court and he held that the pleaded allegations were capable of establishing that the company's affairs were being or had been conducted in an unfairly prejudicial manner. But he stated this (at [81] and [82]):

“As it seems to me, the petition as presently drafted pleads both that (a) the consequence of the Respondents conduct was that Mr Graham sought to and was unable to increase his influence within the Company: ie that he was diluted, and that as a result (b) the affairs of the Company have been conducted in a manner that is allegedly unfairly prejudicial to his interests. It is true that these allegations are not particularised in the way they should be, and that they do not explain how it is alleged that Mr Every used his control of the impugned shares to take decisions of which Mr Graham did not approve, or why the non-compliant share purchase caused Mr Graham any loss in the way that the Company's affairs were thereafter directed, but those lacunae can be dealt with in the way that Arden LJ has suggested.

As Mr Stewart explained in argument, the allegation is, in effect, that the Respondents denied Mr Graham the additional shares he ought to have had, and have thereafter used their greater control of the Company's affairs to his disadvantage by, for example, excluding him from the management of the Company and

reducing the (greater) profit share he would otherwise have had. These matters have been unfairly prejudicial to his interests.”

93. Mr Newman also relied on the decision of HHJ Wyn Williams QC (as he then was) in *Blackmore v Richardson* (1 November 2004, unreported) and the decision of Lam I in the Court of First Instance in Hong Kong in *Li Guozhu v New Century Iatrical Management Ltd* [2018] HKCFI 868. Both cases illustrate the general proposition which I derive from *Graham v Every* that the actions of a shareholder or even a third party may give rise to actionable unfair prejudice where they are combined with acts or omissions or other conduct on the part of the company.
94. However, in my judgment *Graham v Every* also stands for a second, and narrower, proposition. The real difference between the judgments of Arden LJ and Vos LJ (on the one hand) and McCombe LJ (on the other) was that the majority considered it necessary for the petitioner to plead (and then prove) the causal connection or link between the actions of the shareholder or third party and the conduct of the company’s affairs which led to the unfair prejudice: see, in particular, the last sentence of [41] (Arden LJ) and the second sentence of [81] (Vos LJ).
95. In *Graham v Every* the Court accepted that it was arguable that there was such a causal link or connection because of the way in which the directors were remunerated. By failing to comply with the pre-emption provision the respondent obtained greater control over the company and was able to dictate the dividend policy and the remuneration which the petitioner was to receive.
96. Given the very wide-ranging allegations made in the Points of Claim, it seems to me that this is the real issue to which the present application gives rise. Have the Petitioners pleaded a clear link or causal connection between the actions of the Respondents and the conduct of the Company leading to the prejudice of which they complain? I also bear in mind that in *Graham v Every* the Court of Appeal was (if necessary) prepared to give the petitioner time to make good the defects in his pleaded case and to give particulars of that connection.

CPR Parts 1 and 3

97. The Companies (Unfair Prejudice Applications) Proceedings Rules 2009 apply to unfair prejudice petitions presented under section 994. Rule 2(2) provides that except insofar as they are inconsistent with the Act and those rules, the Civil Procedure Rules 1998 apply to proceedings under Part 30 of the Act with any necessary modifications.
98. In support of the application Ms Addy relied on CPR Part 1.4 which is headed “Court’s duty to manage cases”. In particular she relied upon CPR Part 1.4(1) and Part 1.4 (2)(b), (c) and (h), which provide as follows:

“(1) The court must further the overriding objective by actively managing cases. (2) Active case management includes—.... (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;....(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;....”

99. Ms Addy also relied upon the Court’s general powers of management in CPR Part 3.1 and the power to strike out a statement of case in CPR Part 3.4. The relevant parts upon which she relied were as follows:

“3.1- The court’s general powers of management

(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) Except where these Rules provide otherwise, the court may—....(k) exclude an issue from consideration....(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.”

“3.4 – Power to strike out a statement of case

(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2) The court may strike out a statement of case if it appears to the court— (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or (c) that there has been a failure to comply with a rule, practice direction or court order.

(3) When the court strikes out a statement of case it may make any consequential order it considers appropriate.”

100. Mr Newman submitted both in his Skeleton Argument and orally that the Petitioners had a fundamental right to an adjudication at a trial in respect of their pleaded matters where they are (or could be) arguable. I do not accept that submission without some qualification. In my judgment, the right to a trial is subject to the Civil Procedure Rules and, in particular, to the overriding objective set out in CPR Part 1.1. The views expressed by Harman J in *Re Unisoft Ltd (No 3)* and Arden LJ *Re Coroin Ltd (No 2)* (above) also provide clear guidance that the Court may exercise its case management powers proactively in relation to unfair prejudice petitions.

101. Subject to these qualifications, I accept in general terms that the Petitioners have a legitimate expectation that they are entitled to an adjudication of the allegations made in the Points of Claim at trial unless those allegations are liable to be struck out on one or more of the grounds set out in CPR Part 3.4. But this does not mean that they are entitled to take every allegation to trial. In *Grove Park Properties Ltd v The Royal Bank of Scotland Plc* [2018] EWHC 3521 (Comm) Males J (as he then was) stated as follows at [24]:

“If it will be open to the claimant's counsel to cross examine the bank's witnesses about the Wyatt Proceedings, it may be asked whether it matters whether the claimant's case about those proceedings is set out in the pleadings in this action. In my judgment it does. Statements of case should be as concise as the nature of the case allows and should plead only material facts, that is to say those which are necessary to formulate a cause of action or defence, not background facts or evidence: *Tchenguiz v Grant Thornton LLP* [2015] EWHC 405 (Comm), [2015] 1 All ER (Comm) 961 . It is wrong in principle to plead matters which do not support or relate to any of the remedies sought and to plead immaterial matters with a view to obtaining more extensive disclosure than might otherwise be ordered: *Charter UK Ltd v Nationwide Building Society* [2009] EWHC 1002 (TCC) at (the second) [15]. To do so is likely to complicate or confuse the fair conduct of proceedings.”

102. I add that in my judgment it is equally wrong in principle to plead matters which do not support or relate to any of the remedies sought or to plead immaterial matters with a view to re-opening issues which have been decided in earlier

proceedings (or which would have been decided if the claimant or petitioner had not discontinued those proceedings).

CPR Part 38.7

103. I turn now, therefore, to the effect of discontinuance. CPR Part 38.7 deals with the effect of discontinuance on subsequent proceedings. It provides as follows:

“A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if—
(a) he discontinued the claim after the defendant filed a defence;
and (b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim.”

104. In *Westbrook Dolphin Square Ltd v Friends Provident Life and Pensions Ltd* [2011] EWHC 2302 (Ch) Arnold J considered how the Court should approach the application of this provision. He stated (at [45]):

“Counsel for Friends Provident submitted, and I accept, that the principles identified by the maxims *nemo debet bis vexari pro una et eadem causa* (no-one should be vexed twice in respect of one and the same cause) and *interest reipublicae ut sit finis litium* (it is in the public interest that there be an end to litigation) should inform the court’s approach to CPR 38.7. In my judgment it follows that there is an analogy between the principles to be applied to an application under r. 38.7 and those applied by the courts under CPR r. 3.4(2)(b) with respect to *Henderson v Henderson* abuse of process. The main difference I perceive is that under r. 38.7 the onus lies upon the applicant to show that it should be given permission to bring the new claim, whereas under r.3.4(2)(b) the onus lies upon the defendant to show that the new claim is an abuse of process. ”

105. Although the decision was overturned on appeal (see [2012] EWCA Civ 666) this analysis was not the subject of any criticism by the Court of Appeal. But in any event Briggs LJ (as he then was) adopted a similar approach in *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609 at [60] and [61]:

“... it seems to me that the rule leaves it to the court to decide whether to grant or refuse permission having regard, as I have said, to the public interest in finality. It is true that the Notes to the current edition of the White Book use the phrase ‘exceptional circumstances’ as characteristic of the sort of explanation likely

to be required in an application for permission under Pt 38.7, but it is dangerous in my view to erect that as a test imposed by the rules, not least because of its inherent uncertainty. To that limited extent the judge may have mis-described the ambit of the court's discretion to give such permission. The real question for the judge was whether, having abandoned the de facto directorship claim in the light of Jean Angela's Defence (in which the other defendants precisely concurred) a sufficient explanation was offered for its re-introduction to overcome the court's natural disinclination to permit a party to re-introduce a claim which it had after careful consideration decided to abandon."

106. In the present case, Ms Addy did not seek to persuade me that the allegations made in the Misrepresentation Claim and in the Petition were identical. It is necessary, therefore, for me to consider the effect of CPR Part 38.7(b). There is an obvious analogy between that provision and CPR Part 17.4(2) (which deals with the circumstances in which a party may be permitted to amend to add a new claim after a limitation period has expired). Mr Newman drew my attention to the White Book Vol 1 at 17.4.4.3 (p.644) where it is stated that the expression "the same or substantially the same as" is not synonymous with "similar". That passage continues:

"A new claim does not arise out of the same or substantially the same facts as the original claim if it puts the defendant in the position of being obliged to investigate facts and obtain evidence well beyond the ambit of the facts that the defendant could reasonably be assumed to have investigated for the purpose of defending the original claim."

