Neutral Citation Number: [2023] EWHC 65 (Ch)

Case No: CR-2022-MAN-001110

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

Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

18 January 2023

Before :

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

- -

Between :

ZEDRA TRUST COMPANY (JERSEY) LIMITED	**Petitioner**
- and -	
THG PLC and others	**Respondents**

- -
- -

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

Hearing date: 16 December 2022

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10:00am on Wednesday 18 January 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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MR JUSTICE FANCOURT

Mr Justice Fancourt :

Introduction

1. On 7 January 2019, the petitioner ("Zedra") issued a petition under section 994 of the Companies Act 2006 claiming various forms of relief against the respondent company, by its former name of The Hut Group Limited ("the Company"), and its directors for having conducted the affairs of the Company in a manner alleged to be unfairly prejudicial to the interests of Zedra.

2. Following its acquisition of shares in the Company, as at 4 October 2011 Zedra held 13.2% of the issued share capital and 13.37% of the Company's voting rights. By the date of issue of the petition in 2019, Zedra complains that its holding had reduced to 8.34% of the issued share capital and 9.63% of the voting rights.

3. In 2020, the Company underwent an IPO and its share capital was restructured for that purpose. At about that time, Zedra sold the majority of its holding for £5 per share. It has subsequently modestly increased its holding by purchasing further shares.

4. Following the exchange of statements of case, the original respondents to the Petition applied by notice dated 14 June 2019 to strike out the petition, in whole or in part, and in the alternative for permission to serve a Rejoinder to Zedra's Points of Reply.

5. By order dated 10 February 2020, HHJ Eyre QC (as he then was) dismissed the strike out application and gave permission for the Rejoinder.

6. The original respondents to the Petition appealed to the Court of Appeal, which handed down its judgment on 15 June 2021. It allowed the Company's appeal in part. David Richards LJ, who gave the only reasoned judgment, identified that the allegations of unfair prejudice in the petition fell under essentially 3 heads: the removal and variation of Zedra's "co-sale rights" in relation to its shares; the reduction in the relative size of Zedra's shareholdings; and a failure by the Company to provide information to Zedra in accordance with the terms of a shareholder agreement ("the Information Allegation").

7. The first three grounds of appeal concerned relief sought by Zedra to vary the Articles of the Company and for the issue of new shares to Zedra. Those grounds were all dismissed. The next two grounds concerned the claim for equitable compensation to be paid by certain directors of the Company to the Company itself, or alternatively to Zedra, for breaches of the Articles, the shareholder agreement and/or fiduciary obligations. The appeal was allowed in part and the relief claimed for payment of compensation to the Company itself was struck out, but the claim for compensation to be paid to Zedra survived for further consideration.

8. The final ground of appeal concerned share allotments between February 2016 and May 2018, which caused the diminution in the relative size of Zedra's holding. Zedra had alleged that these shares were issued by the Company in bad faith and for improper purposes. It was alleged that these share issues were characterised by concealment of the allotments and failure to disclose relevant information to Zedra.

9. David Richards LJ said that the real issue was whether sufficient facts were pleaded from which findings of bad faith and/or improper purpose could be made in relation to

the share issues. He said that it was immediately striking that no challenge was pleaded to the commercial legitimacy of any of the share issues in dispute, nor was there an allegation that the shares were issued at less than full value, or that the Company had no reason for raising fresh capital. There was no reference to the terms or circumstances of the share issues themselves in the petition.

10. His Lordship said, at [76], that in the absence of any challenge to the commercial purpose or the terms of the share issues or the choice of allottees, it was difficult to ascribe bad faith or an improper purpose to the decisions to make the share issues, but he nevertheless proceeded to address the points on which Zedra relied. The third of these was described in [79] as follows:

> "… it is pleaded in paragraph 44.2 that the directors did not offer Zedra the opportunity of participating in the share issues. This would be a crucial allegation – indeed, it would provide an independent basis for seeking relief – if Zedra alleged that it had any right to be offered participation in the share issues. No such allegation is made in the petition. In the points of reply, as I have mentioned, it is pleaded that the directors have the obligation to make a pro rata offer to 'existing preferential shareholders'. Article 3.2 of the articles adopted in May 2011 contained a general provision giving pre-emption rights to the holders of the A shares and the A and B Ordinary Shares in respect of the allotment of any new shares, but it was expressly subject to a number of exceptions, as to which nothing is pleaded by Zedra. This is not a sufficient pleading of a breach of shareholders' rights under the articles."

11. As regards the allegation that the share issues were for the improper purpose of prejudicing Zedra's interests as shareholder, David Richards LJ said that the allegation presupposed that the purpose of the share issues was to prejudice Zedra's interests, but that was the very matter that had to be capable of being established by reference to pleaded facts. There were no sufficient facts to establish the allegation. That conclusion was reached notwithstanding the legitimately pleaded allegations of bad faith relating to co-sale rights and the Information Obligation.

12. The Court of Appeal therefore allowed the appeal against the refusal to strike out the part of the petition that alleged unfairly prejudicial conduct in the making of the identified share issues. David Richards LJ recognised that an application to amend the petition might be made – indeed it had been prefigured in argument before the Court. By paragraph 3 of its Order, the Court of Appeal ordered that the petition in its reduced form be remitted to a High Court Judge for a case management conference at which the future of the petition and any further application by the parties, including any application to amend the petition, could be considered.

The Application to re-amend the Petition

13. After a substantial and inadequately explained delay, Zedra's solicitors finally sent a copy of a draft re-amended petition to the respondents' solicitors on 23 May 2022, almost a year after the Court of Appeal decision. The application before me was issued when there was no substantial response within a reasonable time by the respondents.

14. The re-amended petition (in a more recently drafted version) now advances two main grounds of complaint in addition to the Information Allegation and the allegations of bad faith in relation to the interference with Zedra's co-sale rights:

    i) The first is that Zedra had a right, pursuant to article 3.2, to participate in eight of the ten share allotments previously the subject of complaint. This is advanced on the basis that the Company did not disapply Zedra's rights of pre-emption in accordance with the terms of the Articles ("the First Complaint"). It is pleaded mainly in paragraphs 45D-45J, 45P, 45Q and 45S of the draft and includes an allegation of bad faith.

    ii) The second is that Zedra was wrongly excluded from a bonus share issue on 11 July 2016, despite owning shares in the same class and with the same dividend rights as the shareholders who did benefit: paragraphs 45K-45O, 45P, 45R and 45S ("the Second Complaint"). It too includes an allegation of bad faith.

15. The application for permission to amend was supported by a short witness statement of Thomas James Charnley, setting out the circumstances in which it was made and summarising the proposed amendments.

16. On 16 September 2022, the respondents' solicitors enclosed "by way of voluntary disclosure" the key documents that the respondents would rely upon, at the hearing of the application, in support of paragraph 4 of its Rejoinder. Those documents ("the Rejoinder Disclosure") were said to demonstrate that the asserted inference that the pre-emption rights of Zedra were not validly disapplied was wrong, and that the First Complaint had no real prospect of success and was bound to fail.

17. On 23 November 2022, the respondents served their evidence in response in the form of a witness statement of Thomas William Peter Cox. It contends that there is no proper factual basis for the First Complaint, referring in particular to the terms of the Rejoinder that had been served pursuant to Judge Eyre QC's Order. Mr Cox's witness statement said that the Rejoinder Disclosure "destroys" the inference that Zedra seeks to draw that the Company failed to disapply its pre-emption rights. Mr Cox exhibited a table summarising the Company's case in relation to the share allotments in dispute.

18. In relation to the Second Complaint, Mr Cox reluctantly accepted that there is a sufficient factual basis pleaded but indicated that the respondents would argue that permission to amend should not be granted because the complaint is arguably time-barred.

