Neutral Citation Number: [2022] EWHC 2762 (Ch)

Case No: CR-2021-LIV-000100

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

In the matter of the Companies Act 2006
And in the matter of K&B Homes Limited

Liverpool Civil and Family Court
35 Vernon Street
Liverpool, L2 2BX

Date: 02/11/2022

Before :

MR JUSTICE FANCOURT
Vice-Chancellor of the County Palatine of Lancaster

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Between :

Kerrie Heywood	**Petitioner**
- and -	
(1) Kevin Freakley	
(2) Kelly Freakley	
(3) K&B Homes Limited	**Respondents**

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Mr Peter Kidd (instructed by **ABH Law Limited**) for the **Petitioner**
No attendance or representation for the Respondents

Hearing dates: 10, 11 October 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10AM on 2 November 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

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The Vice-Chancellor :

1. This is a claim brought by the petitioner, Kerrie Heywood ("KH") as a shareholder of K & B Homes Ltd ("the Company") alleging that the affairs of the Company have been conducted in a manner unfairly prejudicial to herself as a shareholder, within the meaning of s.994 Companies Act 2006.

2. It is the third set of linked proceedings involving KH in the last few years. On about 23 April 2020, KH issued a derivative claim in the Manchester District Registry against the three Respondents to this claim and sought an interim injunction to restrain dissipation of assets. The application was refused and those proceedings appear to have progressed no further.

3. In March 2020, the Company, controlled by the First Respondent, Kevin Freakley ("KF"), presented a petition for a bankruptcy order against KH, based on an alleged debt in a director's loan account of the Company. That petition was dismissed.

4. Significantly before these proceedings, on 1 November 2019, solicitors formerly acting on behalf of KH wrote a detailed letter of claim to solicitors acting for the Freakley family, including KF, complaining of the conduct of the family (and KF in particular) in matters that are now the subject of this claim. The petition was issued on 18 May 2021.

5. The matters that were tried before me are issues of liability directed by order of HHJ Cadwallader made at a pre-trial review on 7 September 2022. Issues of what remedy was appropriate and quantum were directed to be tried separately at a later date.

6. At the pre-trial review, KH was represented, as she was before me, by Counsel, and the First and Second Respondents were represented by the Second Respondent, Kelly Freakley ("Kelly").

7. The Court's Order of 7 September 2022 records that Kelly informed the Court that she and KF were travelling to the UK in order to be present at the trial starting on 10 October 2022.

8. However, on 4 October 2022 KF and Kelly both signed a letter to the Court indicating, courteously, that they would not be attending the trial. The letter was not copied at the time to KH's solicitors. It states:

> "We have eventually received from the courts and considered the trial bundle E-filed by the claimant in this matter, the claimant's story/version of events differ in all of her witness statements and the earlier solicitor correspondence letter from Mr James Ford during litigation of November 2019 when he had 1st been instructed to act as litigator. We do not consider that the claimant can prove her case on the balance of probabilities. Even if the claimant is successful we do not see what remedy the claimant expects to be granted in the light of the court's direction and she cannot now commence a derivative action.

> We have been unsuccessful in obtaining a direct access barrister to attend the hearing on our behalf and we feel uncomfortable representing ourselves at trial. In addition we do not have the funds to pay the Barristers fees of some £10-15,000, due to these factors and my ongoing chronic health conditions we have concluded that there is little point in travelling to attend the trial."

Which of the Respondents suffered a chronic health condition is not identified. The letter contained no request for an adjournment, nor has one otherwise been requested.

9. I will refer in this judgment to KF and Kelly collectively as "the Respondents", and to them individually where appropriate. The Third Respondent, the Company, was joined to be bound and has played no independent part in the proceedings.

10. I indicated at the start of the trial that I was satisfied that the Respondents had knowingly waived their right to be present at and participate in the trial. I therefore invited Mr Kidd to make a full opening of the case, having previously read the statements of case and KH's skeleton argument.

11. Mr Kidd clarified that he was now only intending to rely on two matters that were unfairly prejudicial to KH's interests as a shareholder of the Company:

    i) The dilution of her 50% shareholding by the events of 28-30 March 2018, as a result of which, without her consent or knowledge, she became the owner of a 25% shareholding;

    ii) The Company's release on or about 6 August 2019 of its rights under a building agreement dated 7 June 2019.

