

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

**In the Matter of Simply Naturals Limited (Company No. 04288979)**  
**And in the Matter of the Companies Act 2006**

Date: 4 July 2024

**Before :**

**Deputy ICC Judge Kyriakides**

**Between :**

**Peter Charles Willoughby**

**- and -**

**(1) Eric Martin Cole**

**(2) David James Evans**

**Petitioner**

**Respondents**

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**Marc Beaumont instructed by Beaumont Legal Services Limited for the Petitioner**  
**Ella Vacani (instructed by Frettons Solicitors) for the First and Second Respondents**

Hearing date: 16 February 2024  
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**Approved 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.

**Deputy ICC Judge Kyriakides :**

1. There is before me an application by the Petitioner to strike out certain parts of the Points of Defence of the First and Second Respondents (“**the Defence**”) and/or for summary judgment to be granted in respect of them. There is also an application for an order that unless the Respondents reply to a CPR Part 18 Request dated 23 October 2023 within 14 days, the Defence be struck out and judgment be entered in favour of the Petitioner (together “**the Application**”).
2. The Application is made within the context of a petition presented by the Petitioner (“**the Petition**”) under section 994 of the Companies Act 2006 (“**CA 2006**”). The Petition relates to the affairs of Simply Naturals Limited (“**the Company**”), which was incorporated on 18 September 2001 and which from about 24 February 2011 carried on business as a supplier of health supplements, including primarily a product known as “Sizzling Minerals”.
3. It is the Petitioner’s case that he is the founder of the business of the Company, having purchased in 2006 an American Company, US Naturals Inc. (“**US Naturals**”), with US\$500,000 of his own money. US Naturals manufactured and sold Sizzling Minerals in the USA. The Petitioner claims that he had been involved with US Naturals in developing the product and that the purpose of purchasing that company was to manufacture and sell Sizzling Minerals products in the United Kingdom.
4. In about 2011 the Petitioner invited the Respondents to join with him and a Mr Aldridge (who later left the Company) in the above venture in the United Kingdom. The First Respondent had been the Petitioner’s best friend since their teenage years. The Respondents agreed and it was decided to carry out the venture through the Company, in respect of which the Respondents became shareholders and directors. It is the Petitioner’s case that there was an understanding between him and the Respondents that the Petitioner would always be a director of the Company, although it is not alleged by any of the parties that the Company was a quasi-partnership.
5. For the purposes of this judgment, it is the Petitioner’s principal case that since about early 2022 the Respondents have sought to exclude him from the management of the Company’s business and from having access to information relating to its affairs and that ultimately, on 28 July 2023, they removed him as a director of the Company without

having made any fair offer for the purchase of his shares. The Petitioner claims that such conduct is unfairly prejudicial conduct of the Company's affairs falling within section 994(1) of the CA 2006.

6. In their Defence, the Respondents deny that there has been any unfairly prejudicial conduct. In particular, they contend that there has been misconduct on the part of the Petitioner as a director of the Company which justified his removal as a director, and therefore, that, if such removal was prejudicial, it was not unfair.
7. The grounds on which the Respondents claim that the removal of the Petitioner was not unfair are set out in paragraphs 5c, 5h, 5i, 5j, 10c and 12 of the Defence. It is these paragraphs which are the subject of the Petitioner's strike out application and his application for summary judgment and which I consider below.

### **Procedural History**

8. The Petition was presented to this Court on 13 July 2023. Initial directions were given by Chief ICC Judge Briggs on 19 July 2023, which were varied by consent and approved by the Court on 23 August 2023.
9. The Petitioner filed and served an Amended Petition on 30 August 2023 and the Respondents filed and served their Defence on 15 September 2023, although it had to be re-filed in order to rectify the statement of truth, which was defective. A Reply was filed and served by the Petitioner on 28 September 2023.
10. On 20 October 2023 a Request for Further Information pursuant to CPR Part 18 ("**the Request**") was served on the Respondents, which required a response by 6 November 2023. On 20 November 2023 the Petition came on before ICC Judge Barber for a costs and case management conference at which directions were given in relation to issues for disclosure and expert evidence to assess the authenticity of certain documents.
11. On 21 November 2023 the Application was issued. It was supported by the witness statement of Marc Beaumont dated 14 January 2024. On 6 February 2024 a short witness statement of Anna Curtis, an associate solicitor at Frettons, solicitors for the Respondents, was filed and served in reply.

12. The hearing came on before me on 16 February 2024. After having heard the parties' arguments, I reserved my judgment, but ordered that in the meantime the Respondents file and serve Replies to the Request. I also gave the Respondents the opportunity, should they so wish, to amend their Points of Defence, and ordered that the Petitioner file and serve a Note setting out the Petitioner's position regarding whether or not he consented to any proposed amendments to the Defence as well as his position on whether he was satisfied with the Respondents' replies to the Request. Directions were also given enabling the Respondents to reply to that Note.
13. The Respondents filed and served their Response to the Part 18 Request on 22 March 2024 ("**the Part 18 Reply**"), but decided that they did not wish to make any amendments to their Defence. Supplemental submissions were also served by counsel for the Petitioner and the Respondents as directed by my order.

## **The Applications for Summary Judgment and/or a Strike-Out**

### **The Law**

#### Summary Judgment Application

14. CPR r.24(2) states:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) the claimant has no real prospect of succeeding on the claim or issue; or

(ii) the defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

15. The classic exposition of the principles that govern the approach that the court is to take in relation to summary judgment applications is found in the judgment of Lewison J in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch). Those principles are set out at [15] and are as follows:

"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91 ;

ii) A "realistic" claim is one that carries some degree of conviction. This means a

claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550 ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63 ;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

16. In *King v Stiefel* [2021] EWHC 1045 (Comm), Cockerill J expanded further on the matters referred to in (iii) to (vi) of Lewison J’s judgment, stating at [21]-[22]:

“21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is not real (as opposed to a fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But

there will be cases where the Court will be entitled to draw a line and say that – even bearing well in mind all of those points – it would be contrary to principle for a case to proceed to trial.

22. So, when faced with a judgment application, it is not enough to say, with Mr Micawber, that something may turn up.”

### Strike-out Application

17. CPR 3.4 provides that the court may strike out a statement of case or part of a statement of case if it appears to the court:

“(a) that the statement of case discloses no reasonable ground for bringing or defending the claim;

(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.”

18. Practice Direction 3A (Striking Out a Statement of Case) supplements CPR r. 3.4. It provides:

“1.1 This practice direction sets out the procedure a party should follow if they wish to make an application for an order under rule 3.4(2)(a) (where a statement of case discloses no reasonable grounds for bringing or defending a claim); or under rule 3.4(2)(b) (where a statement of case is an abuse of the court’s process or otherwise likely to obstruct the just disposal of the proceedings).

.....

A.4 A defence may fall within rule 3.4(2)(a) where:

(1) it consists of a bare denial or otherwise sets out no coherent statement of facts, or

(2) the facts it sets out, while coherent, would not amount in law to a defence to the claim even if true.”

19. The core principles to be considered in relation to a strike-out application were set out by Warby J in *Duchess of Sussex v Associated Newspapers Limited* [2020] EWHC 1058 (Ch) (although that case was concerned with an application to strike out parts of the particulars of claim). In making adjustments to those principles where there was an application to strike out parts of a defence, Steyn J in *Vardy v Rooney* [2021] EWHC 1888 (QB) summarised those core principles at [14] as follows:

“i) A defence must be concise. It should be confined to the material facts necessary to inform the claimant of the nature of the case she has to meet.....

ii) “An application under CPR 3.4(2)(a) calls for analysis of the statement of case, without reference to the evidence. The primary facts are assumed to be true. The court should not be

deterred from deciding a point of law; if it has all the necessary materials it should “grasp the nettle”...but it should not strike out under this sub-rule unless it is “certain” that the statement of case, or the part under attack, discloses no reasonable grounds of claim...Even then, the Court has a discretion; it should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment.” (*Sussex (1)* at [33(2)], citations omitted.).

iii) “Rule 3.4(2)(b) is broad in scope, and evidence is in principle admissible. The wording of the rule makes clear that the governing principle is that a statement of case must not be “likely to obstruct the just disposal of the proceedings.” Like all parts of the rules, that phrase must be interpreted and applied in light of the overriding objective of dealing with a case “justly and at proportionate cost”...” (*Sussex (1)* at [33(3)].)

iv) “ “Abuse of process” is a sub-set of category (b). An abuse of process is a significant or substantial misuse of the process. It may take a variety of forms. Typical examples are proceedings which are vexatious, or attempts to re-litigate issues decided before, or claims which are “not worth the candle” (*Jameel v Dow Jones & Co Inc [2005] EWCA Civ 75 [2005] QB 946*). But the categories are not closed.” (*Sussex (1)* [33(4)].)”