19. There was a short further witness statement on behalf of Zedra dated 7 December 2022, made by Lyndsey Jayne Crowder-Barton. This conceded that the share allotments dated 31 May 2017 and 19 July 2017 were valid but affirmed Zedra's case in relation to the other eight share allotments comprised in the First Complaint.

20. On 14 December 2022, two days before the hearing, the respondents issued an application seeking permission to rely upon a further witness statement made by James Anthony William Brown on 13 December 2022. This witness statement is mainly argumentative but exhibits (and provides to Zedra for the first time) copies of board minutes relating to four of the eight share allotments. This, together with filings from Companies House provided by the respondents on 12 December 2022, will be referred

to as "the Late Disclosure". The four allotments were those in relation to which, in Mr Cox's schedule, the abbreviation "N/A" was entered in the "Document Relied Upon" column.

21. Mr Chaisty KC who appeared with Mr McPherson on behalf of Zedra did not oppose the application for permission to rely on Mr Brown's statement but asked the Court to draw adverse inferences from the very late production of the Late Disclosure.

The First Complaint

22. It is common ground that the question of whether permission to amend should be granted or refused in relation to the First Complaint depends on the validity of the case pleaded in the paragraphs of the draft identified in para 14(i) above. If no proper basis of claim is disclosed by those paragraphs, all the other intended amendments (except for those relating to the Second Complaint) fall away.

23. The draft of the re-amended petition has undergone a number of changes. The first version was annexed to the application notice. Following the Rejoinder Disclosure, a further version was exhibited to Ms Crowder-Barton's witness statement on 7 December 2022, varying the content of paras 45G, 45H, 45I, 45J and 47B in particular. In light of the Late Disclosure, a further version of the re-amended petition was provided shortly before the hearing took place. This includes a considerably expanded version of para 45G, headed "Rider", pleading the inadequacy of the respondents' disclosure, what is said to be lacking in terms of documentary proof of the validity of the share allotments, and a non-admission of the authenticity of the board minutes and other documents in the Late Disclosure pending disclosure of their metadata.

24. The principally important part of the draft re-amended petition on this application is the following:

> "45E. During the period 1 February 2016 to 31 May 2018 the Company's directors did not provide to Zedra prior to allotting shares (a) details of the proposed share allotments (b) the proposed grounds for disapplying the Pre-Emption Rights set out in paragraph 21D above or (c) any documentary evidence in support of such grounds. The Company's directors during this period included individual shareholders or nominees of corporate shareholders who (i) comprised the Fundamental Shareholder Majority or Special Shareholder Majority (as applicable) at the time of one or more of the relevant Share Allotments and/or (ii) were issued shares pursuant to one or more of the relevant Share Allotments.
>
> 45F. By paragraph 4 of a Rejoinder dated 17 February 2020, the Respondents alleged that the Pre-Emption Rights had been disapplied in relation to the 10 Share Issues by virtue of the following provisions:
>
> 45F.1. Article 3.7 Exception (19 February 2016; 31 May 2017; 19 July 2017; 22 February 2018; 29 March 2018; 19 April 2018; 30 May 2018);
> 45F.2. FSM Exception (3 May 2016); and
> 45F.3. SSM Exception (11 July 2016; 5 September 2017).
>
> 45G. In breach of paragraph 5.1 of Practice Direction 51U the Respondents did not provide any Initial Disclosure in support of paragraph 4 of the

Rejoinder at the time of serving the Rejoinder.... [this paragraph then continues, in its latest version, with a very extensive "Rider", which in view of its length is set out as a schedule to this judgment. The Rider contains positive averments that the 3 May 2016 and 11 July 2016 share allotments did not disapply Zedra's pre-emption rights.]

45H. By reason of the matters set out at paragraphs 45E to 45G above, Zedra infers that in respect of the Relevant Share Allotments the Pre-Emption Rights were not properly disapplied. Accordingly, in respect of each such Share Allotment, the directors were obliged to make Initial and Further Pre-Emption Offers to Zedra in respect of the shares corresponding to Zedra's entitlement under paragraph 21D above.

45I. Further, in breach of Article 3.2, the Company's directors failed to make to Zedra Initial or Further Pre-Emption Offers in respect of any of the Relevant Share Allotments in accordance with the procedure set out at paragraph 21D above. In the premises, Zedra was denied the opportunity to exercise the Pre-Emption Rights in respect of any of the Relevant Share Allotments such that its shareholding in the Company was unfairly diluted.

45J. Further or alternatively, in breach of (1) the Allotment Duty set out at paragraph 21L.1 above and/or (2) the Information Obligation set out at paragraph 21M.1 above, the Company's directors failed to prepare and deliver to Zedra information and documentation (including copies of relevant board minutes pursuant to clause 4.2.2 of the SHA) in relation to the Relevant Share Allotments as set out at paragraph 45G above, so that Zedra was unfairly precluded from participating in the Relevant Share Allotments and/or monitoring the value of its shareholding in the Company as a result thereof.

……

45P. Pending disclosure, Zedra infers from the following matters that in taking the actions set out at paragraphs 45E, 45H, 45I, 45J and 45N above during the period February 2016 to May 2018 the Company's directors acted in bad faith and or for improper purposes in order to prejudice Zedra's interests as a minority shareholder …. [the matters specified are: the breakdown of the board's relationship with the settlor of the trust of which Zedra is the trustee; failure to reinstate Zedra's co-sale rights promptly, when notified; preferring the interests of other shareholders over Zedra in connection with co-sale rights and conversion of shares; and matters relating to the settlor's and another person's cancelled membership of a country club acquired by the Company in July 2016.]

……

45S. In the premises, Zedra has suffered loss and damage in the amount of the additional Ordinary Shares which Zedra would have acquired and sold pursuant to the IPO on 20 September 2020 at £5 per share as set out at paragraphs 45Q and 45R above."

25. The substantial relief claimed in the re-amended petition is:

> "(1) A declaration that the Information Obligation set out at paragraph 21M.1 is valid and binding on the Company and its directors and shareholders.
>
> …….
>
> (5) Further or alternatively, an order that the directors of the Company involved in the breaches of duty pleaded at paragraphs 45I, 45J, 45N and 45P above pay equitable compensation to Zedra for such breaches in respect of the losses pleaded at paragraph 45S above.
>
> ….
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> (7) Further or alternatively, an order that the Company pay damages to Zedra in respect of any losses caused as a result of the breaches of the Information Obligation set out at paragraph 47C above.
>
> (8) Further or alternatively, an order that the Director Shareholders pay damages to Zedra in respect of any losses caused as a result of their breaches of the Information Obligation set out in paragraph 47C above."

It can therefore be seen that, unlike the relief sought in relation to breaches of the Information Obligation in paras (1), (7) and (8), the relief claimed for the First and Second Complaints is against the directors of the Company generally, not against the Company itself or against only the Director Shareholders (who were parties to the shareholder agreement). The only relief sought against the directors is monetary compensation.

26. The Rejoinder filed by the respondents pleaded that the directors were not obliged to offer Zedra the opportunity to participate in the share issues in dispute, and that article 3.2 did not apply for these reasons:

> "(1) The 19 February 2016 share issue, article 3.2 was disapplied by operation of article 3.7.2(b)
>
> (2) The 3 May 2016 share issue, article 3.2 was disapplied by the written consent of a fundamental shareholder majority;
>
> (3) The 11 July 2016 share issue, article 3.2 was disapplied by the written consent of a special shareholder majority;
>
> (4) The 30 March 2017 share issue, article 3.2 was disapplied by virtue of article 3.7.2;
>
> (5) The 31 May 2017 and 19 July 2017 share issues, article 3.2 was disapplied by operation of article 3.7.3: the board, with the consent of the investor majority, allotted the relevant shares subject to article 3.7.3(a) and (b);
>
> (6) The 5 September 2017 share issue, article 3.2 was disapplied by the written consent of a special shareholder majority;

(7) The 22 February 2018 and 29 March 2018 share issues, article 3.2 was disapplied by operation of article 3.7.3;

(8) The share issues between 19 April and 30 May 2018, article 3.2 was disapplied by virtue of article 3.7.2."