12. Mr Kidd called KF and her partner, Antony Banks, as witnesses on day 2 of the trial. Having read their witness statements and re-read the Respondents' Points of Defence overnight, I was able to question each of them on their own witness statements and by reference to the Points of Defence. Mr Kidd then made closing submissions in the usual way.

13. At the end of the hearing, I invited Mr Kidd to ensure that I had available any earlier witness statements of KH and Mr Banks, or of solicitors made on their behalf in the earlier proceedings, that were material the liability issues, and to provide me with a copy of the letter from Mr James Ford referred to in the letter from the Respondents dated 4 October 2022. I reserved my judgment in order to be able to read and consider these documents and a question of law that had arisen in the course of Mr Kidd's arguments.

14. The claim of KH concerns land on the east side of Lostock Lane, Lostock, Bolton (title no GM875013) ("the Site") that was owned by four members of the Freakley family, including KF and Kelly. In late 2016 it was advertised for sale. The Site had the benefit of outline planning permission for residential development, granted on 12 January 2015.

15. Mr Banks and KH told me that they were looking for a new development opportunity, having just finished the development of two houses in Wigan. KH is a hairdresser by occupation and Mr Banks, her life partner, is a property developer. They saw the Site advertised and each put in a bid – the lower bid was with a view to the higher bid appearing to be more attractive to the seller.

16. The bids were refused. Mr Banks managed to find the name of the accountants who worked for the Freakleys or their other companies and, through them, they made contact with KF and offered to meet to discuss the development of the Site. KH told me that one of these meetings, at which all four of them were present, took place at her home. She accepted that Mr Banks was the person who was conducting the discussions, not her. She was a full-time hairdresser with her own salon, owned with a partner, and has 5 children. She played only a subsidiary part in the development work of Mr Banks, placing orders at builders' merchants, paying wages and bringing the workmen food on occasions.

17. Meetings between Mr Banks and KF took place early in 2017 (at some, their partners, KH and Kelly were present too), At these meetings, the essentials of an agreement emerged that, with the benefit of funding, the parties would develop the Site rather than sell it. After the costs of finance and development and a credit for the value of the Site, the profit would be shared 50:50 between Mr Banks and KH on one side and the Freakleys on the other side. It was understood that a limited company would be used for this purpose, but no discussion took place about the vehicle or how ownership would be structured.

18. At one stage, it was considered that KH might use her home as security (in addition to the Site) for a development loan, but that did not happen because discussions also took place with what Mr Banks called "investors", to see if funding could be obtained from them. A meeting took place in January 2017 with one investor at Whites Hotel at the Bolton Wanderers FC stadium, and eventually agreement was reached with a Mr Chivers, who was a contact of KF, to provide the necessary funding.

19. In April 2017, an application was made for reserved matters approval for a development of 6 apartments and 8 houses, and permission was granted in July 2017.

20. There is disagreement between KH and Mr Banks and the Respondents' pleaded case as to whether it was agreed at the outset that the shares in the corporate vehicle would be split 50:50. Mr Banks said that, although nothing specific was discussed about how the company would be set up, it was understood that there would be a 50:50 shareholding. He and KH said that it was agreed that KH would be a director of the company because her house was going to be used as security, and this would give her some protection. However, that funding route was not in the event pursued.

21. The Respondents' case is that there was no agreement that the company to be used would be owned 50:50. They plead that it was agreed that a significant financial contribution had to be made by each side, towards the development costs, and that such a contribution from Mr Banks was a condition precedent to the issue of shares, and that the issued shares would be allotted pro rata to the amount of the contribution in money or money's worth. They specifically plead that it was agreed that at the outset only one share would be issued and that this would be held by KF on trust for

him and Kelly, since they would be contributing (at that stage) the only asset of the company, i.e. the Site.

22. The Respondents admit that they agreed to the appointment of KH as a director of the Company, they say as Mr Banks' nominee at his request, owing to financial difficulties that he was having with HSBC, but also plead that it was agreed that KF would control the decision making of the Company. (KH's chronology for the trial accepts that a bankruptcy petition against Mr Banks was issued on 20 October 2017 and that he was made bankrupt on 22 February 2018.)