20. Steyn J observed that in the *Sussex (1)* case, Warby J, applying the above principles, struck out certain parts of the particulars of claim on the grounds that the allegations pleaded (namely, allegations of dishonesty in the context of a misuse of private information claim) were irrelevant and likely to obstruct the just disposal of the proceedings by calling for an investigation which would have no bearing on the decision. At [15] she made reference to the following observations of Warby J in *Sussex (1)*:

“34. In the context of r.3.4(2)(b), and more generally, it is necessary to bear in mind the Court’s duty actively to manage cases to achieve the overriding objective of deciding them justly and at proportionate cost; as the Court of Appeal recognised over 30 years ago, “public policy and the interest of the parties require that the trial should be kept strictly to the issues necessary for the fair determination of the dispute between the parties”: *Polly Peck v Trelford [1986] Q.B. 1000, 1021 (O’Connor LJ)*. An aspect of the public policy referred to here is reflected in CPR r.1.1(2)(e) : the overriding objective includes allotting a case “an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases”.

51. ...The overriding objective of deciding cases justly and at proportionate cost requires the Court to monitor and control the scale of the resources it devotes to each individual claim. Irrelevant matter should, as a rule have no place in Particulars of Claim. There may be cases where the court would allow the inclusion of some minor matters that are, on a strict view, immaterial. But where the irrelevant pleading makes serious allegations of wrongdoing which are partly implicit, unclear, lacking in the essential particulars, and likely to cause a significant increase in cost and complexity the case for striking out is all the clearer.”

21. In *David Towler v Dr Julian Willis* [2010] EWHC 1209, in considering whether a statement of case was unreasonably vague or incoherent, Flaux J stated at [18]:

“The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his

documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not be able to do any of these things. Time and costs will, or may be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case that is being brought so that it may fairly and expeditiously decide the case in a manner which saves unnecessary expense.”

22. At [18] Flaux J also commented on the inclusion of claims in a Reply to a Request for Further Information under CPR Part 18 as follows:

“The transactions which the Defendant is alleged to have conducted in the name of the company without disclosing his conflict of interest and which have caused loss have not been clearly identified. The Further Information could perhaps have cured these defects but is has not done so. The particular transactions cannot be identified with ease. Moreover, additional claims, not foreshadowed or pleaded in the Amended Particulars of Claim, appear to have been added. They have no place in the Further Information since they have not been pleaded in the Particulars of Claim.”

23. Finally, whilst it would not be proper for a court to strike out a case merely because the story told in the statement of case is highly improbable and one which is difficult to probe (*Lawrance v Lord Norreys* (1890) 15 App Cas 210 per Lord Hershell at 219), there are exceptional cases where a court will strike out a claim on the basis of its merits. This is illustrated by the case of *Lux Locations Ltd v Zhang (Antigua and Barbuda)* [2023] UKPC 3, where the Privy Council struck out the statement of case of a claimant who sought to set aside a consent order on grounds of non est factum and the lack of authority of his lawyer. At [83] and [84] Lord Legatt stated:

83. There are, however, cases where, exceptionally, allegations pleaded in a statement of case need not be taken at face value even at the stage of considering whether the claim is one that the defendant should be called on to answer. These include cases where the statement of case makes factual allegations which are so incredible that they cannot possibly be true. In judging whether a case falls into this category, the court is not confined merely to looking at the statement of case itself but is entitled to take account of other matters, including the history of the proceedings and the degree of implausibility of the allegations. Allegations will not be struck out if the court considers that there is any realistic possibility that, after investigation through the ordinary process of litigation, they might be proved at a trial to be true. It is, however, an abuse of the court’s process to require a defendant to answer, or the court to deal with, allegations which the court is satisfied are manifestly ill-founded and incapable of proof.

84. An example of such a case is *Lawrance v Lord Norreys (1890) 15 App Cas 210*, where the House of Lords affirmed the decision of the Court of Appeal to strike out the statement of claim and dismiss the action as an abuse of process on the ground that “the story told in the pleadings is a myth, which – has no substantial foundation” (p 220, per Lord Hershell). Lord Watson, concurring, said, at p 222, that it was “legitimate to examine not only the pleadings in this suit, but the whole probabilities of the case, and the judicial history of the claim.” His conclusion, having done so, was that “the statement of claim presents to my mind a tissue of improbabilities which ought not to be sent to proof.””



## **Paragraphs 5c, 5h, 5i, 5j, 10c and 12 of the Defence**

24. Before considering the arguments of the parties, it is first necessary to set out the allegations that have been made in paragraphs 5c, 5h, 5i, 5j, 10c and 12 of the Defence. The allegations in these paragraphs constitute the totality of the allegations made by the Respondents concerning the alleged misconduct of the Petitioner and, in the case of paragraphs 5i, 5j, 10c and 12, the grounds on which the Respondents rely in asserting that the Petitioner's exclusion from the management of the Company and his removal as a director were not unfair.
25. In paragraph 5(b) of their Defence the Respondents state that in 2011 the parties and one Warren Aldridge agreed to set up a company to sell healthcare supplements to the UK Market, which they define as the "**Agreement**".
26. In paragraph 5(c), the Respondents claim that they were induced to enter into the Agreement by representations ("**Representations**") made by the Petitioner to them during the course of discussions in 2010 and 2011 as to:
  - 26.1. the financial success of US Naturals ("**the First Representation**");
  - 26.2. the Petitioner's partial ownership of the mine in the US where the minerals, which formed the key and unique part of Sizzling Minerals, were mined, thereby suggesting that the Company would always have access to the core mineral product by virtue of his partial ownership ("**the Second Representation**"); and
  - 26.3. the compliance of the Sizzling Mineral products with UK health and safety standards and trading standards and the Company's ability to be able to sell these products in the United Kingdom ("**the Third Representation**").
27. In paragraph 5(h), the Respondents claim that over the course of their involvement in the Company, they realised that the Representations, which had induced their entry into the Agreement, were false in that:
  - 27.1. in relation to the First Representation:
    - 27.1.1. US Naturals was in steep decline and was heading for significant losses for some time prior to the Agreement;

27.1.2. the Petitioner was involved in a significant legal dispute with Elmer Heinrich from whom he had purchased US Naturals in that he had not paid amounts due under the purchase agreement;

27.2. in relation to the Second Representation, the Petitioner did not own any share in the US mine, but US Naturals and the Company purchased minerals in the same way as any other “consumer”; and

27.3. in relation to the Third Representation, the Sizzling Mineral products had not been subject to the necessary health and safety and trading standards tests and were not authorised for sale in the United Kingdom, which the Respondents discovered after they received correspondence from government bodies informing that the sale of the products was a criminal offence, that the Company should immediately cease sales of its Sizzling Mineral and Pure Plant Minerals products and recall them. The Respondents allege that they had previously been assured by the Petitioner that the formulas were compliant with UK and EU food supplement regulations when they were not and that he continued to reassure them of the same after they had been contacted by the authorities and to represent that a laboratory could not detect plant minerals, which was also untrue. I shall refer to the allegations made in paragraphs 5(c) and 5(h) as “**the Misrepresentation Claim**”.

28. In paragraph 5(i), the Respondents claim that the Petitioner’s involvement in the Company demonstrated increasingly poor performance and breaches of duty owed by him as a director in that:

28.1. he failed to settle the dispute with Mr Heinrich and exposed the Company to reputational and financial damage because the Company became embroiled in the dispute because of the Petitioner’s common involvement in both US Naturals and the Company and he also failed to make payments under a settlement agreed with Mr Heinrich, which again exposed the Company both reputationally and financially;

28.2. he persistently falsely represented to the Company’s clients and contacts that he owned a share in the US mine;

28.3. he permitted the Company to sell Sizzling Minerals products without the proper UK health and safety trading standards authorisations which caused uproar in the

sales agent and customer base and resulted in a drop in the sales revenue, loss of customers and considerable embarrassment to the Company, which was left with unsaleable stock and had to cease trading in Sizzling Minerals and Pure Plant products, which formed about 90% of the Company's revenue, whilst they were reformulated;

28.4. he was routinely late for work on the three days on which directors were required to be present in the Company's office;

28.5. he was preoccupied with an excessive amount of personal matters whilst at work and took advantage of the parties' agreed flexi-time arrangement to work less in that he failed to complete tasks which should have been completed in his working week; and

28.6. on or around 3 August 2023 he removed the Company's CCTV cameras.

