

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (Ch D)

IN THE MATTER OF THE HUT GROUP LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 17th January 2020

Before:

HIS HONOUR JUDGE EYRE QC

Between:

ZEDRA TRUST COMPANY (JERSEY) LIMITED

Petitioner

- and -

THE HUT GROUP LIMITED & OTHERS

Respondents

Paul Chaisty QC and George McPherson (instructed by **DWF Solicitors**) for the **Petitioner**
Lance Ashworth QC and Dan McCourt Fritz (instructed by **Gowling WLG (UK) LLP**) for
the **Respondents**

Hearing date: 23rd September 2019

JUDGMENT

I direct that pursuant to CPR PD 39A 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.

HH Judge Eyre QC:**Introduction.**

1. The Petitioner is a trust company. It is the trustee of Oliver's Sebastian Led Trust 2011, a trust of which Oliver Nobahar-Cookson is a beneficiary. The Petitioner holds shares in the First Respondent. The parties are agreed that the Petitioner holds 153,904 A Ordinary shares and 205,972 B Ordinary shares. There is disagreement, which is immaterial for present purposes, as to the precise proportion which that holding constitutes of the issued share capital of and of the voting rights in the First Respondent. The Petitioner's shareholding derives from a Sale and Purchase Agreement of May 2011 between the First Respondent, the Petitioner, and Mr. Nobahar-Cookson. That provided for the First Respondent to acquire the shares of the Petitioner and Mr. Nobahar-Cookson in Cend Ltd in return for a cash consideration and for the issue and allotment to the Petitioner of 153,904 A Ordinary shares and 153,904 A4 shares in the First Respondent. The A4 shares were subsequently converted into B Ordinary shares. It is common ground that the Petitioner's rights as shareholder were governed by the Sale and Purchase Agreement; by a Shareholders' Agreement; and by the Articles of the First Respondent although the consequences of that and the rights flowing from those documents are heavily contested.
2. After the First Respondent's acquisition of the share capital of Cend Ltd Mr. Nobahar-Cookson became a director of the First Respondent but there was then a significant falling out. The First Respondent alleged that Mr. Nobahar-Cookson and the Petitioner had breached the warranties in the Sale and Purchase Agreement and for their part Mr. Nobahar-Cookson and the Petitioner alleged that the First Respondent had fraudulently breached the warranties it had given.
3. The Petitioner says that the consequence of that breakdown of relations was that those in control of the First Respondent thereafter conducted the affairs of that company vindictively and for the purpose of causing harm to the Petitioner and to Mr. Nobahar-Cookson. That improper conduct is said to have been manifested in actions in relation to the rights of the shares held by the Petitioner; in a dilution of the Petitioner's shareholding in the First Respondent; and in breaches of an obligation to provide information which is alleged to derive from the Shareholders' Agreement.
4. In the current proceedings the Petitioner petitions pursuant to section 994 of the Companies Act 2006 ("the Act") against the First Respondent and fourteen other respondents. The latter respondents are persons who have been directors of the First Respondent at various times and five of whom are also shareholders in the First Respondent. Detailed Points of Defence have been served and these have been met by Points of Reply.
5. In the current application the Respondents seek the striking out of the Petition in its entirety as an abuse of process or failing that the striking out of particular elements of the Petition. This course was foreshadowed in the Points of Defence which begin by characterising the Petition as an abuse of process. In the event that the Petition is not struck out the Respondents seek permission to serve a

Rejoinder and the Petitioner does not resist that aspect of the application. The application is stated to be made on the basis that the Petition or parts of it are “improperly pleaded, unsustainable, and/or abusive”. The Respondents are accordingly relying on CPR Pt 3.4 (2) (a) and (b).

The Petition.

6. It is necessary to set out in some detail the allegations contained in the Petition and the relief sought.
7. The Petition lists the dates of appointment of the Second – Fifteenth Respondents as directors of the First Respondent with the dates of termination of the appointments of the Fourth and Eighth Respondents. It then sets out duties owed by those respondents deriving from sections 171, 172, and 175 of the Act and states that the duties were owed to the First Respondent. It sets out the circumstances of the Sale and Purchase Agreement and the Petitioner’s acquisition of shares in the First Respondent pleading particular terms of the Shareholders’ Agreement. It asserts that the effect of the Shareholders’ Agreement was in part that the First Respondent “and its director shareholders” were “each bound to disclose and not to withhold from [the Petitioner] ... such information as it reasonably required for the purpose of monitoring the value of its shareholding in [the First Respondent]”. This is characterized as “the Information Obligation”. At paragraph 1 of the prayer the Petitioner seeks a declaration that the Information Obligation is binding on the First Respondent “and its directors and shareholders”.
8. At paragraphs 24 – 29 the Petition pleads that the Articles were amended with effect from 7th August 2014 to remove the co-sale rights which had formerly attached to the Petitioner’s A Ordinary shares. It says that in approving the special resolution adopting the new Articles the First Respondent “and its directors” had acted “in bad faith and/or for an improper purpose”. The allegation that the action was taken in bad faith and/or for an improper purpose is made at paragraph 27 of the Petition and the particulars are set out at 27.1 – 27.4. Thus it is said that there was “no proper commercial basis” for the amendment; that the amendment “could not have been inadvertent and/or by mistake”; that it was to be inferred from the acrimonious breakdown of relations following the respective allegations of breach of warranty that “the directors exercised their power vindictively and for the improper purpose of causing damage to [the Petitioner] and Mr. Nobahar-Cookson”; that the omission of reference to the relevant Article in an email sending a draft amendment resolution was a breach of the Information Obligation and that it is to be inferred it was a deliberate omission which was intended to conceal from the Petitioner the effect of the amendment. At paragraph 2 of the prayer the Petitioner seeks an order that the First Respondent “amend the Articles to reinstate the co-sale rights”.
9. The Respondents’ Points of Defence plead that the amendment was made in error and was ineffective and invalid by reason of a failure to comply with the requirements of section 630 of the Act. They say that the error has now been remedied and that an offer to do so had been made before the presentation of the Petition. In those circumstances the Respondents seek the striking out of

paragraph 2 of the prayer as seeking relief that is no longer needed and also of those parts of the Petition which allege bad faith in relation to the amendment as being irrelevant to the current issues.

10. At paragraphs 30 – 39 the Petition sets out the second of the actions which are said to have adversely affected the Petitioner’s shareholding in the First Respondent. It is said that the Articles were amended to have the effect that the conversion of the Petitioner’s A4 shares to B Ordinary shares would result in the loss of the Petitioner’s co-sale rights in a way which would not happen to the holders of A, A1, A2, A3, A5, A6, and D shares who converted their shareholdings. The Petitioner converted its A4 shares to B Ordinary shares in March 2018 and lost the co-sale rights which had formerly attached to them.
11. At paragraph 37 the Petition alleges that the First Respondent “and its directors” had acted “in bad faith and/or for an improper purpose” and preferred the interests of the other shareholders to those of the Petitioner. The particulars of the alleged bad faith and impropriety are set out at 37.1 – 37.6. It is said that the preferential treatment of the other shareholders had “no proper commercial basis”; that the shareholder beneficiaries of this preferential treatment included four directors of the First Respondent (naming the Fifth, Sixth, Seventh, and Ninth Respondents); that the Board of the First Respondent unlawfully prevented the Petitioner from inspecting the register of members and that the purpose of this was the improper one of concealing the conversions from the Petitioner; that it was a breach of the Information Obligation for the First Respondent not to disclose to the Petitioner the intention of the other shareholders to convert their holdings; that the shareholders who did convert their shares are to be inferred to have acted collectively and in consultation with the Board of the First Respondent but to the exclusion of the Petitioner; and that there was a further breach of the Information Obligation on the part of the First Respondent in failing to disclose to the Petitioner the effect of the proposed conversion of the Petitioner’s shares. The relief sought appears in part at paragraph 3 of the prayer where the Petitioner seeks an order for amendment of the Articles so that the Petitioner’s A4 shares benefit from the co-sale rights.
12. The Respondents deny the alleged impropriety. In short they say that the amendments to the Articles were properly made and were driven by the requirements of Old Mutual plc which was seeking to make a substantial investment in the First Respondent. They say that the Petitioner converted its A4 shares of its own volition and without consulting the Respondents in circumstances where the Respondents had no obligation to advise the Petitioner on the potential consequences of its actions.
13. At paragraphs 40 – 45 the Petition alleges that there has been a progressive dilution of the Petitioner’s shareholding in the First Respondent. This also is said to have been the consequence of the First Respondent “and its directors” acting “in bad faith and/or for an improper purpose”. That bad faith and alleged impropriety is particularised at 44.1- 44.4. There is said to have been a breach of the Information Obligation in failing to inform the Petitioner of other share issues and their consequences and in fact a deliberate concealment by the directors of the First Respondent in withholding inspection of the register of members. The impropriety is said to have included failing to invite the Petitioner