23. The Company was incorporated on 9 August 2017. Mr Banks said that this must have been done by the Respondents or their accountants as he knew nothing about it until much later. The Respondents have not disclosed the Company's books and records.

24. KH was made a director at the outset, as was KF, but KH ceased to be a director and Mr Banks was appointed on 12 September 2017. Again, KH and Mr Banks said that they knew nothing about this. One share was allotted to KF and Mr Banks jointly and both were reported as being persons with significant control of the Company, having in excess of 25% but not in excess of 50% of the issued shares.

25. The development appears to have begun in the autumn of 2017. KH provided funds for plant and equipment for the Site to be purchased in November that year. She provided further substantial sums in March 2018.

26. At this stage, Mr Banks said that he became concerned about the structure of the Company. He said that he was anxious because the development was ready to start, using external funds, and he was worried about whether the Company had been set up properly on a 50:50 basis.

27. He said that, at his request, KF showed him at the Site corporate documents that appeared to show that he was a director of the Company and that he and KF were the joint shareholder. He said that he asked KF why he had been named and that KF said that this was an accountant's mistake. Mr Banks said that he told KF that it was KH who should have been the director and shareholder.

28. As a result of this discussion, whatever exactly was said, there was a flurry of corporate activity, as a result of which KH was again appointed a director and Mr Banks removed from the board, and the single share was recorded as being owned by KF and KH jointly. An AGM of the Company is recorded as having taken place, but KH and Mr Banks said that they were not invited to it, and the minutes show that they were not present.

29. The relevant corporate documents are the following:

<u>2017</u>

i) Notice of Termination of a Director Appointment filed on 19 September 2017 stating that KH's appointment as director of the Company was terminated on 12 September 2017;

ii) Notice of Appointment of Director filed on 19 September 2017 stating that Mr Banks was appointed a director of the Company on 12 September 2017;

iii) Notice of Individual Person with Significant Control filed on 19 September 2017 stating that Mr Banks became registrable as such a person on 12 September 2017 and that he held more than 25% but not more than 50% of the shares in the Company

iv) Confirmation Statement filed on 19 September 2017 stating that the shareholder information for the Company on that date was that 1 ordinary share was held by Kevin Arthur Freakley and Anthony Banks [sic]

v) Notice of change of individual person with significant control filed on 19 September 2017 showing that KF on 12 September 2017 became a person with more than 25% and not more than 50% of the shares and voting rights in the Company.

The inference from these documents, which are the best evidence available of the ownership of shares and directors of the Company at the time, is that KF and KH were the original directors on incorporation of the Company and that KF originally owned the single share in the Company in his own name, then held it jointly with Mr Banks when Mr Banks was appointed a director.

2018

vi) Minutes of AGM of the Company held on 28 March 2018, at which KF (chairman), Kelly and the Company's accountant, Mr Woosey, were present, which record that it was resolved that

a) due to information received about the bankruptcy of Mr Banks, he should be removed as a director;

b) KH be appointed as director;

c) due to increasing investment not matched by Mr Banks, the share capital should be increased and that the shares in the name of KF and KH be transferred to KF solely and a new share of the same class be issued to KH, and two new shares of a new class be issued to KF and Kelly.

vii) Notice of Appointment of Director filed on 29 March 2018 stating that KH was appointed a director of the Company on 28 March 2018;

viii) Notice of Termination of a Director Appointment filed on 29 March 2018 stating that Mr Banks' appointment as director of the Company was terminated on 28 March 2018;

ix) Notice of Individual Person with Significant Control filed on 29 March 2018 stating that KH became registrable as such a person on 28 March 2018 with more than 25% but not more than 50% of the shares in the Company;

x) Notice of ceasing to be a person with significant control filed on 29 March 2018 stating that on 28 March 2018 Mr Banks ceased to be a person with significant control;

xi) Return of Allotment of Shares filed on 17 May 2018 recording that on 30 March 2018 one new ordinary share was allotted for cash and two hew A shares were allotted for cash, resulting in the share capital of the Company being 2 ordinary shares and 2 A ordinary shares, each with full rights to vote and share in dividends and capital distributions.