107. In *Ward v Hutt* [2018] 1 WLR 1789 HHJ Matthews considered the scope of CPR Part 38.7(b). In that case a liquidator discontinued a misfeasance claim against two directors for payments made in breach of fiduciary duty but then commenced a second claim against them in their capacity as partners of the recipient firm on the basis that the payments were a preference. The judge held that the second claim arose out of substantially the same facts and that CPR Part 38.7 was engaged. He analysed the two claims at [28] and [29]:

"The liquidator says that for the original claim, based on misfeasance and breach of director's duty, it would have been necessary to prove the payment and receipt, and also that the directors of the company misappropriated the company's assets in making the payment, but not that the recipient was a creditor.

However, for the new claim the liquidator would need to show not only the payment and receipt of the money, and that the recipient was a creditor but also that there was an intention to prefer that creditor. The respondents say that the original claim at inception actually included a preference claim (albeit for different sums than that now claimed) against the first and second respondents as recipients, but this was later changed to a misfeasance claim against the same respondents as directors. The focus of the claimant changed but the underlying facts and consequence were the same.

In my judgment, the substance and the reality is that where the respondents as directors pay themselves as creditors the liquidator has a choice of courses of action. He could have chosen the route of a preference claim. He did choose that route in respect of two other payments. Then he dropped it. Instead, in the original claim at trial he pursued the respondents for misfeasance as directors. That was the liquidator's choice. I do bear in mind the need in a preference claim to show an intention to prefer the creditor. But that is a minor point in the present context, and may well be inferred from the primary facts proved. On the whole, in my judgment the second claim arises out of substantially the same facts as the first.”

Abuse of Process

108. In addition to CPR Part 38.7 Ms Addy relied upon *Henderson v Henderson* abuse of process. The decision of the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 remains the leading authority even though that part of the decision dealing with the so-called principle of reflective loss has recently been subjected to scrutiny by the Supreme Court in *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255. Lord Bingham (with whom three other members of the House of Lords agreed) explained the general principle at 31A-F:

“But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is

satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.”

109. Lord Bingham also confirmed that the principle may apply where the claim is brought by a different party and the action results in a settlement or compromise rather than a judgment: see 32C-33A. In *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748 the Court of Appeal also confirmed that there is no rule of law that there cannot be an abuse of process unless the defendants in the new action have a sufficient identity with the defendants in the original action: see [10]. However Thomas LJ stated that the fact that the defendants were different is a powerful factor in the application of the merits-based judgment identified by Lord Bingham.

110. In *Ward v Hutt* (above) HHJ Matthews struck out the liquidator's new claim on the ground that he had not complied with CPR Part 38.7. However, he declined to strike it out on the basis that it involved *Henderson v Henderson* abuse of process (although he held it was an abuse for other reasons). After citing the judgment of Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at [17] to [24] he held that *Henderson v Henderson* abuse of process could have no application where a claimant discontinued one claim but then commenced another. He said this at [51] and [52]:

“50. It is therefore clear that the principle exemplified by the decision in *Henderson v Henderson* is properly to be treated as part of the rules of res judicata; hence the formulation of the summary of the relevant rules in para 22 of the judgment of Lord Sumption JSC, set out above. It was accepted at the hearing by the first and second respondents that there could be no question here of any issue estoppel because the first claim had been discontinued. Yet they argued that the principle in *Henderson v Henderson* could nevertheless apply. But, since there was no decision on the first occasion and the *Henderson v Henderson* principle is part of the rules of res judicata, I struggle to see how the principle is relevant.

51. On the other hand, where the claim does not progress so far as to be decided, but is instead *discontinued*, there are the rules in CPR Pt 38. The relevant rule, which I have already set out and discussed, is rule 38.7. This deals with the situation where, if there had been a decision on the first claim, there could have been an argument, if a second claim were brought, that some aspect of res judicata should apply, whether it was because of cause of action estoppel, issue estoppel, or the *Henderson v Henderson* principle. Rule 38.7 provides that in circumstances where the claim is to be brought against the same defendant as before and based on the same or substantially the same facts, there is a requirement to obtain the permission of the court before bringing the fresh claim. As it seems to me, that is sufficient protection for defendants facing a second bite at the cherry. It enables the court to intervene and prevent injustice, in exactly the same way as the court may do in the case of res judicata.”

111. Ms Addy and Mr Sullivan argued that *Ward v Hutt* was wrong because the judge wrongly interpreted *Virgin Airways* as re-drawing the boundary between *res judicata* and abuse of process and treating the principle in *Henderson v Henderson* as part of the law of res judicata. I accept that submission. It is

important to understand the argument in *Virgin Airways* and Lord Sumption set it out at [23]:

“It was submitted to us on behalf of Virgin that recent case law has re-categorised the principle in *Henderson v Henderson* 3 Hare 100 so as to treat it as being concerned with abuse of process and to take it out of the domain of res judicata altogether. In these circumstances, it is said, the basis on which Lord Keith qualified the absolute character of res judicata in *Arnold v National Westminster Bank* by reference to that principle is no longer available, and his conclusions can no longer be said to represent the law.”

112. Lord Sumption rejected this submission and with it the argument that a claim could not be the subject matter of a cause of action estoppel even though circumstances had changed and material was available which had not been available before. He concluded that the principle in *Henderson v Henderson* could be the subject matter of a cause of action estoppel. But he was not suggesting that the Court had no power to stay or strike out proceedings for *Henderson v Henderson* abuse where there was no cause of action or issue estoppel. This is clear from his analysis of *Johnson v Gore Wood* (above) at [25]:

“It was clearly not the view of Lord Millett in *Johnson v Gore-Wood* that because the principle in *Henderson v Henderson* was concerned with abuse of process it could not also be part of the law of res judicata. Nor is there anything to support that idea in the speech of Lord Bingham. The focus in *Johnson v Gore-Wood* was inevitably on abuse of process because the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run....Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 110G, “estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process”.”

113. In my judgment, it remains open to a party to rely upon *Henderson v Henderson* abuse of process where the first claim has been discontinued as well as resulting in a judgment or compromise. With the greatest of respect to HHJ Matthews, his decision on this point was not necessary for his decision because he had already decided to strike out the claim for failure to comply with CPR Part 38.7. However, the point is of much more than academic significance in the present case because the respondents to the Petition include a number of parties (and, in particular, Mr Stiefel) who were not defendants to the Misrepresentation Claim.

VII. Decision

(1) Post-deal events and restoration of original terms

114. In the Points of Claim the Petitioners continue to assert that they believe that they were induced to enter into the Transaction by representations which were untrue and also that the assurances which Mr Stiefel gave to them after completion confirmed that belief: see extract (1). In my judgment those paragraphs should be struck out for a number of reasons.

115. First, the Petitioners do not allege that any of the facts and matters pleaded in these paragraphs constitute conduct of the affairs of the Company or that the relevant conduct was unfair or that it caused prejudice: see paragraph 234. Moreover, it is impossible to see what relevance the Petitioners' belief that they were misled before the Transaction could have to the prejudice which they claim to have suffered after it was completed or, indeed, to the remedies to which they may be entitled. In those circumstances it was wrong to plead those facts: see *Grove Park* (above).

116. Secondly, I am satisfied that CPR Part 38.7 is engaged and since there was no application for permission to make that claim I strike out extract (1) under CPR Part 3.4(2)(c) for failure to comply with that provision. I say this for the following reasons:

- i) Although the Petitioners and their legal advisers have tried to avoid repeating in terms the ingredients of the tort of misrepresentation, in my

judgment the allegations now made in extract (1) are the same or substantially the same as those originally made in the Amended Particulars of Claim.

- ii) This can be tested in the following way. On 17 March 2016 Anthony signed the statement of truth at the foot of the Amended Particulars of Claim on behalf of himself and his parents stating that he believed its contents to be true. The facts which he stated that he believed to be true included both: (1) that Primekings had fraudulently misled him (and James and Susan); and (2) that Mr Stiefel gave the assurance that “we are big enough and ugly enough to tear up the agreement and start again”.
- iii) The Petitioners then withdrew those allegations without reservation. Nevertheless, in paragraph 35 of the Points of Claim they now state that they believed that they were induced by untruthful representations to enter into the Transaction. In substance, therefore, Anthony is repeating (on behalf of himself and his parents) the statement of truth which made in support of the original claim.
- iv) Moreover, the way in which those representations are now pleaded in paragraph 36 is wide enough to cover both the original case as pleaded and the change of case articulated by Anthony in his cross-examination. The words “a fundamental adverse shift in the attitude of KSGGL’s lender, GE Capital, towards the business” in paragraph 36 are apt to cover both the Petitioners’ original case that Mr Swain told them that all of the Company’s accounts were frozen and that GE was no longer prepared to support it. They are also apt to cover their new case that Mr Fisher told him that they would continue to support the Company if a deal was done.
- v) Whichever case the Petitioners intended to advance in paragraph 36 – and I assume that they intended to advance their new case – I am satisfied that they arise out of the same or substantially the same facts as pleaded in the Misrepresentation Claim. It seems to me that the Petitioners’ change of case is analogous to the change of case in *Ward v Hutt* (above).

