Neutral Citation Number: [2018] EWHC 1035 (Ch)
Case No: CR-2013-003499 (No. 1805 of 2013)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
COMPANIES COURT

IN THE MATTER OF BANKSIDE HOTELS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

IN THE MATTER OF PEDERSEN (THAMESIDE) LIMITED CR-2013-003500 (no.1806/2013)
AND IN THE MATTER OF THE COMPANIES ACT 2006

IN THE MATTER OF G & G PROPERTIES LIMITED CR-2013-003502 (No. 1807/2013)
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
7 Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 09/05/2018

Before :

SIR NICHOLAS WARREN

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Between :

NICHOLAS JOHN CLWYD GRIFFITH	Petitioner
- and -	
(1) MAURICE SALEH GOURGEY (2) TRUCHOT TRUSTEES LIMITED (3) ROBERT LEWIS and NICHOLAS EDWARD REED (as Joint Trustees of the estate of Robert John Hodge) (4) BANKSIDE HOTELS LIMITED	Respondents

AND B E T W E E N

MEWSLADE HOLDINGS LIMITED	Petitioner
- and -	
(1) MAURICE SALEH GOURGEY (2) FRANCOIS NAIRAC (3) PEDERSEN (THAMESIDE) LIMITED (4) BRENTFORD HOTELS LIMITED	Respondents

AND B E T W E E N

NICHOLAS JOHN CLWYD GRIFFITH	Petitioner
- and -	
(1) NEIL JOSEPH GOURGEY (2) CHARLES DUNCAN GOURGEY	Respondents

(3) ROBERT LEWIS and NICHOLAS EDWARD REED
(4) G & G PROPERTIES LIMITED (as Joint Trustees of the estate of Robert Hodge)

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Christopher Parker QC and Oliver Phillips (instructed by **Blake Morgan**) for the **Petitioners**
Andrew Thompson QC (instructed by **Simmons & Simmons**) for the **Second Respondant**
Daniel Lightman QC and Adil Mohamedbhai (Instructed by Olephant Solicitors) for Maurice Salek Gourgey, Neil Gourgey, Charles Gourgey, Brentford Hotels Limited and Jane Nairac

Hearing dates:
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Judgment Approved

Sir Nicholas Warren:

1. I have before me a number of applications in three related unfair prejudice petitions under section 994 Companies Act 2006 2004 ("section 994") concerning Bankside Hotels Ltd ("Bankside"), Pedersen (Thameside) Ltd ("Pedersen") and G&G Properties Ltd (G&G"). The petitioner in the Bankside and G&G petitions is Nicholas Griffith ("Mr Griffith") and in the Pedersen petition is Mewslade Holdings Ltd ("Mewslade"), a company in which Mr Griffith is interested.

2. The petitions are being case-managed together. They have been before the Court on a number of occasions with a number of judgments having been produced. For present purposes, I mention the following judgments:
    a. The judgment of Simon Monty QC sitting as a deputy High Court Judge dated 13 November 2014;
    b. The judgment of Simon J dated 23 April 2015 ("the Simon judgment");
    c. The judgment of Mark Anderson QC sitting as a deputy High Court Judge dated 10 November 2017 ("the Anderson judgment");
    d. The judgment of HHJ Judge Pelling QC (sitting as a High Court Judge) dated 12 December 2017 ("the Pelling judgment) reported at *Re Pedersen (Thameside) Ltd* [2017] EWHC (Ch) 3406, [2018] BCC 58.
3. The background to the petitions and the current state of the proceedings will be apparent from a reading of those judgments. I do not propose to repeat any of it in this judgment.

4. The result of the hearing before Simon J was that the Amended Points of Defence of certain respondents in each petition stood struck out, that is to say the consolidated defence of those respondents in all three petitions. As will be apparent from the judgments which I have mentioned, the respondents whose defences were struck out are Mr Gourgey , Truchot Trustees Ltd ("Truchot") and Bankside (in relation to the Bankside petition), Mr Gourgey, Francois Nairac , Pedersen and Brentford Hotels Ltd ("BHL") (in relation to the Pedersen petition) and Neil Gourgey ("Neil") Charles Gourgey ("Charles") and G&G (in relation to the G&G petition). Neil and Charles are Mr Gourgey's sons. Truchot is, and was at all material times, the trustee of a family settlement created by Mr Gourgey; Mr Gourgey and his wife were originally discretionary beneficiaries but were excluded from further benefit as from 22 December 2004. Ms Nairac is now deceased. Jane Nairac is now the sole executrix of his estate.

5. Following delivery of the Simon judgment, Simon J made an order dated 1 May 2015, paragraph 4 of which provided as follows:

> "There be a further hearing to consider the further steps necessary to dispose of the Petitions in the light of this order, to be listed before a Judge of the High Court with a time estimate of two days. 28 days prior to that hearing the parties shall file a list of issues to be determined at that hearing."

An appeal from Simon J's decision was unsuccessful.

6. The hearing before me included the hearing referred to in that paragraph. It should be noted that the applications before Simon J were (1) an application on the part of the petitioners for final relief on the petitions and (2) an application for relief from sanctions by the respondents. The first of those was dated 29 January 2015 in which the petitioners "of what, if any, relief, the petitioners might now … and further directions where the Amended Points of Defence stand struck out". It does not state on its face under what provision of the CPR or otherwise it is made.

7. The petitioners and the respondents have filed lists of issues, which largely overlap. The petitioners are clearly hoping that I will grant them some form of final relief, on the basis that it is their application before Simon J which is now before me. However, there are a number of other applications before the Court. I considered it appropriate to deal with some, at least, of those, before it would be possible to embark on the questions of what, if any relief, the petitioners might now be entitled to.

8. As will be apparent from a reading of the Anderson judgment, Truchot was not properly served with the Bankside petition. It knew nothing of it until 17 March 2016. The result of the Anderson judgment was that service of the Bankside petition on Truchot was set aside on the basis that the solicitors purporting to act for it had no authority to do so and with the result that the strike out of the Points of Defence had no impact on it. The Bankside petition has now been served, and directions will need to be made in the ordinary way for the further conduct of it.

9. The matters which I have heard are these:
   a. An application by Truchot to strike out certain references to it in the Bankside petition and the current version of the Points of Claim ("the PoC") on the grounds that neither of them discloses any reasonable grounds for bringing the claim to the relief sought (or any relief) against it. That application has been met by a draft of amendments ("the Bankside draft amendments") to the Bankside petition and the PoC for which permission is likely to be sought if I rule against Mr Griffith in relation to them.
   b. An application by Neil and Charles in the G&G petition and the PoC to strike out certain references to them on the grounds that neither of them discloses any reasonable grounds for bringing the claim to the relief sought (or any relief) against either of them, alternatively an order that Mr Griffith apply within 28 days of the hearing for permission to amend them. Proposed amendments to the G&G petition have been produced since the hearing, which I will consider when this judgment is handed down.
   c. The issue of the extent to which the petitioners need to adduce any evidence to establish unfair prejudice sufficient to found relief under section 994 against the respondents whose Points of Defence have been struck out.
   d. An application by Mewslade to amend the Pedersen petition. At the hearing, it became apparent that Mr Griffith wished to make amendments going beyond those specified in the application. I will deal with this application too when this judgment is handed down.
   e. An application by Mr Griffith that the Bankside petition should be stood over as against Truchot pending the outcome of that petition as against Mr Gourgey and, assuming that Mr Gourgey is ordered to purchase Mr Griffith's shares, pending satisfaction of such an order, the purpose being to allow Mr Griffith

to proceed with the Bankside petition against Truchot if Mr Gourgey proves unable to meet the purchase price.

The strike-out applications

10. There are some general principles which I need to address which are relevant to both applications to strike out. But before I do that, it is important to remember the statutory jurisdiction which the petitioners invoke by their unfair prejudice petitions.

11. Section 994 permits a member of a company to apply to the Court by petition for an order on the ground (so far as relevant in the present case) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members generally or of some part of its members. If unfair prejudice is established, the Court has wide ranging powers under section 996 for "giving relief in respect of the matters complained of"

12. The essence of the powers under section 996 is to give a remedy where there is complaint about the way the company's affairs are being conducted through the use (or failure to use) powers in relation to the conduct of the company's affairs provided by its constitution. The section is concerned with the company's affairs rather than the affairs of individuals and concerned with acts done by the company or by those authorised to act as its organs as well as with internal management matters. The conduct of a member of his own affairs, for example by requesting a general meeting of the company or seeking answers to an excessive number of questions, is irrelevant. Relief is to be granted only in respect of the matters complained of: *Re Legal Costs Negotiators Ltd* [1999] BCLC 171 at 195 - 196, CA. Relief can be given in against a person only where some complaint is made about the conduct of such person.

13. In the same case, it was said that the Court on an application to strike out an unfair prejudice petition can look at the realities of the case. It is entitled to take the pragmatic view that the petition should not be allowed to proceed where the likelihood of the trial judge exercising his discretion to grant the claimed relief is so remote that the case can be described as perfectly hopeless. The test is "whether it is plain and obvious that the relief claimed would never be granted".

14. A complaint as to dealings with shares, such as a breach of an agreement that a shareholder will not sell his shares without the consent of other shareholders "does not relate in any way to the conduct of the company's affairs and, therefore, cannot …. fall to be protected by the court under [s. 994]": see Rattee J *Re Leeds United Holdings Limited* [1997] BCC 131 at 143.

15. In *Re Coroin* [2012] EWHC 2343 (Ch) at [639], David Richards J held that a failure by a shareholder to give a transfer notice under pre-emption provisions could not involve conduct of the affairs of the company or an act or omission of the company and it would only be a failure by the board to exercise a power in relation to pre-emption provisions that might fall within section 994.

16. In the same case, the Judge observed at [56] that the parties' cases are defined by their pleadings adding:

> "This is of particular importance to proceedings under [section 994]. The breadth of the jurisdiction means that the petition plays, in my judgment, a vital role in defining the basis of the petitioner's case..... the grounds on which the petitioner says the affairs of the company have been conducted in an unfairly prejudicial manner should be fairly set out in the petition. Only in this way will the respondents be able properly to meet the case and the court be able to keep the proceedings within manageable bounds."

17. In the Pelling judgment, HHJ Pelling QC dealt with an application in the Pedersen petition by Mrs Nairac to strike out the claim against her. He held at [11] that:

> "where a claim under s.994 is brought it is necessary for the petitioner both to plead and prove that the respondent was concerned either directly or indirectly in conducting the affairs of the company in an unfairly prejudicial manner. In considering a strike-out application, as when trying a s.994 petition, it is necessary to focus on the allegations that have been pleaded – see *Re Fildes Brothers Ltd* [1970] 1 WLR 592"

18. He cited a passage from Megarry J's judgment in that case, part of which is worth repeating here:

> "….. The petitioner is confined to the heads of complaint set forth in his petition. His evidence may no doubt amplify and explain these complaints, but I do not think he can rely upon any new head not fairly covered by his petition …
> ...In cases where there are no normal pleadings, it seems to me important that those who oppose winding up should know, in time to prepare their case, what are the allegations that they have to meet. If after a petition has been presented the petitioner wished to broaden his attack let him first amend his petition."

19. Megarry J had himself referred to what Plowman J had said in *In Re Lundie Brothers Ltd* [1965] 1 WLR 1051, at 1058E-F:

> "It was suggested in the course of argument that it was really the evidence and not the allegations contained in the petition which was of importance in this matter. I entirely dissent from that proposition. It seems to me that it would be wrong for the court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity."

20. These comments and citations of Megarry J were emphatically endorsed by Dillon LJ in *Re Tecnion Investments Ltd* [1985] BCLC 434, at 441.

21. The force of Megarry J's observations (and their endorsement by Dillon LJ) is, I think, rather less true today in the context of a section 994 petition than it was in 1970. Today, Points of Claim and Points of Defence are the norm. And whilst Points of Claim should still not go outside the ambit of the petition, the detail which Megarry J saw as a requirement of the petition is no longer necessary if it is found in the Points of Claim. It remains the case, however, that it is not the evidence which is of importance in the context under consideration but the petition and the Points of Claim.