to participate in the share issues. The Petitioner's consent is said to have been improperly obtained because the Petitioner had been given insufficient information before giving its consent. Finally it is said that the dilution of the Petitioner's shareholding was contrary to the Petitioner's legitimate expectations and was "part of a concerted attempt by the directors to prejudice [the Petitioner]'s interests as a shareholder.

14. At paragraph 6 of the prayer the Petitioner seeks an order that the First Respondent issue such shares to the Petitioner as will remove the dilution of its shareholding.
15. The Points of Defence take issue with the Petitioner's calculation of the alleged dilution. It is denied that the Respondents were obliged to give the Petitioner an opportunity to participate in the sundry share issues on which the Petitioner relies as having caused the dilution in its shareholding. The Respondents deny that their conduct was unfairly prejudicial to the Petitioner pointing out that the investment into the First Respondent has enabled value to be added with the consequence it is said that the monetary value of the Petitioner's shareholding has been enhanced.
16. At paragraphs 46 and 47 the Petition avers that the previously pleaded matters constituted breaches of the Information Obligation by the First Respondent and "each of the shareholder directors" respectively and says that the First Respondent and those directors are liable in damages to the Petitioner. The Respondents deny the existence of the Information Obligation and rely on their earlier responses to the particular alleged breaches.
17. At paragraph 4 of the prayer the Petitioner seeks an order that the directors involved in the breaches of duty set out in paragraphs 27, 37, and 44 pay equitable compensation to the First Respondent for those breaches and that "out of the proceeds thereof" the First Respondent compensate the Petitioner in respect of the losses pleaded at paragraphs 29, 39, 44, and 45. At paragraph 5 there is an alternative prayer for an order that the directors involved pay equitable compensation to the Petitioner.
18. At paragraph 7 the prayer seeks an order that the First Respondent pay the Petitioner damages for any losses suffered as a result of the former's alleged breaches of the Information Obligation with a further or alternative claim at paragraph 8 that the shareholder directors pay the Petitioner damages for the losses caused by their breaches of the Information Obligation.

The Application.

19. The application has a number of limbs. The first relates to the Petition as a whole and is the contention that the Petition is in reality a derivative claim within the meaning of section 260 of the Act. No permission to bring such a claim has been sought let alone granted and the Respondents say that such permission would not have been given. Accordingly, the Respondents contend that it is an abuse of process to seek to bring what is in reality a derivative claim under the guise of a section 994 petition. The Petitioner denies that the Petition amounts to a derivative claim and contends that even if it were to be, incorrectly the Petitioner

would say, characterised as such that would not mean that it is to be struck out as an abuse of process.

20. Next the Respondents contend that elements of the relief sought in the prayer are to be struck out as amounting to claims for compensation for reflective loss to which the Petitioner is not entitled. The Petitioner again does not accept this saying that when seen in context the relief sought is within that which the court would be entitled to grant under section 996.
21. The Petition contains at various points averments that “the Company and its directors” acted “in bad faith and/or for an improper purpose”. The Respondents say that the allegations of bad faith and/or impropriety are inadequately particularised and/or fail to set out matters capable of being held to be bad faith or impropriety and so fail to be struck out on that ground. The Petitioner does not accept this saying that the pleading of the Petition sufficiently enables the Respondents to know the case they have to meet.
22. Finally, the Respondents say that elements of the relief sought are abusive because they fall outside the scope of section 996 and so the claim for such relief is doomed to fail. In particular it is said that the relief sought by way of orders for the First Respondent to amend its Articles or issue shares to the Petitioner are outside the scope of section 996 being orders which the court does not have power to make. Moreover, the Respondents say that the proposed relief would affect the rights of other shareholders who have not been made respondents to the Petition with the consequence that it is abusive to seek relief without seeking to make all shareholders parties to the proceedings. The Petitioner responds to this contention by pointing to the width of the relief available under section 996 and by saying that the fact that other shareholders are not parties might be relevant in due course to questions of whether others should be joined to the petition but that it does not mean that the petition is not properly constituted or is liable to be struck out.

The Approach to be taken to the Striking Out of Claims or of Particular Allegations.

23. The parties were agreed that the approach to be taken to the potential striking out of a section 994 petition was that set out by Peter Gibson LJ in *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171 at 194 g – i and 195 h – 196 h as supplemented by HH Judge Pelling QC in *Re Pedersen (Thameside) Ltd* [2017] EWHC 3406 (Ch), [2018] BCC 58 at [10] – [12] and Sir Nicholas Warren in *Re Bankside Hotels Ltd* [2018] EWHC 1035 (Ch), [2019] 1BCLC 434 at [10] – [25].
24. The effect of that guidance is that I am to have regard to the width of the court’s jurisdiction under section 994 and to the breadth and variety of relief which can be granted under section 996. However, neither the jurisdiction nor the potential range of relief is limitless. For a petition to be within the scope of section 994 it must be based on the contention that the affairs of the relevant company have been conducted in a way which is unfairly prejudicial to the Petitioner and the relief sought must be such as addresses the consequences of the unfairly prejudicial conduct. In order to be sustainable and to avoid being struck out a

petition must plead a case falling within the scope of section 994 and the relief sought must be such as is capable of being awarded under section 996.

25. For the purpose of considering a striking out application the facts alleged by a petitioner are to be assumed to be true in the sense that the court is to proceed on the footing that the facts pleaded will be established at trial. The court is to look to the reality of what is alleged and undue weight is not to be attached to infelicities of language. The court is to be conscious that the drafting of almost any pleading could be improved upon with the benefit of hindsight but that does not mean that an overly liberal approach is to be taken and a petitioner cannot escape from his or her pleading to seek to put a case different from that which appears from a fair reading of the petition as drafted.
26. The court is to look to the realities of the litigation and a petition is to be struck out if the prospect of the relief sought being granted at a trial is “perfectly hopeless”.
27. The jurisdiction to strike out a petition is exercised “very sparingly and only where the clearest grounds are shown for doing so” (per Bingham LJ in *Copeland v Craddock* [1997] BCC 293 at 300C). Similarly the court is to be conscious of the “heavy burden” to be discharged before a petition is to be struck out (per Peter Goldsmith QC as a deputy judge in *Re Legal Costs Negotiators Ltd* approved by Peter Gibson LJ at 195 h – 196 a). However, where clear grounds are shown and the heavy burden discharged the petition is to be struck out.
28. The Petitioner contends that in considering the interrelation between a derivative action and a section 994 petition the court must have regard to the fact that this is an area of developing jurisprudence. Mr. Chaisty QC adopted the comment of the editors of the White Book at 3.4.2 that “it is not appropriate to strike out a claim in an area of developing jurisprudence since, in such areas, decisions as to novel points of law should be based on actual findings of fact”. That proposition is derived from the judgment of Chadwick LJ in *Farah v British Airways* The Times 26th January 2000 where, at [42] in the transcript, he paraphrased the speech of Lord Browne-Wilkinson in *Barrett v Enfield LBC* [2001] 2 AC 550 to the effect that “in an area of the law which was uncertain and developing it could not normally be appropriate to strike out”.
29. In my judgement care is needed in applying that approach. It is to be noted that the view expressed by the editors of the White Book goes beyond the approach of Chadwick LJ and of Lord Browne-Wilkinson which was that striking out would not “normally” be appropriate. Moreover, that note of caution comes into play when the relevant area of law is “uncertain and developing”. It is not sufficient for a petitioner or claimant to say that the jurisprudence in the relevant field is developing let alone that there is scope for academic debate or that the petition or claim raises a novel point of law. A claim which is properly arguable in the light of the authorities and the underlying principles must be shown. However, where there is scope for genuine debate as to the effect of the authorities or the application of the relevant principles to the particular case then it will not be appropriate to strike out and that is because such debate should be determined on the basis of findings of fact rather than on the assumption that