- vi) In the case of Mr Stiefel, I am also satisfied that the Petitioners could and should have advanced these allegations against him in the Misrepresentation Claim. In paragraph 37 of the Amended Particulars of Claim the Petitioners stated that they suspected that Mr Stiefel had participated in their deception and in his cross-examination Anthony gave evidence that he was convinced that Mr Stiefel knew that the Transaction was fraudulent and was a party to it. It is also clear from counsel's submissions on Day 1 of the trial that the Petitioners had made a preliminary decision (at the very least) not to join any further parties because they were seeking rescission rather than for any other reason.
- vii) Furthermore, it is clear from the terms of the apology which counsel gave on Day 10 of the trial that the Petitioners were unreservedly withdrawing the allegations not only against the Primekings Parties but also against Mr Stiefel. If they had joined him as a party to the Misrepresentation Claim, he would have had the benefit of the protection provided by CPR Part 38.7 now. In my judgment, it would be unjust and an abuse of process if the Petitioners were able to pursue these allegations against him because they failed to join him as a defendant to the Misrepresentation Claim.

(2) *Proposed Acquisition of Cougar/DSSL*

117. Ms Addy applied to strike out extract (2) on the basis that it related to two acquisitions which were contemplated by the Subscription Agreement but never went ahead. She also submitted that there was no allegation that this conduct was unfairly prejudicial. I am not prepared to strike out these paragraphs for the following reasons:

- i) It is clear that these paragraphs relate to the conduct of the affairs of the Company by Mr Fisher, Mr Swain and Mr Stiefel in their capacity as directors of the Company.
- ii) The Petitioners do allege that this conduct was unfair and caused prejudice: see paragraph 234. They also allege that it was unfairly prejudicial either because it demonstrated improper or unnecessary use

of company money, provided similar fact evidence or supported the existence of the Campaign: see paragraph 235.

- iii) Although the transactions were not completed, they involve clear allegations that the acquisitions were not in the interests of the Company and that Mr Fisher and Mr Stiefel were not willing to disclose damaging information to Anthony and the Company's finance director, Mr Mark Pownall.
- iv) Mr Newman submitted that it does not matter whether the acquisitions took place and also that it is unnecessary for the Petitioners to show specific financial detriment. I accept that it is arguable that a failure to disclose damaging information by directors of the Company to their fellow directors is capable of being unfairly prejudicial whether or not the transactions proceeded and that this allegation should go to trial.
- v) Indeed, a specific allegation of non-disclosure of this nature is clearly capable of forming a wider allegation of mismanagement or a breakdown of trust and confidence (which often forms the basis of an unfair prejudice petition).

118. In his Skeleton Argument Mr Newman also submitted that this conduct amounted to a breach of fiduciary duty and relied on these allegations as similar fact evidence. The Petitioners do not, in fact, plead that Mr Fisher, Mr Stiefel and Mr Swain committed any breaches of their duties as directors in relation to these matters. But when I put this point to counsel it was common ground between Ms Addy and Mr Newman that it was not necessary for them to do so (despite the general allegation in paragraph 107). Finally, I add that I was not persuaded that it was permissible to plead these allegations on the basis that they provided similar fact evidence. But in the event, it was unnecessary for me to consider this point further.

(3) *The commencement of the Misrepresentation Claim*

119. In extract (3) the Petitioners repeat the allegation that they believed that they had been the subject of an actionable misrepresentation. They also state that

they believed that they had been the subject of economic duress. In my judgment those paragraphs should also be struck out for similar reasons to extract (1):

- i) The Petitioners do not allege that the facts and matters pleaded in these paragraphs constituted conduct of the affairs of the Company or that this conduct was unfair or caused prejudice: see paragraph 234. Moreover, what the Petitioners and DWF may or may not have believed have no relevance to the prejudice which they claim to have suffered or the remedies to which they are entitled. In those circumstances, it was wrong to plead those facts: see *Grove Park* (above).
- ii) The allegations arise out of the same or substantially the same facts as pleaded in the Misrepresentation Claim. Again, Anthony signed the statement of truth on the Amended Particulars of Claim stating that he believed that the Petitioners had been the subject of an actionable representation and economic duress; that Mr Stiefel had given an assurance that the “Original Deal” would be restored; and that it was not. Those allegations were then withdrawn but in extract (2) the Petitioners now repeat them.
- iii) I am, therefore, satisfied that CPR Part 38.7 is engaged and I strike out paragraphs 72 to 77 (apart from the balance of paragraph 75) under CPR Part 3.4(2)(c) for failure to comply with that provision.
- iv) In the case of Mr Stiefel, I am also satisfied that it would be unjust and an abuse of process if the Petitioners were able to pursue these allegations against him for the reasons which I have set out in paragraphs 116 vi) and vii) above.

(4) Conduct Relating to the B Shares and EBITDA

120. In paragraph 96 e. the Petitioners allege that Primekings’ efforts in the Part 8 Proceedings to take the B Shares from the King family was evidence of the lengths which Primekings is prepared to go to deny them their lawful entitlements. For the reasons which I set out below in relation to extract (7) I am not prepared to strike out this paragraph.

(5) *Trial and Discontinuance of Misrepresentation Claim*

121. In my judgment, paragraphs 97 to 101 of extract (5) should also be struck out for very similar reasons to extracts (1) and (3). In particular:

- i) The Petitioners do not allege that the facts and matters pleaded in those paragraphs constitute unfair conduct of the affairs of the Company: see paragraph 234. Moreover, the parties' respective positions and the evidence given by DWF can have no relevance to the unfair prejudice which the Petitioners claim to have suffered or the remedies to which they are entitled. In those circumstances, it was wrong to plead those facts: see *Grove Park* (above).
- ii) In any event, the allegations in paragraphs 97 and 98 arise out of the same facts as the Misrepresentation Claim. In those paragraphs the Petitioners rely in terms on their pleaded case and the case which Primekings put forward in answer. These paragraphs should be struck out for failure to comply with CPR Part 38.7.
- iii) The Petitioners also plead the evidence given by a partner of DWF and that he failed to come up to proof: see paragraphs 99 to 101. If he gave this evidence to the Court in the Misrepresentation Claim, it follows that those paragraphs must arise out of the same facts. Again, these paragraphs should also be struck out for failure to comply with CPR Part 38.7.

122. The Petitioners also allege that the lawyers who acted for them in the Misrepresentation Claim were negligent: see paragraph 102. However, they plead in terms that this negligence is not relevant to these proceedings. The only possible reason for the Petitioners to introduce this allegation is because they wish to challenge or explain DWF's conduct of the earlier claim and the evidence which they gave. In my judgment, this is not a permissible reason for pleading this allegation and it is likely to complicate or confuse the fair conduct of the Petition: see *Grove Park* (above). The Applicants should not have to deal with a challenge to DWF's evidence or an attempt to explain it away. Nor should they have to defend an allegation that DWF or other lawyers were negligent.

123. Paragraph 104 falls into a slightly different category. In that paragraph the Petitioners plead Primekings' application for the Interim Costs Order and attribute significance to the fact that the Claimants relied on their budgeted figure of £1.872m. It therefore looks forward to the allegations that the Interim Costs Order was used to put unfair Prejudice on the Petitioners. For the reasons set out in relation to extract (7) (below), I am not prepared to strike it out. But in any event, I would not have been prepared to strike it out because it is very closely related to the allegations in paragraph 126 (to which there is no challenge).

(6) *June 2017 - obstruction of exercise of put option*

124. In extract (6) the Petitioners allege that the Applicants prevented or obstructed Anthony from exercising the call option to require Primekings to buy the AK Option Shares. They allege that this was a breach of contract by Primekings but also part of the Campaign. Ms Addy submitted that these paragraphs contained allegations relating to the conduct of Primekings and did not involve any conduct of the affairs of the Company.

125. Viewed in isolation, I would have accepted that submission. Even though Schedule 5, paragraph 4.1 (above) involved the Company in the valuation process, it seems to me that there is no real difference between the allegations made here and the allegations made in *Re a company (No 001761 of 1986)* and *Re Coroin Ltd (No 2)*. Moreover, it is impossible to see how the failure by Primekings to acquire the AK Option Shares from Anthony could have prejudiced his ability to influence or control the conduct of the affairs of the Company.