27. The Articles of Association of the Company provided, in substance (though there were five different sets of Articles that were adopted during the period in issue), that (article 3.1) the directors of the Company were authorised to allot securities up to a maximum nominal value of £1,000,000, but that (article 3.2) subject to the other articles and to any specified majority determination (either a "Fundamental Shareholder Majority" or a "Special Shareholder Majority", as defined) any relevant securities allotted by the directors had to be offered first to various classes of shareholder (including at all times the classes of shares held by Zedra) in proportion to their existing aggregate holdings.

28. The pre-emption rights in article 3.2 did not apply in specified cases (article 3.7), which varied over time but broadly included: shares issued pursuant to share incentive arrangements or specified share ownership schemes; and securities issued with board approval in any calendar year up to a specified aggregate nominal value, if further provisos were satisfied. These provisos were that the subscription price would be such as to imply a value of a minimum stated amount for other issued shares, and that the new shares would not rank ahead of the A and B Ordinary Shares on a return of capital.

29. What is different about the newly pleaded case is that the wrongs alleged do not depend on the allegation of bad faith or improper purpose, as the previous allegations did. Zedra relies in the first instance on contractual rights under the articles. But there is then pleaded an inference that the wrongdoing was done in bad faith on the part of the directors. That inference is said to arise from the matters specified in para 45P, including the treatment of Zedra in relation to its co-sale rights and the preferential treatment of other shareholders. With only two exceptions, Zedra's case for relief depends on inference, both as to invalid disapplication of its pre-emption rights and as to the allotments having been made in bad faith or for an improper purpose.

30. Mr Ashworth KC on behalf of the respondents submitted that, for there to be a credible claim to relief under s.994 against the directors of the Company, as pleaded, Zedra has to allege and prove bad faith or improper purpose. Otherwise, there is no more than a breach of contract claim against the Company (and possibly the Director Shareholders, under the terms of the shareholder agreement). So far as improper purpose is concerned, Mr Ashworth emphasised that, as when the matter was before the Court of Appeal, there is no allegation of improper purpose for the remaining disputed share issues, which raised over £260,000,000 in capital for the Company. So far as relief against the directors personally is concerned, everything therefore depends on the allegation of bad faith. The real complaint is that Zedra was deliberately and wrongly excluded from the opportunity to join other investors in subscribing for further shares.

Applicable Principles for Permission to Amend

31. There was no dispute about the relevant test to apply when deciding whether permission should be granted to amend a statement of case to plead a new or different case where (despite the time since the issue of the petition) the application was not made late. The pleaded case must disclose a case that is more than merely arguable and that has a real (as opposed to a fanciful) prospect of success. In that sense, it must be properly arguable, not just pleadable.

32. In Elite Property Holdings Ltd v Barclays Bank plc [2019] EWCA Civ 204, Asplin LJ, giving the lead judgment with which the other members of the court agreed, said at [40] – [42]:

> "There was no dispute about the test to be applied in the circumstances of this case. The dispute was whether the Judge had applied it properly or whether he had fallen into error by conducting a mini trial. In any event, it is important to bear in mind that the overriding objective applies and the question of whether permission to amend should be given must be considered in the light of the need to conduct litigation fairly and justly and at proportionate cost.
>
> For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the claimant has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No.3)* [2003] 2 AC 1.
>
> The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon."

33. In avoiding conducting a mini-trial, there is therefore an important distinction to be drawn between, on the one hand, facts alleged that are unsupported, implausible, or incoherent or a case that is inadequately particularised, which can be rejected summarily, and, on the other hand, facts for which there is some credible support and which therefore establish at least a prima facie case.

34. The question was considered further in Kawasaki Kishen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33. In that case, there was both a question of whether permission had properly been granted to serve out of the jurisdiction and an application

to amend the points of claim. Popplewell LJ, with whom Henderson and David Richards LJJ agreed, said at [16] – [18]

> "It was common ground that on an application to serve a claim on a defendant out of the jurisdiction, a claimant needs to establish a serious issue to be tried, which means a case which has a real as opposed to a fanciful prospect of success, the same test as applies to applications for summary judgment: *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* ...
>
> The court will apply the same test when considering an application to amend a statement of case, and will also refuse permission to amend to raise a case which does not have a real prospect of success.
>
> In both these contexts:
>
> (1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at paragraph 8; *Global Asset Capital Inc v Aabar Block Sarl* [2017] EWCA Civ 37; [2017] 4 WLR 163 at paragraph 27(1).
>
> (2) The pleading must be coherent and properly particularised: *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 at paragraph 42.
>
> (3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: *Elite Property* at paragraph 41."

35. The reference by Popplewell LJ to evidential support for the case should not be taken as implying that what needs to be pleaded in the amendment is evidence rather than the material facts. It is rather a recognition that, on an application for permission to amend to add a new or varied claim, it is not sufficient merely to advance a pleading containing alleged facts. At that stage, as with an application to strike out, the court requires to be satisfied by some evidence in support of (or opposing) the application that there is a sufficient foundation for what is alleged in the pleading. Otherwise, the permitted amended pleading could immediately be met with an application to strike it out as being unrealistic and fanciful.

Application to the Facts of this Case

36. In its original petition, Zedra would have been entitled to plead the principal provision in article 3.2, asserting that it had an equal right to be allotted new securities but was wrongly excluded because none of the exceptions in that article or other articles applied. It would then have been for the respondents to plead (as they did in the Rejoinder) that a particular exception or exclusion did apply, setting out the material facts relied upon. To obtain relief against the directors, Zedra would also have needed

to plead deliberate wrongdoing by them. In its original petition, however, Zedra had not even pleaded that it had a right to participate and the contractual basis of its right.

37. On an application to amend to plead a contractual entitlement, after the Rejoinder had already been served, a mere assertion of the basic contractual right will not suffice to pass the merits test. It is necessary for Zedra to put forward some evidence to establish a sufficiently arguable case on the facts that the respondents were wrong in alleging, as they did in the Rejoinder, that its rights under article 3.2 were disapplied in respect of every share allotment. It also needs to establish a factual basis for a credible inference of deliberate wrongdoing on the part of the directors.

38. At the outset, when the draft re-amended petition was sent to the respondents' solicitors, Zedra relied on inference in support of its pleaded case. Para 45H, by reference to para 45E, relies on the fact that Zedra was not given notice of the share allotments or told in advance the grounds for disapplying the pre-emption provisions "or [given] any documentary evidence in support of such grounds". This is principally an allegation of breach of the Information Obligation. Para 45G also relied on the fact that no initial disclosure was given with the Rejoinder. There was still no evidence to support the allegations of bad faith and improper purposes relating to the share allotments, though para 45P pleads other facts from which bad faith is said to be inferred, in particular the allegations of breaches of Zedra's co-sale rights. However, this approach adds little if anything to the other arguable allegations that the Court of Appeal held did not establish a case of bad faith in relation to the share allotments.

39. By the date of the hearing, however, the position had significantly changed owing to the Rejoinder Disclosure, the evidence of Mr Cox and the Late Disclosure. Zedra's case now depends on alleged gaps or inconsistencies in the evidence provided by the respondents and inferences to be drawn from that and from the lateness of the disclosure.