the facts alleged will be established and because it will be less likely that in such circumstances it will be possible to conclude that a particular claim is not properly arguable.

30. Finally in summarising the applicable approach it is to be noted that the Petition asserts that in a number of respects the First Respondent and its directors acted “in bad faith and/or for an improper purpose” and the Respondents say that those allegations are not properly particularised.
31. The approach to be taken in assessing the adequacy of the particularisation of allegations of bad faith was laid down by Lord Hope in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 at [49] – [55]. There is to be a balance “between the need for fair notice to be given on the one hand and excessive demands for detail on the other”. Although there is to be such a balance “the more serious the allegation of misconduct the greater is the need for particulars to be given to explain the basis for the allegation”. If bad faith is alleged then the facts on which that allegation is based must be pleaded.
32. Not only must the facts on which the allegation of bad faith or impropriety is based be pleaded but they must be such as are capable of supporting a finding of bad faith. At points in his oral submissions Mr. Ashworth QC appeared to be contending that for the allegation of bad faith to be adequately particularised the Petitioner had to set out facts which if established at trial would necessarily lead to a finding of bad faith. That contention went beyond the position set out in Mr. Ashworth’s skeleton argument where the applicable approach was correctly said to be that laid down by Flaux J in these terms in *Jsc Bank of Moscow v Kekhman & others* [2015] EWHC 3073 (Comm) at [20]:

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

33. It follows that if bad faith or other impropriety is not alleged clearly and in terms in his or her pleading a party cannot seek a finding of bad faith at trial even if relying on the pleaded facts. Where an allegation of bad faith is asserted in the relevant pleading then the pleading will be struck out unless there is adequate particularisation enabling the other party to know the case which must be answered and setting out matters which are capable of sustaining a finding of the alleged bad faith or impropriety. The facts pleaded do not have to be such as will inevitably if established at trial give rise to an inference of bad faith but they do have to be such that an inference in those terms is the more likely outcome. The question is one of balance. The case must be properly and clearly pleaded but the fact that more detail could be given does not warrant the striking out of a pleading provided that the party against whom the allegation is made

knows the case he or she has to meet and provided that the material which is pleaded is sufficient to be likely to lead to the finding sought if accepted at trial.

Is the Petition an Attempt to circumvent the Restrictions on bringing Derivative Claims?

34. Derivative claims are defined in section 260 (1) of the Act as:

“...proceedings in England and Wales or Northern Ireland by a member of a company—

- (a) in respect of a cause of action vested in the company, and
- (b) seeking relief on behalf of the company.”

35. Section 260 (3) provides that a derivative claim:

“... may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. The cause of action may be against the director or another person (or both).”

36. Section 261 requires that a member of a company who has brought a derivative claim must apply to the court for permission to continue the claim and section 263 sets out, at subsection (2), the circumstances in which permission must be refused and, at subsection (3), the factors which the court must take into account in considering whether to give permission. There has been no application for such permission here and the Respondent contends that if permission were to be sought the proper application of section 263 would result in a refusal of permission.

37. Regard must also be had at this stage to the provisions of sections 994 and 996 of the Act.

38. Section 994 (1) sets out the circumstances in which a petition can be brought namely that:

“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.”

39. Section 996 sets out the powers of the court in the event that a petition is well-founded in these terms:

“(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of subsection (1), the court’s order may—

- (a) regulate the conduct of the company's affairs in the future;
 - (b) require the company–
 - (i) to refrain from doing or continuing an act complained of, or
 - (ii) to do an act that the petitioner has complained it has omitted to do;
 - (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;
 - (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;
 - (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.”
40. As explained at [23] and [24] above sections 994 and 996 have a wide ambit but that is not limitless.
41. The Respondents' case is that the Petition is in reality making a derivative claim. The relevant distinction is that between unlawful misconduct by the directors of a company and unfairly prejudicial mismanagement of the company's affairs and regard is to be had to the nature of the complaint and the relief necessary to remedy it (invoking the explanation given by Millett J in *Re Charnley Davies Ltd (No 2)* [1990] BCC 605). Here redress is, the Respondents say, being sought against the directors of the First Respondent for breaches of their duties to that company with the relief sought involving an order that the directors pay compensation to the First Respondent. The whole gist of the complaints is said to lie in the unlawfulness of the directors' alleged acts and omissions. It is said that this falls four square within the definition of a derivative claim and outside the scope of section 994 which is to address unfairly prejudicial conduct in respect of a shareholder. The Respondents contend that it is an abuse of process to bring a derivative claim concealed as a petition under section 994 thereby circumventing the restrictions on the bringing of derivative claims.
42. In support of that contention the Respondents, through Mr. Ashworth, place particular emphasis on the pleading at paragraph 9 of the Petition of the duties owed to the First Respondent by the directors; on the averment at paragraphs 27, 37, and 44 that the actions set out there were breaches of the duties owed to the First Respondent; and on paragraph 4 of the prayer seeking an order for the payment of “equitable compensation” to the First Respondent. They say that the “central claim” by the Petitioner is for the First Respondent to be compensated for the alleged breaches of duties by the directors. The Respondents accept that in the light of the decision of Briggs J in *Sikorski v Sikorski* [2012] EWHC 1613 (Ch) the court does have power under section 996 to order a director to provide compensation for breaches of duty to a company. However, they say that this does not mean that the distinction between derivative claims and unfair prejudice petitions can be overlooked. They point to the cautionary notes sounded in *Gamlestaden Fastigheter v Baltic Partners Ltd* [2008] 1 BCLC 468

and in particular in *Re Chime Corp Ltd* (2004) 7 HKCFAR 546 and contend that the preconditions set out there for the making of such an order are not present here. That has the consequence, the Respondents say, that such relief should not be given here but more significant is the indication which the relief sought gives of the true nature of the proceedings. In those respects Mr. Ashworth emphasised that an order for the buying out of a minority's shares is the paradigm relief granted under section 996. He accepted that other orders could be made but said that the fact that the relief sought here was far removed from that paradigm was an indication as to the true nature of the Petitioner's claim.