29. Paragraph 5(j) asserts that by reason of the matters set out in 5(i), the Respondents consider that the Petitioner breached his duties: (i) to act in the best interests of the Company and/or to promote the success of the Company; (ii) to exercise independent judgment; (iii) to exercise reasonable care and skill; (iv) to avoid conflicts of interest; and (v) to keep good records.

30. I shall refer to the allegations made in paragraph 5(c), 5(h), 5(i)(i), 5(i)(ii) and 5(i)(iii) together as "**the Old Allegations**" and the allegations in 5(i)(iv), 5(i)(v) and 5(i)(vi) together as the "**the New Allegations**". The Old Allegations are by their nature far more serious than the New Allegations.

### **The Arguments of the Parties**

31. Mr Beaumont, who acted as direct access counsel for the Petitioner, relied on the same submissions in support of the Petitioner's applications for both summary judgment and strike-out.

32. The overarching argument of Mr Beaumont was that the Old Allegations were historic and irrelevant and did not lead to the Petitioner's removal as a director and that the New Allegations, even if true, did not justify his removal as a director. He argued that to retain, in particular, the Old Allegations would not lead to a just disposal of the proceedings,

because it would subject them to irrelevant, but detailed and/or document-heavy issues that would require disclosure and witness evidence to extend to a much broader factual terrain than was necessary or proportionate.

33. His submissions may be summarised as follows:

- 33.1. first, there was no plea of any causal connection between the Old Allegations and the removal of the Petitioner. Mr Beaumont pointed out that if such matters were genuine reasons for removing the Petitioner as a director, one would have expected to see them referred to in correspondence in 2023 as justifying his removal, but there was not a single item of correspondence in which reference was made to the Old Allegations and, indeed, such contemporaneous evidence as there was, was wholly inconsistent with the Old Allegations forming part of the reasons for the Petitioner's removal;
- 33.2. second, the reasons actually given in the contemporaneous correspondence only referred to more recent allegations of time-keeping issues and poor work performance (albeit not in the context of alleged breaches of directors' duties) and not to the much more serious allegations made in the Old Allegations, which raised issues of fraudulent misrepresentation/deceit and breaches of director's duty. Indeed, the point is made that on a simple level had any of the old Allegations, which go back as far as 2010 and which are serious, been germane, the Respondents would have removed the Petitioner as a director and employee long before 2023. Instead, the Respondents chose to continue to work with the Petitioner for many years after they had happened and, indeed, to leave the Petitioner wholly in charge of the Company for a period of four years from 2018, when they resigned as directors, to 2022, when they claim that they were re-appointed as directors;
- 33.3. third, the contemporaneous evidence of the reasons for the Petitioner's removal did not correspond with what the Respondents had pleaded in their Defence. The Old Allegations were therefore obviously the product of self-serving after-thought and ex post facto rationalisation;
- 33.4. fourth, if the defence of the Respondents is one of justification for acts which otherwise would be prejudicial, the Respondents should be restricted to allegations which relate to matters that occurred that were not far removed timewise from the

date when the Petitioner was removed as a director. Mr Beaumont submitted that the Respondents should be restricted to matters which could rationally be said to be relevant to the Petitioner's exclusion. In this case, they would be restricted to the allegations regarding the Petitioner's time-keeping and performance at work, which although not properly particularised, were in principle capable of forming a causative link between the conduct of the Petitioner and his removal as a director, although the issue raised about the removal of the CCTV was outside the timeframe, as it occurred after the Petitioner had been removed;

33.5. fifth, the claimed misrepresentations referred to in paragraphs 5(c) and 5(h) of the Defence had nothing to do with the pleaded issues in the Petition. They were not, and could not be, pleaded as having any linkage to the events of 2023 or 2022 and therefore could not form any proper defence to the Petition;

33.6. sixth, although the Defence appears to be deliberately evasive as to when the Respondents discovered the matters set out in paragraphs 5(h), 5(i)(i), 5(i)(ii) and 5(i)(iii), thereby giving the impression of a linkage between the Old Allegations and the Petitioner's ultimate removal, the Initial Disclosure made by the Respondents, relied upon by the Respondents in their Part 18 Reply, shows that the breaches of health and safety and trading standards were known to the Respondents in 2016 and the dispute between the Petitioner and Mr Heinrich was known to them also in 2016. In light of the seven year period that elapsed between 2016 and 2023, these allegations therefore were not, and could not be, relevant to the events of 2022 or 2023. Further, the dispute between Mr Heinrich and the Petitioner was a personal dispute or a dispute with US Naturals Inc., and did not directly affect the Company;

33.7. seventh, the Respondents have failed in both their Defence and the Part 18 Reply to identify a single client or contact to whom it is alleged in paragraph 5(i)(ii) of the Defence the alleged representation by the Petitioner as to his part ownership in a US mine was made. The allegation is consequently incoherent or vague and should be struck out;

33.8. eighth, there is no witness statement from either of the Respondents dealing with any of the matters in their Defence (which they also did not sign) and, in particular,

seeking to explain why they acted in the way that they did towards the Petitioner in 2023;

33.9. ninth, faced with the Application, the Respondents have now asserted that the pleaded conduct of the Petitioner, in addition to justifying the removal of the Petitioner as a director, also supports the denial of relief under the CA 2006. Mr Beaumont submitted that this new assertion was highly problematic and referred me to paragraph 10 of the judgment in *Bhanu Patel v Simply Alarming Security Limited and Steven Kirby* [2020] EWHC 2263 (Ch). He submitted that if the Respondents wished to argue against the grant of relief, they should both plead this and the reasons supporting such denial of relief. Instead, in paragraph 15 of their Defence, in response to paragraph 8 of the Petition, the Respondents admit that the Petitioner would be entitled to relief. Therefore, the new assertion that the Old Allegations are also relevant to any relief is merely a pretext to prevent the Old Allegations from being struck out, albeit that such historic allegations are not relevant to this issue, in any event;

33.10. tenth, no particulars at all have been provided in the Defence in respect of each of the breaches of duty alleged in paragraph 5(j) of the Defence and although some particulars have now been provided in the Part 18 Reply, the particulars relating to the alleged breaches of duty under sections 173 and 175 of the CA 2006 and the duty to keep records are incoherent and should be struck out;

33.11. finally, the Old Allegations have nothing to do with the material events of 2023 (or 2022) and are of historical interest at best. They have been designed by the Respondents to try and fortify the paltry reasons (late for work, personal issues at work, poor work) for ganging up against the Petitioner in 2023 in order to stage a boardroom coup.

34. In response, Ms Vacani, counsel for the Respondents, argued that the court should not grant summary judgment or strike out the paragraphs referred to in the Application. She submitted as follows:

34.1. first, as a matter of law, serious misconduct could justify the removal of a petitioner as a director and could, therefore, be a defence to a claim for unfair prejudice on the basis that the removal was not unfair;

- 34.2. second, the Respondents' case was that there had been cumulative misconduct on the part of the Petitioner that justified his removal, which comprised both the Old Allegations (excluding the Misrepresentation Claim) and the New Allegations. This was demonstrated by a complete reading of the Defence which showed that the Respondents removed the Petitioner as a director after having discovered all of the Petitioner's failings, some of which were older and others newer, such as the tampering with the CCTV on 3 August 2023. In particular, I was referred by Ms Vacani to paragraphs 5(m), 11(b) and 12 of the Defence;
- 34.3. third, the Court cannot find that the Defence and the Part 18 Reply disclose no reasonable grounds for defending the Petition: if the Respondents' position about the Petitioner's alleged cumulative misconduct is proved at trial, then they will amount to a denial of the unfair element of the unfair prejudice claim and/or otherwise be a ground for the court refusing to grant relief;
- 34.4. fourth, the Court should not on the pleadings alone find that the Respondents had no real prospect of establishing the various instances of misconduct. The Petitioner had not adduced any evidence showing that there was no real prospect of success and the Court does not have the benefit of having the evidence that a trial judge would have, including Frettons' files, which have significantly more relevant documentation concerning the reasons for removing the Petitioner than is before the Court. Without sight of the full evidence, the Court was therefore not in a position to assess whether the Old Allegations were relevant to the fairness of that removal;
- 34.5. fifth, the type of dispute raised in the proceedings was a very common one in unfair prejudice proceedings and whether or not the Petitioner committed the various acts of misconduct complained of in the Defence are all matters for evidence and determination at trial;
- 34.6. sixth, the Misrepresentation Claim had been included because it informed the misconduct alleged in paragraphs 5(i)(i) to 10(c) and provided the factual background for the Defence. However, the representations, which were discovered to be false, continued throughout the life of the Company and had an effect on it as set out in the Defence;

34.7. finally, the Respondents rely on their Part 18 Reply, including paragraph 25(a), where they contend that their concerns about the Petitioner's poor performance were raised informally with the Petitioner on numerous occasions.