40. There are two questions that I must decide. First, on the basis of the evidence before me at the hearing, is there a properly arguable case that Zedra's pre-emption rights were not validly disapplied in relation to any of the eight share allotments? It is not appropriate to conduct a mini-trial and decide the issues raised on what may well be an incomplete selection of documentary evidence, and without oral evidence to explain what happened. The right approach is to see whether there is sufficient evidential support for Zedra's case, either direct support or inferential support, such that the allegations have a degree of substance and conviction about them. Second, if so, is there a properly arguable case that the breaches alleged were not simply inadvertent or even negligent but the result of deliberate acts in bad faith by the directors of the Company, such as to justify the grant against them of the only relief claimed.

(1) Invalidity

41. Each side prepared an updated schedule addressing the eight disputed share allotments. These addressed, variously: the version of the Articles that applied at each relevant time; the basis on which Zedra's article 3.2 right was said to have been disapplied; the number of shares allotted and the price paid; documents relied upon by the respondents, and points relied upon by Zedra.

42. I address below each of the remaining disputed share allotments in turn, by reference to the issues that appear to arise and the evidence, such as it is at this time.

19 February 2016

43. It is common ground that the relevant Articles are the 19 February 2016 version and that the question is whether Zedra's pre-emption rights were disapplied under article 3.7.2(b), namely that the shares were to be issued pursuant to the 2016 Growth Share Scheme ("the Scheme"), where the aggregate nominal value of Scheme shares does not exceed £350,646.

44. The evidence appears to show that Zedra was sent the proposal to establish a new employee incentive scheme and empower the directors to issue D ordinary shares up to a maximum value of £350,646 and that this resolution was passed on 19 February 2016 and filed at Companies House ("CH") subsequently. There is a copy of an SH01 return of allotment filed at CH proving that 350,646 D Ordinary shares in the Company were allotted at £1.00 nominal value on 19 February 2016.

45. The Growth Share Scheme is identified in the Articles. There is no evidence before me that these shares were in fact allotted to the Growth Share Scheme though, as Mr Ashworth argued, Zedra obtained by injunction the right in December 2017 to inspect the register of members of the Company, and could have asked for access at any time if it wished to check this matter.

46. The remaining issue therefore appears to be whether the shares were in fact issued pursuant to the identified scheme. Zedra does not plead that they were not or that the D Ordinary shares are owned by anyone else.

3 May 2016

47. Mr Cox's schedule accepted that the 3 May 2016 articles applied to this share allotment, as Zedra contends, but the respondents argue that it is the 19 February 2016 articles that applied. The respondents contend that the written consent of a Fundamental Shareholder Majority was obtained, pursuant to the exception in article 3.2. However, the 3 May 2016 articles require a Special Shareholder Majority to agree to disapply the pre-emption rights. The meanings of these terms are different, as defined in the Articles.

48. The reason for the difference between the parties is that the consent of the majority was obtained before the date of the allotment and adoption of the new articles. At the time when the signed consent was obtained, the earlier version of the Articles applied; however, on the date of allotment of the shares, the later version had been adopted.

49. Documents apparently signed by (and as) the Fundamental Shareholder Majority dated 20 April 2016 are in evidence, by which the 3 majority shareholders at that time determine that the directors can issue 405,630 B Ordinary Shares to a number of institutional and individual investors, including Blackrock and Trufidee, who only became shareholders pursuant to this allotment. These signatures were sufficient for a Fundamental Shareholder Majority under the 19 February 2016 articles but not, on the face of it, for a Special Shareholder Majority under the 3 May 2016 articles. There is a

copy of an SH01 return of allotment filed at CH proving that 405,630 shares of £1.00 nominal value were allotted on 3 May 2016.

50. The issue raised is which version of the Articles governs this allotment and whether, if the 3 May 2016 articles applied, a Special Shareholder Majority as defined in them was obtained. Zedra pleads that it was not.

51. It is just about arguable, as Zedra contends, that the 3 May 2016 Articles applied to the allotment and issue of shares on that day. If so, the consent of either Blackrock or Trufidee was required. Logically, however, it would seem that consent to allot shares to new shareholders would need to be given by the pre-existing majority shareholders, since Blackrock and Trufidee could not consent as majority shareholders until they had become shareholders. Alternatively, even if the 3 May Articles did strictly apply, since Blackrock and Trufidee were allottees of shares on 3 May 2016 it is artificial and unrealistic to say that they too did not consent. There is no requirement in article 3.2 for consent of the Special Majority Shareholders to be documented or signed.

11 July 2016

52. Mr Cox's schedule accepted that the 11 July 2016 Articles applied to this allotment, as Zedra contends, but the respondents argue that it is the 3 May 2016 Articles that applied. The respondents contend that the written consent of a Fundamental Shareholder Majority was obtained, pursuant to the exception in article 3.2. However, the Rejoinder pleads a Special Shareholder Majority. Both the 3 May 2016 Articles and the 11 July 2016 Articles require a Special Shareholder Majority to agree to disapply the pre-emption rights, and the definitions of these terms appear to be the same in both sets of Articles.

53. The evidence of Mr Cox was that a Fundamental Shareholder Majority was obtained on 30 June 2016. The document purporting to consent to the allotment and issue of 116,756 D Ordinary shares to Matthew John Moulding is signed and dated between 20 June and 30 June on behalf of four major shareholders. This document states that it is signed by the signatories as "together the Fundamental Shareholder Majority and including a Special Shareholder Majority (as those terms are defined in the articles of association of the Company)". Written agreement on behalf of Matthew Moulding was originally absent from the documents disclosed (though he was the allottee of the shares), but this was separately provided by the respondents' solicitors shortly before the hearing. So all five signatories required for a Fundamental Shareholder Majority appear in fact to have consented; only 4 out of the 5 (but always including Mr Moulding) are required for a Special Shareholder Majority.

54. There is a copy of an SH01 return of allotment filed at CH proving that 116,756 D Ordinary shares of £1.00 nominal value were allotted on 11 July 2016.

55. The real issue here is therefore whether the consent of Mr Moulding was given to the allotment of further shares to himself. Zedra pleads that it was not.

30 March 2017

56. It is common ground that the 11 July 2016 articles apply to this allotment. The pre-emption rights are said to have been excluded pursuant to clause 3.7.2, by reason of the

issue being pursuant to "any Incentive Arrangements". Mr Cox identified the arrangement as being the Company's employee scheme, implemented by special resolution dated 21 May 2010. The term "Incentive Arrangements" is defined in the Articles as including the "Share Option Scheme", which is itself defined as being the Hut Group Limited Share Option Scheme adopted on 20 January 2010.

57. This is the first of the allotments where Mr Cox had stated "N/A" in relation to the document relied upon, but in the Late Disclosure minutes of the Company's board meeting on 27 March 2017 were provided. These show that a Mr Boardman was leaving the Company and that he had share options pursuant to the Hut Group Scheme in relation to 3,289 C Ordinary Shares. The board resolved to issue those shares pursuant to article 3.9, noting that no consent of any shareholder was required. Article 3.9 also relates to the allocation of shares pursuant to Incentive Arrangements but it is in fact article 3.7.2 that disapplies the pre-emption rights in article 3.2.

58. There is a copy of an SH01 return of allotment filed at CH proving that a total of 3,289 C Ordinary Shares were allotted with a nominal value of £1.00 per share on 30 March 2017. There is no evidence before me that the shares were in fact issued to Mr Boardman.

59. The real issue in relation to this allotment is whether the shares in question were in fact issued pursuant to an Incentive Arrangement, as defined. Zedra does not plead that they were not.