43. The Petitioner says that this is a mischaracterisation of its claim. It says that this is a conventional unfair prejudice claim in which it is seeking redress against those in control of the First Respondent for the fact that the affairs of that company have been conducted in a way which is unfairly prejudicial to the Petitioner in its capacity as a shareholder. On its behalf Mr. Chaisty contends that the fact that the allegedly unfairly prejudicial conduct involves breaches by directors of the First Respondent of their duties as directors does not mean that this is in reality a derivative claim. Indeed it is said that the alleged misconduct could not proceed as a derivative claim because the First Respondent has suffered no loss and there would inevitably be ratification of the conduct. Far from abusing process by bringing a section 994 petition the Petitioner is, it is said, using the only means available to it to obtain redress. The redress sought is asserted by the Petitioner to be well within the wide ambit of the court's powers under section 996.
44. As a supplemental argument Mr. Chaisty says that the interrelation between derivative claims and unfair prejudice petitions is a developing area of law with the consequence that even if the proceedings were to be characterised as a derivative claim striking out would be inappropriate.
45. I was referred to a number of authorities in which the distinction and interrelation between unfair prejudice petitions and derivative actions was considered together with academic commentary on this topic. However, on analysis there is no dispute of any significance as to the applicable principles. The question is rather one of their application to the circumstances of this case. In the light of that I can state the principles comparatively shortly.
46. The purpose of section 994 is to provide redress in cases where the affairs of a company have been conducted in a way which is unfairly prejudicial to the interests of a shareholder as shareholder. It is concerned to address mismanagement of the affairs of the company rather than to provide redress for misconduct which has harmed the company. However, the mismanagement of the affairs of a company can take the form of a breach of duty by those in control of a company and the same acts can be both mismanagement which is unfairly prejudicial to a minority shareholder and misconduct in breach of a director's duties and causing harm to the company. The question of whether a claim is properly to be seen as appropriately brought by way of a section 994 petition or as being in reality a derivative claim is a matter of analysis of the true nature of the particular claim. In that analysis particular regard is to be had to the relief sought and even more to the nature of the complaint. The court has to consider whether the complaint is in reality in respect of the harm caused to the relevant

company by the misconduct (in which case there should be a derivative claim) or in respect of the impact on a petitioner's position and rights as a minority shareholder (in which case section 994 proceedings are appropriate).

47. The Respondents placed emphasis on the judgment of Millett J in *Re Charnley Davies Ltd (No 2)* and on the following passage from 625B - C:

“Mr Oliver asked: "If misconduct in the management of the company's affairs does not without more constitute unfairly prejudicial management. what extra ingredient is required? In my judgment the distinction between misconduct and unfairly prejudicial management does not lie in the particular acts or omissions of which complaint is made, but in the nature of the complaint and the remedy necessary to meet it. It is a matter of perspective. The metaphor is not a supermarket trolley but a hologram. If the whole gist of the complaint lies in the unlawfulness of the acts or omissions complained of, so that it may be adequately redressed by the remedy provided by law for the wrong the complaint is one of misconduct *simpliciter*. There is no need to assume the burden of alleging and proving that the acts or omissions complained of evidence or constitute unfairly prejudicial management of the company's affairs. It is otherwise if the unlawfulness of the acts or omissions complained of is not the whole gist of the complaint, so that it would not be adequately redressed by the remedy provided by law for the wrong. In such a case it is necessary to assume that burden, but it is no longer necessary to establish that the acts or omissions in question were unlawful, and a much wider remedy may be sought.”

48. Mr. Ashworth drew particular attention to the requirement to consider whether the gist of the complaint consisted of the unlawfulness of the relevant acts or omissions. However, that requirement is to be seen in the light of the need to consider “the nature of the complaint and the remedy necessary to meet it” and in the light of the immediately following passage where Millett J said:

“A good illustration of the distinction is provided by *Re a Company No. 5287/85* (1985) 1 BCC 99.586. In that case the petitioners, who were minority shareholders, alleged that the respondent, who was the majority shareholder, had disposed of the company's assets in breach of his fiduciary duty to the company and in a manner which was unfairly prejudicial to the interests of the petitioner. *Hoffmann J* refused to strike out the petition, holding that the fact that the petitioners could have brought a derivative action did not prevent them seeking relief under sec. 459.

Again, I respectfully agree. The very same facts may well found either a derivative action or a sec. 459 petition but that should not disguise the fact that the nature of the complaint and the appropriate relief is different in the two cases. Had the petitioners' true complaint been of the unlawfulness of the respondent's conduct, so that it would be met by an order for restitution, then a derivative action would have been appropriate and a sec. 459 petition would not, but that was not the true nature of the petitioners' complaint. They did not rely on the unlawfulness of the respondent's conduct to found their cause of action; and they would not have been content with an order that the respondent make restitution to the company. They relied on the respondent's unlawful conduct as evidence of the manner in which he had conducted the company's affairs for his own benefit and in disregard of their interests as minority shareholders; and they wanted to be

bought out. They wanted relief from mismanagement, not a remedy for misconduct.”

49. Conduct which is a breach of a director’s duty to a company can be the basis for an unfair prejudice petition. This is apparent from the passages just quoted and the point was made succinctly by Jonathan Crow QC as a deputy judge in *Atlasview Ltd v Brightview Ltd* [2004] EWHC1056 (Ch), [2004] 2 BCLC 191 at [60] and [61] saying “the law reports are full of cases in which petitioners have complained successfully under s459 about unfairly prejudicial conduct which has involved a majority shareholder stripping out the company’s assets ... there is no justification for reading into s459 a restriction to the effect that a petitioner can only complain if the unfairly prejudicial conduct does not involve a breach by the directors of their duties to the company”. Finally, it is to be noted that in *Re Tobian Properties Ltd* [2012] EWCA Civ 998, [2013] 2 BCLC 568 Arden LJ said, at [22] that breach by a director shareholder of his fiduciary duties as a director will “generally indicate that unfair prejudice has occurred.”
50. As Mr. Ashworth said, the typical relief granted under section 996 is an order for the buying out of the shares of the unfairly prejudiced minority. However, the court has a wide power to give other relief. This can include an order that compensation be paid by a director to the company but caution is needed before such an order is made
51. In *Sikorski v Sikorski*, Briggs J said, at [71], that the court’s powers under section 996 had been “authoritatively declared to include powers to require a respondent director to provide compensation (or an account) in relation to breaches of duty to the company without requiring the bringing of separate proceedings for that purpose...”.
52. The authoritative declaration on which Briggs J relied was that of Lord Scott at [27] – [28] in the Privy Council case of *Gamlestaden Fastigheter v Baltic Partners Ltd* where Lord Scott had referred back to his judgment in *Re Chime Corp Ltd* in the Hong Kong Court of Final Appeal.
53. It was from *Re Chime Corp Ltd* that Mr. Ashworth derived the limitations on the making of such orders and indeed on claims for such relief which he said precluded the relief sought in paragraph 4 of the prayer. In that case, at [49], Lord Scott accepted that “in the strict sense” the court had jurisdiction to make such an order. However, he said that the issue was whether it was proper for the claim for such an order to be included in the petition under consideration. The court was there considering an appeal from an order which had allowed amendment of the petition to include such relief. The Court of Final Appeal concluded that such amendment should not be permitted and, at [62], Lord Scott said:

“As a general rule, in my opinion, the court should not in a s.168A petition make an order for payment to be made by a respondent director to the company unless the order corresponds with the order to which the company would have been entitled had the allegations in question been successfully prosecuted in an action by the company (or in a derivative action in the name of the company). If the order does not so correspond then, either the company will have received less than it is entitled to, in which case it will be entitled to relitigate the issue in an

action against the director for the balance, or the company will have received more than it was entitled to, in which case a clear injustice to the director will have been perpetrated. Nor, in my opinion, should the court allow a prayer in the petition for payment by the respondent director of compensation or of restitution to the company to stand unless it is clear at the pleading stage that a determination of the amount, if any, of the director's liability at law to the company can conveniently be dealt with in the hearing of the petition. In any other case, in my opinion, if the allegations against the director are proper to be relied on as evidence of unfairly prejudicial conduct, the appropriate relief to be sought would be an order under s.168A(2)(b) for a derivative action to be brought for the recovery of the sum legally due. It would be proper for the company to express its views as to whether it would be in its interests for such an action to be brought.”