As HH Judge Pelling QC noted, it is fundamental that "in considering a strike-out application, as when trying a s.994 petition, it is necessary to focus on the allegations that have been pleaded".

22. The test of attribution of unfairly prejudicial conduct to a respondent to a section 994 petition (or, as HHJ Pelling QC puts it, whether the respondent was concerned either directly or indirectly in conducting the affairs of the company in an unfairly prejudicial manner) was considered by Sales J in *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2012] Ch 613 at [1094] to 1096]. Sales J considered that where

> "relevant conduct is carried out by a person himself or by his agent, there is no difficulty of attribution of responsibility for that conduct for the purposes of section 994 since the ordinary and strict standards of attribution or responsibility applicable under the general law will have been satisfied".

23. Beyond the narrow class of agency, the judge held that the test is whether the respondent

> "is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in sections 994 to 996, to grant a remedy against that [respondent] in relation to that conduct. The standard of justice to be applied reflects the requirement of fair commercial dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court's assessment whether what was done involved unfairness in which the relevant [respondent] was sufficiently implicated to warrant relief being granted against him."

24. In addition HHJ Pelling QC, at [12], made these observations with which I agree:

> "However, the relief sought must be proportionate to the unfairly prejudicial conduct of which the petitioner complains … It is for the petitioner to specify the relief that he, she or it seeks and in my judgment in an appropriate case a respondent is entitled to seek to strike out the relief claimed as being excessive, providing that the respondent can show that the likelihood of a trial judge exercising his discretion to grant the relief claimed is so remote that the case can be described as perfectly hopeless."

25. Moreover, it is, as the Judge said at [19], the duty of the petitioner to plead the remedy sought and if it is plain and obvious that the remedy sought will not be granted, then the petitioner is at obvious risk of having the claim struck out. It is for the petitioner to specify the relief that he seeks and a respondent is entitled to seek to strike out the relief claimed as being excessive, if he can show that the likelihood of a trial judge exercising his discretion to grant the relief claimed (that is to say, against the relevant respondent) is so remote that the case can be described as perfectly hopeless. As Marcus Smith J pointed out in *VB Football Assets v Blackpool Football Club (Properties) Ltd (formerly Segesta Ltd)* [2017] EWHC 2767 (Ch), at [425 (iii)-(iv)]:

> "… the fact that a petitioner advocates one course, does not make it fair or appropriate. One aspect of fairness that must be borne in mind is that the remedy must be proportionate to the unfair prejudice found. In the case of

relatively modest unfair prejudice, a buyout order may be disproportionate…"
.

26. So far as concerns amendment, I consider that a party seeking permission to amend its petition or Points of Claim should be required fully to particularise its proposed amendments before it is granted permission to amend. This is particularly so where there has been a substantial passage of time since the petition was presented. In this context, in *Re Unisoft Group Limited (No 2)* [1994] BCC 766 ("*Unisoft*"), Harman J said this at 771 in relation to pleadings generally (not just pleadings in unfair prejudice proceedings):

> "…In my judgment it is the invariable practice of the court to require late amendments … to be completely and fully particularised in every respect when made, leaving no lacuna and no uncertainty of allegation."

This is of particular importance in unfair prejudice proceedings in relation to which the observations of David Richards J in *Re Coroin* referred to at paragraphs 15 and 16 above are equally applicable to amendments as to original pleadings.

27. Further, it is well established that the court will not grant permission to amend unless it is satisfied that the amended claims have a real, as opposed to a fanciful, prospect of success: see the decision of Henderson J in *Davidson v Seelig* [2016] WTLR 627, at [53]. Thus the party seeking permission to amend has to have a case which is better than merely arguable: see the decision of Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), at [36].
28. With those general principles in mind I turn to the two strike-out applications.

The Truchot strike-out application

29. Although Truchot is a party to the Bankside petition, there are very few references indeed to it. They are as follows:
    a. In paragraph 3, the ownership of shares in Bankside is set out ("At all times the shares have been held as follows:") with 50 shares being held by Truchot. Truchot is described as the trustee of "the M.S Gourgey Settlement, a trust benefiting the family of" Mr Gourgey; and
    b. In paragraph (1) of the prayer for relief an order is sought that "the First and/or Second Respondents [*ie* Mr Gourgey and Truchot] be ordered to purchase [Mr Griffith's] shares in Bankside at a price to be determined by the Court" on a number of bases set out.
30. The PoC contain the same pleading. There is no other reference in either the petition or the PoC to Truchot. The petition and the PoC make a number of serious allegations against Mr Gourgey but do not allege, expressly, any knowledge on the part of Truchot of, or involvement in, the conduct alleged. There is no allegation that Mr Gourgey is a beneficiary of the settlement or that he was a beneficiary at the time of the conduct complained of. Indeed, it seems clear that Mr Gourgey ceased to be a beneficiary as long ago as 2004.
31. There is one allegation in the Bankside petition and the PoC on which Mr Parker (for the Mr Griffiths) relies. It is found in paragraph 6 of the Bankside petition. So far as relevant it provides, in sub-paragraph (1) as follows:

> "The Company represents a collaboration in 1996 between [Mr Griffith], Mr Hodge and Mr Gourgey. The Company was formed on the basis of relationships of mutual trust and confidence between Mr Hodge and Mr

Gourgey and between Mr Hodge and [Mr Griffith] on the understanding ("the Understanding") that all profits, however, taken should, be taken, and all risks were, subject to contrary agreement, to be taken in proportion to the parties' shareholding, i.e. [Mr Griffith] 25%, Mr Hodge 25% and Mr Gourgey 50%."

32. In fact, the 50% shareholding was never owned by Mr Gourgey but was always owned by Truchot as trustee of the family settlement. Paragraph 3 of the Bankside petition recognises that "all times" the 50 shares were held by Truchot. As to 49 shares, this is clear from the allotment of 15 June 1996 allotting 24 shares to Mr Hodge, 25 shares to Mr Griffith and 49 shares to Truchot (under its then, different, name). The other 2 shares were no doubt subscriber shares. I infer that 1 share was allotted to Mr Hodge but I do not know if the other 1 share was allotted to Mr Gourgey or Truchot, but nothing turns on that. The shares were £1 ordinary shares and were allotted for cash of £1 per share. There is nothing to suggest that the consideration in each case was provided other than by the allottee. The contrary is certainly not pleaded.
33. Mr Thompson for Truchot submits that the Bankside petition and the PoC disclose no arguable claim for relief against Truchot. The relief currently sought is that Truchot be ordered to purchase Mr Griffith's shares at a price far in excess of what they are currently worth in that (i) the price would be inflated because there would be no discount to reflect the fact that Mr Griffith is a minority shareholder and (ii) the price would be inflated to reflect the allegedly unfairly prejudicial conduct. He contends that to grant this relief (or any relief) would be unjust and unjustifiable:
    a. No allegation is made that Truchot has been in any way party to or had any connection with, or had any responsibility for, any allegedly unfairly prejudicial conduct.
    b. If the unfairly prejudicial conduct is made out, then Truchot as a 50% shareholder was as much a victim of that conduct as Mr Griffith and yet the relief sought if granted would in effect require Truchot to compensate Mr Griffith.
    c. Mr Griffith could not pursue a derivative claim against Truchot on behalf of Bankside and yet, if granted, the relief sought would make Truchot indirectly liable for the wrongdoing of others.
34. Mr Thompson accordingly submits that there is simply no basis on which the relief sought against Truchot could conceivably be granted at trial even if all the allegations in the Bankside petition were proved.

35. On the basis of the pleading, it might be wondered why relief is sought against Truchot at all. The reason is that Mr Griffith fears that, even if he obtains a share purchase order against him, Mr Gourgey will not have the money to pay for the shares which he is ordered to buy. If Mr Gourgey himself owned the 50% of the shares in Bankside, he would have the necessary resource. Fairness and justice, according to Mr Parker, requires that the value of those shares should be available as the source of payment to Mr Griffith; the way to achieve that is to make an order against Truchot (albeit, Mr Parker now accepts, although this is not currently pleaded) limiting Truchot's obligation to the assets of the settlement). As he put it "You can't put a piece of paper between" Mr Gourgey and Truchot/the settlement. Truchot acquired its shares by way of gift for no consideration. An order against it would only be an order, in effect, to return that which it had been given: the entire value of the 50% of the shares has been derived from Mr Gourgey.

36. In effect, Mr Gourgey's misdeeds are to be treated as misdeeds of Truchot; there is a sufficient connection for making Truchot susceptible to relief under section 996 within the principles explained by Sales J. Mr Parker points out that money went from Bankside (improperly on Mr Griffith's case) to where Mr Gourgey wanted it to go and not to Truchot; certainly the pleaded case does refer to improper distributions which were not made to Truchot. The fact that money did not go to Mr Gourgey or to Truchot but to third parties (at his direction) supports, in Mr Parker's submission, the proposition that no difference is to be drawn between Mr Gourgey and Truchot. But here, it seems to me, the real complaint is not that the distributions were not made to Truchot, but that they were made at all and I can attach very little, if any, weight to that particular submission.

37. Mr Parker submits that the pleading in the Bankside petition is enough to establish unfairly prejudicial conduct on the part of Truchot. He submits that from paragraphs 3 and 6 of the Bankside petition, can be derived the proposition that it proceeds on the basis that the shares held by Truchot were to be treated as Mr Gourgey's shares. Truchot should not be able to turn round and say, even if the facts alleged are established as against it, that it is not liable. He draws an analogy with a nominee, suggesting that a nominee could be subjected to a share purchase order. I very much doubt that that is true: in a true nomineeship situation, there is no need to make the nominee liable since the principal (whose conduct is complained of) actually has ownership and control of the shares. If Truchot held the shares as nominee for Mr Gourgey, there would be no need for any order against Truchot since the value of the shares would be available to enable Mr Gourgey to meet any order against him personally.

38. What I have said above records the oral submissions made by Mr Parker on the first day of the hearing of the various applications before me. Overnight, he produced a Note running to 7 full pages. I need to summarise and comment on the argument in that Note.

39. He explains, correctly, that the Bankside petition proceeds on the basis that upon Bankside's founding, Mr Gourgey had his 50% of the shares taken by Truchot. I add that, whether or not the shares were paid for by Truchot, the value of those shares from time to time would reflect the profits made by Bankside realised from the opportunities introduced by any of Mr Griffith, Mr Hodge or Mr Gourgey (or anyone else, come to that), the Understanding being that profits (however taken) and risks would be shared in accordance with the share holding ratio. Mr Parker submits that this without more would entitle Mr Griffith to seek relief against Truchot "since it takes those shares subject to the equitable constraints imposed by the Understanding and subject to the possibility of being ordered to buy out the minority shareholder". I will return to the point about equitable constraints later. The reference to the possibility of a buy-out order adds nothing to the debate, in my view. Any shareholder holds his shares subject to the possibility, depending on what happens in the real world, that another shareholder will launch a section 994 petition. Clearly Truchot holds the shares subject to the possibility of such a petition: but a petitioner has to satisfy the ordinary requirements of section 994.

40. And so Mr Parker submits that Truchot obtained its shares from Mr Gourgey otherwise than for a consideration and "if the value of its shareholding is reduced because the buy-out order contains a compensatory element because of Mr Gourgey's conduct then it has no cause for complaint in the context of the unfair prejudice petition based on Mr Gourgey's conduct when compared with the position of Mr Griffith". However, as I have said, there is no currently pleaded case that Truchot obtained its shares from Mr Gourgey or that it did so for no consideration.

41. This rationale for relief is not, it is submitted, dependent on showing a further relation between Mr Gourgey and Truchot. Nonetheless, it is contended that the Bankside petition proceeds (in accordance with paragraphs 3 and 6) on the basis that for the purposes of the Understanding and the conduct of Bankside's affairs, the shareholding in the name of Truchot was treated as Mr Gourgey's shareholding and that the entitlement to 50% of Bankside's profits was agreed as being that of Mr Gourgey personally and not that of Truchot. It follows, according to Mr Parker, that the Bankside petition proceeds on the basis that there is no material distinction for the purposes of the claim between the 50% shareholding being held by Mr Gourgey and its being held by Truchot; and that relief should therefore also be given on that basis.