xii) Notice of Individual Person with Significant Control filed on 26 April 2018 stating that Kelly became registrable as such a person on 30 March 2018 with more than 25% but not more than 50% of the shares in the Company;

xiii) Notice of ceasing to be a person with significant control filed on 26 April 2018 stating that on 30 March 2018 KH ceased to be a person with significant control;

xiv) Notice of ceasing to be a person with significant control filed on 26 April 2018 stating that on 30 March 2018 KFceased to be a person with significant control

The inference from these documents, which are the best evidence available of the ownership of shares and directors of the Company at the time, is that on 28 March 2018 KH replaced Mr Banks as a director and joint owner of the single share in the Company that had by then been issued; that on the same day the Company then resolved to transfer that share to KF and issue a new share to KH and two new shares to Kelly; and that two days later the three new shares were allotted and issued. In the absence of the Company's register of shares, the obvious conclusion is that the previously existing share was re-registered in the name of KF and KH was registered as the owner of another such share, with Kelly being registered as the owner of the two new A shares.

30. Mr Banks said that, after requesting that he be replaced as director and shareholder by KH, he was shown by KF documents that appeared to show that KH was a director and joint shareholder with KF of the single share in the Company. KH and Mr Banks both said that the issue of the new shares was kept from them and that they did not discover this until about the time of the final breakdown in their relationship with KF in June 2019. They point out that the delay in registering the issue of the new shares and consequent changes in control suggests that the Respondents wanted Mr Banks and KH to have an opportunity to confirm online that KH was indeed a 50% shareholder, when in fact it had already been decided by KF that she should become a 25% shareholder.

31. As to the dispute about whether it was originally agreed that KH or Mr Banks should be a 50% shareholder or whether only one share was to be issued to KF pending contributions to the development cost, I accept the evidence of KH and Mr Banks for 4 reasons.

32. First, it is inherently likely that the parties would have agreed a 50% split, after allowing for the value of the Site, since it was Mr Banks who was going to be

instrumental in carrying out the development and the Freakleys who were providing the Site.

33. Second, the one issued share in the Company was in fact held jointly by KF and Mr Banks: this was the result of records produced by KF or his accountants, over which Mr Banks and KH had not control.

34. Third, emails sent by the Respondents' solicitors at later dates acknowledged that a 50:50 split of profit, after repaying borrowing and crediting land value, was intended: email dated 14 November 2018 from Justine McMillan of Winder Taylor Smith to Gary Shepherd of Alker Ball Healds, and email dated 13 March 2019 from and to the same persons. These strongly imply that the understanding was that the shares in the Company were to be issued equally, since it was the Company that was going to make the profit on sales.

35. Fourth, the alternative contended for by the Respondents does not make good commercial sense: Mr Banks, even if he put no capital towards the development cost, was going to be responsible for the work. If no capital contribution was made by him, the only issued share would remain with KF. From a relatively early stage, the parties were talking to external funders and investors and their intention was probably that the development would be funded in that way. Accordingly, if the Respondents were right, Mr Banks would get nothing for carrying out the development on the Freakleys' land.

36. I am not, however, persuaded that it was agreed and understood from the outset that KH and not Mr Banks would be the 50% shareholder. The original shareholder was KF and on 19 September 2017 Companies House was notified that KF and Mr Banks were the shareholder. Mr Banks and KH said that that was acknowledged to be a mistake by the Company's accountants but since KH was appointed a director originally it is unclear how or why her replacement as director by Mr Banks came about in September 2017, unless it was because Mr Banks rightly became the joint shareholder at that time. By then it was clear that KH's house was not going to be used as security for a loan. On 22 September 2017, Mr Banks sent Paul Wilcox at GDP Funding an email answering some questions that had been raised. In answer to one, he wrote:

> "Kevin is the only shareholder and director at the minute but we have handed in the application to add me (Antony Banks) on as a 50% shareholder and director so that should be finalised early next week."

It was therefore apparently deliberate that Mr Banks, not KH, became the joint shareholder.

37. Mr Banks's explanation of the concern about the shareholding in March 2018 was that the project was ready to go, using external finance; but there had been money invested by KH since November 2017 and the project was in part underway. It is common ground, on the pleaded cases, that the work started at the end of the 2017 and that finance had been secured by then. It is true that the principal funding agreement with Mr Chivers was not signed off until 18 April 2018, but the borrowers were the Freakley family, not the Company.