54. Mr. Ashworth derived two restrictions on such claims from that passage. First, that the order sought must correspond to that to which the company would have been entitled in an action brought by it against the delinquent director. Second, that it has to be clear at the pleading stage that the determination of the director's liability can conveniently be dealt with in the context of the petition.
55. In my judgement Lord Scott in that passage is not to be seen as laying down preconditions which must necessarily be fulfilled before the court can ever permit a claim seeking such relief to be brought. Rather he was giving guidance, albeit potent guidance, as to the circumstances in which it was likely to be or not to be appropriate for the court to permit such a claim to be made. That interpretation follows from Lord Scott's acceptance that the court had power to grant such relief and his indication that the question was the propriety of the inclusion of the claim in the particular case. Moreover, it is of note that Lord Scott expressly stated that he was setting out his assessment of what was appropriate “as a general rule” rather than setting out preconditions for the exercise of the jurisdiction. The distinction is a narrow one because at the lowest the passage provides powerful guidance as to when it will be appropriate for the court to permit such a claim. It follows that it will rarely be appropriate for the court to permit a claim of this kind in circumstances where the two elements identified by Lord Scott are not present. However, I do not understand Lord Scott to have been saying that such a course could never be appropriate.
56. How are those principles to be applied to the circumstances of this case? In my judgement the Petitioner is correct to say that the claim is properly to be seen as one seeking redress for unfair prejudice. The complaint is in respect of the conduct of the affairs of the First Respondent and the effect of that conduct on the Petitioner's interests as a shareholder. The fact that the allegedly wrongful conduct includes breaches of duties which the Second – Fifteenth Respondents owed as directors does not without more mean that the claim is a derivative claim. Instead the nature of the claim must be considered. Subject to consideration of paragraph 4 of the prayer the Petition is not seeking to recover damages for a loss suffered by the First Respondent and there is no suggestion that the First Respondent has suffered loss. It is clear when the body of the Petition is considered that the complaint being made relates to the impact of the alleged actions on the Petitioner as shareholder rather than the impact on the First Respondent. Similarly, when regard is had to the relief being sought the primary relief consists of a number of orders against the First Respondent. Such

relief patently is not relief which could have been sought in a derivative claim. It is apparent that redress is being sought for the alleged reduction in the value of the Petitioner's shareholding in relation to the other shareholdings and/or the reduction in the Petitioner's rights in relation to the First Respondent. There is no suggestion that there has been a reduction in the value of the First Respondent as a whole.

57. The fact that not all of the Second – Fifteenth Respondents are shareholders does not prevent the proceedings properly being the subject of a section 994 petition. Section 994 is concerned with prejudice to a petitioner's rights as shareholder but it does not follow that all those who are said to have caused the prejudice or who are made respondents to a petition have themselves to be shareholders. What is required is that the alleged unfair prejudice has resulted from the way in which the relevant company's affairs have been or are being conducted.
58. It is of note that the relief sought at paragraph 8 of the prayer is an award of damages against the shareholder respondents for the alleged breaches of the Information Obligation. That is a breach of the obligations said to be owed to the Petitioner by reason of the Shareholders' Agreement. That is redress which would not have been available to the First Respondent and so could not be the subject of a derivative claim.
59. The relief sought at paragraph 4 of the prayer by way of an order that the directors pay equitable compensation to the First Respondent has to be seen in the context of the Petition as a whole. That context is of redress being sought for allegedly unfairly prejudicial conduct in the management of the affairs of the First Respondent. When seen in that context paragraph 4 of the prayer does not change the nature of the proceedings and convert them into a derivative claim. In that regard it is significant that the relief sought in paragraph 4 is not just an order that the directors pay compensation to the First Respondent but also that the First Respondent itself pay compensation to the Petitioner out of the proceeds of such compensation.
60. It follows that the Petition is not a concealed derivative claim and is not to be struck out in its entirety as an abuse of process on that basis.
61. Although the Petition as a whole is not abusive should paragraph 4 of the prayer be regarded as distinct and as itself abusive as seeking redress which is not appropriate under section 996? In my judgement it does not fall to be struck down on that basis.
62. The Respondents say the relief sought in that paragraph does not meet the criteria laid down by Lord Scott in *Re Chime Corp*. They say that the order sought does not correspond to the order to which the First Respondent would be entitled in an action brought by it against the other respondents and that the liability of those respondents to the First Respondent cannot conveniently be determined at the hearing of the Petition. In addition it is said that if the First Respondent suffered no loss (and they say none is alleged) then the directors cannot be liable to pay compensation to it.

63. The Petitioner says that the relief sought is squarely within the scope of the language used by Briggs J in *Sikorski v Sikorski*. In addition Mr. Chaisty in this respect, as he had in relation to the dispute as to the overall nature of the Petition, placed considerable emphasis on his contention that this is an area of developing jurisprudence such that striking out is not appropriate.
64. I have concluded that paragraph 4 of the prayer does not fall to be struck out as an abuse of process. The relief sought there could have been more elegantly pleaded but seen in context the nature of the relief being sought is clear. Moreover, that paragraph of the prayer must be seen as a whole and when that is done it amounts to a claim for indemnification. The relief sought is compensation payable to the First Respondent but in circumstances where the First Respondent is then in turn to use that compensation to make payment to the Petitioner. It would be open to the First Respondent to bring proceedings against the other respondents seeking indemnification in respect of the compensation payable to the Petitioner and so the first of Lord Scott's criteria is satisfied. The Respondents asserted that the liability of the other respondents to the First Respondent in this respect could not conveniently be determined at the hearing of the Petition but there was no expansion of the reasons why this was said to be the case. In my judgement it will be possible and convenient to determine that liability at the hearing of the Petition. Indeed, that will be the convenient place to determine it given the other allegations made in the Petition and the issues which will need to be determined in respect of those. Seen in the context of a petition which I have held is not as a whole abusive on the ground of being a concealed derivative action paragraph 4 of the Prayer sets out a claim which is appropriately made in the Petition and which is not itself abusive.

Are Parts of the Petition impermissible Attempts to recover Reflective Loss?

65. As an alternative to the striking out of the Petition in its entirety the Respondents say that the relief sought in paragraphs 4 and 5 of the prayer are claims for reflective loss and as such are impermissible. They also say that the "combined effect" of paragraphs 7 and 8 is to make a further and impermissible claim for reflective loss. I reject those contentions.
66. The no reflective loss principle was explained in *Johnson v Gore Wood & Co* [2002] 2 AC 1. Arden LJ summarised the effect of that decision thus in *Day v Cook* [2001] EWCA Civ 592, [2002] 1 BCLC 1 at [38] and [41]:

"38. It will thus be seen from the speeches in *Johnson v Gore Wood* that where there is a breach of duty to both the shareholder and the company and the loss which the shareholder suffers is merely a reflection of the company's loss there is now a clear rule that the shareholder cannot recover. That follows from the graphic example of the shareholder who is led to part with the key to the company's money box and the theft of the company's money from that box. It is not simply the case that double recovery will not be allowed, so that, for instance if the company's claim is not pursued or there is some defence to the company's claim, the shareholder can pursue his claim. The company's claim, if it exists, will always trump that of the shareholder.

...

“41. However, it is apparent that there are limits to the application of the no reflective loss principle. The principal limit is that the no reflective loss principle does not apply where the company has no claim and hence the only duty is the duty owed to the shareholder (Lord Bingham's proposition (2)). Likewise it does not apply where the loss which the shareholder suffers is additional to and different from that which the company suffers and a duty is also owed to the shareholder: see Lord Bingham's proposition (3) and see *Heron International v Grade* [1983] BCLC 244, as explained by Lord Millett in *Johnson v Gore Wood*. There may well be other limits.”