42. Mr Parker places reliance on what was pleaded in the Points of Defence (since struck out) to show how the respondents read and understood the Bankside petition. I agree with him that the Points of Defence are relevant so far as concerns the parties to it other than Truchot (which knew nothing of it): see the pithy observations of Tomlinson LJ in *Theverajah v Riordan* [2015] EWCA (Civ) 41 at [33]. How those respondents (and their advisers) read the Bankside petition is not conclusive in any way: its meaning must be objectively established as to which I must form my own view. Dealing, nonetheless, with Mr Parker's submission, he suggests that the Points of Defence show that Mr Gourgey's case was that he and Truchot can be treated interchangeably for the purposes of sections 994 and 996. He relies on paragraphs 5 ("the prime example"), 11, 13 to 31 and 31.2.

43. Paragraph 5, so far as material reads as follows:

> "5. Mr Gourgey, Mr Griffith and Mr Hodge ("the **Three Shareholders**") (or in some cases their families and/or family trusts associated with them) were members of or beneficially interested in large numbers of companies, including various companies referred to in the Petitions. In the majority of cases, the interest of Mr Gourgey was equal to that of the combined interests of Mr Hodge and Mr Griffith. This was the case in relation to the following companies:
> 5.1 Bankside, ..."

44. Mr Parker contends that this "accepts, at least implicitly the Petitioner's case on this" observing that the reference to the three men as "the Three Shareholders" is particularly telling of how Mr Gourgey viewed the relationship between him and Truchot. He sees as telling also the reference to the "family trust associated with" him.

45. Paragraph 11 pleads that the Three Shareholders' agreement was limited to an understanding that Mr Gourgey would have a 50% shareholding, that Mr Hodge and Mr Griffith would have a 25% shareholding each and that the business and affairs of Bankside would be conducted in accordance with its Memorandum and Articles of

Association. It is pointed out that Mr Gourgey did not have a 50% shareholding since "his" shares were held by Truchot; but it is not suggested that the understanding that Mr Gourgey would have a 50% shareholding was not carried into effect.

46. Paragraphs 13 to 31 plead the way in which the Three Shareholders are said to have operated the businesses of Bankside and other companies. Reliance is placed on paragraph 17, which states that each of the Three Shareholders was fully aware of and consented to the practice referred to (including inter-company loans). Mr Parker submits that this "can only work if Mr Gourgey's knowledge and consent is to be treated as that of Truchot, since otherwise the point would have no force so far as Bankside is concerned. A similar point is made in relation to paragraph 19 dealing with other aspects of the conduct of the business.

47. Particular reliance is place on paragraph 31.2 which reads as follows:

> "To the extent that any conduct falling within that course of action would otherwise have constituted a breach of Mr Gourgey's fiduciary duties, it was authorised and/or ratified by the Three Shareholders, who between them were or represented all the members of the relevant companies...."

48. And so Mr Parker submits that according to Mr Gourgey the relationship between him and Truchot was so close that he was able to ratify his own breaches of fiduciary duty on Truchot's behalf as its representative.

49. The conclusion which Mr Parker asserts is that Mr Gourgey accepted in his Points of Defence that Truchot should be treated as interchangeable with him. He notes that Truchot's strike-out application does not address this and does not suggest that it exercised control of the shares independently of Mr Gourgey such that the understanding of both Mr Gourgey and Mr Griffith is flawed. Submissions are made on the basis of what the lawyers instructed by Mr Gourgey (and who acted for Truchot without, as subsequently established, authority) have said and on subsequent disclosure allegedly showing that Truchot left "the management of the shareholding" (by which I understand is meant exercise of the voting rights attached to the shares) to Mr Gourgey so that he "did indeed have control over the relevant assets of Truchot". There is no pleaded case as to why control of a 50% shareholding by Mr Gourgey should make the owner of those shares, Truchot, susceptible to a remedy under section 996.
50. In my judgment, Truchot's application, in the absence of any amendment to the Petition and the PoC, succeeds. I do not accept that the petition and PoC as they currently stand sufficiently plead the case which Mr Parker wishes to present. All that paragraphs 3 and 6 of the Bankside petition (and the corresponding paragraphs of the PoC) plead is that Truchot holds the 50% shareholding as trustee of a family settlement for the benefit of Mr Gourgey's and his family although we now know he has been excluded from benefit since 2004 and that there was the Understanding. There is no allegation that Truchot knew of, let alone that it authorised, the alleged breaches of duty by Mr Gourgey. There is not even an allegation along the lines that Truchot ought to have exercised some supervision of the activities of the directors, that it failed adequately to do and that such failure makes it fair and just for the Court to grant relief against them.

51. In my judgment, there is no reasonable prospect of success in an argument that merely because the settlor of a 50% shareholding in a company is guilty of unfairly prejudicial conduct in relation to that company as a director of it, the trustees of the settlement are thereby automatically themselves responsible for or implicated in such conduct or automatically exposed to relief against them under section 996 whether or not themselves guilty of or implicated in that conduct. Indeed, even in a case where the trustees held a controlling interest, the mere fact that they do so cannot, without more, render them responsible for the unfairly prejudicial conduct of the settlor. In either case, the settlor may be acting without the knowledge of the trustees and that could be so even in a case where the trustees were taking the sort of interest in the company which might ordinarily be expected of a minority or majority shareholder (as the case may be).

52. It makes no difference to my conclusion whether Truchot acquired its shares for consideration or not. It is not the mere ownership of shares which can, in my view, give rise to the necessary connection between Truchot and the unfairly prejudicial conduct. There has to be something more, as I have just explained. For instance, where the trustees are majority shareholders, it may well be the case (depending on the precise facts) that, where there is a threat of unfairly prejudicial conduct on the part of a director/settlor and the trustees with knowledge of that threat fail to take any action in relation to it, the trustees are so connected with the conduct when it takes place as to make it fair and just that they should be liable. It may even be the case that a majority shareholder who takes no interest in the company and leaves it to the directors to run the company without any supervision or reporting leaves himself exposed to relief under section 996 in relation to the unfairly prejudicial conduct of those running the company. And it may also even be the case that a minority shareholder which knows of a threatened breach of duty by a person with whom he is connected in some way might expose himself of liability if he fails to do anything to prevent it although if he engages with the other shareholders to agree a plan of action it is difficult to see why there should be any remedy against him. Or if the settlement were a sham, then the shares would have remained in the beneficial ownership of Mr Gourgey, although it is my view that in such a case there would be no scope for relief under section 996 against the trustees any more than against a nominee, whose position I have considered at paragraph 37 above. In the present case, there is nothing more pleaded so that the claim against Truchot as currently formulated cannot stand.

53. I need to say something more about Mr Parker's submissions. The first point relates to his submission that, since the shares were acquired for no consideration by Truchot, it holds them subject to the Understanding. For the purposes of the current strike-out application, I will assume that no consideration was given, although it may well be that Truchot did pay £1 for each share which may have represented full consideration given that Bankside had not, as I understand, it yet commenced trading and was simply the vehicle into which the various ventures would be placed. But what is meant by taking the shares subject to the Understanding is not clear. The Understanding was that the profits would be taken and risks were to be shared in proportion to the parties' shareholdings. There is nothing inconsistent with that Understanding (i) that any of the parties should be able to put their respective shares in Bankside in structures (perhaps for perfectly sensible tax planning reasons) such as family settlements, or (ii) that the share of profit should likewise pass to such a structure. Indeed, if profit were distributed in conventional ways such as dividend or

capital distributions, the agreed proportions would automatically follow from the respective shareholdings. Thus if Bankside had been run as Mr Griffith says it should have been run and if the alleged unfairly prejudicial conduct had not taken place, it is inconceivable to my mind that Mr Griffith could have asserted that the Understanding had not been complied with simply because Mr Gourgey's interests had been placed in a family trust and any dividends or capital distributions had passed to that family trust. It does not follow from the creation of the trust structure that the 50% shareholding was somehow necessarily to be treated for any purpose as though it were Mr Gourgey's shareholding.

54. In contrast, if there were a wish to implement an arrangement inconsistent with the Understanding, Truchot may well be prevented from doing so in the face of opposition from Mr Griffith. Suppose, for instance, that there was a proposal for Mr Gourgey to be given an over-generous remuneration package with a view to reducing the profit otherwise available for distribution in accordance with the agreed percentages. I can see that it is arguable that Truchot would be unable to use its votes in an attempt to achieve that proposal; or at least if it did so, it would itself risk being guilty of unfairly prejudicial conduct in the affairs of Bankside. There is nothing of that sort which is relevant in the present case. At least, nothing is pleaded.

55. In my judgment, the Understanding cannot have any impact on the question whether Truchot is sufficiently connected with the alleged unfairly prejudicial conduct on the part of Mr Gourgey to satisfy the test described by Sales J; and there is no reasonable prospect of success in Mr Griffith establishing the contrary

56. So far as the submissions made in relation to the various paragraphs of the Points of Defence are concerned, I make the following observations:
    a. As to paragraph 5, I do not agree for a moment that it accepts, even implicitly, Mr Griffith's case. "The Three Shareholders" is a perfectly apposite description of the three men concerned even if they chose to put their interests (that is to say the percentage shareholdings in Bankside allocated to them) into a family trust. I do not regard the definition as in the least telling about the relationship between Mr Gourgey and Truchot. Nor is the description of a "family trust associated with [him]" in the least telling. To say that it constituted an admission by Mr Gourgey of a relationship between him and Truchot is no more than a trite statement true of any settlor and the trustees of the settlement which he creates.
    b. As to paragraph 11, the pleading makes perfectly good sense. The Understanding was that each individual would take the agreed percentage of the shares and, as I have said, it is inconceivable that the Understanding was breached by Mr Gourgey placing the shares in Bankside in a family settlement. That does not entail that for any purpose, even for the purpose of the Understanding, that the shares are to be treated as Mr Gourgey's. Quite the reverse: the shares are indeed those of Truchot and not Mr Gourgey, but the Understanding is to be understood as permitting the shares to be placed in settlement. Surely the concern of each man was that he would be entitled to his share, not that others should be restricted in how they dealt with their entitlement.
    c. As to paragraphs 13 to 31 (other than 31.2), I find it difficult to understand the point being made. From Mr Gourgey's perspective, what is important in a

claim by Mr Griffith is that Mr Griffith himself consented and cannot therefore be heard to complain. The pleading does not address a complaint by Truchot were one to be made, but that is beside the point.

d. As to paragraph 31.2, it may or may not be that Mr Gourgey did consider that he represented Truchot. In relation to instructing lawyers purportedly on behalf of Truchot in the litigation the Court has held that he had no such authority.

57. There is one final point which I should make in relation to the Bankside petition as it stands (although the point will be relevant to any amendment as well). It goes to the question of what Mr Griffith could or should have done to establish (or better to establish, depending on your point of view) the connection between Truchot and the alleged unfairly prejudicial conduct. Mr Thompson made the suggestion that Mr Griffith should have asked Truchot to take action or to join with him in taking action. As Mr Thompson pointed out, Truchot, as a 50% shareholder, was not in a position to control Bankside. But joining with Mr Griffith, they could together have taken steps to prevent any breaches of duty by Mr Gourgey in the future and to procure Bankside to seek a remedy against Mr Gourgey without the need for Mr Griffith to bring derivative proceedings. Mr Parker says that this is an absurd suggestion. Mr Griffith, he said, understood Mr Gourgey to control the shareholding so could not be expected to have sought to enlist the support of Truchot. And as he points out, Truchot's complete lack of action since March 2016 once it knew of the allegations – incontestable according to Mr Parker – against Mr Gourgey speaks volumes about what an approach would have achieved.