126. However, in the present case the Petitioners also allege that this conduct formed part of the Campaign to deprive them of their shares, to exclude them from the business of the Company and to deprive them of their ability to vindicate their legal rights: see paragraph 106. No application has been made to strike out that paragraph nor indeed to strike out other allegations relating to the Campaign which clearly do involve the conduct of the Company's affairs. See, for

example, paragraphs 108 to 126, paragraphs 172 to 174 and paragraphs 177 to 181 which are all concerned with the removal of Anthony as a director.

127. I turn therefore to the question which I posed in [96] (above). Have the Petitioners pleaded a clear link or causal connection between the actions pleaded in paragraphs 127 to 136 and the conduct of the Company leading to the prejudice of which they complain? Not without some hesitation, I have to come to the conclusion that the Petitioners have pleaded a sufficient link or connection. I say this for the following reasons:

- i) One difficulty which I found with the Points of Claim is that no clear attempt has been made to distinguish between (i) conduct of the Company's affairs, (ii) unfairness and (iii) prejudice. As the citation from *Loveridge v Loveridge* makes clear these are three separate questions. In the Points of Claim there is a tendency to run them together. See, for example, the last sentence of paragraph 136 where the obstruction of the exercise of the put option is described as "unfairly prejudicial conduct of the affairs of the Company".
- ii) Nevertheless, the Petitioners have alleged prejudice which they have suffered in their capacity as members of the Company. In paragraph 233 they plead that money which could have been spent on the Company's operations has been squandered on the Campaign and legal expenses have led to increased borrowing. They also plead that the Campaign has damaged the Company's reputation and that the pursuit of the Campaign has damaged its short term financial performance in ways that are prejudicial to them.
- iii) In marked contrast to the narrow and more focussed allegations in *Graham v Every*, these complaints are both wide and sweeping. But in my judgment this should make no difference as a matter of pleading. I am satisfied that if these allegations are true, they would demonstrate a sufficient causal connection between the conduct of the Applicants in their personal capacity, their conduct of the affairs of the Company itself and the prejudice which the Petitioners claim to have suffered.

- iv) Put another way, if the Petitioners prove at trial that the Applicants have mounted a campaign to use all of the means at their disposal (including their powers as directors, their rights as shareholders and their rights as judgment creditors) to force the Petitioners sell their shares at an depressed value, this may justify relief under section 996. I say it may justify relief because the Petitioners will have to demonstrate that the specific conduct of the Company on which they rely was unfair.
- v) I stress that all of these allegations are strongly contested by the Applicants. They deny that there was (or is) any Campaign or that it had (or has) the purpose alleged by the Petitioners. If they establish this at trial, then they will also satisfy the Court that any attempt to obstruct Anthony's exercise of the put option did not amount to conduct of the affairs of the Company. But that must be an issue for trial and cannot be determined on this application.

(7) *June Charging orders*

128. Ms Addy submitted that I should strike out paragraph 104 and extracts (4) and (7) to (14) for two reasons: first, because all of the pleaded allegations are against the Primekings Parties in their personal capacity and did not form part of the conduct of the Company; and, secondly, because the Petitioners had already made materially similar complaints in the Part 8 Claim and it was an abuse of process to re-litigate them.
129. *Conduct of the affairs of the Company*: I do not accept the first submission. Again, viewed in isolation I would have accepted that most (if not all) of the allegations made in extracts (4) and (7) to (14) involved personal conduct and did not form part of the conduct of the Company's affairs. However, for the reasons which I have set out in relation to extract (6), I am satisfied that the Petitioners have pleaded a sufficient causal link or connection between the personal conduct, the conduct of the affairs of the Company and the prejudice which they have suffered.
130. *Abuse of Process*: In relation to the second submission, however, it is necessary in my judgment to distinguish the allegations made by the Petitioners in relation

to the Part 8 Claim from those relating to the enforcement of the Interim Costs Order and the assessment of costs more generally because the Part 8 Claim was the subject of a final determination by Deputy Master Cousins. I deal with those allegations in the context of extract (7) and the remaining allegations in the context of extract (8) (below).

131. Extracts (7), (11), (12) and (14) (together with paragraphs 96 e. and 104) are all concerned with the Part 8 Claim and, in particular, with the enforcement of the charging orders by obtaining an order for the sale of the Petitioners' shares. Again, not without some hesitation, I have come to the conclusion that it is not an abuse of process for the Petitioners to advance those allegations in the Points of Claim. I reached that conclusion for the following reasons:

- i) Ms Addy did not submit that the three judgments of Deputy Master Cousins were res judicata in these proceedings and in my judgment she was right not to do so. Those decisions did not give rise to a cause of action estoppel or an issue estoppel: see *Virgin Atlantic* at [17]. The Part 8 Claim was not a claim for unfair prejudice under section 994 and the Deputy Master was not asked to decide any of the issues identified by Floyd LJ in *Lovegrove*.
- ii) However, the issues which the Deputy Master had to decide and the arguments which were presented to him are almost identical to the issues in these proceedings. In particular, Anthony and leading counsel both argued that the Primekings Parties were using the Part 8 Claim for an improper purpose, namely, to stifle the Petitioners' rights by forcing a sale at the very low valuation placed on them by Mr Eastaway. The Petitioners make identical allegations in extract (14): see, in particular, paragraph 186. The Deputy Master rejected those arguments and held that there was no abuse of process or collateral advantage of stifling of the Petitioners' rights.
- iii) In my judgment, this attempt to re-litigate issues which have already been decided would normally be an abuse of process. However, in deciding this point I must adopt the two stage approach identified by

Lords Bingham in *Johnson v Gore Wood* (above) and consider whether there are special circumstances which excuse such an abuse. Mr Newman identified two special circumstances which, in my judgment, excuse the Petitioners' attempt to re-litigate these issues.

- iv) First, the application which the Deputy Master had to determine was whether to stay the order for sale pending the determination of the Petition. He was shown the Petition and it was submitted to him that there was clear overlap between the issues which he had to decide and the issues in the Petition. Although he expressed the view that it "was challenging to understand" how the issues before him could be the subject of consideration in the Petition, he did not decide that issue and clearly accepted that it was for the Companies Court to decide: see paragraph 36(8) of his second judgment.
- v) Indeed, it would in my judgment have come as some surprise to the Deputy Master and the parties if the effect of his judgment had been to prevent the Petitioners from pursuing the related allegations in the Petition. He was being asked to decide whether he should stay the Part 8 Claim not to decide those issues once and for all.
- vi) Secondly, as Mr Newman pointed out, the Deputy Master did not hear oral evidence and cross-examination. In context, he was clearly entitled to take the view that the Primekings Parties were entitled to enforce their legal rights as judgment creditors with the benefit of the charging orders over the shares. In the present context, however, it will be crucial for the Petitioners to establish by cross-examination that the Applicants had the purpose pleaded in paragraph 106. As I have stated, if they are able to do so, this may justify relief under section 996.

132. I have considered whether I should exercise my wider case management powers to exclude these allegations and I have decided that I should not do so for the reasons which I have set out in relation to extract (8). I will not, therefore, strike out paragraph 96 e. or paragraph 104 or extracts (7), (11), (12) and (14).

(8) *Service of papers*

133. Extracts (8) and (9) are concerned with the oral examination. In extract (10) the Petitioners also allege that the Primekings Parties put improper pressure on them by the threat of detailed assessment proceedings when they knew that they would recover no more than the amount in the Interim Costs Order. In extract (13) they allege that a solicitors' letter dated 30 October 2018 amounted to harassment.
134. Ms Addy drew my attention to the fact that CPR Part 71.3 requires an order under CPR Part 71.2 to be served personally on the creditor not less than seven days before the hearing. She also pointed out that the Petitioners were in breach of the Interim Costs Order and that the Primekings Parties were well within their rights to issue an application under CPR Part 71 (and it was not suggested otherwise). She also pointed out that extract (8) is now factually incorrect because Primekings has issued detailed assessment proceedings which are shortly due to be heard.
135. Ms Addy submitted that I should strike out extracts (10) and (13) on the basis that the Court will determine whether Primekings is entitled to an order for payment of further sums by way of costs in the detailed assessment proceedings and that if they are entitled to a further payment, the allegations in extracts (10) and (12) will fall away. She also pointed out that the Petitioners' lack of funds and reliance upon solicitors and counsel who were prepared to act on a conditional fee basis cut both ways. If the Petition is dismissed, then the Respondents will have very little prospect of recovering their costs. I should, so she submitted, limit the issues before the Court as much as possible.
136. Mr Newman submitted that there was no principle of a "proper forum" and that the Petitioners were perfectly entitled to raise the same issues in different sets of proceedings at the same time. He relied on *Grove Park Properties Ltd v The Royal Bank of Scotland plc* (above) as authority for the proposition that a party may rely on earlier litigation in subsequent proceedings or at the same time for different purposes.
137. Mr Newman also submitted that the detailed assessments of the costs of the Misrepresentation Claim and the Part 8 Claim would not determine the issues

in the Petition. He drew my attention to *Nicholas Drukker & Co v Pridie Brewster & Co* [2006] 3 Costs LR 439 where Openshaw J held that the costs judge did not have jurisdiction to decide allegations of professional negligence and criticisms of the solicitors' conduct which affected not just individual items in the bill but which went to "the heart of the retainer": see [34].