## Discussion

35. As there is a substantial overlap between the issues that arise in the summary judgment application and the issues raised in the strike-out application, I shall deal with them together.

36. A preliminary matter that I first need to consider is whether the paragraphs in the Defence on which the Petitioner seeks summary judgment are an "issue" for the purposes of CPR r.24.2 on which summary judgment can be given.

37. In *Anan Kasei Co v Neo Chemicals* [2021] EWHC 1035 (Ch) (which was followed in *Vardy v Rooney* [2021] EWHC 1888(QB)) Fancourt J considered what an "issue" meant in the context of CPR r.24(2). He held at [82]:

"The "issue" to which rule 24.2 (*the claimant has no real prospect of defending the claim or issue*") and PD 24 refers is a part of the claim, whether a severable part of the proceedings (e.g. a claim for damages caused by particular acts of infringement or non-payment of several debts) or a component of a single claim (e.g. the question of infringement, or the existence of a duty, breach of a duty, causation or loss). It is not any factual or legal issue that is one among many that would need to be decided at trial to resolve such a claim or part of a claim. If the determination of an issue before trial has no consequences except that there is one fewer issue for trial then the court has not given summary judgment and the application was not for summary judgment. If it were otherwise, parties would be able to pick and choose the issues on which they thought their cases were strong and seek to have them determined in isolation, in an attempt to achieve a tactical victory and cause the respondent to incur heavy costs liability at an early stage."

38. The question that therefore arises is whether paragraphs 5c, 5h, 5i, 5j, 10c and 12 in the Defence in respect of which the Petitioner seeks summary judgment (together "**the Summary Judgment Paragraphs**") are merely factual or legal issues that are one among many that need to be decided at trial to resolve one of the defences to the Petition, or whether they individually constitute an issue for the purposes of CPR 24.2.

39. In my judgment, taken individually, each of the paragraphs on which summary judgment is sought is not an "issue" for the purposes of CPR 24.2, but one of several factual and/or legal issues relied upon by the Respondents in support of their defence that if the removal of the Petitioner as a director of the Company is prejudicial, it is not unfair because of the misconduct alleged against the Petitioner in these paragraphs. Accordingly, an application



for the grant of summary judgment on each of the Summary Judgment Paragraphs is not an application for judgment on an issue and therefore does not fall within CPR 24.2.

40. I note, however, that Summary Judgment Paragraphs contain the totality of the misconduct claimed by the Respondents to have justified the removal of the Petitioner and which forms the basis of the Respondents' defence that the removal was not unfair ("**the Justification Issue**") Although the Application Notice does not seek summary judgment on the Justification Issue and although the grounds of the application set out in the Application Notice appear to be restricted to the Old Allegations, the written and oral arguments made to me were not confined to the Old Allegations. The Petitioner argued that without the Old Allegations, the New Allegations, if proved, whilst potentially having a causal link to the Petitioner's removal, were not sufficient in themselves to justify the Petitioner's removal and constitute a defence to the Petition. The Respondents argued that they had a real prospect of succeeding in their defence that the removal of the Petitioner was fair. They argued that both the Old Allegations and the New Allegations were relevant and that together they justified the Petitioner's removal. They did not, however, seek to counter the Petitioner's argument by arguing that, if the Old Allegations were struck out, the New Allegations alone were sufficient to amount to a defence.

41. In my judgment, in light of both the Petitioner's and the Respondents' arguments, which do not seek to contend that the New Allegations disclose a defence without the Old Allegations, it will be helpful at this stage to reach a conclusion on whether, if the Old Allegations are struck out, there is a real prospect that the New Allegations are sufficient by themselves objectively to justify the removal of the Petitioner without a fair offer being made to him.

#### The Unfairness Defence- the Law

42. In dealing with the issue of unfairness resulting from a petitioner's exclusion from the management of a company, the courts often have to consider whether the exclusion was justified by the misconduct of the petitioner without a fair offer having been made for the purchase of his shares. Two matters relevant to this case arise when considering this issue:

- 42.1. first, whether the court is restricted to the actual reasons that operated on the mind of a respondent when excluding a petitioner from participating in the management of a company; and
- 42.2. secondly, what the nature of the misconduct is that would justify excluding a petitioner without making a fair offer to purchase his or her shares.

### The Law on the First Issue

43. There are two authorities relevant to the first matter. The first is *Waldron v Waldron* [2019] BCC 862, where HH Judge Eyre Q.C (as he then was), sitting as a deputy High Court Judge, held that the test of unfairness or fairness was an objective test and that the court, in deciding whether an exclusion was fair or unfair was not limited by law to the circumstances which caused the exclusion. At [49] he stated:

“49. Moreover, it would be wrong as a matter of principle to impose a requirement of causal connexion before account can be taken of an excluded party’s conduct when addressing the fairness or unfairness of an exclusion. The exercise for the court is to determine whether conduct which was prejudicial to the party complaining was unfairly so. In the context of exclusion, that involves a determination of whether the exclusion was unfair. That determination is an objective one as I have already explained and is not dependent on the subjective intention with which particular acts were done. The objective nature of this exercise indicates that the court should undertake it in the light of all the circumstances known to the court. Fairness or unfairness is to be determined in the light of those circumstances seen as a whole. Just as a genuine belief by a party that he or she was acting properly in excluding another party is not determinative of the question and does not prevent a finding of unfairness so an exclusion is not to be regarded as having been unfair if circumstances existed warranting the exclusion. This is so even if those circumstances were not known at the time of the exclusion or were not the reason for it. The existence or otherwise of a causal connexion between a petitioner’s conduct and his or her exclusion is likely to be a factor relevant to the court’s consideration of the fairness of the exclusion. If particular circumstances were not the cause of an exclusion then it is likely to be harder for a respondent to argue that those circumstances justified the exclusion particularly if they were known at the time and even more so when they had occurred some time before the exclusion. However, that is a matter of argument and of assessment of the evidence and is very different from the contention, which I reject, that as a matter of law a respondent cannot rely on particular circumstances to say an exclusion was fair if those circumstances did not in fact cause it. Mr Cawson’s argument would require the court to treat as unfair actions which would not be so regarded if account were to be taken of all the circumstances of the case and of the parties’ dealings. That would be incompatible with the nature of the exercise being undertaken by the court and which requires a conclusion as to unfairness. The alleged unfairness is to be assessed in the context of equitable considerations constraining the powers of those controlling the company the presence or absence of considerations which is to be determined by reference to the circumstances as a whole. Having found in the light of the circumstances as a whole that there are such equitable considerations operating to constrain one party’s rights, then it follows that the court has to determine the question of fairness in the light of those same considerations. In doing so, it is again to have regard to the circumstances as a whole. It would be perverse if the court were permitted and required to look to all the circumstances of the case in order to decide whether the relevant

equitable considerations are present but required to look only to some of the circumstances in order to decide whether a particular action was unfair and so precluded by those considerations.”

44. Then at [118]:

“It follows that it is necessary to consider whether the conduct of Austin and Gerard warranted their dismissal and their exclusion from the business of the company. The dismissal and exclusion would be unfair prejudice if the circumstances at that time did not warrant such action. The exclusion of Austin and Gerard would not have been justified solely because Patrick wished to take control of the company and was no longer willing to put up with the participation of his brothers. Mr Cawson said that this was in fact the reason for the dismissal. He invited me to conclude that the other matters now alleged against Austin and Gerard had not actually caused the dismissal and so were to be disregarded. I have already explained, at [47]–[50], my conclusion that it is not necessary for there to be a causal connexion between an exclusion and the matters which are said to justify it and which might lead the court to find that it did not constitute unfair prejudice. Instead in considering whether an exclusion was unfairly prejudicial I am to look at matters in the round and determine whether it lies in the mouth of a person excluded from the life of a company to say that the exclusion was unfair. The motive for and the reasons which actually caused the exclusion will be relevant to the extent that if an exclusion was in fact for an unjustified reason then the court will need to examine with greater care and potentially with a degree of scepticism an argument that there were other matters which although not motivating the exclusion happened to justify it. This is particularly so if those matters had been known at the time of the exclusion. In the circumstances of this case if I were to find that the exclusion was caused by Patrick’s decision that he no longer wished his brothers to be involved in the business and wished to have outright control (matters which would not justify the exclusion) then I would have to consider with care the contention that the other circumstances meant that the exclusion was not unfair.”