58. There is force in what Mr Parker says on that point. But it does not meet Mr Thompson's point. Mr Parker's submission depends on the proposition that Mr Gourgey controlled the 50% shareholding held by Truchot in the sense, as I understand it, that the shares would always be voted by Mr Gourgey as he wished. But Truchot's position is that it did not know of Mr Gourgey's alleged wrongdoing any more than it knew of the proceedings against it. If Mr Griffith had at least told Truchot of his concerns and invited their assistance, some of the problems now facing him would have been removed. Had it refused to help, then that might be relied on as unfairly prejudicial conduct by Truchot itself. And it might have gone some way in supporting the suggestion that Truchot left "managing the shareholding" to Mr Gourgey.

59. But what I find very difficult to accept is that Truchot could be made subject to a buy-out order in circumstances where it did not know of our authorise the conduct complained of. It is one thing for a trustee in the position of Truchot (even if this gives rise to a breach of trust) to exercise inadequate supervision of the directors and to allow them to run the company and vote shares accordingly; it is quite another to say that because of that laxity, they are taken to approve whatever the directors do even if it is in breach of the directors' duties. Allowing the directors to run the company without taking any interest in what they are doing is not to be taken as a permission to rob the company of assets. This aspect of the case is especially important where the alleged unfairly prejudicial conduct was never approved by a shareholders' resolution in circumstances where the alleged connection between Truchot and that conduct is precisely the alleged management of the shareholding suggested by Mr Parker. The alleged management or lack of it was not the cause of

or authority for the conduct. The pleaded case against Truchot is not that it knew of the conduct complained of or that it knew there was likely to be misconduct but that it that it turned a blind eye. Indeed, there is as yet no express pleaded case at all.

60. The position would be entirely different if the settlement created by Mr Gourgey was, and was known by Truchot, to be, a sham. That might give rise to the connection between Truchot and the alleged unfairly prejudicial conduct which the test adumbrated by Sales J requires but even then Truchot would surely have a very strong case for restricting the relief against it to the value of the shares in Bankside in its name. No case of sham is alleged.

The proposed amendments

61. The next question is whether the proposed amendments to the PoC would cure the pleading defects. I should make clear that Mr Griffith did not, at the hearing before me, seek to amend. It was left that whether he would actually pursue an amendment would depend on the outcome of my ruling on the adequacy of the PoC as they stand at present. Mr Griffith did not want to risk an unnecessary amendment giving rise to an argument that the respondents whose Points of Defence had been struck out would assert the right to plead fully to the amended PoC and thereby resurrect the defences which had been struck out. However, I required the parties to present their cases on the basis that the current PoC should be struck out and in effect to rule on an amendment application were it to be made in order to avoid a further unnecessary hearing.

62. The proposed amendments to the Bankside petition and the PoC are identical and are to be found in what would become the renumbered paragraphs 89 to 102 of the Bankside petition. Paragraphs 89 to 94 are not contentious. They explain that:
    a. Truchot is a Guernsey-registered professional "trustees" company;
    b. Mr Gourgey settled certain assets in 1988, the beneficiaries being himself, his wife and his family;
    c. The settlement contains a provision (fairly standard in my experience) absolving the trustees from interference in the management or conduct of the business of any company, and giving them liberty to leave the conduct of the business to the directors provided they have no notice of any act of dishonesty or misappropriation of monies. I note that it is not pleaded in the current PoC or by the suggested amendments that Truchot had actual notice of any of the alleged unfairly prejudicial conduct and Mr Parker has not suggested that it did;
    d. Truchot was appointed trustee in May 1990; and
    e. Mr Gourgey and his wife were excluded as beneficiaries on 22 December 2004 and new trusts were appointed for the benefit of other family members.
63. Paragraph 95 alleges that Truchot has

> "permitted Mr Gourgey to conduct the affairs of [Bankside] entirely as he saw fit, including in a manner which is unfairly prejudicial to the interests of [Mr Griffith] as pleaded above."

64. Paragraph 96 alleges that

"… Truchot has permitted Mr Gourgey to act as its agent in connection with the exercise of its rights as shareholder in [Bankside] including by (a) granting him and/or his wife retrospective authority to act as its agent on its behalf at [Banksides] annual general meetings on [certain specified dates] (b) granting him prospective authority to do so at [Bankside's] annual general meeting held on 23 August 2006, and (c) failing to take any steps to procure the holding of annual general meeting in subsequent years."

65. Paragraph 97 alleges that at all material times Mr Gourgey has held himself out as having authority to act on behalf of Truchot in connection with the settlement and Truchot has not sought to prevent him from doing so. Paragraph 98 refers to particular instances connected with Mr Gourgey's instructing, without authority, solicitors to act for Truchot in these proceedings and signing a statement of truth on a pleading that he was duly authorised by the respondents (which included Truchot). Paragraph 99 refers to Mr Gourgey and/or Neil purporting to instruct solicitors to act on Truchot's behalf in connection with the exercise of pre-emption rights under the provisions of article 7 of Bankside's articles (conduct which has only recently been ratified by Truchot).

66. Paragraph 100 asserts that Truchot became aware of the petitions in around March 2016 (a fact which I think is accepted by Truchot). It is alleged that at no time since then has Truchot sought to interfere with the management of Bankside. Paragraph 101 set out the uncontentious facts that Truchot applied to set aside service of the Bankside petition on the grounds that Mr Gourgey had no authority to act on its behalf and that Mark Anderson QC granted that application on 10 November 2017.

67. Paragraph 102 asserts that the Court should on those facts grant a remedy against Truchot on a number of grounds set out in paragraphs a. to f. as follows:
    a. Truchot has permitted (and continues to permit) Mr Gourgey to conduct the affairs of Bankside in a manner unfairly prejudicial to the interests of Mr Gourgey;
    b. Truchot has permitted (and continues to permit) the affairs of Bankside to be conducted by a man, Mr Gourgey, who is unfit to be a director of it;
    c. Truchot has permitted (and continues to permit) Mr Gourgey to act as its agent in connection with the exercise of its rights as a shareholder in Bankside;
    d. Truchot has not at any time sought to interfere with Mr Gourgey's management of the affairs of Bankside notwithstanding that it has been on notice since March 2016 of Mr Griffith's allegation;
    e. Truchot has failed to prevent Mr Gourgey from purporting to act as its agent in circumstances where he lacked authority to do so; and
    f. Mr Griffith's interest in the proper operation of article 7 of Bankside's articles has been unfairly prejudiced.

68. Mr Parker contends, of course, that if, contrary to his primary case, the current pleadings are defective, these amendments cure any defect. In contrast, Mr Thompson contends that the proposed amendments do not disclose any reasonable grounds for the Court to grant the relief sought against. In the following paragraphs 69 to 87, I consider Mr Thompson's objections to the amendment.

69. Mr Griffith has only just served the Bankside Petition on Truchot, despite having been pursuing these proceedings for over 4 years. In those circumstances, Mr Thompson says that one would expect him properly to have formulated his claim against Truchot before serving it. There are two observations which need to be made about that. The first is that it was through no fault of Mr Griffith that the Bankside petition was not served on Truchot earlier; rather, it was Mr Gourgey's fault for having acted without authority. The second is that Mr Griffith (or at least his legal team) has all along thought that his claim as currently formulated was adequately pleaded and that he neither needed nor wished to amend. Indeed, Mr Gourgey's own legal team, when they thought they were acting for Truchot, did not take the point that the current pleadings were inadequate. One would expect any petitioner properly to formulate his claim before presenting his petition; but in the present case I do not think that the lateness of the suggested amendment is a matter for criticism.

70. On the substance of the matter, Mr Thompson submits that the amendments are fatally flawed (to use my words) because they do not allege that Truchot was in any way party to or involved in or connected to the allegedly unfairly prejudicial conduct of Bankside's affairs. It is true that there is no express pleading using the word "connection" or anything similar. But connection is not a concept which is to be found in the legislation; it is a concept which has been developed by the Courts (and is found in Sales J's test) to enable the identification of persons who might be made the subject to relief under section 996. The real issue is whether the facts pleaded arguably establish such a connection.

71. Mr Thompson correctly identifies that main (he would say the only, but I will come to other aspects later) attempt to allege that Truchot was in some way responsible for that conduct is the allegation in paragraph 95 of the Bankside petition that Truchot permitted Mr Gourgey to conduct the affairs of Bankside as he saw fit. Mr Thompson interprets that as, in effect, an allegation of general non-involvement in Bankside's affairs by Truchot. The pleading is, however, open to a wider interpretation. It would be consistent with the express wording of the allegation for Mr Griffith to contend that "permitting" is wide enough to subsume permitting something to be done with actual knowledge of the proposed conduct. However, Mr Parker has not suggested that Truchot actually knew that Mr Gourgey was about to carry out any of the activities which give rise to the claims of unfairly prejudicial conduct. And were it to be Mr Griffith's case that Truchot knew, or even that it ought to have known, that Mr Gourgey was going to act, or that he had acted, in breach of his fiduciary duty to Bankside or in other ways amounting to unfairly prejudicial conduct, he must plead that case, setting out the facts and matters relied on in support of the allegation, a requirement reflected in PD 16 para 8.2(5). This is a particularly important requirement in the context of an amendment to a pleading, although that sort of material ought to be pleaded even in an original petition or Points of Claim.

72. I therefore proceed on the basis that this proposed amendment goes no further than an allegation that Truchot was simply not involved in or even concerned about the conduct of the affairs of Bankside. The allegation is to be taken as being simply that Truchot allowed Mr Gourgey to conduct the affairs of the Bankside as he saw fit and that in fact he did so in a manner which was unfairly prejudicial. It is not an allegation that Truchot knowingly allowed the affairs of the Company to be conducted in an unfairly prejudicial way or even that it ought to have known. Nor is it an

allegation that Truchot had the power to control the affairs of Bankside. It in fact had no control because it was not at any material time a majority shareholder, holding only 50% of Bankside's shares.

73. Mr Thompson makes some other submissions, which have a resonance with my discussion above concerning what Mr Griffith himself could or should have done to raise his concerns with Truchot, which are these:
    a. Other than having an ability to block an ordinary resolution, Truchot was not really in any different position from Mr Griffith himself. It would be obviously unjust for one minority shareholder to claim compensation for wrongdoing by directors against another minority shareholder who was in no better position to take steps to prevent that wrongdoing. Truchot is no more culpable in relation to the alleged wrongdoing than Mr Griffith himself. On the basis of the proposed allegations, whatever criticism Mr Griffith might make against Truchot could just as well be made against Mr Griffith himself. I agree with that once it is recognised that the general non-involvement allegation does not extend to an allegation of knowledge or constructive knowledge of the unfairly prejudicial conduct complained of. I am not saying that Mr Griffith actually has no case against Truchot to establish that it had the knowledge or constructive knowledge necessary. His problem is that the proposed amendments do not plead such knowledge or the facts relied on in support of such an allegation.
    b. Mr Thompson points out, entirely correctly, that it is not alleged that Mr Griffith ever demanded any action by Truchot or even raised with Truchot any concern about the affairs of Bankside. And so it is not alleged that Truchot failed to take steps (insofar as it had any power to do so) to control the affairs of Bankside to prevent the alleged wrongdoing in response to such a request. This is not, therefore, a case where, for example, a petitioning minority shareholder has demanded action from a majority shareholder with the power to control the affairs of the company to prevent wrongdoing by directors and the majority shareholder has refused to take any action, thus facilitating the wrongdoing.
74. As to the other new allegations, Mr Thompson submits that they provide no realistic basis for granting the relief sought against Truchot. Thus some are just background and others post-date the alleged wrongdoing for which Mr Griffith is trying to make Truchot liable. Most relate to conduct by Mr Gourgey and not to Truchot at all. Most do not relate to the conduct of the affairs of Bankside at all. None of them establishes any connection between Truchot and the alleged unfairly prejudicial conduct. None of them provides any basis on which the relief sought against Truchot could realistically be ordered.

75. In addition to the recital by me above of the proposed amendments Mr Thompson makes the following points.

76. As to paragraphs 89 to 94, which relate to the trusts on which the shares held by Truchot have been held, he points out correctly that it is not suggested by Mr Griffith that as a consequence of those trust arrangements Truchot should be liable in the way claimed. I agree that any such suggestion would be hopeless.