38. I consider that it is more likely that KH becoming the joint shareholder and director on 28 March 2018 was as a consequence of Mr Banks' bankruptcy in February 2018. Mr Banks said that he was unaware of the bankruptcy until April 2018, but KH was aware of it by 28 March 2018, as the minutes of the AGM record. Further, the letter dated 1 November 2019 from KH's solicitor, James Ford, written at a time much closer to the events in question, records that the deal originally agreed was that KF and Mr Banks would set up a jointly-owned company and that upon sale of the development the proceeds were to be distributed equally between Mr Banks and Mr Freakley. The letter states:

> "In early 2018 Mr Banks became unable to pay his debts and in particular a liability to HMRC in the order of some £30,000, which Mr Banks is still repaying to this day. He was made bankrupt in February 2018, but not before he in fact discussed and agreed with Mr Freakley that Miss Haywood would enter into the joint venture in his place and the joint venture would still proceed. Mr Freakley agreed to going into the joint venture with Miss Haywood, on the above said terms, knowing and understanding that Mr Banks would still likely bring his expertise to the table and he would still be able to work on the development, notwithstanding his bankruptcy".

39. The matter is only material in this case – given that KH was in fact a shareholder from 28 March 2018 onwards – because of an argument raised by the Respondents in their pleaded case, and identified at the pre-trial review as being a live matter to be pursued at trial, that KH held her share on trust for Mr Banks and she therefore did not have standing to pursue the petition. I will return to that legal issue later.

40. However, my finding, is that Mr Banks was (and KH was not), by design, the joint shareholder of the one issued share in the Company from 12 September 2017 to 28 March 2018, and that KH was then a joint shareholder from 28 March to 30 March 2018, when KF became the sole owner of that share, and on 30 March 2018 (without the knowledge of Mr Banks or KH) KH became the sole owner of a second ordinary share of the Company, one of four issued shares, and accordingly a 25% shareholder. I reach that conclusion on the basis that the Company's share register (not disclosed by the Respondents) probably reflects the notices that were filed at those times. KH remains the registered owner of 1 share to this day. For reasons that I will explain later, it is unnecessary for me to decide at this stage of the trial of this claim whether that share is held as nominee or on trust for Mr Banks.

41. Although Mr Banks and KH were initially reassured by what they were shown by KF in March or early April 2018, appearing to demonstrate that KH was then a 50% shareholder in the Company, relations between the parties continued to be strained and by June 2018 KH and Mr Banks sought advice and were advised to seek to document the agreement about development of the Site. Initially, an agreement was prepared by the Respondents' solicitor, Kate Nightingale at Winder Taylor Smith, but she then recognised a conflict of interests, and at that stage KH instructed Gary Shepherd at Alker Ball Healds.

42. KH said that she negotiated the agreement in the belief that she held a 50% shareholding, and a 50% share of the profits seemed to be accepted by Winder Taylor

Smith in communications that I have already referred to. KH said that she had increasing concern about money that was disappearing from the Company's bank account, of which KF and Kelly were the authorised signatories. KH was advised by her lawyers not to raise that contentious matter until the agreement was signed.

43. It was finally signed on 7 June 2019 ("the Building Agreement"). By that time, about 95% of the building work on the development had been carried out by Mr Banks.

44. The Building Agreement was made between the 4 members of the Freakley family who owned the Site, as "Landowner", the Company as "Developer", and Mr Chivers, as "Charge Holder"). The following terms are material.

i) By clause 3, the Landowner granted the Developer licence to enter the upon the Site, with equipment, for the purpose of carrying out the development in accordance with the Building Agreement;

ii) By clause 4.1, the Developer undertood to enter upon the Site for the purpose of carrying out the development, but the Landowner was entitled to possession subject to the rights of the Developer under the Building Agreement;

iii) By clause 4.2, the Developer understood to carry out the development at its own expense and in accordance with the plans, to the reasonable satisfaction of the Landowner, and to proceed diligently with the work;

iv) By clauses 4.16 and 4.17 the Developer agreed to indemnify the Landowner in relation to claims arising from the works and the materials and workmanship;

v) By clause 5.1, the Landowner was required to transfer to a nominee of the Developer the freehold of any dwelling constructed on the Site, and deduce title sufficient to enable the Developer to deduce title to the buyers of the dwelling;

vi) By clause 8.1, it was agreed that the Developer was solely responsible at its expense for appointing agents and determining the price structure to conduct the sale of the dwellings to be constructed;

vii) By clause 5.3, the Landowner agreed not to sell or transfer title to the Site or any part of it except in accordance with clause 6.1, without the Developer's consent;

viii) By clause 6.1, the Developer agreed following completion of every sale of a dwelling to forward to the Landowner the proper proportion of the proceeds of sale in accordance with clause 3 (which is obviously a typographic mistake for clause 2);

ix) Clause 2 provides:

> "The Charge Holder, the Landowner and the Developer agree that within 5 days of the completion of the sale of each Dwelling forming part of the Development the Developer shall pay to the Charge Holder and/or the Landowner as appropriate the Charge Holders and the Landowners

> Payment or apportioned between the two if appropriate on making the final Charge Holders Payment"

x) Under Annex 1, it was provided that the Charge Holder should be repaid its £880,000 plus any further advances in priority, and then the Landowners should be paid £380,000, out of the proceeds of sale. It is unclear whether this was meant to be apportioned on the sale of each dwelling, and if so how, but that does not detract from the fact that these sums were to be paid out by the Company from the proceeds of sale.

xi) The Building Agreement provides at clause 8.3 for termination if the Developer failed to start or proceed with prompt diligence, failed to complete the development in good time, failed in a material respect to comply with its obligations in the Building Agreement, failed to remedy a breack within 1 month after receipt of written notice requiring it to be remedied, or ebtered insolvency proceedings.

45. It is obviously implicit, if not expressly provided in the Building Agreement, that in consideration of its expense and work in building and selling the dwellings, the Company was to retain the net sale proceeds of sale of the development after payment of the priority sums to the Charge Holder and the Landowner. Since the Company was obliged to carry out the development, in accordance with the Building Agreement, it was entitled to do so as against the Landowner.

46. Not much more than a month after the Building Agreement was signed, a final rupture occurred between KH and Mr Banks on one side and the Freakleys on the other side. KH and Mr Banks gave evidence that this was triggered by a request by Kelly that KH transfer her interest in the Company to her, so that it could be used by Kelly as security for obtaining further loans (though not in connection with the Site). After KH refused, Kelly returned to the Site and told Mr Banks that they had made a terrible mistake and there was now no further money for the development and that he and KH must leave the Site. This was on 24 June 2019.

47. The Respondents' pleaded case in this regard is that Mr Banks was told to leave the Site because he had failed to invest £100,000, as agreed; his work was so poor that the local planning authority had declared the development unlawful; the cost of remedying the mistakes was substantial and the Company did not have the money; and Mr Banks had been misusing the Company's funds to pay his personal expenses. It is alleged that the failure to invest £100,000 was a repudiatory breach of the oral investment agreement reached with KF and Kelly. It is also pleaded that there was no profit in the development.

48. There is no evidence to support this case, and Mr Banks gave evidence that there was no agreement that each side would have to contribute £100,000 before any shares were issued. It seems surprising to say the least that such an issue could arise after the Building Agreement was made, at a time when the development was nearly complete. It is also inconsistent with the fact that Mr Banks was made a joint shareholder and then KH became and remained a 25% shareholder in the Company.

49. As for the development being unlawful, this was in fact only a failure to discharge pre-commencement conditions relating to drainage plans and landscaping, which was

notified by the local planning authority on 7 November 2019, well after the events of June 2019. It is not explained in the statement of case how this matter entitled the Respondents to treat the Building Agreement as terminated, nor is it alleged that there was a breach of the Building Agreement. The allegations of misuse of corporate money have not been proved.

50. Whatever the true position is, Mr Banks and KH did leave the Site, as instructed. There was no suggestion of a material breach of the Building Agreement on their part or some other occurrence that entitled the Landowner to terminate it. They said that the reason given at the time was lack of funds to finish the development. KH and Mr Banks were concerned that the Company's funds were being misused by KF and Kelly. The development was nearing completion in any event and, Mr Banks said, the dwellings were being already advertised for sale.

51. KH and Mr Banks said that the Freakleys then carried out further works and proceeded to sell the dwellings as and when they were completed. Disclosure given by the Respondents suggests that up to £2.3 million may have been received by way of net proceeds of sale, which in turn points to a profit of in the region of £1 million or more. KH has received none of that profit.