138. In my judgment, the Court undoubtedly has jurisdiction to strike out or stay extracts (7) to (14) under CPR Part 3.1(1)(k) and (m) in the exercise of its case management powers and the authorities encourage the Court to exercise those powers proactively. However, I am not prepared to strike out extracts (7) to (14) for the following reasons:

- i) I accept Mr Newman's submission that there is no general "proper forum principle". I also accept his submission that the costs judge is highly unlikely to make findings which will assist the judge hearing the Petition to determine whether the detailed assessments formed part of the Campaign.
- ii) Moreover, it seems to me unlikely that it will add very significantly to the time and costs of the Petition if the Petitioners are permitted to take the allegations in extracts (7) to (14) to trial.
- iii) Nevertheless, at the end of this judgment I am left with a serious concern about the proliferation of claims brought by the Petitioners all arising out of their own decision to discontinue the Misrepresentation Claim in circumstances where they accept (and, indeed, affirmatively assert) that they will be unable to pay the costs if they lose.
- iv) I am also left with a serious concern that the allegations in the Points of Claim travel well outside the normal boundaries of an unfair prejudice petition and if it had not been for the "Campaign" allegation and the allegation of prejudice in paragraph 233 I would have struck them out.
- v) However, I have found that those allegations are arguable and I accept Mr Newman's general proposition that in the absence of any finding of abuse or application for reverse summary judgment, I should permit

them to go to trial. It seems to me that it would go well beyond the proactive case management of the kind considered in *Unisoft* and *Coroin* (above) to strike out allegations which may have a real prospect of success in the absence of any relevant abuse of process.

VIII. KSSL

139. Mr Newman also submitted that I should not strike out any of the extracts which the Applicants challenged because KSSL had made no application to strike them out. In the event, I need only consider this submission in the context of extracts (1), (3) and (5). Whether or not KSSL is an active party in the present proceedings, I reject that submission. KSSL was not a party to the Misrepresentation Claim and the allegations which I have struck out have no relevance to any claim against it. In fairness to him, Mr Newman did not press this point hard.

IX. Disposal

140. For these reasons I strike out the paragraphs set out in extracts (1), (3) and (5) shown in the Appendix (below) (apart from those parts shown in square brackets and in bold). I dismiss the application to strike out the paragraphs in extracts (2), (4) and (6) to (14). I leave it to the parties to agree a Minute of Order and, if possible, the appropriate costs order. If they are unable to do so, I will determine the incidence of costs on paper.

Appendix

(1) *Post-deal events and restoration of original terms*

35. Soon after the 2013 Transaction completed, the Kings discovered facts which led them to believe that their agreement to those changed terms had been induced by representations which were untrue.
36. In particular, the Kings believed that Mr Fisher and Mr Swain had conveyed the impression that the change in the terms had been necessitated by a deterioration in the attractiveness of the investment to Primekings resulting from a fundamental adverse shift in the attitude of KSGl's lender, GE Capital, towards the business.
37. On 20 December 2013 Anthony King learned facts from GE Capital which led him to believe that there had been no such fundamental change in attitude.
38. That belief caused the Kings to lose trust in Primekings and the Respondents, albeit that was for a period mitigated by assurances given by Mr Stiefel that the terms of the deal (as originally contemplated) would be restored:
 - a. Mr Stiefel in January 2014 stated that the Kirsh Parties were '*big enough and ugly enough to tear up the agreement and start again*' which was understood to mean that the terms of the original deal would be gone back to;
 - b. Further assurances were given to James King on 10 June 2014 (as to which see below).
39. Since the Kings understood that, with the backing of Mr Kirsh, Mr Stiefel was in a position to make good on such assurances, the Kings hoped that they would be made good.
40. Further to those assurances, certain aspects of the original deal were in fact substantially restored, during the course of 2014 and 2015....."

(2) *Proposed Acquisition of Cougar/DSSL*

43. By clause 11.4 of the Subscription Agreement the parties acknowledged that it was contemplated that the Company might acquire the business of Cougar Monitoring Limited ('Cougar') and Defence Security Systems Limited ('DSSL'), businesses in which Mr Fisher, Mr Stiefel, Prime Interaction Ltd, Prime, and Kifin Ltd had an interest, "*if thought fit*", by 31 March 2015.
44. For any such acquisition to take place, the Company's directors would have needed to have been satisfied that the transaction was in the Company's best interests pursuant to section 172 of the Companies Act 2006.
45. During the course of 2014, Mr Stiefel and Mr Fisher suggested that the Company acquire Cougar and DSSL. By December 2014, this suggestion took the form of

a proposal that the acquisition take place in exchange for the Kings having their percentage shareholding diluted from 40% to 32%.

46. Anthony King responded that he would look into Cougar and DSSL to determine their viability. After having spent only a few hours with the Company's Finance Director, Mark Pownall, at both of those businesses' premises, and after interviewing Robin Fisher (in relation to Cougar and DSSL) and Peter Swain (in relation to DSSL), Mr King and Mr Pownall had concerns about the performance of those companies. Mr Pownall emailed Mr Fisher and Mr Swain on 17 December 2014 at 14.53 stating *"I am in the process of putting together a comprehensive information request list and I aim to get this over to you tomorrow"*.
47. Mr Fisher and Mr Swain did not provide the information requested, but instead Mr Fisher called Mr King to say he was being too negative, so he (Mr Fisher) was stopping the process. Mr Stiefel emailed Mr King on 18 December 2014, criticising *"the apparent negative approach adopted by both you and Mark. We are your partners and have always carefully considered the impact of what we propose on all stakeholders. Would we really propose a transaction that was detrimental to our partners and stakeholders? You clearly think so."* The email accused Mr King of being *"so short sighted"*, stated *"what a big opportunity Kings have missed"* and included the words *"to say I am deeply disappointed would be a gross understatement"*. In fact, far from being unduly negative, Mr King was acting reasonably in expressing legitimate concerns that were shared by Mr Pownall. The provision of the information requested would have powerfully confirmed the validity of those concerns:
 - a. DSSL's accounts for the year to 31 March 2015, filed late on 13 April 2016, showed that DSSL had a total P&L deficit £4,888,910, increased from a deficit of £1,471,443 in the previous year.
 - b. DSSL is now in an even more parlous financial state: for the year to 31 March 2017 it had net liabilities of £9,527,794. £627,929 was owed to Prime Interaction Limited and £5,925,639 to Ki Finance SARL, a finance vehicle of Mr Kirsh. DSSL's accounts for the year to 31 March 2018 show that annual turnover is now down to £1,659,180 and the profit was less than a thousand pounds. £6,424,972 is now owed to Ki Finance SARL.
48. It is to be inferred that:
 - a. Mr Fisher felt under considerable pressure (as described above) because Prime's investment in DSSL had plainly not been successful to that point;
 - b. He and Mr Stiefel saw an acquisition of DSSL by the Company as providing a solution to that problem.
 - c. Such an acquisition would have significantly lowered the EBITDA and distributable profits of KSGI and therefore (i) potentially triggered the Primekings Call Option and/or (ii) eliminated or at least reduced, and/or delayed, the payment of the deferred consideration to be paid to James and Susan King by way of redemption of the B Shares.

- d. That outcome, whilst benefiting Primekings and/or other companies associated with Mr Stiefel and Mr Fisher, would have come at a considerable cost to the Company and to the Kings, as minority shareholders in the Company, and holders of the deferred consideration B Shares.
- e. Mr Fisher and Mr Stiefel were not willing to release the requested information to Mr Pownall because they were aware that such information would show how costly the acquisition would be to KSGI.

(3) *The commencement of the Misrepresentation Claim*

- 72. In February 2015 the Kings concluded that the assurances which they had been given by Mr Stiefel that the terms of the 2013 Transaction would be restored to the terms originally contemplated would not be honoured in full.
- 73. Anthony King reached this conclusion when he went to a KSGI board meeting in the Kirsh Family Offices on the 17 February 2015. Mr Stiefel came to the meeting carrying a copy of the Subscription Agreement, with it tabbed up, and stated words to the effect of: “*Kirsh honour signed agreements and we expect the King family to do the same.*”
- 74. That conclusion caused the Kings to contact their solicitors DWF to explore what action could be taken.
- 75. Pre-action letters were sent in April 2015 [**and on 16 July 2015 the Kings issued a misrepresentation claim in the High Court against Primekings, Peter Swain and Mr Fisher (‘the Misrepresentation Action’).**]¹
- 76. The Misrepresentation Action was based on the King family’s belief that they had been the subject of an actionable misrepresentation and/or economic duress when agreeing the 2013 Transaction, as set out above.
- 77. That was a belief shared by DWF partners Lester Wilson and David Armitage (who were both present at the time the 2013 Transaction was signed) and DWF gave evidence in support of the claim as described below as well as acting as solicitors with conduct of the litigation.”