77. As to paragraph 96, which relates to the alleged agency in relation to the exercise of shareholder rights, Mr Thompson submits that that plainly does not provide any basis on which the relief sought could be granted against Truchot. In particular, it does not establish any connection at all between the conduct complained of and Truchot. In this context, it is important to note what is not alleged. For example – again there is a resonance with what I have already said in relation to the strike out application itself - it is not alleged that Truchot allowed Mr Gourgey to act as its agent in exercising Truchot's voting rights so as, for example, to vote against a resolution that Bankside take action to prevent the alleged wrongdoing or to vote in favour of a resolution authorising conduct which is alleged to be unfairly prejudicial. The actual examples pleaded ("including by ….") are of no consequence of themselves either separately or cumulatively; and in an amendment application, I would expect there to be pleaded all of the facts and matters relied on to make good the allegation in the opening words of paragraph 96 that Truchot has permitted Mr Gourgey to act as it agent.

78. As to paragraph 97, where it is alleged that Mr Gourgey held himself out as having authority to act on behalf of Truchot in connection with the settlement and Truchot did not seek to prevent him from doing so there is once again, as Mr Thompson submits, no allegation that Truchot knew that Mr Gourgey was holding himself out in that way. I agree with Mr Thompson that there is therefore no basis on which Truchot could be blamed for failing to prevent that. In any event, it is not easy to see how any holding-out, if it were established, would be connected to the unfairly prejudicial conduct. Even if Mr Gourgey had had express authority to act on behalf of Truchot in relation to the affairs of Bankside, such an authority would clearly not extend to an authority to Mr Gourgey *qua* director to act in breach of his fiduciary duty or otherwise in a way amounting to unfairly prejudicial conduct.

79. As to paragraph 98, which concerns the instructions to accept service, it has been established by the hearing before Mark Anderson QC and his decision, that Mr Gourgey did not have the authority referred to. Clearly he did not have authority to hold himself out as having such authority and clearly Mr Anderson's decision would be wholly inconsistent with any suggestion that Truchot knew of Mr Gourgey's assertion of authority. Whatever complaint Mr Griffith may have about Mr Gourgey's conduct concerning service of the Bankside petition, he can have no complaint against Truchot. Nor can Mr Gourgey's conduct be relied on as a factor in seeking to establish the required connection between Truchot and the unfairly prejudicial conduct complained of.

80. As to paragraph 99, which concerns the exercise of pre-emption rights, Mr Thompson submits that that patently has no bearing on the allegations of unfairly prejudicial conduct and obviously provides no basis whatsoever to claim the relief sought against Truchot. I agree that, of itself, it provides no basis. But I think it is relied on principally as another example of Mr Gourgey acting as Truchot's agent but, as I have already said, without a pleading of knowledge or constructive knowledge of intended or actual wrongdoing, it is impossible for Mr Griffith to suggest that Truchot had authorised any improper conduct.

81. Further, Mr Thompson submits (and I agree) that if this allegation is intended as a new allegation of unfairly prejudicial conduct, then it is unclear. Any such allegation is wholly unparticularised; and in any case it would fail as a new allegation of unfairly prejudicial conduct since this conduct is plainly not conduct of the affairs of Bankside

for the purposes of section 994. As Mr Thompson says, the operation of pre-emption provisions under the articles under the supervision of the board might be conduct of the affairs of the company, but delay by a shareholder in deciding whether to adopt an unauthorised share purchase transaction purportedly carried out pursuant to the pre-emption provisions is not. That conclusion is, I think, clear and is consistent with the approach in *Re Leeds United Holdings Limited* [1997] BCC 131 at 143 and in *Re Coroin* (*supra)* at [639].

82. Moreover, I agree with Mr Thompson that any such new allegation of unfairly prejudicial conduct, if that were intended, could not, standing by itself at least, be used to attempt to justify the relief actually sought (that is to say an order requiring Truchot to buy Mr Griffith's shares at a price adjusted for the effects of entirely different alleged unfairly prejudicial conduct by Mr Gourgey).

83. As to paragraph 100, which concerns the continuing failure of Truchot to seek to interfere with the management of Bankside, Mr Thompson makes criticisms similar to those which he made in relation to the general non-involvement allegation. In particular, there is no allegation that Mr Griffith requested action by Truchot. More importantly, to my mind, the draft amendments do not, even now, identify what it is said Truchot should have done, or do, other than generally to "interfere with the management of the Company". I would expect a more focused and specific identification, in the context of an amendment application, of what it is said that Truchot did not do which it ought to have done.

84. Further, there was by March 2016, nothing that anyone could have done to prevent the alleged wrongdoing; the alleged unfairly prejudicial conduct had already taken place. Even if it could be said that Truchot ought then to have taken steps to make a monetary claim against Mr Gourgey, the failure to do so would at best from Mr Griffith's point of view amount to new unfairly prejudicial conduct on the part of Truchot. Quite apart from the fact that no such claim is asserted in the proposed amendment, it is obvious, I think, that such conduct would not justify a buy-out at the price asserted in the Bankside petition.

85. I am not sure what reliance, if any, is now placed by Mr Parker on the provisions of the settlement referred to at paragraph 62c. above and set out in paragraph 91 of the proposed amended Bankside petition. Those provisions are irrelevant to the matters before me. They relate to the relationship between the trustees and the beneficiaries and have nothing to do with relationships between the trustees and third parties. Truchot cannot shelter behind that provision to avoid liability in respect of any unfair prejudicial conduct if it would otherwise be liable; and nor could Mr Griffith rely on the provisions to cast liability on Truchot when it would otherwise not be liable. In any case it does not apply to the facts of the present case. It expressly deals only with the situation where the trustee holds "the whole or a majority of the shares carrying the control of the company". At all material times Truchot did not do so.

86. Paragraphs 101 and 102 are background and summary and add nothing substantive to the pleaded claims.

87. Applying the principles which I have set out above in relation to the strike out application, Mr Thompson's submission is that the allegation of non-involvement does not amount to a sufficient connection between Truchot and the unfairly prejudicial conduct to make it just to grant the relief sought against Truchot and submits that the remedy sought will not be granted.

88. Mr Parker's response to all this is that Truchot has never manifested any interest in the 50% shareholding in Bankside as against Mr Gourgey. There is a distinction between ownership of the shares – that is to say, who the beneficial owner is – and control over the shares. He says that it is not necessary to establish that the shares belong to Mr Gourgey (indeed, that would involve an allegation that the settlement is a sham, and no such allegation is made). Rather, he submits that the fact that Truchot has done absolutely nothing in relation to the shares makes it unfair to Mr Griffith to treat the trust and Truchot as different from Mr Gourgey so as to deny a remedy against the trust and Truchot. The perceived unfairness here, of course, is that Mr Gourgey may not have sufficient assets to meet any buy-out order against him in circumstances where Mr Griffith would be unable to obtain satisfaction by recourse to the shares which Mr Gourgey had gifted to the settlement. In effect, Mr Gourgey would enjoy both the benefit of the shares through use of the votes attached to them and also practical immunity from suit by Truchot whilst at the same time Mr Griffith would be deprived of access to the value of those shares to meet the buy-out price of his own shares. These submissions repeat, in substance, the submissions made in relation to the strike-out application itself, submissions which I have already rejected. I do not repeat my reasoning here. The conclusion remains that mere ownership by trustees of a settlement of a 50% shareholding given to them by a settlor does not of itself expose them to a risk of relief against them in consequence of unfairly prejudicial conduct by the settlor as a director of the company. Further, absent any knowledge or constructive knowledge of the facts giving rise to the complaint of unfairly prejudicial conduct, it is not enough, in order to establish the connection required between trustees sought to be made liable and the conduct complained of, that the trustee have never manifested any interest in the company.
89. Mr Parker suggests that paragraph 96 of the proposed amended PoC deals with the question of knowledge. It is certainly pleaded (necessarily implicitly) that Truchot knew of the matters mentioned in paragraph (a) and (b) following "including" and it is fair to say that Truchot knew that it had not taken any subsequent steps to procure the holding of a general meeting. I fail to understand, however, how this demonstrates any knowledge, constructive or otherwise, about the unfairly prejudicial conduct alleged.
90. Mr Parker also made submissions concerning the pre-emption rights. He did not challenge the general proposition that dealing with contractual rights concerning shares, even if contained in the articles, is not conduct in the course of a company's affair. However, he submitted that if a shareholder conducts himself in a way which prevents the company from acting in accordance with its articles of association, that can be conduct in the course of the company's affair and thus relevant in the context of section 994. He points out that under the articles, Mr Griffith has the right to acquire Mr Hodge's shares subject to the same rights of pre-emption as other shareholders. Truchot's right of pre-emption was purportedly exercised on its behalf but without authority. Until recently, Truchot had not said whether it wished to ratify the acquisition of the shares. The consequence, until ratification, was that Bankside was unable to carry out the administrative work regarding the correct destination of

Mr Hodge's shares. It is said that the failure to decide whether or not to ratify is conduct in the course of Bankside's affairs. I disagree. The relevant conduct complained of is the failure to elect whether or not to ratify. That is clearly not conduct in the course of Bankside's affairs. At most it has an effect on what Bankside can do administratively. The complaint is not in substance or form a complaint about the conduct of the affairs of Bankside; rather it is complaint against Truchot in its personal capacity. But even if that were wrong, what is absolutely clear is that no allegation is made in the draft amended pleading that this failure to elect is, of itself, unfairly prejudicial conduct on the part of Truchot.

91. I reject Mr Parker's submissions as an answer to the points which Mr Thompson has made. There is nothing, in my judgment, in the proposed new allegations which could give Mr Griffith a real prospect of obtaining the relief sought against Truchot. Quite apart from the insurmountable hurdles facing Mr Griffith's case, the proposed amendments are defective because they do not raise the issues. Mr Parker's primary contention that there is no material distinction between Mr Gourgey and Truchot is nowhere pleaded.
92. Accordingly, I would reject any application for an amendment in the form of the current draft amended Bankside petition and PoC.

The G&G strike-out application

93. The G&G petition names Neil and Charles as respondents, but not Mr Gourgey, although it is Mr Gourgey's conduct which is alleged to be unfairly prejudicial. Mr Parker has not explained to me why a decision was taken not to join Mr Gourgey, although one might speculate that it is because Mr Griffith hopes to succeed against Neil and Charles and does not want, if that result is obtained, a further judgment against Mr Gourgey which would dilute his assets available to meet a judgment on the Bankside and Pedersen petitions.

94. Neil and Charles now seek to strike out certain references to them. Mr Lightman has taken me to a number of paragraphs of the amended petition.

95. Paragraph 3 sets out the shareholding in G&G. At all material times, Neil, Charles, Mr Hodge and Mr Griffith held 25 shares each. Mr Hodge's shares are now held by his trustee. Paragraph 8 pleads the shareholdings in Bankside. The figure against his name is wrong because his shares have now passed as to 8 to Mr Griffith (giving him 33 in total) and as to 17 to Truchot (although only recently, following ratification by Truchot of the notice exercising the right of pre-emption).

96. Paragraph 9 is in similar terms to paragraph 6 of the Bankside petition.

97. Paragraph 15 pleads a number of fiduciary duties (as set out in the Companies Act 2006) owed by Mr Gourgey to each of the companies of which he was a director. There is no pleading of any fiduciary duties owed by Neil or Charles, although paragraph 19 of the PoC does plead such duties on the part of Neil and Charles. Later paragraphs through to paragraph 29 contain no material allegations concerning Neil or Charles.

98. Paragraph 29 pleads a number of loans including loans to Neil and Charles, but these were made not by G&G but by Pedersen Knightsbridge.

99. Paragraph 30 alleges breaches of duty by Mr Gourgey as a director of Pedersen Bromsgrove, contrary to the Understanding and without regard to the interests of Mr

Griffith. Mr Gourgey's conduct as a director of that company is relied on to show his unfitness generally to be a director of certain other companies. Paragraph 31 alleges breaches of duty by Mr Gourgey as a director of Pedersen Ealing.