5 September 2017

60. Mr Cox's schedule states that the 11 July 2016 articles apply to this allotment, as the respondents contend, but Zedra contends that the 5 September 2017 Articles apply. The respondents contend that a Special Shareholder Majority disapplied the pre-emption rights under article 3.2, but Mr Cox's schedule suggested that it was article 3.7.2 that applied, with a Special Shareholder Majority.

61. The Rejoinder Disclosure shows that between 25 and 30 August 2017, five shareholders signed a consent to the allotment of 220,201 B Ordinary shares to Old Mutual funds, and that this was on the basis of disapplying the pre-emption rights under article 3.2, not an allotment under article 3.7.2 pursuant to an Incentive Arrangement. The Late Disclosure includes an SH01 return of allotment filed at CH proving that 220,201 B Ordinary Shares were allotted on 5 September 2017. A point was taken by Zedra in its schedule relating to absence of proof of a power of attorney on behalf of Mr Moulding, but a copy of the power was filed by the respondents shortly before the hearing.

62. Accordingly, the issue here is whether a Special Shareholder Majority was achieved. Zedra does not plead that it was not, but it reserves its position about the genuineness of the power of attorney.

22 February 2018

63. Mr Cox's schedule states that the 16 February 2018 Articles are relevant to this allotment, as Zedra contends, but the respondents argue that the 5 September 2017 Articles apply. The pre-emption rights are alleged to have been disapplied pursuant to

article 3.7.3(a), which is the article that permits the board to issue securities up to a specified nominal value subject to certain value and ranking provisos. There is no difference between the wording of article 3.7.3 in the two sets of Articles relied upon.

64. For this allotment Mr Cox had stated that documents were "N/A", but in the Late Disclosure the respondents produced in evidence a board minute dated 8 February 2018 by which the board resolved to allot 69,729 B Ordinary shares to Old Mutual funds at a premium of £544.49 per share over the nominal value of £1.00.

65. There is a copy of an SH01 return of allotment filed at CH proving that 69,729 B Ordinary Shares were allotted at an amount of £545.49 each. That figure is significantly ahead of the proviso minimum value of £454.13 per B Ordinary Share, and as Ordinary Shares it is asserted that they will not rank ahead of the other ordinary shares on a return of capital.

66. It is hard to see what issue remains in relation to this allotment, particularly given that two similar allotments under article 3.7.3 made on 31 May 2017 and 19 July 2017 are now agreed by Zedra to be valid, without any valuation evidence having been provided. No basis of invalidity is pleaded by Zedra but it complains about failure to provide the board minute now relied upon at the time or sooner.

29 March 2018

67. This is a further allotment of the same kind as the 22 February 2018 allotment raising the same issue. There is no dispute that the 16 February 2018 Articles apply on this occasion.

68. In the Late Disclosure, the respondents put in evidence minutes of a board meeting of the Company on 19 March 2018, at which it was resolved to allot and issue 73,329 B Ordinary shares to Sofina Capital S.A. at a price of £545.49 per share and resolved that the pre-emption rights did not apply pursuant to article 3.7.3.

69. There is a copy of an SH01 return of allotment filed at CH proving that 73,329 B Ordinary shares of £1.00 nominal value were allotted on 29 March 2018 at a premium of £544.49 above a nominal value of £1.00.

70. Again, it is hard to see what issue remains. Zedra has no pleaded basis of invalidity. Its proposed re-amendment relies on failure to provide the board minutes now relied upon at the time or sooner.

19 April to 30 May 2018

71. It is common ground that the 16 February 2018 Articles apply to this allotment, where the disapplication of rights of pre-emption is said to be pursuant to article 3.7.2.

72. The term "Incentive Arrangements" is defined in the Articles to include the "2017 E Ordinary Share Issue", which in turn is defined as the issue of E Ordinary Shares on, around or from the Adoption Date (16 February 2018). In Late Disclosure, there are board minutes for 2 meetings on 19 April 2018 considering the separate allotment and issue of 10,189 E ordinary shares and a further 4,997 such shares of £1.00 each. The board resolved to approve the allotment of E Ordinary Shares to the employees identified in the appendices to the minutes, on the basis that article 3.7.2 applied,

subject to receipt of signed agreements from each employee to whom shares were allotted.

73. There is a copy of an SH01 return of allotment filed at CH proving that 15,186 E Ordinary shares were allotted between 19 April and 30 May 2018. There is no evidence before me of the issue and registration of particular employees as owners of the shares.

74. The only issue here appears to be about the absence of other documents relating to the particular scheme and the late provision of the board minutes.

Analysis

75. The evidence shows that very substantial allotments of shares in the Company took place, principally to large investors at substantial premiums, raising over £250,000,000 of capital for the Company. There were also two instances of allotments to employee incentive schemes, in smaller numbers and values, and one case of an allotment under such a scheme to a leaver who exercised share options.

76. Zedra's main argument against the volume of evidence belatedly filed by the respondents is that to engage with the detail of the evidence and attempt to answer the question of whether the pre-emption rights were validly disapplied would be wrongly to engage in a mini-trial, with incomplete evidence and an asymmetry of relevant information between the parties. Mr Cox's evidence has been shown to be inaccurate in a number of respects, though the basis of the disapplication stated in the Rejoinder remains that on which the respondents rely. Mr Chaisty said that it was unsatisfactory that Mr Cox should assert, on the basis of a conscientiously prepared analysis, that the Rejoinder Disclosure conclusively answered the allegations about invalid disapplication (which they do not) and that documents were irrelevant in four of the ten cases, only later for further documents to be "drip fed" as evidence by the respondents. That continued up until the day before the hearing, when documents purporting to be a missing signed consent and power of attorney for Mr Moulding were provided.

77. Zedra also contends that it does not have the complete picture because there are other documents referred to in the documents lately put in evidence by the respondents that have not been seen, such as those relating to the employee benefit schemes or, where material, those showing to whom the allotted shares were actually issued. As regards the allotments said to be valid pursuant to article 3.7.3, it is said that there is no valuation to support the satisfaction of proviso (a) (which however was also the case in the two allotments that Zedra does now accept to have been validly made).

78. In answer to Mr Ashworth's detailed submissions based on the Rejoinder Disclosure and the Late Disclosure, Mr Chaisty accepted that the relevant question was whether there was demonstrated to be sufficient substance to the factual allegations made in First Complaint. He maintained that Zedra was entitled to see the metadata of the documents lately disclosed before accepting them at face value. He relied on the dubious behaviour of the Company in preventing Zedra for months from having access to the register of members of the Company; the interference with Zedra's rights under the Information Obligation; and the drip feeding of documents rather than proper provision of relevant documents at an early stage. All of that, he submitted, should be considered in the light of the allegations of bad faith which, in view of the Court of Appeal's conclusion, do justifiably remain in the petition.

79. In the final analysis, with two exceptions Zedra does not have a positive case in connection with the disapplication of its pre-emption rights. In the other six cases, the matter rests on inference only, said to arise from alleged breaches of the Information Obligation, the self-interest of certain directors in relation to share issues, the reluctance of the Company to provide relevant documents, and gaps in the documentary evidence.

80. As for the two positively pleaded allegations about the allotments of 3 May 2016 and 11 July 2016, Zedra contends that its pre-emption rights were not validly disapplied. Its case is that for both allotments a Fundamental Shareholder Majority is relied upon, whereas a Special Shareholder Majority was required under the Articles; and that, for the 11 July 2016 allotment, the authenticity of Mr Moulding's apparent consent (in a document provided the day before the hearing) is not admitted (para 45G(2)(ii), (iii)).