45. The approach in *Waldron v Waldron* was approved and followed by Adam Johnson Q.C (as he then was) sitting as a Deputy High Court Judge in *In Re Dinglis Properties Ltd* [2019] EWHC 1664 (Ch). At [225] and [226] he stated as follows:

“225. For my own part, I am inclined to agree with the idea that the proper approach is a broad, objective one, and that in assessing the fairness or otherwise of the petitioner’s exclusion, there is no bar to taking account of matters which were in existence at the time, but not actually known to the respondent. I thus prefer the approach of Warren J in *Amin v Amin* [2009] EWHC 3356 (Ch) and of Judge Eyre QC in *Waldron v Waldron* [2019] Bus LR 1351 to that of Mark Cawson QC in *In re J & S Insurance & Financial Consultants Ltd* [2014] EWHC 2206 (Ch) .

226. This result seems to me to follow from the language of section 994 itself. This posits an objective test: i e, whether the company’s affairs are being or have been conducted in a manner that is unfairly prejudicial. Where the petitioner has been excluded, the question is: was the exclusion fair? A respondent ought to be entitled to argue that it was, by reference to all relevant circumstances obtaining at the time of the exclusion, whether he was subjectively aware of them or not. For example, a respondent may make the decision to exclude the petitioner on an entirely mistaken basis, not knowing that at the same time—perhaps because the truth had been concealed from him—the petitioner was in fact guilty of serious misconduct which would certainly have justified exclusion, if known about. In such a case, it seems to me it ought to be open to argue that the petitioner’s exclusion was objectively *fair* , in the sense that his (unknown) conduct was damaging to the business and he deserved to play no ongoing part in managing it.”

## The Law on the Second Issue

46. For an exclusion from participating in the management of a company to be justified and fair without a fair offer being made for a petitioner's shares, serious misconduct on the part of the petitioner in relation to the company's affairs must be shown as illustrated by the passages from the cases set out below.

47. In *O'Neill v Phillips* [1999] 1 WLR 1092, Lord Hoffman stated at 1104:

"There are cases, such as *In re A Company (No. 006834 of 1988)*, *Ex parte Kremer* [1989] B.C.L.C. 365, in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur (as in this case) without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company."

And at 1107:

"The Law Commission Report on Shareholder Remedies, at pp. 30–37, paras. 3.26–56 has recommended that in a private company limited by shares in which substantially all the members are directors, there should be a statutory presumption that the removal of a shareholder as a director, or from substantially all his functions as a director, is unfairly prejudicial conduct. This does not seem to me very different in practice from the present law. But the unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer."

48. In *Ritchie v Kolah* [2021] EWHC Ch ICC Judge Jones stated at [140]:

"140. However, in this case there is also an issue as to whether Mr Ritchie and anyone assisting him can rely upon his dismissal as an unfair and prejudicial action of exclusion if it resulted from his own misconduct. The appropriate approach is set out in Hollington on Shareholders' Rights, 9th ed at 7-64 as follows:

"In "exclusion" cases, the majority may seek to justify the exclusion of the minority as being a reasonable management decision, taken in the best commercial interests of the business. It is clear, however, that it is not sufficient that the majority were acting in good faith and making a reasonable commercial decision: *Re Westbourne Galleries* [1973] A.C. 360 at 381F–H. But it still remains open to the majority to argue that the "working partner" has brought his exclusion upon himself by reason of his own misconduct. Given that the statutory test is ultimately unfairness and it is necessary to take into account the conduct of both parties, as a matter of common sense any misconduct by the excluded party would at least be a factor to be taken into account by the court in deciding whether the majority has acted unfairly and also what, if any, relief to grant. But, in order to do practical justice, the courts are loathe to allow s.994 petitioners to degenerate into old-style divorce cases, where one side blames the other, the proceedings become lengthy and expensive, and at the end of the day the court has the very difficult and often futile task of deciding where fault lies in circumstances where the parties have simply fallen out and neither side is seriously at fault." (my underlining for emphasis)".

49. Finally, in *Re Edwardian Group* [2018] EWHC 1715 (Ch) 1715 Fancourt J stated at [412], [413] and [415]:

412. This question is material if I am wrong in concluding that equitable considerations did not constrain the exercise of Verite/Jemma’s rights in July 2009. If they did then the removal of HS was prima facie unfairly prejudicial to HS’s rights as a member, absent an offer to buy his shares at a fair price (see *O’Neill v Phillips* at pp. 1106H-1107C). However, a number of authorities establish that, in certain circumstances, the removal of a quasi-partner without making such an offer can be objectively justified. Those circumstances are, essentially, where the quasi-partner has brought his removal on himself by conduct that objectively justified the other members in excluding him in that way: see per Nourse J in *Re R.A. Noble & Sons (Clothing) Ltd* [1983] BCLC 273 at 292.

413. Lack or loss of competence in business affairs, a breakdown of the relationship of trust and confidence and even personal misbehaviour do not of themselves justify exclusion without a fair offer. The court does not indulge in what Lord Hoffmann once referred to as a “contest of virtue”. Nor can removal without a fair offer be justified solely on the grounds of what the majority consider to be in the best interests of the company: per Lord Wilberforce in *Ebrahimi* at p.381.

.....

415. The authorities do not establish any bright line between what does and does not justify exclusion without an offer, but it is clear that the conduct in question must be misconduct in the affairs of the company, not merely personal misconduct. It must be so serious as to undermine the basis for the equitable considerations that bound the parties. The right approach, in my judgment, is to ask whether the exclusion without a fair offer is proportionate and justified by the misconduct in question, but bearing in mind that incompetence, mere misconduct and a breakdown of confidence are not sufficient to justify removal without a fair offer.”

50. Finally, it should be noted that the issue of the conduct of a petitioner is relevant not only to whether his exclusion from the management of a company was fair in all the circumstances, but also to whether the court should grant any relief, if the petition is successful, and, if so, the nature of the relief to be granted. This appears from the judgment in *Ritchie v Kolah* [2021] EWHC Ch at [140] (see paragraph 46 above) and the judgment in *Bhanu Patel v Simply Alarming Security Limited and Steven Kirby* [2020] EWHC 2263 (Ch) where the court at [10] stated that the exclusion from management of the petitioner would be unfairly prejudicial, subject to the respondent “*being able to deny any of the allegations and/or being able to rely upon her misconduct to argue that the court should not grant relief.*”

The reasons given for the removal of the Petitioner as a director

51. In the present case, the court has not had the benefit of any evidence from the Respondents setting out their case in respect of the Petitioner’s application for summary judgment. The only witness statement that has been filed and served on behalf of the

Respondents is the witness statement of Anna Curtis, an associate solicitor at Frettons, This witness statement, however, does not seek to provide any evidence in response to the witness statement of Marc Beaumont or to depose to any evidence concerning the matters relating to the exclusion and removal of the Petitioner as a director. The Respondents therefore rely wholly on their Defence and their Part 18 Reply filed after the date of the hearing for the purposes of seeking to persuade the Court that they have a real prospect of succeeding on the Justification Issue.

52. In deciding whether or not the Respondents have a real prospect of establishing at trial that the exclusion and removal of the Petitioner as a director of the Company was objectively justified without a fair offer having been made for his shares in the Company, as shown by *Waldron v Waldron*, the starting point is to examine the contemporaneous evidence relating to the reasons given for removing the Petitioner as a director.
53. In paragraph 5(m), which is in the summary section of the Defence, the Respondents assert that their removal of the Petitioner as a director was entirely justified “due to the Petitioner’s poor performance and failings as set out above”.
54. In paragraph 11(b), the Respondents assert that they ultimately removed the Petitioner as a director “by virtue of his persistent and continued lack of work and poor performance in the execution of his work” and in support rely on the matters set out in paragraph 5(i) of the Defence (the statement of case mistakenly states paragraph 3(i) as was acknowledged at the hearing). In paragraph 12 of the Defence, the Respondents “contend that the Petitioner has demonstrated continued poor performance, in respect of which paragraph 3(i) [this should be 5(i)] is repeated, and accordingly, they have appropriately terminated the Petitioner’s appointments.”
55. In paragraph 5(k) of the Defence, the Respondents claim that they repeatedly raised concerns about the Petitioner’s poor performance with him informally and in paragraph 11(b) of the Part 18 Reply, they allege that they specifically put forward the allegation made in paragraph 5(i)(i) of the Defence as a reason for removing the Petitioner as a director. However, neither in the Defence nor in the Part 18 Reply do they give any particulars of what they said to the Petitioner and the actual concerns alleged to have been raised with him and in the case of paragraph 11(b) of the Part 18 Reply, they also fail to

give any particulars of the occasion or occasions on which they allege that this reason was given.