100. Paragraph 32 arrives at G&G, the company with which this petition is actually concerned, and pleads breaches of duty by Mr Gourgey as a director of G&G, again contrary to the Understanding and without regard to the interests of Mr Griffith. The breaches consist of payments or loans of sums of money to various other companies. The consequence, set out in paragraph 32, is that due to the insolvency of the recipient companies and/or the unwillingness of Mr Gourgey to repay, little or none of these monies will be repaid to G&G. Although the fact of the payments and loans is pleaded, no detail is given of how or even when the payments were made.

101. Paragraphs 34 to 77 make allegations in relation to a number of other companies and further breaches of duty by Mr Gourgey.

102. Paragraphs 78 and 79 make various allegations concerning the sale by G&G of a property known as 10 Albert Embankment producing, after repayment of bank borrowings, net proceeds of about £4 million. It is said that despite requests to the directors (who include Neil and Charles), Mr Gourgey refuses to say what he has done with that £4 million. Paragraphs 80 to 82 contain further allegations against Mr Gourgey.

103. The core allegation, again against Mr Gourgey, is found in paragraph 83 and 84:

> "83. The affairs of [G&G] are being conducted by a man, Mr Gourgey, who is unfit to be a director thereof as evidenced by his conduct of [companies referred to earlier] as set out above.
> 84. Whilst unlawfully appropriating to himself or his companies the assets of [G&G] [and other companies], Mr Gourgey is withholding any benefit from [Mr Griffith] and seeking repayment of such benefit as he [presumably a reference to Mr Griffith] has previously derived as a result of his shareholding."

104. Subsequent paragraphs make no reference to Neil or Charles.

105. One then finds relief being sought in the prayer against Neil and Charles, namely that they may be ordered to purchase Mr Griffith's shares in G&G and on the bases set out in paragraph (a) to (d):

a. The basis under (a) is the Court "has determined the amount that [Neil] and/or [Charles] should pay to G&G as compensation for his/their breaches of duty to [G&G] pleaded above".

b. The basis under (d) is after "taking account of and making due allowance for the unfairly prejudicial conduct of [G&G's] affairs about which complaint is made herein, and in particular the same in (a) above".

106. The PoC depart to some extent from the G&G petition itself. The most important departure is the inclusion in the PoC of two allegations not found in the petition:

a. The first is found at paragraph 19 where it is alleged that Neil and Charles as well as Mr Gourgey owed fiduciary duties to each company of which he was a

director. It may be that in some cases in other petitions, such duties on the part of Neil and Charles were alleged; but none was alleged in the G&G petition and an allegation that duties were owed should not have been pleaded in relation to G&G without amendment of the G&G petition.

b. The second is found at paragraph 36 which provides as follows:

> "In breach of their fiduciary duties as directors and contrary to the Understanding, Mr Gourgey has, without the approval of Mr Griffith, and with the support of his sons, caused the following monies to paid over or lent by G&G"

and there follows the same list of payments as is found in paragraph 32 of the G&G petition.

107. The obvious difficulty with the pleading in paragraph 36 is that it is not clear that as breach of duty alleged against Neil and Charles and there is certainly no pleaded basis at all on which the full amount of the relief sought could be claimed against them.

108. The only lever for relief is the allegation in paragraph 36 that Mr Gourgey acted "with the support of his sons". Mr Lightman describes this, with some justification, as an extraordinary basis for relief let alone an immediate share purchase order against Neil and Charles. This allegation is not without difficulties, including that the G&G petition and the PoC:

a. fail to explain what is meant by the expression “with the support of his sons”;

b. fails to specify how, with respect to any of the payments relied on by Mr Griffith either (i) Neil or (ii) Charles is alleged to have given “support” to Mr Gourgey;

c. fail to identify which fiduciary duties either (i) Neil or (ii) Charles is alleged to have breached in relation to any of those payments; and

d. fail to explain the relevance of the alleged Understanding to the relief sought against Neil and Charles in the G&G Petition or the allegation that the payments are alleged to have been contrary to its terms, in circumstances where:

i. neither Neil nor Charles is alleged to have been a party to the alleged Understanding or to be or at any time to have been bound by it; and

ii. Mr Gourgey is not, and has never been, a shareholder in G&G, and is not a respondent to the G&G Petition.

109. Mr Parker accepts that Mr Gourgey is the real villain, to use his words. But what he says is that, although he is unable to assert that Neil and Charles are lead players in the breaches of duty, they cannot be immune from a buy-out order if they are nominated to hold the shares. I imagine that what Mr Parker is getting at here is that Mr Gourgey placed shares in the names of his sons. Mr Parker submits that it is not possible to get out of section 994 by putting the shares in a family member: Neil and Charles cannot rely on the fact that the wrongdoing was that of their father to avoid the strictures of section 994. The submission here is similar to the one made in relation to Truchot. But as with Truchot, something more has to be shown than the

mere fact of ownership by a family member, even if the shares were given to his sons by Mr Gourgey. It might, for instance, be pleaded that Neil and Charles knew of their father's actions or even that they are to be treated as knowing by virtue of their positions as director; and it might be pleaded that they acted in breach of fiduciary duty. Or if it is alleged that Neil and Charles were somehow cyphers of their father, there may be an argument which could be raised. But nothing like any of this is pleaded in the G&G petition. And even the PoC, which do allege the subsistence of duties, do not say which of those duties have been breached or how they may have been be breached. In my judgment, the G&G petition discloses no case for relief against Neil or Charles.

110. This conclusion is not affected by what was contained in the Points of Defence on behalf of persons including Neil and Charles. Mr Parker says that reference to those Points of Defence show how Neil and Charles understood the allegations being made so that the G&G petition is sufficient when it is seen how they understood it. Reliance is placed on some of the same paragraphs as are relied on in resisting Truchot's claim and which I have already noted. In particular, Neil and Charles admitted in paragraph 31.2 of their Points of Defence that for the purposes of ratifying any breach of duty by Mr Gourgey, he represented Neil and Charles as shareholders in G&G.

111. Mr Griffith may have an argument based on that admission that the necessary connection between Neil and Charles on the one hand and the alleged unfairly prejudicial conduct on the other is established. Mr Griffith's immediate problem, however, is that this case and the facts necessary to support it are not pleaded.

112. My conclusion is that the G&G petition cannot stand as against Neil and Charles. The PoC cannot be relied on insofar as the allegations go beyond particularisation of more general allegations in the petition. In particular, Mr Griffith cannot rely on the duties alleged in paragraph 19 of the PoC or the allegation of support of Neil and Charles in paragraph 36.

113. That is not an end to this aspect of the case. At the end of his submissions on the strike-out application, Mr Parker was inclined to accept that the petition needs amending to introduce the allegations in paragraph 36 of the PoC and I imagine he would accept the same about the existence of a breach of duty. He flagged some possibilities to deal with the concern which Mr Lightman had about relief. It was left that he would prepare a draft of a proposed amended G&G petition and further amendments to the PoC for Mr Lightman to consider. The draft has now been produced. I will hear submissions about it when I hand down this judgment. I will no doubt have to make a ruling not only on whether to allow the amendment but also on the extent to which Neil and Charles, are to be entitled to serve Points of Defence in consequence of the amendment if allowed.

The extent of evidence required

114. The next issue is whether the petitioners need to adduce any evidence in relation to their claims against the respondents whose Points of Defence have been struck out. The petitioners' position is that as a result of that strike-out, the facts in the petitions and PoC are not open to challenge; the petitioners are entitled to obtain relief on the basis of those facts so that the Court should move straight to determining

what, if any, relief they should now be granted. The response of those respondents is that the petitioners still need to prove their cases. The Court cannot be satisfied in the way that section 996 requires simply on the basis of pleadings, even if supported by a statement of truth.

115. I remind myself of the essential elements of the statutory scheme:

a. Section 994 provides that a member of a company may apply to the court for an order on the ground that the company's affairs are being or have been conducted in an unfairly prejudicial manner.

b. Section 996 provides for the remedies available: if the Court is satisfied that a petition is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

116. There are therefore two aspects of the process. First, the court has to be satisfied that there has been unfair prejudice. If it is, then it has wide powers to grant relief in respect of the unfair prejudice established. Procedurally, a petitioner will set out in his petition and Points of Claim the facts and matters alleged to amount to unfairly prejudicial conduct and will also set out the relief he seeks. The Court, even if it is satisfied that there is such conduct, is not circumscribed in the relief, if any, which it decides to grant by the petitioner's claimed relief. There is, as Mr Lightman correctly submits, no entitlement to relief, even if unfairly prejudicial conduct is established. The appropriate relief will depend on all the circumstances of the case. As Patten J said, giving the judgment of the Court of Appeal in *Grace v Biagioli* [2005] EWCA Civ 1222, [2006] 2 BCLC 70 at [75]:

> "Once unfair prejudice is established, the court is given a wide discretion as to the relief which should be granted. Although [section 994] speaks in terms of relief being granted 'in respect of the matters complained of', the court has to look at all the relevant circumstances in deciding what kind of order it is fair to make. …. the court must assess the appropriateness of any particular remedy as at the date of the hearing and not at the date of presentation of the petition; and may even take into account conduct which has occurred between those two dates. The court is entitled to look at the reality and practicalities of the overall situation, past, present and future."

117. The trial of a section 994 petition will ordinarily be concerned with establishing whether there has been unfairly prejudicial conduct and with the relief to be granted if it is established. It may be that a judge hearing a petition will make a decision (giving a judgment) on the issue whether it is satisfied that there has been unfairly prejudicial conduct leaving further submissions on remedy to be argued, or argued further, after such decision has been made and judgment delivered. But in other cases, the judge will give a single judgment dealing with both unfair prejudice and remedy. It is possible, I suppose, for it to be directed, at an early stage, for there to be a trial of the issue of unfair prejudice only, with remedy being dealt with later, in the same way as, in an action for damages, there can be a trial of liability with a subsequent enquiry into the amount of damage. I have not myself been involved in a section 994 petition which has been split in that way; and the present case has not been subject to any such direction.

118. Turning to the relevant procedural rules governing section 994 petitions, these are to be found in a combination of the Companies (Unfair Prejudice Applications)

Proceedings Rules 2009, SI 2009/2469 ("the 2009 Rules") and the CPR. Rule 2(2) of the 2009 Rules provides that, except so far as inconsistent with the Companies Act 2006 and the 2009 Rules, the CPR apply to section 994 proceedings with any necessary modifications. Jumping ahead, Mr Lightman submits that the provisions of the CPR on which Mr Parker relies are, indeed, inconsistent with section 994 to 996 and that those provisions effectively require a trial to be held even where a respondent has been debarred from defending, *a fortiori* where he has, as in the present case, had his defence struck out but has not been altogether debarred from defending

119. The rules of the CPR mentioned in the following paragraphs have featured in argument.

120. Rule 3.5: This rule is headed "Judgment without trial after striking out". It applies where an unless order has not been complied with. Paragraphs (2) to (4) deal with money claims (including an amount of money to be decided by the court) and claims for delivery of goods. Paragraph (5) provides that a party must make an application under Part 23 if they wish to obtain judgment under Rule 3.5 in a case not within those categories.

121. Rule 16.5: this rule is headed "Contents of defence". Paragraph (5) provides (subject to paragraphs (3) and (4) which are not material to the present case) that "a defendant who fails to deal with an allegation shall be taken to admit that allegation". The respondents whose defences have been struck out are thereby persons who have failed to deal with the allegations in the PoC.

122. Rule 32: this rule is headed "Evidence in proceedings other than at trial". Paragraph (1) sets out the general rule which is that evidence at hearings other than trial is to be by witness statement. Paragraph (2) provides that at hearings, other than the trial, a party may rely on his statement of case or application notice if verified by a statement of truth.