52. What KH did not know until a much later time was that, purporting to act on behalf of the Company and in a personal capacity as one of the four owners of the Site, KF signed a deed of "Mutual Release of Obligations pursuant to Building Agreement" on 6 August 2019 ("the Deed of Release").

53. The Deed of Release is admitted by the Respondents in their pleaded case. It recites that the Company was unable to fulfil its obligations under the Building Agreement at its own expense, that it was likely to be the subject of insolvency or HMRC enforcement proceedings, and that the parties had agreed to terminate the Building Agreement. KH and Mr Banks deny this: they knew nothing of the Deed of Release at the time it was made.

54. The terms of the Deed of Release are that the Building Agreement was terminated with immediate effect and that each party released the others from all claims or demands in connection with the Building Agreement.

55. The effect of the Building Agreement as at the date of the Deed of Release was that, on completion of the development, the Company would be likely following sales to realise a profit in the region of £1 million. This would belong to it, once the prior charges had been paid off. The effect of the Deed of Release was that the Company would be entitled to nothing, as it would not sell the completed dwellings and it had no further right under the terminated Building Agreement to retain the net proceeds of sale.

56. KF had the clearest possible conflict of interest in purporting to agree on behalf of the Company with himself and three members of his family as owners of the Site to release the Company's rights under the Building Agreement. The effect would be that – subject to the Respondents incurring some expense in finishing the works – the net proceeds of sale would be retained by 4 members of the Freakley family who had title to sell the dwellings.

57. Before dealing with the two allegations of unfairly prejudicial conduct that are pursued by KH, I must deal with the question – raised in the Respondents' pleaded case – that KH has no standing to bring a s.994 petition because she is only a nominee shareholder. The basis of the argument is that KH was not intended to be a shareholder, that Mr Banks was (subject to contributing capital to the project), and that the share was only issued in KH's name as a result of Mr Banks' bankruptcy.

58. There is no dispute that 1 share in the Company is registered in the name of KH. It is not suggested that the registration is in error. Whether KH holds the share on trust for Mr Banks or his trustee in bankruptcy, as alleged, matters not so far as standing to petition for relief under s.994 is concerned. The pre-condition for presenting such a petition is that the petitioner is a member of the company and that at least their interests have been unfairly prejudiced.

59. In two decisions, the High Court has held (or opined) that it is the registered owner of the share who is the member of the company entitled to petition, not the beneficial owner. In Atlasview Ltd v Brightview Ltd [2004] 2 BCLC 191. Jonathan Crow QC, sitting as Deputy Judge of the High Court, held that the beneficial owners of shares (other than those to whom shares had been transferred by operation of law) could not be added as petitioners or respondents to a s.459 petition. He further expressed the conclusion that a bare nominee could not petition despite the fact that it had no economic interest in the shares. The interests of a nominee shareholder are capable of including the interests of the beneficial owner.

60. In Re McCarthy Surfacing Limited [2006] EWHC 832 (Ch), Ferris J was dealing with a case that turned on the specific provision of s.459(2) relating to the standing of transferees by operation of law. He effectively approved the decision of Mr Crow QC in considering whether it was inconsistent with a decision of David Richards J, Baker v Potter [2004] EWHC 1422 (Ch); [2005] BCC 855, which was made at about the same time as the Atlasview decision. In the last paragraph of his judgment, Ferris J acknowledged the possibility that in a s.459(2) case there might be two legitimate petitioners: the registered shareholder and the transferee by operation of law.

61. In my judgment, it is sufficiently clearly established now that a trustee or nominee shareholder can issue a petition under s.994 even if the beneficial interest in the share is held by another: see e.g. Gower's Principles of Modern Company Law (11th ed.) at 14-013. The interests of the beneficial owner must in such circumstances normally be treated as the interests of the trustee or nominee, save where those interests may conflict. In a case such as this, where the alleged unfairly prejudicial conduct is dilution of the shareholding and wrongful extraction of the value of the Company's assets, there will be no such conflict. The interests of KH in seeking relief against the Respondents and the interests of Mr Banks or his creditors in doing so are aligned. I therefore reject the Respondents' argument that KH has no standing as petitioner. Where the beneficial interest in the share lies may, conceivably, have a bearing on the appropriate relief to grant, which is for the next trial.