56. The Respondents also claim that they confronted the Petitioner with their concerns at a directors' meeting on 24 May 2023. The minutes of that meeting were disclosed by the Respondents in their Initial Disclosure and, although the Petitioner claims that they have been fabricated, for the purposes of my judgment, I shall assume that they are genuine. Those minutes record as follows:

“A discussion took place about the inappropriate behaviour of Peter Willoughby, his administrative failings, failures to complete agreed upon tasks, attendance and time keeping issues spanning many years.”

57. The only other contemporaneous evidence before me is a letter from Frettons, the solicitors acting for the Respondents, dated 14 July 2023, which is 14 days prior to the Petitioner's removal as a director (this letter and the minutes of 24 May 2024 are together referred to as the “**Contemporaneous Evidence**”). When seeking to justify the requisition by the Respondents of a general meeting for the purposes of removing the Petitioner as a director, Frettons stated:

“In view of his recent erratic behaviour and his failure to carry out properly the administrative and other functions entrusted to him by the board, this procedure was entirely justified...”

58. Under the heading “Conduct” Frettons continued:

“...it is our instructions that it is your client who has acted in a manner damaging to the interests of the Company in failing to carry out his proper administrative duties, unauthorised absences, the removal of stocks and acting against the company's interests.”

59. The Respondents have since withdrawn the allegation that the Petitioner removed stocks from the Company.

60. The Contemporaneous Evidence shows that the Respondents' reasons for removing the Petitioner as a director at the time of his removal in July 2023 were related to the Petitioner's timekeeping and alleged absences from, and lack of performance at, work; this is consistent with what is pleaded in paragraphs 11(b) and 12, insofar as those paragraphs rely on the matters set out in paragraphs 5(i)(iii) to 5(v). What the Contemporaneous Evidence does not show, however, is that the Old (and more serious) Allegations formed part of the Respondents' reasons for removing the Petitioner. These

allegations are not concerned with the Petitioner's alleged absences from work, time-keeping or the alleged poor performance of his work. They are concerned with serious allegations of dishonesty, both in relation to the alleged misrepresentations made by the Petitioner and his alleged misconduct and breaches of duty as a director.

### The Issues

61. In light of the above, the following issues arise:

61.1. first, whether the Defence discloses reasonable grounds that the Old Allegations are relevant to the objective exercise that the court has to carry out in determining whether the Petitioner's exclusion and removal as a director was fair in all the circumstances;

61.2. second, if the answer to paragraph 61.1 is answered in the negative, whether the Defence discloses reasonable grounds and/or the Respondents have a real prospect of persuading the Court that the New Allegations objectively justified their removing and excluding the Petitioner as a director without making a fair offer for his shares.

### The Old Allegations

62. In my judgment, for the reasons set out below, the Defence discloses no reasonable grounds that the Old Allegations are relevant to the objective determination to be made by the Court about whether the Petitioner's removal and exclusion as a director of the Company was fair. One of the Old Allegations is also unparticularised, vague and incoherent.

63. First, although paragraphs 11(b) and 12 of the Defence baldly assert that the Petitioner was removed as a director in 2023 for the reasons set out in paragraph 5(i), as I have shown above, they have not produced any evidence, nor have they pleaded, or in the case of paragraph 11(b) of the Part 18 Reply, pleaded with any coherency, that prior to the Defence, the Old Allegations were given as part of the reasons for removing the Petitioner, even though, according to their Defence and Part 18 Reply, they had known of the Old Allegations for a considerable period of time (see further below). Further, no evidence has been adduced by the Respondents to explain the inconsistency between the reasons asserted in the Defence for the removal of the Petitioner and the reasons actually



given by the Respondents in the Contemporaneous Evidence. Whilst, as a matter of law, no causal connection between the Petitioner's conduct and his removal is required, the fact that it is not pleaded as part of the Respondents' case (nor has any evidence been produced), that the Old Allegations were given by the Respondents to the Petitioner as a reason for removing him as a director, despite their being known to the Respondents at the time, is a factor that I am entitled to take into account, and have taken into account, when considering whether the Defence discloses reasonable grounds that the Old Allegations are relevant to the Justification Issue. I would, however, add that even if such a case had been pleaded, because the assessment to be made is an objective assessment, I would still have reached the conclusions set out below.

64. Second, the Defence shows that the Misrepresentation Claim is not part of the misconduct which is alleged to have justified the removal of the Petitioner in that:

64.1. assuming that the Representations were made, the Defence makes it clear in paragraphs 5(c) and 5(h) that the Representations were relied on by the Respondents in a personal capacity in reaching the Agreement with the Petitioner in 2011 to set up a company to sell healthcare supplements. It is not pleaded that the Representations were made by the Petitioner in his capacity as a director of the Company nor that they were made by the Petitioner to, and relied upon by, the Company. The matters pleaded might give rise to personal claims by the Respondents against the Petitioner for misrepresentation, but do not show misconduct by the Petitioner in relation to the Company's affairs;

64.2. as shown by paragraphs 11(b) and 12 of the Defence, it is only the matters set out in paragraph 5(i) which are relied upon as demonstrating the alleged breaches of duty and misconduct which are claimed to justify the Petitioner's removal as a director. This was affirmed by Ms Vacani during the course of the hearing who explained that paragraphs 5(c) and 5(h) had been included by way of background in order to explain the breaches of duty. The alleged breaches of duty are set out in paragraph 5(j) of the Defence. This paragraph claims that it is by reason "of the matters set out immediately above" that the Respondents consider that the Petitioner has breached those duties. The matters set out immediately above are those matters set out in 5(i);

64.3. in paragraph 3 of the Part 18 Reply, in response to the Petitioner's request to explain how the allegation set out in paragraph 5(h) was or was part of a defence to the Petition, the Respondents stated:

“The Respondents’ defence to the Petition denies that any prejudicial conduct is unfair. The Respondents contend that they were justified in removing the Petitioner from his position as a director and Company secretary on the grounds of misconduct. The Respondents further contend that the instances of the Petitioner’s misconduct accrued cumulatively such that, it was a combination of those instances that the Respondents removed him from office on 28 July 2023.

The very first instances of misconduct on which the Respondents rely are the Representations. Although the Representations were initially made by the Petitioner to the Respondents, the Petitioner maintained those Representations during the period of the parties’ mutual operation of the Company and continued and/or perpetrated those Representations, notwithstanding that they were false. The Petitioner’s maintenance, continuation and/ or perpetuation of the Representations constituted misconduct because they were plain breaches of duty.”

64.4. as shown by the above, in paragraph 3 of the Part 18 Reply the Respondents have sought to expand their case under paragraphs 5(i), 5(j), 11(b) and 12 to claim that until the Petitioner was removed from office (this being the period of the parties’ mutual operation of the Company), the Petitioner continued to make the Representations. By referring to the mutual operations of the Company, it is implicit that the Respondents are claiming that the Petitioner continued to make the Representations, but this time, in his capacity as a director of the Company. Although the Respondents were offered the opportunity to amend their Defence (the most logical place being paragraph 5(i), which sets out the facts alleged to constitute the breaches of duty), they have chosen not to do so. In my judgment, what is in essence a new ground relied upon by the Respondents to justify their removal of the Petitioner as a director, namely, the alleged misrepresentations made by him whilst in office to the other members of the board of directors, should be pleaded in a defence. It is not permissible for such a matter to appear in a Part 18 Reply as it avoids the requirements in the CPR to obtain either the consent of the other party to the new ground or the court’s permission. For this reason alone, it would not be right for me to take into account what is a new allegation of misrepresentation. However, even if I

were wrong, in my judgment, as currently pleaded, this new allegation discloses no reasonable grounds that the Representations continued to be made and has no real prospect of success on the grounds that:

64.4.1. the claims that the Petitioner continued to make the Representations until he was removed are no more than bald assertions; no particulars whatsoever are provided of them including, when, how and in what circumstances the Petitioner is alleged to have continued making the Representations, particularly during the period when the Respondents say they were aware of their falsity (see below);

64.4.2. as shown by my judgment below, having regard to when the Respondents became aware of the alleged falsity of the Representations, the Defence discloses no reasonable grounds for such Representations to be taken into account when considering whether the removal of the Petitioner was objectively justified.