(4) *Conduct Relating to the B Shares and EBITDA*

96.

- e. The efforts of Primekings in the Part 8 proceedings (referred to below) to take the B Shares from the King family for £10,000 (in fact £0 at first) is further evidence of the lengths to which Primekings is prepared to go to deny the King family their lawful entitlements in respect of the B Shares.”

¹ The Applicants did not apply to strike out any of the words in square brackets.

(5) *Trial and Discontinuance of Misrepresentation Claim*

97. **[The Misrepresentation Action came to trial in May 2017.]**¹ The Defendants to the claim contended (among other things) that the Kings had not suffered any loss because the Kings' position had already been voluntarily restored to a position according with the deal as originally contemplated.
98. The Kings' pleaded case was that a critical change to the deal (induced by the representations) was that the deferred consideration was to take the form of the B Shares rather than cash.
99. That case was supported by a witness statement from Lester Wilson, the lead DWF partner who had acted for the Kings in relation to the transaction, but it was fundamentally flawed, as explained below.
100. Mr Wilson gave evidence on day 8 of the trial. At the start of his evidence he accepted that aspects of his evidence were factually incorrect. In particular, he accepted that the payment of the £3m deferred consideration by KSGl in the form of B shares had been introduced into the draft documentation at an earlier stage than his evidence had suggested and that that part of his evidence was a '*mistake*'.
101. That evidence contradicted the pleaded case and opening skeleton argument, documents which Mr Wilson had approved.
102. **[Soon thereafter the King family discontinued the claim.]**¹ Although not relevant to these proceedings, it is clear even from the brief description above that there had been negligence on the part of the lawyers instructed by the Kings in respect of the Misrepresentation Action.

Interim costs order

- [103. That discontinuance led to an indemnity costs order which the Kings consented to.]**¹
104. **Primekings applied to the Court for a payment on account. In making that application Primekings made no mention of its actual costs and its submissions were made by reference only to its budgeted costs of £1.872m. It is to be inferred that the actual incurred costs of Primekings at that time were not or not significantly greater than that figure, alternatively that Primekings made a tactical decision not to assert a significantly higher costs number in order to avoid the risk that the higher costs figure would have an adverse impact on the Court's discretion.**
105. **On the basis of those submissions, [Marcus Smith J made an order for a payment on account of £1.7m (plus interest and costs) to Primekings ('the Payment on Account Debt').]**¹

(6) *June 2017 obstruction of exercise of put option*

127. By letter dated 16 June 2017, Mr King gave notice that he was exercising his put option in relation to the AK Option Shares (which represented 50%) of his shares in the Company.
128. It was made clear by Mr King at the time (in an email to Teacher Stern dated 31 August 2017) that "*The reason for exercising my 'put option' was to be able to pay down some of the debts that we owe to your client following our withdrawal of our case against them.*"
129. The terms of the put option provided for the put option shares (if their value was not agreed) to be independently valued on a pro rata basis, with no minority discount. The put option shares amounted to 6.65% of the Company's ordinary shares.
130. Transfer of those shares at a properly assessed fair value pursuant to the put option would have immediately brought about a substantial reduction in the Payment on Account Debt, as was Mr King's intention.
131. However, it is to be inferred that Mr Stiefel and Mr Fisher were, pursuant to the Campaign, set on a course of obtaining all of the Kings' shares at a much lower value, this being their true motivation, not the reduction of the Payment on Account Debt. Indeed, a reduction at that time in amount of the Payment on Account Debt was tactically undesirable for Primekings, as that debt provided the only basis for enforcement action against the Kings which could be used to seize ownership of the King' shares.
132. Consequently, Primekings cynically obstructed the exercise of the put option, as described below.
133. Knowing that the King family were in a straitened financial situation (exacerbated by the fact that Primekings, Mr Fisher, Mr Stiefel and Mr Zeidler had ensured that the £70,000 due to Mr King under the Settlement Agreement was not paid to him), Primekings refused to agree the appointment of an independent valuer unless Mr King paid his share of the valuer's fees up front, rather than from the proceeds of sale.
134. It is the Kings' position that Primekings' refusal to cooperate in the exercise of the put option was a breach of contract because:
 - a. The stipulation in paragraph 5.3 of Schedule 5 to the Subscription Agreement that, "*The fees of the appointed accountants shall be borne equally by the parties, who shall be jointly and severally liable for such fees*" concerned the incidence of those fees, not the timing of payment. There would have been nothing unusual about the fees being paid once the work was done, which fees (in the case of Mr King) could have been paid from the proceeds of sale. Anthony King had made it clear that he was content to have his share of the fees paid from the proceeds of sale.
 - b. Obstructing the exercise of the put option in this way was contrary to clause 19.1 of the Subscription Agreement, because it prevented the provisions of

the agreement from being given full force and effect according to its spirit and intention.

135. Further, whether or not it amounted to a breach of contract, Primekings' refusal to cooperate in the exercise of the put option provides powerful support for the inference of its true intentions, and those of Mr Fisher, Mr Stiefel and Mr Zeidler, as set out herein, because:

- a. An independent valuer would have been unlikely to have required payment up front for his or her services, and if payment up front had been demanded, Primekings would have had no difficulty in making such payment.
- b. As described below, Primekings subsequently instructed a valuer (Mr Eastaway) to value the Kings' shares applying assumptions that differed very substantially from the (very standard) assumptions required to be made under Schedule 5 of the Subscription Agreement.
- c. Primekings positively relied, in the charging order proceedings described below, upon the absence of any payment by the Kings towards the Payment on Account Debt. In a witness statement dated 22 May 2018 placed before Deputy Master Cousins Ms Toomer asserted (at paragraph 15) that "*the Defendants have not sought to sell their shares despite their position...*".
- d. The only plausible motivation for Primekings obstructing the exercise of the put option is as set out herein.

136. The obstruction of the exercise of the put option amounted, both in itself and as part of the Campaign, to unfairly prejudicial conduct of the affairs of the Company.

(7) *June Charging orders*

137. Having deliberately obstructed this attempt by Mr King (via exercise of the put option) to pay back a significant proportion of the Payment on Account Debt, Primekings then proceeded to obtain charge over assets of the Kings as security for the Payment on Account Debt. In particular in June 2017, Primekings, Mr Swain and Mr Fisher applied for charging orders in respect of:

- a. Anthony King's 201 Ordinary Shares;
- b. Anthony King's put option of shares exercisable pursuant to schedule 5 of the Subscription Agreement;
- c. James Patrick King, Susan Mary King and Amanda Geraldine Crowther as Trustees of the Trust's 402 Ordinary Shares;
- d. James Patrick King and Susan May King's 6 B Ordinary Shares.
- e. 263 Bradford Road Idle BD10 8SQ, the home of Mr and Mrs King

- f. 77 Moorhead Lane, Bradford BD18 4JN the home of Anthony King and Gillian King and their 6 children
- g. 103-107 Bradford Road Menston, a commercial property owned by Anthony and Gillian King.

138. Interim charging orders were made on 22 June 2017. These were made final on 3 August 2017.

139. As set out below, Primekings and Mr Fisher subsequently launched an application for an order for sale in respect of the shares only (not the properties), with a view to obtaining an order that the charged shares be sold to them at the lowest possible valuation.

(8) *Service of papers*

168. On the morning of 3 September 2017, whilst leaving his property to go to church, Mr King was personally served with papers to appear in court on 11 October 2017 for an examination under CPR71.

169. That personal service was unnecessary and was intended to intimidate the King family as part of the Campaign and to put pressure on him to accept the terms set out in the 13 June 2017 letter. Up to that point High Court papers had been served by email from Teacher Stern and hard copies by registered post.

170. That service was timed to increase the pressure on the King family in advance of a meeting which Primekings wished to have on 6 September 2017 at which (it is to be inferred) Primekings wanted the King family to agree to hand over their shares in the company in consideration of what was asserted to be a costs debt of £2.7m.

171. Anthony King offered to attend that meeting with his mother on behalf of the family as his father was ill. Primekings were not willing to give any indication as to the agenda for the meeting and following Anthony King's request for clarity around the meeting he received a response on 3 September 2017 stating "*my clients are not prepared to negotiate by email or with you in isolation from your parents*". It is to be inferred that Primekings wanted to be able to exploit the presence of Anthony King's elderly parents, and considered that Anthony King would not be so easily intimidated. That strategy continues to be evident in the letter sent to James King by Eversheds detailed in section XII below."