81. In the case of the 3 May 2016 allotment, there is no reason advanced why a Special Shareholder Majority was not in fact achieved, if required, given that Blackrock and Trufidee were allottees and only became shareholders as a consequence of the allotment and issue of those shares.

82. In the case of the 11 July 2016 allotment, the signed consent is expressed to be as both a Fundamental Shareholder Majority and a Special Shareholder Majority, the latter being slightly less onerous in its requirements. There is no realistic case that Mr Moulding (the allottee) did not consent to this allotment, only a Micawberish hope that the metadata of the signed consent might reveal something that helps Zedra to construct an argument.

83. As for the six cases in which an adverse inference is relied upon, Zedra's case does not appear to have any substantial foundation. In principle, if Zedra were to prove a technical failure for any given share allotment then it will be entitled to rely on it as being an invalid disapplication of its pre-emption rights. However, there is no evidence to support the case of invalidity. By reason of the proposed Rider to paragraph 45G, reflecting the Late Disclosure, the inference of improper disapplication of Zedra's rights has become an argument that the belatedly disclosed documents are insufficient to prove beyond argument that its rights have been correctly disapplied. However, this is not a summary judgment application by the respondents. The burden lies on Zedra, on its application, to satisfy the court that there is real substance in the allegations of invalidity that it seeks to make.

84. As Mr Ashworth said in argument, it is inherently implausible that, with large fundraising share issues to institutional investors, the Company and the investors would fail to address correctly the exclusion of pre-emption rights. There may be some more room for doubt where internal share incentive schemes are concerned.

85. I have nevertheless reached the conclusion that there is no sufficiently substantial case in relation to any of the eight share allotments. In two cases, there is just about a realistic argument that the respondents are relying on the wrong version of the Articles (though the respondents' case on this is more logical); but there is no realistic case that the consent of a necessary Special Shareholder Majority was not in fact obtained in those cases. It matters not if the signatories thought they were consenting as a Fundamental Shareholder Majority if in fact their agreement made up a Special Shareholder Majority. The argument that Blackrock and Trufidee did not in fact consent, if their consent was required, is hopeless. No proper basis is pleaded for an

inference that Mr Moulding did not in fact consent to the allotments at the time, and there is no basis for suggesting (which Mr Chaisty was careful not to say) that the Company has created a false document intended to mislead the court.

86. In the other six cases, where Zedra relies on inference, given the documents that have been put in evidence there is no scope to *infer* a failure to disapply the pre-emption provisions. All the evidence before the court suggests that there was an intention to comply with these requirements of the Articles, even if there may be other documents relating to the share allotments that have not yet been disclosed. The mere existence of undisclosed documents that relate to the share issues (such as the register of members, notifications of allotment, and the terms of the incentive schemes) does not give rise to an inference that the allotments were ineffective to disapply Zedra's pre-emption rights.

87. The facts, if proved, that the directors wrongly did not provide information to Zedra, acted to prefer other shareholders when varying the conversion and co-sale rights attached to shares, or wrongly excluded Zedra from a small bonus issue (the Second Complaint), do not lead even arguably to the conclusion that the pre-emption rights were not in fact validly disapplied. That is principally because the Articles, in their successive versions, did entitle the Company to issue shares without triggering pre-emption rights. The only credible inference from the evidence is that the directors were seeking to comply with the requirements of the Articles in that regard and did so.

88. The fact that there are properly pleadable allegations of wrongdoing in other respects does not enable Zedra to *infer* a failure to comply with the terms of articles that entitled the Company to allot the shares in the way that it sought to do. There is insufficient evidence to support the inference of invalidity that is pleaded in the draft re-amended petition.

(2) Bad faith

89. Even if there were a realistic prospect of establishing non-compliance with the requirements of the Articles, such that Zedra's rights were not validly disapplied in relation to one or more allotments, this would give rise to a claim for damages for breach of contract against the Company and possibly the Director Shareholders. To obtain the relief sought in the draft re-amended petition against all the directors, Zedra would need to show that the directors' powers were exercised for an improper purpose and/or in bad faith, in breach of duty, and not merely that there had been a technical failure (however negligent) to bring the share allotments within one or other exclusion.

90. The difficulty for Zedra is that the Articles did at all times entitle the Company to allot shares in the ways that it sought to do without triggering Zedra's pre-emption rights. In alleging breach of duty and bad faith against the directors, Zedra must therefore be alleging that the directors either did not know what the Articles gave them power to do, or alternatively believed that the Company could not legitimately allot or was not lawfully allotting the shares pursuant to those powers, so that it was necessary to "cheat" Zedra out of its rights rather than allot shares in accordance with the Articles. Understandably, no such allegation is expressly pleaded: there is no foundation for it.

91. The directors' answer to such allegation, if made, would self-evidently be that they were entitled to allot the shares, even if there was a technical failure to comply with the requirements of the Articles. Any suggestion that the directors deliberately did not comply with the terms of the Articles in this regard would be nonsensical, given that there is no argument on behalf of Zedra that the Company *could not* validly have excluded Zedra's pre-emption rights. Nor is it pleaded that exercising the power to allot in the way that the directors did would be an improper exercise of their discretion.

92. In seeking to infer bad faith on the part of the directors, Zedra relies on its case of invalidity and on other matters that, it says, evidence bad faith. The Court of Appeal was willing to accept that the co-sale right allegations raised a properly arguable case of unfairly prejudicial conduct and did not strike them out (despite its conclusion that no relief would now be granted in relation to the prejudice alleged). It recognised that they might be relevant to the question of whether the directors acted in bad faith in relation to other matters of legitimate complaint. Similarly, the alleged breaches of the Information Obligation still stand in the petition, and the respondents accept that the Second Complaint is properly pleadable. There is therefore a case of bad faith on other matters to be answered.

93. The inference of bad faith based on the self-interest of some of the directors is undermined by the fact that the investors paid in aggregate nearly £265 million for the eight disputed share allotments, and there is no allegation that the allocations lacked commercial purpose or that the shares allotted were under-priced. The lack of information and disclosure may have been a point at the stage when the Rejoinder was first served, following the order of Judge Eyre QC in February 2020 (though Zedra never complained of lack of disclosure until May 2022), but it has largely been overtaken by the Rejoinder Disclosure and Late Disclosure.

94. Despite the arguable allegations of bad faith that remain in the petition on other matters, it is impossible to identify a realistic prospect of establishing that the board of directors acted in bad faith in relation to the eight share allotments. The case that Zedra now pursues is, in reality, one of failure to satisfy conditions to exclude its pre-emption rights, not one of concealment of allotments that breached those rights.

95. The board's right to allot and issue shares was exercised (in five cases) to obtain very substantial further capital for the Company and (in three other cases) to reward employees. The Company was entitled to allot and issue shares for those purposes. There is no credible case that they were exercised for an improper purpose or in order to damage the interests of Zedra.

96. In those circumstances, even if Zedra could establish a breach of its pre-emption rights in relation to one or more of the eight share allotments in dispute, it could not succeed in obtaining orders that all the directors of the Company pay equitable compensation for culpable breaches of duty, as claimed, as distinct from damages from the Company or from the Director Shareholders for breach of contract (which are not claimed).

97. I therefore refuse permission to re-amend the petition to plead the First Complaint.

The Second Complaint: Limitation

98. The respondents reluctantly accept that the Second Complaint, as pleaded, passes the merits threshold for permission to amend. The issues raised by the Second Complaint are:

    i) Whether and if so how Zedra's dividend rights were varied by a combination of amendments to article 17 of the Articles, an ordinary resolution to capitalise profits and an allotment of bonus shares, all on 11 July 2016;

    ii) Whether those events involved a breach by the Company's directors of pleaded Allotment and Capitalisation Duties, as defined.