65. For the reasons set out above, in my judgment, the Defence does not disclose any reasonable grounds that the Misrepresentation Claim is relevant to any of the central issues in the Defence, in particular, the Justification Issue.

66. Third, it is necessary to examine the Old Allegations, alleged in paragraphs 5(i), 5(ii) and 5(iii) to constitute breaches by the Petitioner of his duties as a director, in order to determine whether they disclose reasonable grounds that they are relevant to the Justification Issue.

67. In paragraph 5(i)(i) of the Defence and the Part 18 Reply, the Respondents contend that the Petitioner breached his duties as a director because: (i) he breached an agreement made personally with a Mr Heinrich prior to 2010 for the purchase of US Naturals by failing to make payments under that agreement, which gave rise to a dispute between him and Mr Heinrich; (ii) he failed to take steps to direct Mr Heinrich away from the pursuit of the Company in respect of the amounts alleged to have been owed and thereby allowed or permitted Mr Heinrich to assert claims against the Company on the basis that Mr Heinrich appeared to believe that the Company was part of US Naturals or a successor company; and (iii) he breached a settlement agreement subsequently made with Mr Heinrich on 14 April 2016, and which is alleged to have been brokered by the First Respondent, by failing to make payments under that agreement and thereby causing the Company to be exposed to the risk of reputational and financial damage.

68. In my judgment, there is no reasonable case that the matters set out in paragraph 5(i)(i) are relevant to the defence pleaded by the Respondents that the removal of the Petitioner was justified and fair. My reasons are as follows:

68.1. first, the failure to pay Mr Heinrich monies claimed to be due pursuant to a contract made with the Petitioner in his personal capacity prior to entering into the Agreement is not conduct by the Petitioner in his capacity as a director of the Company or conduct relating to the Company's affairs. Likewise, the fact that Mr Heinrich is alleged to have threatened to pursue the Company (although there is no claim that he actually brought any proceedings against the Company or that the Company actually suffered any harm or reputational damage), and that the Petitioner failed to stop him making such threats, cannot in my judgment amount to misconduct by the Petitioner in his capacity as a director of the Company as the Petitioner had no control over the actions of Mr Heinrich, an outside third party, and the tactics that he might use to secure what he believed was owed to him;

68.2. secondly, as disclosed by the Respondents' statements of case, the matters claimed in this paragraph occurred well before the removal of the Petitioner as a director of the Company. As shown by the Defence and the Part 18 Reply, the Respondents' case is that they discovered the dispute with Mr Heinrich at the earliest in 2013 and at the latest by April 2016, when the First Respondent claims that he assisted the Petitioner to reach a settlement agreement with Mr Heinrich after Mr Heinrich had intimated that he might pursue the Company and was prepared to tell others what he was owed. The discovery of the matters in paragraph 5(i)(i) by the Respondents therefore occurred between 7 and 10 years prior to the removal of the Petitioner from office and although the Respondents claim that they were serious and exposed the Company both reputationally and financially, they did not seek to remove the Petitioner as a director at that time. In my judgment, there are no reasonable grounds for holding that events which occurred 7 to 10 years prior to the Petitioner's removal as a director are relevant to the issue of whether the removal of the Petitioner from office in July 2023 was objectively justified.

69. In paragraph 5(i)(ii), the Respondents assert that the Petitioner persistently falsely represented to the Company's clients and contacts that he owned a share in the US mine. In the Part 18 Reply, in response to requests from the Petitioner to provide the date of

each and every alleged representation, the precise terms of the same and the identity of each and every client and contact to which reference is made, the only response provided by the Respondents was that the requests were disproportionate, unnecessary and would be the subject of disclosure and witness evidence. As to the requests for the identities of clients and contacts, the Respondents added that nevertheless some examples of such customers and contacts were provided in the answer to the request at paragraph 14(a). However, no examples are given in the answer at paragraph 14(a).

70. In the premises, there has been a failure by the Respondents to provide any particulars or evidence to support their bald assertion that the Petitioner made false representations to customers and clients that he owned a share in the US mine in breach of his duties. It is not sufficient to state that information concerning the identity of such clients and contacts, the dates when the representations are alleged to have been made and the terms of such representations will become clear when disclosure and witness statements are given. A party is entitled to know the case that he has to meet in order properly to prepare his own case, including giving disclosure and preparing witness statements.
71. In this case, evidence and/or particulars regarding at least some of the clients and contacts to whom it is alleged that such misrepresentations were made, when they were made and how and when the Respondents discovered the same would have sufficed. However, the Respondents have refused and/or failed to provide any such evidence and no particulars are given in their Defence or Part 18 Reply. In my judgment, the allegations made in paragraph 5(i)(ii) are vague and incoherent and no reasonable grounds for them are disclosed in the Defence.
72. Further, the Respondents have not been upfront, either in their statements of case or in their evidence, about when and how they claim that they discovered that the representation referred to in paragraph 5(i)(ii) was false. Bearing in mind that the original representation of part ownership of the US mine is alleged to have been made to the Respondents in 2010/2011 and that they were in business with the Petitioner from 2011 (it being claimed by them in paragraph 10(h) of their Defence that they carried out the vast majority of the work of both running and managing the Company and its business), particulars should have been pleaded in the Defence and/or evidence should have been adduced by the Respondents as to how, when and in what circumstances they discovered that the Petitioner did not own any part of the US mine in order to demonstrate to the

Court that there are reasonable grounds that this reason is relevant to the Justification Issue. Without any such pleading the Court is left with an allegation that on its face occurred well before the removal of the Petitioner in 2023 and is not relevant to the Justification Issue.

73. The final Old Allegation is that made in paragraph 5(i)(iii) in which it is alleged that the Petitioner permitted the Company to sell the Sizzling Mineral products without the proper UK health and safety trading standards' authorisations and that this resulted in the Company having to cease to trade whilst the products were re-formulated, thereby causing it significant financial and reputational damage. In paragraph 5(i)(ii) the Respondents state that they discovered the breach after they had received correspondence from government bodies informing them that the sale of the products was a criminal offence and that the Company had to cease such sales immediately.
74. In paragraphs 9(a), 9(b) and 9(c) of the Part 18 Reply to requests from the Petitioner to identify the correspondence, the government bodies and the criminal offence referred to, the Respondents state that they had produced the correspondence as part of their Initial Disclosure, to which the Petitioner was specifically referred, and that, in particular, they relied on a report from Kent County Council and the Petitioner's own communications with Buckinghamshire and Surrey Trading Standards ("BSTS") in which Loraine Dalton, Senior Trading Standards Officer, identified the criminal offence as a breach of article 19 of the General Food Law Regulation (EC) 178/2002.
75. If regard is had to the documents relied upon in the Part 18 Reply, they show as follows: (i) first the report of analysis from Kent County Council is dated 1 September 2016 and shows that the sample of Sizzling Materials taken on 5 August 2016 had too high an aluminium content; (ii) that similar findings were made by BSTS who on 3 October 2016 informed the Petitioner that the Company should cease to supply the products until it was sure that the product formulation was compliant and safe for human consumption. The correspondence between BSTS and the Company which has been disclosed dates from 2 June 2016 to 11 November 2016. The email dated 7 November 2016 from the Petitioner on behalf of the Company states that the Sizzling Minerals product was withdrawn and customers were informed, but that it had been reformulated based on BSTS' analysis compliance instructions so that it was fully compliant and allowable within the weekly intakes. There is no evidence from the Respondents to the contrary; nor does the Defence

dispute what is said in this email. In fact, the Respondents' case is consistent with the Sizzling products' formula having been re-formulated so as to be compliant with health and safety and trading standards and that this took place in 2016 or 2017 in that in paragraph 17(a) of their Part 18 Reply, they state that loss from the product being non-compliant was suffered from the autumn of 2016 when the Company had to cease sales of the Sizzling Minerals products and continued throughout 2017, although sales appeared to have recovered after that. It is, noticeable, however, that the Respondents fail to mention when the re-formulated Sizzling Minerals product was put onto the market.