67. At [42] Arden LJ emphasised the need for the court to consider “carefully” “such issues as whether the defendant owed a duty to the company as well as the shareholder, and whether, if both the company and the shareholder have a cause of action, the loss which they can claim is the same.” Similarly in *Johnson v Gore Wood & Co* at 36 B – D Lord Bingham emphasised the need for “close scrutiny” of the pleadings at the strike out stage and said that “any reasonable doubt” at that stage “must be resolved in favour of the claimant”.
68. The Respondents say that paragraphs 4 and 5 of the prayer are premised on alleged breaches by the directors of the duties owed to the First Respondent. It follows that the First Respondent would have a claim in respect of those breaches. Accordingly, it is said that the attempt to obtain compensation from the directors whether directly, as in paragraph 5, or through an award out of sums to be paid to the First Respondent, as in paragraph 4, offends the no reflective loss principle as an attempt to obtain compensation for a loss reflective of the First Respondent’s loss.
69. In my judgement that argument is based on a flawed analysis of the Petitioner’s case. The Petitioner does not say that the breaches of duty have caused any loss to the First Respondent other than by way of any obligation to compensate the Petitioner imposed on the latter. It is not suggested that the challenged actions have reduced the value of the First Respondent and the Respondents say that they have enhanced that value. The alleged diminution in the value of the Petitioner’s shareholding comes not from a diminution in the value of the First Respondent as a whole nor from any harm suffered by that company but from actions which are said to have affected the Petitioner’s shareholding in ways which they did not affect the interests of other shareholders.
70. It follows that the case being put forward by the Petitioner is wholly different from the situation with which the Court of Appeal was concerned in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 Ch 204. That was a case where the actions of the defendants had damaged the relevant company and had reduced the value of all the shares in it. The claim was for damages in respect of that loss. That claim was impermissible because it was a reflection of the reduction in the value of the company as a whole (see at 222G – 223D). In the present case the Petitioner’s alleged loss is not reflective of a loss suffered by the First Respondent or shared with the other shareholders but is a loss said to have been suffered uniquely by the Petitioner. Both in the present case and in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* complaint is made of the reduction in the value of a shareholding but that coincidence of

description is misleading because in reality the loss for which recovery is sought is different. Here the Petitioner complains of a reduction in value and rights in relation to other shareholders while in the *Prudential Assurance* case the complaint was of a reduction in value in relation to the world as a whole.

71. As I have already said the alleged breaches have caused no loss to the First Respondent. It follows that the compensation which the Petitioner seeks is not “a loss which would be made good if the company enforced in full its rights against the defendant wrongdoer” (per Neuberger LJ in *Gardner v Parker* [2004] EWCA Civ 781, [2004] 2 BCLC 554 at [33] adopting the words of Blackburne J in *Giles v Rhind* [2001] 2 BCLC 582).
72. My conclusion follows from the application of the approach in those authorities and by way of cross-checking it is to be noted that it accords with the considerations which justify the no reflective loss principle. Those considerations were explained by Flaux LJ thus in *Marex Financial Ltd v Sevilleja* [2018] EWCA Civ 1468, [2019] QB 173:

“On behalf of Mr Sevilleja, Mr David Lewis QC submitted that what emerges from these authorities is that there is a four-fold justification for the rule against reflective loss. I agree with that analysis. The four aspects or considerations justifying the rule which emerge from the authorities, in particular Lord Millett’s speech in *Johnson v Gore Wood*, are: (i) the need to avoid double recovery by the claimant and the company from the defendant: see per Lord Millett at 62E-F quoted at [18] above ; (ii) causation, in the sense that if the company chooses not to claim against the wrongdoer, the loss to the claimant is caused by the company’s decision not by the defendant’s wrongdoing: see per Lord Millett at 66D-F quoted at [20] above and Chadwick LJ in *Giles v Rhind* at [78]; (iii) the public policy of avoiding conflicts of interest particularly that if the claimant had a separate right to claim it would discourage the company from making settlements: see per Lord Millett at 66F-G again quoted at [20] above; and (iv) the need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors. The point about company autonomy is made by Lord Millett at 66H-67A quoted at [21] above and the point about protecting minority shareholders and other creditors is made by Arden LJ at [162] in *Johnson v Gore Wood (No 2)* quoted at [24] above.”

73. In my judgement the inclusion in the Petition of the relief sought at paragraphs 4 and 5 of the prayer does not offend against any of those considerations.
74. The Petitioner says that there is a shorter route to the same answer. Mr. Chaisty referred me to Jonathan Crow QC’s treatment of the reflective loss argument in *Atlasview Ltd v Brightview Ltd* at [58] – [64]. The Deputy Judge appears to have taken the view that the no reflective loss principle was inapplicable to claims made in an unfair prejudice petition. He made the point, at [59], that the authorities to which he had been referred in which the principle had been enunciated (such as *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* and *Johnson v Gore Wood (No 2)*) were concerned with claims for damages in “writ actions” brought against the alleged wrongdoer. In those cases the courts were not addressing the approach to be taken to unfair prejudice petitions and were not, in the Deputy Judge’s view, purporting to lay down any principle applicable to them. The more recent cases to which I have been referred

applying the no reflective loss principle have similarly been claims for the award of damages rather than for relief under section 996.

75. I do not need to reach a conclusion as to whether the no reflective loss principle is simply inapplicable to unfair prejudice petitions and I note the reservations which Lord Scott expressed in *Re Chime Corp Ltd* at [46] about some aspects of Mr. Crow's statement of the law. However, it is right to note that very different considerations apply to such petitions from those affecting damages claims. In any event the Petitioner's argument in this respect does serve to highlight the fact that paragraph 4 of the prayer is a provision for payment to be made to the First Respondent. It is also a reminder that it is well-established that the relief granted under section 996 can include an order for payment to a company of the compensation which would have been recovered in an action brought by the company. This follows from *Sikorski v Sikorski* and is accepted as a matter of law by the Respondents – see [42] and [51] above. It is of note that paragraph 4 of the prayer seeks an order for a payment to be made to the First Respondent with a further direction as to how the First Respondent is to deal with that payment. In my judgement such an order is well within the scope of the relief appropriately sought under section 994 and even if the no reflective loss principle is potentially applicable to unfair prejudice petitions that claim does not offend the principle.
76. The Respondents' contention that paragraphs 7 and 8 of the prayer make impermissible claims for reflective loss involves a series of references back through the Petition. Those paragraphs refer back to paragraphs 46 and 47 of the Petition which in turn refer back to parts of paragraphs 27, 37, and 44. Those latter paragraphs refer back to paragraph 9 and contend that the matters which they contain are alleged breaches of the duties owed by the directors to the First Respondent. The Respondents say that the claim based on loss caused by breaches of the duties owed to the First Respondent is accordingly a claim for loss reflective of that allegedly suffered by the First Respondent.
77. It is correct to note that paragraphs 46 and 47 of the Petition do refer back to the breaches of duty alleged earlier. However, they do so in the context of saying that the actions in question are breaches of the Information Obligation derived from the Shareholders' Agreement. The rights under the Shareholders' Agreement are not rights of the First Respondent. It follows that the First Respondent could not itself seek to make a claim in respect of breaches of that agreement. Similarly breaches of the Information Obligation could not have caused loss to the First Respondent or at least not loss in respect of which the First Respondent could ever maintain a claim. It follows that such losses as the Petitioner might have suffered by reason of breaches of that obligation are not losses "which would be made good if the company enforced in full its rights against the defendant wrongdoer" because the First Respondent has no rights in respect of the same. The fact that the acts which are said to have been breaches of the duties owed to the First Respondent are also said to have been breaches of the Information Obligation does not mean that the claim in respect of the latter is a claim for reflective loss. Indeed a proper reading of the relevant parts of paragraphs 27, 37, and 44 shows that the Petitioner is putting the Information Obligation at the forefront and averring that the breaches of that are breaches of

the directors' duties. I revert to the short point that the claim being asserted in these paragraphs of the prayer is a claim for damages for loss which the Petitioner has suffered because of alleged breaches of a contractual obligation owed to it and as such falls well outside the no reflective loss principle.