(9) *11 and 12 October 2017 questioning*

175. On 11 and 12 October 2017 each of the King Family was questioned about their assets before a judge, pursuant to CPR 71, as part of the enforcement of the Payment on Account Debt. The application relating to that process (which must have been approved by Mr Fisher and/or Mr Stiefel), signed by a statement of truth, stated that "*The total costs claim exceeds £3,000,000*".

176. That hearing was attended by Mr Fisher accompanied by two lawyers from Teacher Stern, a junior barrister and Paul Downes QC. After the questioning of Mr James King on 12 October 2017, Mr Downes told Anthony King and James King that if the Kings handed over all of the shares, and in addition assigned the claim against DWF to Primekings (a significant adverse change from the terms offered in the June 2017 letter), they would get to keep their houses and they might get £100k to rebuild their lives. That statement was made openly because James King had declined to speak on a without prejudice basis with Mr Downes. It reinforces the inference (which naturally arises from the circumstances described herein) that the pursuit of the enforcement proceedings was part of the Campaign to obtain the Kings' shares for less than their true value."

(10) *Pressure exerted by threat of further costs in respect of the Misrepresentation Claim*

182. Notwithstanding the obligation on Primekings to commence detailed assessment in respect of the costs of the Misrepresentation Action, its solicitors' request that the normal time period for submitting costs for assessment of 3 months be extended to the end of October 2017, and numerous intimations from its solicitors that it intended to do so, Primekings has still not started detailed assessment more than 19 months after the making of the order directing such costs to be assessed if not agreed.

183. It is to be inferred that Primekings has been unwilling to start detailed assessment even though the rules require it because Primekings believes that that the recoverable costs following any assessment process are likely to be no greater than the payment on account made of £1.7m. That inference is supported by (i) the fact that Primeking's costs were circa £1.4m in February 2017 and the budget for the costs to trial was £1.7m (ii) no greater figure was ever mentioned to Marcus Smith J (iii) Mr Stiefel's offer to accept the B Shares in satisfaction of the legal bill (iv) the inexplicably evasive conduct of Primekings when Mr King has made reasonable requests for details about the costs position. In such circumstances the threat of detailed assessment has been used as an improper pressure tactic in furtherance of the Campaign."

(11) *Part 8 Claim aimed at expropriating shares at an undervalue*

184. On 27 October 2017, a Part 8 Claim was issued by Primekings, Mr Swain and Mr Fisher, seeking an order for sale of the Kings' shares.

185. The Part 8 Claim:

- a. Must have been in the course of being prepared when the Second Stiefel Threat was made.
- b. Was accompanied by a first witness statement from Clare Toomer of Teacher Stern, exhibiting a valuation that had been obtained from Mr Eastaway valuing the King share in total at £164,000, and stating at paragraph 12 that "no payments have been made by any of the Defendants towards the judgment".

- c. Sought an Order that the Kings' shares be purchased by Primekings for a price based on Mr Eastaway's valuation, subject to an updating exercise which (it is to be inferred) Primekings anticipated would decrease the price.

186. The Part 8 Claim was structured and pursued in a manner calculated to result in an expropriation of the Petitioners' shares on terms that were unfair to the Petitioners in at least the following respects, which it is to be inferred that the Respondents knew and intended for the reasons set out below:

- a. The Part 8 Claim sought to bring about a sale at a price substantially lower than the price that would have been determined by the application of the valuation mechanism set out in the Subscription Agreement. This fact, and the Respondents' knowledge of it, is demonstrated by:

- i. The difference between the assumptions that Mr Eastaway was instructed to make, and made, and the assumptions mandated by the Subscription Agreement; and
- ii. The Respondents' obstruction of Anthony King's attempted exercise of the Put Option over his shares, which would have resulted in a sale of those shares to Primekings pursuant to the mechanism set out in the Subscription Agreement, and the acknowledgement made on their behalf by Counsel during the Part 8 proceedings that this may give rise to a damages claim by Anthony King for breach of contract.

- b. The Part 8 Claim sought to force a sale by reference to a valuation date that was prejudicial to the Petitioners, and was known and intended by the Respondents to be prejudicial to the Petitioners and correspondingly advantageous to Primekings, because, as the Respondents were aware:

- i. The valuation was made at a time and in a manner that maximised the adverse impact of the Respondents' unfairly prejudicial conduct of the affairs of the Company as described above. By way of example:
 - 1. It included the impact of the damage to the group's credit rating caused by the late filing of accounts; Mr Eastaway's report expressly relied upon the fact (drawn from the 2017 CEO's report exhibited to Mr Eastaway's valuation) that "The business has a credit score of zero due to late filing of accounts which is causing issues with creditors and suppliers";
 - 2. By adopting a net asset valuation approach (which was in any event unwarranted from a valuation perspective) Mr Eastaway's valuation directly reflected the adverse impact of the Respondents' expenditure of Company money on the pursuit of the Campaign, including in particular the costs of the Bribery Action.
- ii. The adoption of a net asset value approach not only reflected, but locked in the effects of such conduct. Mr Eastaway's valuation contained no or no proper attempt to estimate the future profits of the

Company, having regard to the plans which it is to be inferred that its management in fact had to generate such profits over whatever planning horizon(s) they were working to.

- iii. The Respondents thereby sought to deprive the Petitioners of the ability to sell on the advantageous terms (which they had bargained for) in the future, for example pursuant to the “tag along” rights in the Articles giving the Petitioners the right to sell their shares at the same time, and on the same terms, as a sale by Primekings of its own stake.
- c. The Part 8 Claim sought to force a sale at a lower price than would have resulted from a valuation following the principles applicable in the context of s.994 proceedings. The present proceedings, seeking an order for sale, had been issued before the Part 8 Claim came on for hearing before Deputy Master Cousins. Rather than agreeing to a sale based on the principles applicable in s.994 proceedings, recognising, as they should have done, that there had been unfairly prejudicial conduct of the Company sufficient for an s.994 buy-out order to be made, the Respondents resisted a stay of the Part 8 Proceedings and vigorously pressed ahead seeking to obtain a sale at a lower value.
- d. The instructions given to Mr Eastaway included the instruction to assume the sale of the Kings’ shares would be in individual parcels, with minority discounts applied to each. (Leading Counsel for the Respondents subsequently to Deputy Master Cousins conceded that that particular assumption should not have been made and the valuation should be adjusted to remove its effect. It is to be inferred that the Respondents were content for that concession to be made because by the time it was made, the impact of all the other instructions given to Mr Eastaway was that the value attributed to the Company was so low that the discounting had limited impact.)
- e. The instructions given to Mr Eastaway included the instruction to assume that the shares should be valued on the basis of a forced sale, as expressly contrasted with a “willing buyer/willing seller” basis. As at least Mr Stiefel and Mr Fisher would have known, as qualified accountants, the making of such an assumption was inconsistent with the standard accounting definitions of fair value. Mr Eastaway relied upon this assumption, among others, to explain the dramatic difference between his valuation of the Company and the valuation produced by Costas Constantinou of Smith & Williamson, the expert instructed by the Respondents in the context of the Misrepresentation Action. Mr Constantinou’s valuation report was dated 10 February 2017, only 8 months earlier than Mr Eastaway’s report. Mr Constantinou’s opinion was that the value of the Company’s voting shares as at 24 January 2017 was £10.3m, assuming that the Company would have sufficient distributable reserves to make the expected pay out of B ordinary shares.³ In the absence of any explanation having been provided by the Respondents as to why they considered it necessary to instruct a different valuer, rather than to instruct Mr Constantinou to update his valuation, it is to be inferred that there is no innocent explanation for doing so.

- f. The instructions given to Mr Eastaway included an instruction that the shares be valued on the basis that no warranties would be given in connection with the transfer of the shares. As at least Mr Fisher and Mr Stiefel would have known, a normal valuation process would have involved the assumption that the terms of sale included the warranties that would normally be included in an arm's length transaction between a willing buyer and a willing seller.
 - g. The instructions given to Mr Eastaway included an instruction that the shares be valued on the assumption that the shareholding was subject (in the hands of the purchaser) to the obligations and rights of third parties set out in the Company's Articles. As the Respondents would have appreciated, that assumption bore no relation to the commercial and legal reality, which was that a purchaser of all of the Company's shares would not need to be concerned about such matters because (i) there would be no other shareholders following such a purchase, and in any event (ii) the purchaser could alter the Articles.
 - h. The instructions given to Mr Eastaway included the expression of opinion that there was no prospect of any payment being made to the holders of the B Shares. Mr Eastaway's report dated 16 October 2017 adopted that opinion, apparently without any proper process of analysis as its validity. The logic behind that assumption, namely that the Company would never make any distributable profits or have 'other monies' available, is plainly inapplicable to a company trading as a going concern. It is to be inferred from (among other things) the preparation of accounts on a going concern basis and the continued support of the Kirsh group for the business, that the Respondents in fact expected the Company to continue to trade as a going concern and believed that in due course it would generate distributable profits sufficient to redeem the B Shares in full and thereafter generate ongoing profits for the ordinary shareholders.
 - i. Mr Eastaway's attribution of a negligible value to the B Shares was also inconsistent with his attribution of some (albeit low) value to the ordinary shares, because Mr and Mrs King are entitled to be paid the whole of the at least £2,133,000 price of the B Shares before any profits become available for distribution to the holders of the ordinary shares.
187. As the Respondents knew and intended, the overall impact of the instructions given to Mr Eastaway was to produce a valuation which bore no resemblance to the commercial reality of the Petitioners' position, in which they have a 40% stake in a very substantial business, with tag along rights to ensure pro rata participation in any sale of the whole, together with the right to receive £2,133,000 in respect of the B Shares as and when the Company was lawfully able to pay it, and with rights under s.994 of the Companies Act to protect them against any unfairly prejudicial conduct by the majority.
188. At a hearing on 31 May 2018, Leading Counsel for the Respondents made the submission that "*in effect, the order sought [by the Petitioners in the Part 8 Claim] is that the court stays execution so that they can benefit from the labour and efforts of those running the company over the years to come*". It is to be

inferred that the inverse of that submission reflected the true motivation of the Respondents, namely, to prevent the Petitioners from participating in or receiving a fair price reflecting or even remotely approaching the true commercial value of Company, which included its potential to make future profits.