76. As shown from the matters referred to above, the alleged breaches of duty were discovered by the Respondents in the autumn of 2016 when the Sizzling Products were withdrawn from sale. Despite this, at the time the Respondents did not seek to remove the Petitioner as a director, even though at that time they were also aware of at least the matters set out in paragraph 5(i)(i) of the Defence and considered both matters to be serious in that they are alleged to have caused or exposed the Company to financial and reputational damage. In light of these matters and the period of over seven years that elapsed between the Respondents' discoveries and the date of removal of the Petitioner, in my judgment, no reasonable grounds are disclosed by paragraph 5(i)(iii) that the matters set out in this paragraph are relevant to whether the removal of the Petitioner in 2023 was objectively fair.

#### Conclusions on the Old Allegations

77. For the reasons stated above, I have reached the view, based on the Respondents' statements of case, including their Part 18 Reply, that the Defence does not disclose any reasonable grounds for holding that the Old Allegations are relevant to the central issues of the Defence and in particular, to the Justification Issue; nor, having regard to their historicity, are there reasonable grounds for holding that they are relevant to the issue of whether the Court should grant relief or to the nature of the relief to be granted, in the event that the Petitioner succeeds in proving unfair prejudice.

78. I accept Mr Beaumont's submissions that if the Old Allegations are retained in the Defence, they will obstruct the just disposal of the proceedings, because the court will be required to adjudicate on matters which I have held to be irrelevant to the central issues of the Defence and also to the relief to be granted. If these allegations are retained, they will

no doubt extend the period of the trial and impose on the parties more extensive obligations in giving disclosure and preparing witness statements. They, and any paragraphs or parts of paragraphs in the Defence that relate to them should, therefore, be struck out.

79. Further, in my judgment, the allegation made in paragraph 5(i)(ii) of the Defence, in circumstances where the Respondents have failed to identify a single contact or client in response to the request for such information made by the Petitioner, should be struck out, in any event, on the grounds that it is vague and incoherent and does not enable the Petitioner to know the case that he has to meet. It is not sufficient to state that the relevant information will be provided through disclosure and witness statements.

### The New Allegations

80. I now come to the New Allegations. As I have struck out the Old Allegations, for the reasons set out in paragraphs 40 and 41 above, I shall consider whether the Justification Issue has a real prospect of success based on the New Allegations alone. I was not invited by the Petitioner to strike out the New Allegations, but was invited to strike out some of the allegations of breach of duty set out in paragraph 5(j) of the Defence on the grounds that they were incoherent.

81. The New Allegations are set out in paragraphs 5(i)(iv), 5(i)(v) and 5(i)(vi) of the Defence. The allegation set out in paragraph 5(i)(vi) is irrelevant as by the time it is alleged to have occurred, the Petitioner had already been removed from office.

82. In paragraph 5(i)(iv) the Respondents claim that the Petitioner was routinely late for work on the three days on which the directors were required to attend the office and in paragraph 5(i)(v) they claim that he was preoccupied with an excessive amount of personal matters and took advantage of the parties' flexi-time arrangement to work less with the result that he failed to complete tasks that should have been completed in the working week.

83. In response to requests for further information relating to paragraph 5(i)(iv), in paragraph 19(b) of the Part 18 Reply, the Respondents refused to provide the dates when it is alleged that the Petitioner was late for work, claiming that it was disproportionate and a matter for disclosure and witness statements and, in response to a request for the



Petitioner's contract of employment, produced a standard form of contract of employment, which the Respondents claim governed the Petitioner's employment. These standard terms prescribe the hours of work as between 9a.m to 5p.m. on Mondays to Thursdays and 9.00 a.m. to 4 p.m. on Friday

84. Despite the terms of the above contract of employment, the Respondents claim that at the inception of the Company's business the parties agreed that they would have an 8.30 a.m. start, but because of the Petitioner's repeated lateness, this was subsequently revised to 9 a.m. and then to 9.30 a.m.. They then claim that when in 2022 the Petitioner failed to arrive at the office by 9.30 a.m and was frequently attending well after 10 a.m., it was agreed that they would have a flexi-time arrangement, whereby the Petitioner could start later in the day, but finish later, but it soon transpired that, although the Petitioner started later in the day than the Respondents, he would leave work shortly after the Respondents left.

85. In response to requests for further information relating to paragraph 5(i)(v) regarding the personal matters the Petitioner was allegedly involved with, the Respondents again claimed that to provide answers to the requests would be disproportionate and that they were matters for disclosure and witness statements. However, by way of example of such alleged conduct, the Respondents referred to the Petitioner making regular telephone calls to his wife to discuss other property business and often playing games on his phone at length, including games such as "Candy Crush" and "Dragon Story". Further, in response to requests relating to the tasks which the Respondents allegedly completed late, the Respondents refused to provide any of the information requested on the grounds that it was disproportionate and would be the subject of disclosure and witness statements, but then provided examples of some of the tasks which are claimed to have been produced late. The examples were in general terms with no specific details provided.

86. On their face, the matters set out above appear to be employment issues rather than director issues. However, for the purposes of this judgment, and as Mr Beaumont has not sought to contend, particularly in the context of the alleged breaches of duty, that the allegations relate to the Petitioner as an employee, I will treat them as director issues. As argued by Mr Beaumont and, as I accept, these issues are much less serious than the Old Allegations. Having regard to the cases referred to above, and, in light of the particulars and lack of particulars provided in relation to the matters asserted in paragraphs 5(i)(iv)

and 5(i)(v), in my judgment, there is no real prospect of the Respondents establishing that these matters alone, even if proven at trial, constitute such serious misconduct that they would objectively justify the removal of the Petitioner as a director without a fair offer being made for his shares. In such circumstances, it seems to me that summary judgment should be granted on the Justification Issue in favour of the Petitioner.

87. However, the New Allegations are also relevant to the issue of relief in the event that the Petitioner is successful and, although the particulars of the allegations pleaded are not satisfactory and taking into account that at the hearing the Petitioner did not ask me to strike out the New Allegations themselves, in my judgment, sufficient has been pleaded regarding the Petitioner's conduct for me to conclude that there is a real prospect that the court might take such conduct into account when considering the nature of the relief, assuming that the Petition is successful. I do not accept Mr Beaumont's argument that in paragraph 15 of their Defence, the Respondents have accepted that the Petitioner is entitled to relief. Paragraph 8 of the Petition, to which paragraph 15 is the response, states that a "*fair value of the shares of the Company is to be determined by expert business valuation evidence*". Paragraph 15 of the Defence responds by stating that the Respondents admit paragraph 8 but only "*insofar as it would be the appropriate course of action where the Petitioner's plea of unfair prejudice succeeds.*" They are therefore not accepting that a share sale is the appropriate remedy and, indeed, in paragraph 18 deny that the Petitioner is entitled to the relief set out in the prayer.

88. That leaves me with the breaches of duty alleged in relation to the New Allegations. In paragraph 24 of the Part 18 Reply the Respondents state that the failure by the Petitioner to perform his day to day duties in the Company effectively or at all in that he was routinely late, preoccupied with an excessive amount of personal matters and failed to complete tasks in a timely manner constituted breaches of his duties to act in the best interests of the Company, to promote the success of the Company, to exercise reasonable care and skill, to avoid conflicts of interest and to maintain good records.

89. I agree with Mr Beaumont that the particulars provided do not explain how, in relation to the New Allegations, the Petitioner was in breach of his duty under CA section 175(1) and on their face have nothing to do with any failure to maintain good records, and that what has been included in the Part 18 Reply is incoherent. I will therefore strike out paragraphs 5(j)(iv) and 5(j)(v) insofar as they relate to the New Allegations. I would add

that had I not reached the conclusion that the Old Allegations should be struck out, I would have struck out the allegations of the breaches of duty in 5(j)(ii), 5(j)(iv) and 5(j)(v) in that the particulars provided do not show how the Petitioner is alleged to have been in breach of these duties in relation to the Old Allegations and they are incoherent.

### **Conclusions**

90. For the reasons set out above, I will order that the Old Allegations set out in paragraphs 5(c), 5(h), 5(i)(i), 5(i)(ii), 5(iii), 5(j), 10(c) and 11(b) and 12 (insofar as they relate to the Old Allegations) be struck out. I will also order that the breaches of duty in paragraphs 5(j)(iv) and 5(j)(v) and paragraph 5(j)(ii) insofar as it relates to the Old Allegations be struck out.

91. I will also order that there be summary judgment on the Justification Issue in favour of the Petitioner.

92. I would also take this opportunity to thank counsel for their helpful submissions.