78. It follows that those parts of the prayer are not to be struck out on the ground that they offend the no reflective loss principle.

The Pleading of the Allegations of Bad Faith and/or Improper Purpose.

79. There are two questions which need to be addressed. First, whether the allegations pleaded are capable of being the basis for findings that the Respondents acted in bad faith and/or for an improper purpose. Second, whether those allegations are pleaded with sufficient particularity.
80. By way of a preliminary to both of those questions Mr. Ashworth says that there is a distinction between acting in bad faith and acting for an improper purpose and that the Petition is deficient in failing to distinguish them and, more important, in failing to set out which of the matters pleaded relates to which allegation. There is, indeed, a distinction albeit a narrow one between an allegation or a finding that a person has acted in bad faith and an allegation or finding of acting for an improper purpose. Thus it would be possible to find that a director had exercised his or her powers for an improper purpose but to find that he or she had been in good faith in doing so. That distinction is of no relevance to the current proceedings. That is because the Petitioner clearly asserts an improper purpose or purposes which is only consistent with action in bad faith. Thus at paragraph 27.3 it is said that the directors "exercised their powers vindictively and for the improper purpose of causing damage to [the Petitioner] and Mr. Nobahar-Cookson". Similarly at paragraph 44.4 the dilution of the Petitioner's shareholding is said to have been "part of a concerted attempt by the directors to prejudice [the Petitioner]'s interests as a shareholder." If the Petitioner had been alleging that the directors' actions amounted to unfair prejudice because even though in good faith their powers had been used for an improper purpose then such an allegation would have had to be spelt out but the current pleading makes it clear that the case is put squarely on the basis of bad faith and of an improper purpose which is only consistent with bad faith.
81. I turn to the question of whether the matters pleaded are capable of being the basis for findings of action in bad faith. I have already summarised the way in which the allegations are set out in the Petition. There are some additional elements in respect of some particular actions but the underlying themes are that the relevant actions had no legitimate commercial purpose (though I note that this allegation is not made in relation to the dilution of the Petitioner's shareholding) and that the actions were accompanied by the concealment of or the failure to disclose information in breach of the Information Obligation.
82. Whether particular actions did or did not have a legitimate commercial purpose is very much a matter of fact. Whether the alleged failures to disclose information were breaches of the Information Obligation is a matter of mixed law and fact with the answer depending on the correct interpretation of the

Shareholders' Agreement and the application of that interpretation to the particular circumstances.

83. Account is also to be taken of the combined effect of the matters alleged. The Petitioner makes clear its case that the Respondents acted other than for a proper commercial purpose and/or wrongfully failed to disclose information on a number of occasions. Moreover, it says that these occasions were part of a course of conduct with the same underlying motivation.
84. The Respondents have various answers to the allegations against them. However, I need to remember that at the strike out stage I must proceed on the footing that the Petitioner will establish the facts alleged. That does not mean that the Petitioner's legal arguments or its contentions as to interpretation are to be assumed to succeed.
85. The Petitioner's case is by no means bound to succeed and there is considerable scope for questioning whether it will establish the factual basis of its allegations but that is not currently the issue. If the Petitioner does establish at trial that there were repeated actions which were harmful to it; which lacked a proper commercial purpose; and which were accompanied by a failure on the part of those taking the actions to disclose information which should have been disclosed then it will be open to the court to infer that the actions were undertaken in bad faith. Not only will it be open to the court to make such an inference but, on the assumption of such findings, it will be the more likely inference. It follows that the Petitioner has set out matters capable of giving rise to the findings it seeks.
86. With regard to the particularisation of the allegations Mr. Ashworth makes the point that the Second – Fifteenth Respondents are separate individuals not all of whom were directors throughout all the relevant period. Moreover, the Fourth and Eighth Respondents were replaced in office by the Fourteenth and Fifteenth Respondents respectively so not all of the Respondents were in office together. Further, some of those respondents were or are shareholders but others were not. They happen currently to be jointly represented but they may well have separate interests and each needs to know the particular case which he or she has to meet. Mr. Ashworth says that it is not possible for them to know this from the Petition as currently formulated. He says that there should have been identification of the particular actions in which each respondent is said to have participated. At paragraph 56 of his skeleton he contends that for the Petition to be adequately particularised the Petitioner "would have to plead proper facts against each of the Individual Respondents identifying what each of the Individual Respondents did and when".
87. This is an initially attractive argument. However, it does not withstand reflection. The Petition has to enable each respondent to know the case which he or she has to meet. Its purpose is to enable a respondent properly to respond to the allegations and to prepare his or her case. It has to be pleaded with sufficient detail to ensure that a respondent is not surprised by allegations (and in particular allegations of matters of fact) which the respondent did not anticipate. I am satisfied that the Petition here fulfils that requirement. It sets out the dates of the relevant actions which are said to have constituted unfair

prejudice and contends that they were the actions of those who were directors at the time acting collectively. To repeat the contentions in respect of each director respondent separately would add nothing of value and would make the pleading markedly more cumbersome. Moreover, it is to be noted that an important aspect of the case being put by the Petitioner is the allegation of a collective “ganging up” against it rather than a series of separate actions taken by individual respondents. The Petition adequately sets out the actions on which it relies and asserts participation in them and in doing so it provides sufficient detail for each Respondent to know the case he or she must meet.

Are Parts of the Petition to be struck out as hopeless or as seeking Relief which cannot be granted?

88. The Respondents’ contention that parts of the Petition are to be struck out as hopeless in the sense that they seek relief which cannot be granted or which simply will not be awarded is to be seen in the light of the wide scope of section 996. That wide scope does not, however, preclude striking out on this basis if on proper analysis the relevant claim is hopeless.
89. At paragraph 2 the prayer seeks an order that the Articles be amended to reinstate the co-sale rights formerly attaching to the A Ordinary Shares. That relief is no longer necessary or appropriate because the Articles have been amended to that effect. That amendment had not been made at the time of the presentation of the Petition. The Respondents say that it was inappropriate for the Petitioner to seek this relief even at that stage because it had been told that the amendment was to be made. They also say that because the earlier amendment purportedly removing the rights was ineffective as a matter of law the order sought could never have been made. I do not accept that latter point. The Articles had been amended and the fact that the amendment was legally ineffective would not have precluded the court ordering that the Articles be re-amended to reflect the true legal position. The contention that the Petitioner had not needed to seek this relief because amendment had been promised may be relevant to questions of costs but does not mean that the inclusion of this part of the prayer was an abuse of process at the time of the presentation of the Petition. There is no longer any need for the court to grant this relief and so paragraph 2 of the prayer has become redundant. That does not mean that it is appropriate for it to be struck out at this stage let alone that it is to be struck out as an abuse of process. It suffices that the court and the parties know that an order will no longer be required or sought in respect of this paragraph.
90. In the light of the restoration of the co-sale rights to the A Ordinary Shares the Respondents say that paragraphs 24 – 29 of the Petition (and in particular paragraph 27) are to be struck out as making allegations of bad faith and impropriety which are no longer relevant to the issues before the court. I do not accept that contention. Those paragraphs are no longer relevant as the basis for the relief sought in paragraph 2 of the prayer but they remain relevant to the issues before the court and to the case pleaded in the Petition. Thus paragraph 48 of the Petition refers to them as part of the actions which are said to have constituted the conduct of the affairs of the First Respondent in a way that is unfairly prejudicial to the Petitioner. Moreover, they are also relied upon in part at paragraphs 46 and 47 as particularisation of the alleged breaches of the

Information Obligation. It follows that they remain relevant to issues which will have to be determined.