    The matters complained of therefore occurred on 11 July 2016.

99. However, the respondents say that permission may not be granted to amend the petition to add this complaint because there is an arguable limitation defence, and therefore under s.35(3) of the Limitation Act 1980 the court must leave Zedra to pursue its claim based on the Second Complaint in a new action. That subsection states:

> "Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above [sc. any new claim made in the course of an action other than in or by way of third party proceedings], other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim."

100. The limitation defence is that a claim for equitable compensation for breach of fiduciary duty by the directors in relation to the events of 11 July 2016 is a claim that is subject to a 6-year limitation period, and that Zedra cannot be permitted to outflank that time bar by bringing its claim in the form of a s.994 petition. There is no limitation period directly applicable to a s.994 petition: see Bailey v Cherry Hill Skip Hire Ltd [2022] EWCA Civ 531 at [36], per Andrews LJ, with whom Lewison and Snowden LJJ agreed. It was therefore argued that I either may not or should not give permission to amend.

101. In my judgment, this argument (which is really an argument of abuse of process) cannot be supported. The claim is for breaches of fiduciary duties by all the directors in capitalising profits and allotting shares for an improper purpose and in bad faith (para 45P). These are duties owed by the directors to the Company, not to Zedra. That is why the claim is properly brought as an unfair prejudice petition, a point made by David Richards LJ in dismissing the respondents' appeal in relation to the relief claimed against the directors. It could not be brought as a derivative action because the Company suffered no loss as a result of Zedra's exclusion from the bonus share issue. It could not be brought as a claim for breach of duty by Zedra against the directors because the directors as a body owed their fiduciary duties to the Company, not Zedra. (The claim is not brought against the Shareholder Directors for breach of contract.)

102. Zedra is therefore not avoiding a limitation period that would apply to a claim against the directors. It is properly seeking discretionary relief under s.994 against those

alleged to have conducted the affairs of the Company unfairly prejudicially to Zedra's interests as shareholder.

103. The respondents had a further argument, which was that claims brought in an unfair prejudice petition seeking only compensation against directors for breaches of fiduciary duty are claims for which a limitation period does or should exist in any event. Mr Ashworth suggested that a 6-year limitation period should apply to such a claim, either because it is a claim for money and is recoverable pursuant to statute or because the six-year limitation period in s.21(3) of the 1980 Act should be applied, or applied by analogy, to the petition.

104. The main hurdle facing Mr Ashworth's argument is in the form of the decision of the Court of Appeal in the Cherry Hill Skip Hire case, on which Mr Chaisty relies. At [36], Andrews LJ stated that no limitation period applies to a s.994 petition:

> "There is no statutory period of limitation applicable to unfair prejudice petitions. It was common ground before us that where there has been delay in the issue of a petition under s.994, the correct approach is that which was adopted by Fancourt J in *Re Edwardian Group Ltd, Estera Trust (Jersey) Ltd and another v Singh and others* [2018] EWHC 1715 (Ch), [2019] 1 BCLC 171 at [571]:
>
> > " … the right approach is to consider how the delay in question should affect the exercise of the court's discretion under section 996 to make such order as it thinks fit. There is no statutory time limit for issuing a petition, nor does the equitable doctrine of laches strictly apply where the relief sought is not equitable relief. However, unjustified delay resulting in prejudice or an irretrievable change of position (the essential ingredients of a defence of laches) are likely to be significant factors in the exercise of the court's discretion to grant or refuse a particular remedy. So too is any evidence that the Petitioners have previously acquiesced in the state of affairs of which they now complain, which is the basis of a number of the authorities to which I was referred. *If, in view of the delay and the reasons for the delay, it is unfair or inappropriate in all the circumstances for the Petitioners to obtain the relief that they seek, the Court will exercise its discretion to refuse it."* [Emphasis added].
>
> To similar effect, Peter Gibson J held in *Re DR Chemicals* (1989) 5 BCC 39 that the test was whether the delay "renders it inequitable for [the Petitioner] to be allowed to obtain relief."

105. Mr Ashworth submitted that that approach was uncontroversial before the Court in that case and was therefore not the subject of argument about its correctness. It is also the case that in *Edwardian Group* the relief sought was a buy-out of the petitioner's shares by the company or its principal director, not a claim for equitable compensation. It is nevertheless the case that the statement about the absence of a statutory period of limitation is part of the *ratio* of the decision in that case, which is that the matter was properly to be considered as one of delay or acquiescence, and that whether a passive shareholder is precluded from relief by delay or acquiescence is a question to be considered at trial, not summarily on the basis of the length of the delay, however long

it appears to be. If, on the contrary, there was a statutory period of limitation that applied it is hard to see how the appeal could have been allowed.

106. As Mr Chaisty submitted, a petition is not a claim of right but a petition to the court to intervene and grant relief, in its discretion, against unfairly prejudicial conduct of the affairs of a company. Even where the form of relief prayed by the petitioner is equitable compensation, that is clearly not "an action to recover any sum recoverable by virtue of any enactment" within the meaning of s.9(1) of the 1980 Act. No sum is made recoverable by ss.994-996 of the Companies Act 2006. Indeed, s.996 says nothing about sums by way of compensation.

107. There is more scope for argument that a claim in a petition by a shareholder (beneficiary) against a director (trustee) that is limited to financial compensation is analogous to a claim for breach of trust described by s.21(3) of the 1980 Act. I cannot however see how a limitation period under the 1980 Act can be said to apply to a claim for relief within a s.994 petition, on the basis that it is in substance a claim for compensation for breach of trust to which a statutory limitation period applies, if the claim did not exist in that form. In any event, under ss.994-996 of the 2006 Act, the matter of what if any relief to grant lies in the discretion of the court. That is a matter to be decided at trial and includes considerations of the impact of delay in issuing the petition: see the Cherry Hill Skip Hire case.

108. It seems to me that the scheme for new claims provided by s.35 of the 1980 Act and the rules of court made pursuant to it do not accommodate a claim for relief in an unfair prejudice petition, at least where it could not have been brought in a claim form at all. Unfairly prejudicial conduct is not a cause of action but a matter of complaint, the remedy for which, if proved, lies in the discretion of the court.

109. It is notable in that regard that the rules of court made under s.35 do not accommodate amendments to petitions. Rule 17.4(1)(a) of the Civil Procedure Rules states that rule 17.4 applies where "a party applies to amend his statement of case" – but a petition is not a "statement of case" as defined by rule 2.3(1).

110. For these reasons, there is in my judgment no basis on which to refuse permission to re-amend the petition to add the Second Complaint. The respondents will be free to argue at trial that financial relief should be refused on the grounds of delay in bringing forward the allegations in the Second Complaint and the claim for financial compensation.

ANNEX 1

RIDER TO PARAGRAPH 45G
DRAFT PARTICULARS

45G. In breach of paragraph 5.1 of Practice Direction 51U the Respondents did not provide any Initial Disclosure in support of paragraph 4 of the Rejoinder at the time of serving the Rejoinder. By letter dated 16 September 2022, the Respondents provided to Zedra what it described as the 'key documents' in support of paragraph 4 of the Rejoinder (the "**Rejoinder Disclosure**"). The Rejoinder Disclosure (comprising (1) the Articles in force at the time of the 10 Share Allotments and (2) selected other documents) does

not evidence that the Pre-Emption Rights have been disapplied in relation to 8 of the 10 Share Allotments (the "**Relevant Share Allotments**")(the exceptions being the Allotments on 31 May 2017 and 19 July 2017).