62. Returning to the issues of liability in this trial, the first allegation of unfairly prejudicial conduct is the dilution of KH's shareholding by the allotment and issue of shares on 30 March 2018. KH contends that she was, as from 28 March 2018, a 50% shareholder and that, by the allotment of 30 March 2018 she became only a 25% shareholder. I have found that as from 28 March 2018 KH was a joint owner with KF

of the single issued share in the Company, and that as from 30 March 2018 she was a 25% shareholder, being the owner in her own right of 1 of 4 issued shares.

63. There is, however, a question as to whether being a joint (second named) holder of a single share is to be treated for this purpose as having a 50% shareholding in the Company. Prior to 30 March 2018, KH did not own a single share in her own name: she and KF were jointly 100% shareholders. KH did not have the right, as against the Company, to sever that shareholding and have a new share issued to her. I was not shown anything in the Company's articles to this effect.

64. Strictly, as the issue of shares is a matter for the Company, not for a shareholder, KH did not have a right to a separate share as against KF either. However, as the only other person with control over or an interest in the Company is KF, in reality KH must have been entitled in equity to require him (and through him the Company) to provide them with one share each, unless it had been specifically agreed between the shareholders (which it was not) that they would only be entitled to a joint holding. Were KF in such circumstances to refuse to cause the Company to allot another share to KH, that in itself would be likely to be unfairly prejudicial conduct, given that as first-named holder of the single share KF held the voting rights and therefore control of the Company (s.286 CA 2006).

65. Accordingly, KH was at midnight on 29 March 2018 to be treated as the owner of 50% of the equity in the Company. I find that without her consent and without notice, on 30 March 2018 the Company re-registered the existing share and allotted three new shares, only one of which was allotted to her, thereby diluting her effective ownership from 50% to 25%. The allotment of two new A shares to Kelly was in breach of the pre-emption provisions of s.561 CA 2006, as the shares are recorded as having been allotted for cash.

66. The allotment and issue of shares is conduct of the Company's affairs and, given the purpose of the Company, viz to make profits from a one-off property development to be shared between its shareholders, the conduct is self-evidently unfairly prejudicial to the interests of KH as shareholder. Her share of the intended profits would be reduced from 50% to 25%, with the Freakley family's share being increased from 50% to 75%. The fact that, as I find, the allotment of new shares was concealed from KH and Mr Banks is a further reason why the allotment and issue was unfairly prejudicial.

67. The second allegation is that the Company, acting by its director, KF, signed away its rights under the Building Agreement, at a time when those rights were very valuable. The decision to do was clearly infected by the conflict of interests that KF had in so acting. The Company may have a claim against KF in that regard, since Kelly was also similarly conflicted and could not have used her shareholding to ratify a breach of fiduciary duty by KH. But no application for permission to bring a derivative claim has been pursued by KH.

68. There is no doubt that signing the Deed of Release was conduct of the Company's affairs, as it was the Company that had the rights under the Building Agreement and the Company, acting by KF, that released those rights. As regards the three recitals to the Deed of Release, the assertion that the Company was unable to fund completion of the development is unsubstantiated and is surprising, given the stage that the

development had reached and the value of the Company's interest under the Building Agreement. The assertion of insolvency or imminent HMRC enforcement is also unsubstantiated. Even if true, the giving up of the Company's valuable rights in the Building Agreement can hardly be justified by the premise. The third assertion of agreement to enter into the Deed of Release is, on the evidence that I have heard, simply false, but reliance in the Deed of Release on alleged agreement does imply that there was no ground for unilateral termination of the Building Agreement by the Landowner. No such ground has been established by evidence at the trial.

69. The Deed of Release is, on the face of it, prejudicial to the interests of all its shareholders because it amounts to giving up the Company's only valuable asset. There was no obvious benefit to the Company in a mutual release of liabilities. The other shareholders apart from KH were Landowners and so the beneficiaries of the surrender by the Company of its right under the Building Agreement to complete and sell the dwellings and retain the surplus proceeds of sale. The Deed of Release was therefore plainly unfairly prejudicial to the interests of KH.

70. Serious unfairly prejudicial conduct of the Company's affairs having been proved in these two respects, the question of what remedy is appropriate must be addressed at a later stage.