91. Various elements of the relief sought by the Petitioner will affect the rights of persons other than the Respondents. Thus paragraph 1 of the prayer seeks a declaration that the Information Obligation is binding on all shareholders; paragraph 3 seeks an order for the amendment of the Articles; and paragraph 6 an order for the issuing of shares to the Petitioner. Such orders would, indeed, affect the rights of persons who are not parties to these proceedings. The Respondents say that the same is true of the compensation sought in paragraph 4 but in my judgement the order sought there is rather different. Although an award of compensation to the Petitioner will have an impact on the assets of the First Respondent and to that extent affect all the shareholders it will not affect their rights and obligations in the way that the other orders would.
92. The Respondents say that these elements of the prayer are hopeless because the court will not make an order affecting the rights of persons who are not parties to the proceedings. In his oral submissions Mr. Ashworth went further and said that the court had no power to make such orders. He said that the court had no power to make orders directing the issuing of shares or the giving away of property (which he said would be the effect of the amendment of the Articles sought in paragraph 3). In my judgement that latter submission had to be considered in the light of the wide scope of section 996 and I do not accept that the court does not have power in a proper case to make orders such as those sought. Certainly a claim for such an order cannot be said to be sufficiently hopeless to be struck out as abusive. However, there is more force in Mr. Ashworth's primary contention that the orders sought will affect the rights of non-parties. In that regard the Respondents relied on the approach set out by Vinelott J in *Re a Company (No 007281 of 1986)* [1987] BCLC 593. Vinelott J was there addressing the contention that a shareholder should not have been joined as a respondent to an unfair prejudice petition. Holding that the joinder had been appropriate he said at 598h – 599e:

“A petition under sec. 459 is not analogous to litigation in which the issues raised affect only those against whom allegations are made by the plaintiff. A closer analogy is an administration action, where all beneficiaries having an interest in the relief sought should be made parties or represented. The practice that has so far been followed in the Companies Court is to require that all members of the company whose interests would have been affected by the misconduct alleged or who would be affected by an order made by the court under the very wide powers conferred by sec. 461 are to be made respondents to a petition or served with it.

In practice this means that in the case of a small, private company every member ought to be joined. If, as is usually the case, the relief sought is the purchase of the petitioner's shares by the respondents against whom allegations of unfairly prejudicial conduct are made, or the purchase of their shares by the petitioner, other shareholders would be affected if the articles contain pre-emption provisions which would be overridden by the purchase, or if the balance of the voting rights might be affected to the detriment of other members. If the relief sought is the purchase of the petitioner's shares, or of the shares of those members against whom allegations of unfairly prejudicial conduct are made, by

the company, the balance of voting rights would, again, almost inevitably be affected. Clearly, if a winding-up order is sought or an order regulating the conduct of the company's affairs in the future, those entitled to vote on a resolution for the winding-up of the company or the appointment of directors, are entitled to be heard.

There may be occasions where it is unnecessary to join all the members of a company, for instance if the articles contain no pre-emption provisions and if some of the members are mere investors who have taken no part in the formation or management of the company—a situation which might arise, for instance, in the case of a public listed company, the affairs of which are under the de facto control of a small group of shareholders. It may be that in such a case it would be unnecessary to make all the members respondents, or to serve the petition on all of them, and that it would be sufficient that they be given notice of the petition so that they may apply to be joined if they so wish. Under the *Companies (Unfair Prejudice Applications) Proceedings Rules* 1986 (S.1. 1986 No. 2000) on the first hearing of a petition the court is required to give directions as to the service of a petition on any person who has not been made a respondent. If there is any doubt as to whether a member or director ought to be made a respondent to, or served with a petition or given notice of the petition, that doubt can be resolved at an early stage.”

93. In his skeleton argument Mr. Chaisty described the Respondents’ contention as “a non-point”. Expanding on this in his oral submissions he said that it was inconceivable that the other shareholders did not know about these proceedings and pointed out that no other shareholder had applied to be joined to the proceedings. He said that the question of the joinder of other shareholders or the giving of notice to them was a matter for determination at a case management hearing and that the failure to join other persons was not to be seen as a ground for striking out the Petition and/or for staying it pending joinder. The Petitioner relied on the approach adopted by Etherton J in *Reiner v Gershinson* [2004] EWHC 76 (Ch), [2004] 2 BCLC 376 where, at [101], he held that the petition in question was not wrongly constituted or bound to fail because a particular shareholder was not a party. Noting that the shareholder in question was aware of the proceedings and had not sought to be joined Etherton J concluded that it was not necessary for him to be joined “at least at this stage”.
94. In the light of those authorities the position is as follows. An unfair prejudice petition is validly constituted notwithstanding a failure to join all the shareholders as either petitioners or respondents. In some cases it will not be necessary for all the shareholders even to be informed of the proceedings. However, in many other cases it will be necessary for them to be joined or at least given notice of the petition. Into which category a particular petition falls and the question of whether other shareholders should be joined or simply notified of the proceedings are matters of fact and degree depending on the nature and circumstances of the company in question and on the relief being sought.
95. In the current case the failure to join as respondents all other shareholders does not mean that the Petition is hopeless or that it is to be struck out as an abuse of process. However, the relief sought will affect the rights of shareholders who are not currently parties to the proceedings. The court would have power to make orders affecting those rights (the assumption that there was such a power

was implicit in the approach of Vinelott J as set out above of ensuring that those who might be affected by an order were informed of the proceedings). However, the appropriateness of exercising such a power unless the other shareholders are parties or have been informed of the proceedings is a very different question. That is because it is not normally appropriate to do so unless the approach set out by Vinelott J has been followed.

96. There will be scope for debate as to whether the other shareholders should be joined or simply given notice of the Petition. The decision in that regard will depend on considerations such as the number of other shareholders and the proposed arrangements for notice. In my judgement Mr. Chaisty is right to say that those are matters to be considered in the context of case management and that the absence of the other shareholders is not a ground for a stay let alone for striking out of the Petition or any part thereof.
97. In his oral submissions Mr. Ashworth contended that the relief sought at paragraphs 7 and 8 of the prayer amounted to a pure contractual claim. The Petitioner was there seeking damages for breach of a contractual obligation and if it wished to do so it should issue a Part 7 claim rather than seek such relief in an unfair prejudice petition. It is to be noted that this point was not made in the witness statement in support of the striking out application nor in the Respondents' skeleton argument. However, at first sight it is an argument of considerable force. The Petitioner is saying that there has been a breach of the Shareholders' Agreement and that it has suffered loss as a consequence. In doing so it is making a claim markedly different in nature from a complaint that the affairs of the First Respondent have been conducted in an unfairly prejudicial manner.
98. However, I must have regard to the reality of the proceedings here. The alleged breaches of the Information Obligation are intimately connected with the alleged acts of unfair prejudice with those breaches being said to be part of the unfairly prejudicial conduct. It follows that even if paragraphs 7 and 8 of the prayer were to be struck out the court would still need to determine the issue of the alleged breaches of the Information Obligation. It is, moreover, relevant that the Petition has proceeded by way of Points of Defence and Points of Reply with the Petition itself taking a form akin to that of particulars of claim. This means that the proper determination of the issue of the alleged breaches has not been hampered by the inclusion of the claim in the Petition rather than in a separate Part 7 claim form with accompanying particulars of claim. Indeed if the latter course had been adopted an order for the Petition and the putative breach of contract proceedings to be heard at the same time would have been appropriate. In those circumstances it would be a pointless exercise for the court to strike out those parts of the prayer on the footing that they should be put in a Part 7 claim with a view to such a claim being tried together with the Petition and it cannot be said to have been an abuse of process for those elements to have been included in the prayer.
99. It follows that the application is dismissed save to the extent of granting permission for the proposed Rejoinder.