The parties' submissions

123. In the light of those provisions, Mr Parker's submissions, put briefly, are these:

a. The defence having been struck out, all of the allegations contained in the PoC are to be treated as admitted. There is no need, therefore, for evidence to support those allegations.

b. Subject to the Court being satisfied that the facts pleaded in the PoC amount to unfairly prejudicial conduct (as to which Mr Parker submits the answer are is obviously that they do), the Court can move on to consider the appropriate relief under section 996. There is no need for a trial to establish the facts pleaded in the PoC. Whether those facts amount to unfairly prejudicial conduct is a matter of argument which can be dealt with as easily on a Part 23 application as at a trial.

c. The case falls within Rule 3.5(5) since it is clear that there is unfairly prejudicial conduct and all that is necessary now is to determine the relief. I would add that, even if the case does not fall strictly within Rule 3.5(5), the applications which the petitioners have made could nonetheless be seen as falling within Part 23. He points out that whether a claimant can simply make a request for judgment (where judgment is obtained automatically under paragraphs (2) to (4)) or has to apply for judgment (where judgment is obtained pursuant to paragraph (5) and requires an application under Part 23) turns on the remedy that is sought. It would, he submits, be irrational if the Court's involvement under a Part 23 application went to anything other than a

consideration of the remedy. There can be no rational basis for requiring a claimant who wants money from the defendant by way of a buy-out order to have to prove his case whilst a claimant who simply wants money (quite possibly in a far larger amount) does not have to do so.

d. Mr Parker accepts that the respondents are entitled to appear on any relief hearing and to make submissions about (i) whether the pleaded facts establish unfairly prejudicial conduct and (ii) the relief which should be granted. He does not accept, as I understand his case, that the respondents whose defences have been struck out would be entitled to adduce any evidence which might be relevant to the appropriate relief.

124. Mr Lightman's submissions in summary are these:

a. Rule 3.5(5) is inconsistent with the statutory scheme. The Court cannot be satisfied that there are unfair prejudice without either an express admission of the facts relied on by a petitioner or evidence on which the Court can decide the facts.

b. Rule 16.5 does not lead to a different conclusion. Rules of Court which merely treat a person as admitting an allegation are insufficient, for the purposes of the statutory scheme, of being capable of satisfying the Court that the affairs of the company have been conducted in an unfairly prejudicial manner.

c. A trial is necessary. At a trial, evidence must be adduced. The PoC, even if supported by an appropriate statement of truth, cannot be relied on since Rule 32.6 only applies at hearings other than a trial.

d. The issue of unfair prejudice cannot be hived off from the issue of the relief sought. There is a single set of proceedings with a single outcome, namely, if a petitioner is successful, the grant of such relief as the Court sees fit. The relief is discretionary: a petitioner has no right or entitlement to particular relief or indeed to any relief at all. Rules 3.5(2) for proceeds on the basis that there is an entitlement to relief . The same should apply to Rule 3.5(5)

125. Before addressing those submissions any further, I mention two other rules of the CPR which have been referred to by the parties, namely default judgment under Part 12 and summary judgment under Part 24. I have not found reference to Part 12 of much assistance. In cases other than money claims and claims for delivery of goods, an application for default judgment must be made under Rule 12.11 using the Part 23 procedure. Judgment is to be such judgment as it appears to the Court that the claimant is entitled to on his statement of case. This procedure is, I consider, not available in section 994 proceedings. The petitioner is not <u>entitled</u> to any particular relief on his statement of case; relief is a matter of the Court's discretion. Further, if Mr Lightman is right in his submissions concerning the non-applicability of Rule 3.5(5), then *a fortiori*, Rule 12.11 would not apply either. It is worth noting that Tomlinson LJ described Rule 12.11 in *Thevarajagh v Rirordan* (see below for the citation) at [33] as a mechanistic, non-judicial, function.

126. That description might be too limited. It is, of course, the case that it has long been the practice that a claimant applying for judgment in default of defence does not have to prove his case (although a claimant could sometimes opt to continue to trial if he so wished). The consequences of this were recognised by Briggs J in *Football Dataco Ltd v Smoot Enterprises Ltd* [2011] EWHC 973 (Ch), [2011] 1 WLR 1978:

> "[16]….. Default judgment is not, in any circumstances, a judgment on the merits"
>
> and

"[19]…the purpose of the requirement for an application is either to enable the court to tailor the precise relief so that it is appropriate to the cause of action asserted, or otherwise to scrutinise the application in circumstances calling for more than a purely administrative response. It is in those respects that it must appear to the court either that the applicant is entitled to the default judgment sought, or to some lesser or different default judgment."

127. Part 24, as Rule 24.1 explains, provides a procedure by which the court may decide a claim or a particular issue without a trial. Summary judgment is available where the Court considers that the defendant has no real prospect of successfully defending the claim or issue. It is to be noted that Part 24 can apply to a claim for specific performance: see 7PD24. The grant of specific performance is a discretionary remedy, and yet Part 24 provides a procedure for deciding a claim for specific performance or of a particular issue within such a claim without the need for a trial. I see no reason why a particular issue in a section 994 petition could not, in appropriate circumstances, be decided including whether the Court is satisfied certain conduct amounts to unfairly prejudicial conduct within section 994. No such summary judgment application has been made in the present case.

128. Mr Lightman has referred me to a number of authorities on this aspect of the case. Those which pre-date the CPR must be read with that point in mind, and in particular the point that Rule 16.5 is a new feature not found in the pre-existing Rules of the Supreme Court.

129. In *Thevarajah v Riordan* [2015] EWCA Civ 41, (post CPR Commencement) the relief claimed by Mr Thevarajah was complex and included specific performance of an agreement. As to the relief claimed, Tomlinson LJ stated as follows:

"[15] …..This relief, or at any rate most of it, is not obtainable by simply filing a request for judgment. It is relief which requires the court to be satisfied, exercising its judicial function, that it is appropriate to grant it.."

"[18]….What was required in order to determine whether Mr Thevarajah was entitled to the relief claimed was a trial. Although we have no transcript of the hearing before Hildyard J, it appears that that was also his view. According to a note cited by the Respondents' counsel in their skeleton argument placed before the Deputy Judge, Hildyard J observed on that occasion that:

> "You need to prove your right with regards to anything that goes to the substance of the claim, you cannot seek judgment in default. That would not work.""

"[21] …..Save that CPR Pt 23 is concerned with the making of applications, it contains nothing which would justify the court directing specific performance of an agreement without enquiring into the question whether the claimant thereto is entitled to such relief. Mr Thevarajah was not "entitled" to any of this relief simply because the Defendants had had their defences struck out and been debarred from defending the claims brought against them."

"[36]…..It is true that rule 3.5(5) mandates an application under Part 23 if a party wishes to "obtain" judgment under this rule in a case to which paragraph (2) does not apply. But a judgment "under this rule" is a judgment without

trial. Rightly, it was here recognised albeit it not perhaps consistently that the Claimant had to prove his case and his entitlement to the relief sought." [this was said in a case, it should be remembered, where the defence had been struck out.]

130. Those passages lend support to Mr Lightman's submissions that there needs to be a trial in a section 994 petition even when a defence has been struck out and the respondent has been debarred from defending. At the very least, even if there is not a full trial, a petitioner has to file evidence to prove his case.

131. He relies also on the decision of Malcolm Davis-White QC (sitting as a deputy High Court Judge) in *Re B&G Care Homes Ltd* [2016] BCC 615, at [13]:

> "In the context of s.994 petitions the court has to be satisfied that the case is established, there is, for example, no room for judgments by consent or judgments in default of defence, but that does not prevent the court from debarring a respondent from defending so that, in that event, the position is that it is for the petitioner to make out his or her case, but without opposition."

132. Next, he refers to the decision of the Court of Appeal in *Baygreen Properties Limited v Gill* [2003] HLR 12 ("*Baygreen*"). This was a case concerning the Housing Act 1988 under which the court could only make a possession order on limited statutory grounds. Clarke LJ said this at [27]:

> "… it follows from section 7 of the 1988 Act that the jurisdiction of the court to make an order for possession is limited. If the court is not satisfied that the relevant grounds are established, it has no jurisdiction to make the order. The court is under a duty to investigate whether the grounds are in fact established independently of whether either party puts that question in issue."

133. Mr Lightman draws an analogy with section 994. He says that, because the Court has to be satisfied that there is unfairly prejudicial conduct, it is under a positive duty to investigate whether the petition is well founded. I agree up to a point. The Court is under an obligation to see that the statutory requirement is fulfilled and so it must be satisfied that there is unfairly prejudicial conduct. However, as Clarke LJ stated at [49],

> "…. The crucial point is that, in order for the court to have jurisdiction in a case where there is a consent order, the relevant admission, whether express or implied, must be clearly shown. If the true explanation for the consent order may simply be that there was a compromise between the parties, it may well be that it will not be possible to imply the relevant admission...."

And so in the case of a section 994 petition, I do not doubt that a respondent is able expressly to admit a fact so that the Court may not need to require that fact to be proved by evidence but can take the fact as established when considering whether it is satisfied that there is unfairly prejudicial conduct. I say "may" rather than "will" since there may be circumstances where another person against whom relief is sought may not agree with the admission and requires the fact to be proved. In my view, the Court can only reach one answer on the question whether it is satisfied that there had been unfairly prejudicial conduct. It cannot reach one answer *vis a vis* one respondent and a different answer *vis a vis* another respondent. Accordingly, if the admission is shown, at trial, to be incorrect, the Court must act on the facts as it has found them, not as they have been admitted by one respondent. But if all the respondents admit a

particular fact, then there is no reason for the Court to receive evidence about that fact: the admission should *prima facie* be enough to satisfy the Court of the fact and if there is nothing to raise a doubt the Court need go no further.

134. Considerable reliance is placed by Mr Lightman on the decision of Ferris J in *Re Full Cup International Trading Ltd* [1995] BCC 682 in which the respondents had been debarred from defending. The petition nevertheless proceeded to a trial before Ferris J, at which he required the petitioner to prove his case. At p 685, he referred to certain cheques and the evidence given by the petitioner. He found it impossible to evaluate that evidence without taking into account the explanation given by the respondent "although to do so is in conflict with the debarring order". It would be unsound, he considered, to accept the petitioner's evidence when it is untested by cross-examination and where the respondents would have wished to contradict it. He observed, at p690, that "it is necessary to analyse with some care precisely what it is that the respondents did and in what capacity they did it". On the facts before him, Ferris J refused to accept all of the allegations of unfairly prejudicial conduct pleaded in the petition, instead finding unfairly prejudicial conduct in one respect only. Ferris J's approach, Mr Lightman submits, was entirely consistent with the requirements highlighted by Clarke LJ in *Baygreen*, namely that the Court is under a positive duty to investigate whether the statutory requirements set out in section 994 have been met. Ferris J's decision was upheld by the Court of Appeal ([1998] BCC 58), where Mummery LJ observed, at 64: "Even if the whole of the respondents' evidence were disregarded and the judge accepted the uncontradicted evidence of the petitioner, his reasons for refusing to make an order under section 461 would still be valid. The debarring order does not discharge the petitioner from satisfying the court that it is proper to make an order for specific relief under that section."

135. In *Apex v Fi Call* [2015] EWHC 3269 (Ch), there were consolidated proceedings involving cross-petitions and other claims between the parties. Even though the respondents/defendants to the counterclaims had been debarred from defending, Hildyard J nonetheless presided over a seven-day trial. That case, however, provides Mr Lightman with little support for his submission that there has to be a trial. The claimants/petitioners themselves were pushing for adjudication notwithstanding the debarring. They were doing so because they wished to vindicate themselves against some very serious allegations of dishonesty. Mr Lightman notes Lewison LJ's observation in the course of argument on an *ex parte* oral hearing for permission to appeal from the order of Simon J where he said "I appreciate that the petitioner has to prove unfair prejudice, but if the respondent to the petition is unable to advance a positive case, the petitioner still has to prove the unfair prejudice" but that cannot take him very far, if indeed it can take him anywhere.