Particulars

(1) In respect of 4 of the 8 Relevant Share Allotments (comprising the 4 allotments made on 30 March 2017, 22 February 2018 and 29 March 2018 and between 19 April – 30 May 2018)[1]:

(i) The only evidence provided in the Rejoinder Disclosure in support of the alleged grounds of disapplication are the Articles stated to be in force at the time of the Allotments. The Articles do not evidence disapplication only the mechanism by which such disapplication may occur. Further, the 'Documents Relied Upon' column in the schedule exhibited to the second witness statement of Thomas Cox dated 23 November 2022 (the "**Cox Schedule**") contains the entry 'n/a' notwithstanding the respondents' position that the Cox Schedule sets out the relevant supporting documents in respect of each of the Relevant Share Allotments.

(ii) As regards the Relevant Share Allotments made (a) on 30 March 2017 and (b) between 19 April – 30 May 2018 the alleged ground of disapplication is Article 3.7.2 (Rejoinder, paragraphs 4(4) and 4(8)) set out at paragraph 21F.2 above (Incentive Arrangements). Notwithstanding the foregoing:

(a) 30 March 2017 allotment: no documents have been provided showing that the alleged 'Incentive Arrangement' identified in the Cox Schedule (namely, an EMI scheme implemented by special resolution dated 21 May 2010) existed;

(b) 19 April – 30 May 2018 allotments: the respondents have not identified the Incentive Arrangement(s) pursuant to which the allotments were allegedly made;

(c) 30 March 2017 and 19 April – 30 May 2018 allotments: the Rejoinder Disclosure does not contain any documents showing

[1] Zedra Skeleton paragraph 63.

the allotments were made pursuant to an Incentive Arrangement(s) (including without limitation: board minutes; share subscription agreements and other communications with recipient employees; scheme rules; notices of exercise under the Arrangement; confirmation that each allottee was an employee or former employee under the terms of the Arrangement)(the "**Incentive Scheme Documents**").

(iii) As regards the Relevant Share Allotments made on (a) 22 February 2018 and (b) 29 March 2018 the alleged ground of disapplication is Article 3.7.3 (Rejoinder, paragraphs 4(7) and 4(8)) as set out at paragraph 21F.3 above (Board-approved allotments). Notwithstanding the foregoing the Rejoinder Disclosure does not include:

(a) any board minutes approving the allotments (and no such board minutes were provided to Zedra at the time of the allotments in breach of the Information Obligation set out at paragraph 21M.1 above); or

(b) any valuation evidence showing that the subscription price for the allotment was supported by a valuation of the Company and its subsidiaries exceeding the amount set out in Article 3.7.3(a) of the 16 February 2018 Articles stated to be in force at the time.

(2) In respect of the remaining 4 of 8 Relevant Share Allotments (comprising the allotments made on 19 February 2016, 3 May 2016, 11 July 2016 and 5 September 2017)[2]:

(i) 19 February 2016 (Article 3.7.2): the Rejoinder Disclosure does not contain the Incentive Scheme Documents referred to in paragraph 45G(1)(ii)(c) above or any documents showing that the quantity and class of shares authorised to be allotted by special resolution dated 19 February 2016 (350,646 D Ordinary Shares) were in fact allotted pursuant to the 2016 Growth Share Scheme.

[2] Zedra Skeleton paragraph 66.

(ii) 3 May 2016 (Article 3.2 shareholder majority consent): Zedra's Pre-Emption Rights were allegedly disapplied pursuant to Article 3.2 by the written consent of a Fundamental Shareholder Majority purportedly executed on 20 April 2016 (the "**20 April 2016 FSM Consent**"). However, under the 3 May 2016 Articles stated in the Cox Schedule to be in force at the date of the allotment, disapplication under Article 3.2 required the consent of a Special Shareholder Majority, not a Fundamental Shareholder Majority. In the premises, the 20 April 2016 FSM Consent was ineffective and did not disapply the Pre-Emption Rights under Article 3.2.

(iii) 11 July 2016 (Article 3.2 shareholder majority consent):

(a) the respondents' case in paragraph 4(3) of the Rejoinder (disapplication by Special Shareholder Majority) is inconsistent with the case set out in the Cox Schedule (disapplication by Fundamental Shareholder Majority)[3];

(b) Zedra's Pre-Emption Rights were allegedly disapplied pursuant to Article 3.2 by the written consent of a Fundamental Shareholder Majority purportedly executed on 30 June 2016 (the "**30 June 2016 FSM Consent**"). However, under the 11 July 2016 Articles stated in the Cox Schedule to be in force at the date of the allotment, disapplication under Article 3.2 required the consent of a Special Shareholder Majority, not a Fundamental Shareholder Majority; and in any event

(c) the 30 June 2016 FSM Consent was invalidly executed because according to the Rejoinder Disclosure it was not signed by the MM Representative (Matthew Moulding) who was a member of the Special Shareholder Majority and the Fundamental Shareholder Majority under the 11 July 2016 Articles. Pending disclosure of the metadata in relation to the signed copy provided by the respondents on 15 December 2022, it is not admitted that the 30 June 2016 FSM Consent was effective; and

[3] Zedra Skeleton paragraph 62.1.

(d) In the premises, the 30 June 2016 FSM Consent was ineffective and did not disapply the Pre-Emption Rights under Article 3.2.

(iv) 5 September 2017 (Article 3.2 shareholder majority consent; alternatively Article 3.7.2):

(a) the respondents' case in paragraph 4(6) of the Rejoinder (Article 3.2 shareholder majority consent disapplication) is inconsistent with the case set out in the Cox Schedule (Article 3.7.2 disapplication)[4];

(b) the written consent of the Special Shareholder Majority purportedly executed on 30 August 2017 (the "**30 August 2017 SSM Consent**") was not signed by Mr Moulding but by an unidentified individual on his behalf pursuant to an alleged power of attorney which has not been disclosed. Pending (1) satisfactory identification of the relevant individual and (2) disclosure of the metadata in relation to the power of attorney provided by the respondents on 15 December 2022, it is not admitted that the 30 August 2017 SSM Consent was effective and validly disapplied the Pre-Emption Rights under Article 3.2; and

(c) the Rejoinder Disclosure does not contain the Incentive Documents referred to in paragraph 45G(1)(ii)(c) above or any documents showing that the quantity and class of shares authorised to be allotted pursuant to the 30 August 2017 SSM Consent (220,201 B Ordinary Shares) were issued to the allottees (the Old Mutual entities) pursuant to an incentive arrangement.

(3) As regards board minutes dated 27 March 2017, 8 February 2018, 19 March 2018 and 19 April 2018 (two sets) provided to Zedra for the first time on 14 December 2022 (the "**2017/2018 Board Minutes**") in support of the alleged disapplication of the Pre-Emption Rights in respect of the

[4] Zedra Skeleton paragraph 62.2.

Relevant Share Allotments made on, respectively, 30 March 2017, 22 February 2018, 29 March 2018 and between 19 April – 30 May 2018[5]:

(i) If the 2017/2018 Board Minutes were created on the dates alleged (which is not admitted) in breach of the Information Obligation (and specifically SHA Clause 4.2.2 set out at paragraph 18.2 above) the Director Shareholders did not provide the Disclosed Board Minutes as soon as they became available;

(ii) The 2017/2018 Board Minutes refer to numerous documents purporting to relate to the Relevant Share Allotments referred to therein which have not been disclosed (the "**Undisclosed Documents**"); and

(iii) In the premises, pending Extended Disclosure (including (1) production of the Undisclosed Documents and (2) disclosure of the metadata in relation to the 2017/2018 Board Minutes pursuant to PD 57AD 13.1(1)) Zedra does not admit the authenticity of the 2017/2018 Board Minutes.

[5] Zedra Skeleton paragraph 64.