189. The Respondents' intention, by the pursuit of the Part 8 Claim, to bring about a result that was unfairly prejudicial to the Petitioners is to be inferred from all the circumstances set out herein, fortified in particular by the following facts and matters:

- a. The Respondents' own previously expressed views about the value of the business and/or the Kings' shares. By way of example only:
 - i. Mr Stiefel stated on 17 May 2017 that "*The chances of KSGL reaching £100m is good and there is no reason why it should not*".
 - ii. Around 6 April 2017, Mr Stiefel told Steve Evans (the former COO of KSSL) that Primekings would consider an offer of £20m for the Kings' 60% stake in the business.
 - iii. In October/November 2017 the Kings indicated a willingness to buy back the business at a premium which would have covered the Payment on Account Debt and debts owed to the Kirsh group. Teacher Stern stated that such a sale was 'of no interest' to their clients.
 - iv. The terms of transfer sought to be achieved by the charging order proceedings were much more disadvantageous to the Kings even than the already unfair terms proposed in the 13 June 2017 letter. That letter indicated that the Respondents appreciated that the Kings' shares were worth more than the Kings' liability in respect of the costs of the Misrepresentation Action.
- b. The money Primekings has been willing to spend on a Campaign aimed at obtaining the shares, including on the Bribery Action, which greatly exceeded the value of the shares as asserted for the purposes of the Part 8 Claim by the Respondents.
- c. The pressure for a result exerted by Primekings on their solicitors which led those solicitors to make an improper threat to report the Deputy Master in an email sent to the Court on 26 April 2018 without a copy being sent to the solicitors for the Kings.
- d. The fact that the amount that would have been realised by the Respondents from the Part 8 Claim would not appreciably have reduced the Payment on Account Debt, and indeed the effect of the Part 8 Claim was likely to increase that debt, once legal costs had been taken into account.

190. The pursuit of the Part 8 Claim amounted, both in itself and as part of the Campaign, to unfairly prejudicial conduct of the affairs of the Company within the meaning of s.994. It forms an integral and important part of a course of

conduct, involving the direct exercise of powers held by the individual Respondents as directors of the Company and KSSL, and Primekings as the Company's majority shareholder, (as well as the exercise of rights held individually) that has been pursued with the objective of expelling the Kings from participation in the management of the Company and expropriating their shares for less than their fair value.

191. Further or alternatively, the fact and manner of the Respondents' pursuit of the Part 8 Claim is highly relevant to the existence and scope of the Campaign, the unfairness of other conduct pleaded herein amounting to conduct of the affairs of the Company, including the inferences to be drawn as to the intentions and objectives of the Respondents, and to the relief that it is appropriate to grant in respect of such conduct.

(12) *Payment of the Payment on Account Debt*

195. In October 2018, the Payment on Account Debt was repaid in full, thus bringing the Part 8 claim to an end. That payment came about when the Kings received a substantial payment from DWF's insurers relating to the services provided by DWF in connection with the Misrepresentation Action. Prior to that time the Kings were not in a position to pay off the Payment on Account Debt, as the Campaign had been effective in ensuring that they were not in a position to do so.

(13) *Letter wrongly asserting more money owed*

196. In a letter dated 30 October 2018 to Mr Anthony King, the Respondents (through their solicitors) asserted that:
- a. *"you and your parents continue to owe significant sums of money to our clients under the Costs Order."* That statement was plainly wrong as a matter of law – the Petitioners have no legal liability to pay unassessed costs.
 - b. *"our client is entitled to updates in matters that affect its position as a judgment creditor and you should therefore be transparent and forthcoming about any significant changes in your financial position."* That statement was also plainly wrong as a matter of law, as *Primekings* was no longer a judgment creditor. In any event a judgment creditor has no such entitlement as a matter of law.
 - c. *"our client has a fixed charge pursuant to the final charging order dated August 2017."* That was plainly incorrect. The Payment on Account Debt had been paid in full and Primekings had agreed (as it had to) that the charge be discharged. On 16 October 2018 at 18.14 Teacher Stern had stated to RPC in correspondence, *"We acknowledge receipt of £1105 and agree to the discharge of the charging orders."*

197. In the circumstances, the letter of 30 October 2018 amounted to harassment and it is to be inferred that it was sent on the instruction of the Respondents in order to add further unfair pressure on the King Family pursuant to the Campaign,

and/or represented an unwarranted attempt to extract confidential information about the financial position of the Kings to which the Respondents had no entitlement.

(14) *Costs of the Part 8 Claim*

198. At the hearing on 17 October 2018, Primekings applied for an order for costs, and in the course of doing so placed two Costs Schedules before Deputy Master Cousins indicating that costs totalling £199,621.80 had been incurred. The covering letter stated: “Absent any proper explanation by your clients as to how, at the eleventh hour, they have been able to make (part) payment, it is our clients' position that their costs should be awarded on the indemnity basis, to be assessed if not agreed. On that basis, we will be seeking a payment on account in the sum of £120,000.”.
199. On 21 December 2018 Teacher Stern wrote to RPC stating: “*Our clients' costs schedules total £199,621.80 although we put you notice that actual billed costs are more significant. Those costs will of course be a matter for detailed assessment pursuant to paragraph 47 the Judgment. For the purposes of seeking to agree a payment on account, our clients propose that your clients pay £180,000 by 15 January 2019, with the balance to be assessed (if not agreed).*”
200. RPC immediately responded asking Teacher Stern to clarify (1) whether the bill that their clients would submit for Detailed Assessment would exceed the signed Costs Schedules of £199,621.80 that had been placed before Deputy Master Cousins, and if so (2) by how much, and (3) why such sum was not included in the Costs Schedules put before the court.
201. On 24 December 2018 Teacher Stern wrote asserting that there were approximately £130,000 of additional costs (exclusive of VAT and excluding work post receipt of Judgment) and asserting that Primekings statements of costs “*were conservatively prepared in an effort to avoid further cost of dispute, expected on the basis of your client's claimed penury to be difficult to recover and on the basis of standard assessment. They are no longer applicable to the ordered indemnity basis assessment and we expect that a substantial additional part of our billed costs will be fully recoverable on the indemnity basis.*” That was factually and legally wrong – the original statements had been prepared in the knowledge that the Respondents would be seeking the assessment of such costs on the indemnity basis and in circumstances where it was known that the Petitioners had been able (as explained above) to repay the Payment on Account Debt, and there was no legitimate reason for the Respondents to claim further costs that had not been included in the schedules.
202. It is to be inferred that the costs figures provided to Deputy Master Cousins represented the costs that the Respondents genuinely believed at the time to be properly recoverable on the indemnity basis (and which they believed could be relied upon without risking adversely influencing the Deputy Master's discretion as to the costs order to be made). Consequently, the assertion of an additional entitlement to costs represented an improper attempt to exert pressure on the Petitioners, in furtherance of the Campaign. That inference is strengthened by the

fact that (i) this is not the first occasion on which the Respondents have asserted that they have incurred properly recoverable costs which exceed schedules relied on at hearings (they did the same thing in relation to the costs of the Misrepresentation Action), and they have a track record (in relation to the costs of the Misrepresentation Action, as described above) of being unwilling to subject such costs to detailed assessment, or substantiate them in any meaningful way.

203. The exertion of pressure in that way demonstrates that the Campaign, funded by the Company, is still in full flow notwithstanding the initiation of these proceedings and the repayment of the Payment on Account Debt.

Actions taken which are calculated or likely to reduce the ability of the Kings to seek an effective remedy from the Court

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- b. The Respondents prevented Mr King from exercising his put option in June 2017 as set out above.