136. In further support of his contentions, Mr Lightman refers the decision of Pumfrey J in *Re Premier Electronics (GB) Ltd* [2002] 2 BCLC 634. In that case, the judge refused to continue a freezing order obtained *ex parte* which had been made against the director respondents to an unfair prejudice petition. Pumfrey J described the nature of the claim as one for relief from mismanagement of the company's affairs, not a remedy for misconduct. There was no derivative claim on foot and no application for leave to bring such a claim had been made. He held that the court had no jurisdiction because there was no subsisting cause of action against the directors. And so Mr Lightman submits there is no subsisting cause of action against Mr Gourgey or any other respondent which demonstrates that there is no right or entitlement to any relief or judgment making it all the more important that the petitioners should prove their cases.

137. Mr Parker's case is that the petitioners do not need to adduce any evidence at all to establish the facts alleged in the PoC. Even if he is right about that, he still has to persuade a judge that the pleaded facts establish unfairly prejudicial conduct. He submits that the CPR generally, and Rules 3.5, 16 and 32 in particular, apply with full force to section 994 petitions. He submits that the necessary modifications envisaged by the 2009 Rules "presents" a high threshold for disapplying any particular rule. It is not possible to conclude that the ordinary pleading rules do not apply.

138. In addressing that submission, it is important to understand how the CPR come to apply to section 994 petitions in the first place. It seems to me that a petition is not a "statement of case" as defined in CPR rule 2.3(1); nor are Points of Claim or defences ordered to be provided in the course of such petitions "a statement of case". It is rule 2(2) of the 2009 Rules which incorporates the CPR into section 994 petitions. And it is as a result of that rule that Points of Claim and defences fall to be treated (except so far as inconsistent with the Act and the 2009 Rules) as statements of case. The CPR then apply with any necessary modifications. It is not the use of the phrase "with any modifications" on which Mr Lightman relies. Rather, he contends that certain parts of the CPR – modified so as to apply to pleadings within a section 994 claim – are inconsistent with the statutory scheme under sections 994 and 996. I therefore take Mr Parker's submission to be that the CPR are not inconsistent with the statutory scheme and are to be applied in a straightforward way according to their terms as I have set out above in the brief statement of the petitioners' cases.

139. In essence, Mr Parker, whilst accepting that the Court has to be satisfied as required by section 996, submits that it can be so satisfied by an application of the provisions of the CPR which permit judgment to be obtained where a defence has been struck out following an unless order (rule 3.5) and which treat a defendant who has not pleaded to a claim (which will be the case where his defence has been struck out) as admitting the facts set out in a claimant's statement of case (rule 16.5). In other words, the facts pleaded in the PoC are now established facts as between the petitioners and the respondents who have had their defences struck out so that the Court can be satisfied as required by section 996 provided that the pleaded facts are sufficient: there is no need for further evidence. The question is not how the facts are to be proved but how they are to be established for the purpose of satisfying the Court that there had been unfairly prejudicial conduct.

140. If that is correct, Mr Parker then submits that the petitioners are entitled to the relief sought in that they are entitled to ask or require the Court to consider whether or not the petitioners should be afforded the relief sought, accepting that the Court might conclude that the facts established are not enough to persuade the Court to grant the relief sought, so that the Court might to grant some other relief not sought or desired or perhaps no relief at all. He accepts that the respondents are entitled to participate in the determination by the Court of the appropriate relief, although he and Mr Lightman do not agree about the extent of the permitted participation.

141. In response to Mr Lightman's submissions concerning the decision of Ferris J in *Full Cup*, Mr Parker submits that it is irrelevant since it pre-dates the CPR and in particular Rule 16.5. I do not consider that Ferris J can be ignored that easily. What he said did not turn on the absence of any rule (now Rule 16.5) treating a fact as admitted nor did it turn on the then subsisting rule in the Rules of Supreme Court

deeming a defendant to deny matters not expressly or impliedly admitted. Indeed, he acknowledged that what he was doing appeared contrary to the debarring order.

Discussion and conclusions

142. I consider that there are two aspects of the competing positions to resolve. The first is substantive and the second procedural. The substantive issue is whether procedural rules which treat a person as admitting facts which he has not in reality admitted are consistent with the statutory scheme under section 994 and 996. The second is how the CPR actually apply in the present case.

143. In my judgment, the requirement that the Court has to be satisfied that there is unfairly prejudicial conduct is inconsistent with procedural rules which require a person to be treated as admitting a fact which he in reality denies. The requirement that the Court be satisfied as required by section 996 goes to jurisdiction: unless the Court is so satisfied, it has no power to grant a remedy in respect of the conduct complained of. Procedural rules cannot override the substantive requirements of the statute. There is no question, however, of the Court having to say that the relevant rules are in any respect invalid since the CPR are incorporated by the 2009 Rules only to the extent that they are not inconsistent with sections 994 and 996.

144. It does not follow from that conclusion that a respondent whose defence has been struck out is entitled to put his own evidence before the Court to show that what might appear to be unfairly prejudicial conduct is not what it appears to be. Procedural rules which constrain the material and submissions which a respondent may put before the Court do not suffer from the same jurisdictional difficulties as the deemed admission of facts which are in reality denied. Thus, in the present case, it if follows from the striking-out of the defences that the relevant respondents cannot put forward a case which is factually inconsistent with the PoC or put forward any other factual material to support a case that the conduct complained of does not amount to unfairly prejudicial conduct. But that does not absolve the petitioners from carrying out the principal task which they would have to carry out if the defences had not been struck out, that is to say to establish the conduct on which they rely. That, in my judgment, requires sufficient evidence to be presented to the Court to satisfy it that there has been unfairly prejudicial conduct. If that evidence does not go beyond the petitioners' pleaded cases, the respondents will not be allowed to controvert it. But if no evidence is presented by the petitioners there is no basis in the present case on which the Court could be satisfied as required by section 996 once it is appreciated that reliance cannot be placed on the deemed admissions under Rule 16.5. The cases on which Mr Lightman relies are certainly consistent with this conclusion and in my view lend some support to it.

145. Turning now to how the CPR actually apply in the present, it would clearly be open to the petitioners to proceed to a trial in the ordinary way. Since there is no issue in relation to the facts pleaded in the PoC, there is no need for the petitioners to give disclosure in relation to the pleaded facts, although there may be need for disclosure in relation to any part of the case which goes to the relief sought. In contrast, the petitioners may require disclosure from the respondents in order to obtain the best documentary evidence available to prove their cases, which they would need to do at trial. For them to prove their cases should not be an overly onerous task since they must already have the evidence which has enabled them to produce their PoC, supported by a statement of truth, in the first place. The presence of a statement of

truth means that there must have been material available on which the person signing it could base his statement and thus material to support the alleged facts. At trial, Rule 32.6 would not apply, so evidence would need to be produced in the ordinary way.

146. It would also be open to the petitioners to seek summary judgment, as I have explained, on the issue whether the Court is satisfied that the conduct complained of amounts to unfairly prejudicial conduct. Success on such an application would then lead on to determination of the remedy under section 996. The hearing of such application would not be a trial so that, in theory, the PoC could be relied on under Rule 32.6. There must be doubt, however, that the judge hearing such an application would be satisfied on the basis simply of a statement of truth accompanying the PoC that there had been unfairly prejudicial conduct especially if the source of knowledge and belief of the person providing it is not apparent. In practice, there may be no advantage in a summary judgment application rather than going straight to trial.

147. The question left to deal with, then, is whether the petitioners are or were entitled to make a Part 23 application, whether relying on Rule 3.5(5) or otherwise. I do not consider that such an application could properly have been made other than in reliance on Rule 3.5(5). The petitioners need to bring themselves within one of the rules for obtaining judgment without trial if they are to succeed on their current application. Apart from Part 24, Rule 3.5(5) offers, in my view, their only potential road to success.

148. However, in my judgment, Rule 3.5(5) is not available. The only relief which the petitioners might obtain is relief, at the Court's discretion, under section 996. They hope to obtain buy-out orders against Mr Gourgey, Neil and Charles (an order against Truchot not being available as a result of my decision earlier in this judgment) and whilst they may have a strong case for some sort of buy-out, there are clearly arguments to be had about the correct valuation basis. It does not seem to me, even if the Court were already able to say that it is satisfied that there has been unfairly prejudicial conduct, that any order will certainly be made. But even if it were clear that some order would be made, it cannot be said that, at the present time, the petitioners are entitled to any judgment. The Court could, as I have already said, order separate trials relating to unfair prejudice and remedy, just as it can order separate trials of liability and damages in a personal injury claim; and if that were done, it may be that Rule 3.5(5) could then be relied on to obtain judgment on the unfair prejudice issue by way of declaratory relief. This, however, is not how the petitioners' case has been put.

149. It is helpful, I think, to contrast this case with that of a claim for specific performance for the sale of land with an alternative claim for damages for breach of contract. Suppose that the defendant to such a claim defends it on the basis that his signature was forged; and that even if it was not, contends that there is some equitable defence to the claim for specific performance. Suppose also that a defence to that effect has been struck out for non-compliance with some procedural rules. Could the claimant proceed to judgment under Rule 3.5(5)? I think that he could. On his pleaded case he would clearly have a valid claim to enforce the contract and thus have a subsisting cause of action. Further, on his pleaded case he would have a right to specific performance. Although an order for specific performance is discretionary, an order for specific performance is made according to established principle. A defendant seeking to resist specific performance has to plead the facts and matters he relies on which, *ex hypothesi*, he has not in a case where his defence has been struck out. This is closely analogous to the sort of default judgment case envisaged by

Briggs J in *Football Dataco Ltd v Smoot Enterprises Ltd* where the court can see that the applicant is entitled either to the default judgment sought, or to some lesser or different default judgment. In contrast, the Court cannot, in the present case, say at this stage that any particular relief will be granted. There needs to be a judicial process, which I prefer to call a trial, of that issue.

150. To put these points in a slightly different way, the claim in the present case is for specified relief which may or may not be obtained. It is only by the trial process that the appropriate relief can be established. There is no cause of action, and no right or entitlement to relief. There is, absent some order directing the trial of separate issues, no order which can be sought on the petition and no judgment which can be obtained, pursuant to a Part 23 application, pursuant to Rule 3.5(5).

151. A further, and separate, question, is the extent to which the respondents whose defences have been struck out are entitled to cross-examine the persons giving the evidence which, for reasons given, I consider that the petitioners need to adduce. I do not consider that I can answer that question in the abstract. It will be for the judge hearing the matter to determine what it is that he needs to be satisfied that a case of unfair prejudice has been made out and to rule on the extent (if any) to which cross-examination should be allowed and the extent to which the respondents should be allowed to introduce documents for use in any permitted cross-examination.

The application to stay the Bankside petition as against Truchot

152. In the light of my decision to strike out certain of the reference to Truchot in the Bankside petition, no question of a stay of the petition against Truchot arises. I hope that I made it clear at the hearing that I regarded the hearing as the occasion on which any further or alternative amended pleading against Truchot should be put forward. None has been put forward. Had the proposed amended PoC cured what I consider to be the pleading defect, the question whether to stay the Bankside petition as against Truchot would have arisen. I do not propose to go into the arguments which I heard on the question whether to grant a stay. I simply say that it is likely that I would have refused to grant a stay. I am unattracted by Mr Parker's argument that if there is no stay, the respondents may use the amended pleading as an opportunity to reopen the defence which has been struck out. Whether it is right or not that the other respondents will be able to replead their defences, Truchot will be able to plead to the PoC and raise any point in its defence which assists it, including points raised by the other respondents but which have been struck out. Since there is a risk - I would put it as a near certainty – that the Court would refuse to hold, in a single judgment, that unfair prejudice is established so as found a remedy against the respondents other than Truchot, and at the same time hold that unfair prejudice is not established so as to found a remedy against Truchot, there is a real possibility that Mr Griffith would lose the benefit of having achieved a strike out of the defence. Mr Parker describes that as unfair and unjust. I do not share that perception. Justice is surely achieved if the Court grants a remedy only if it is satisfied that there has been unfairly prejudicial conduct. It would be open to Mr Griffith to maintain his procedural advantage by abandoning his case against Truchot; but if, for perfectly sound commercial reasons, he perceives the need to run his case against Truchot, he must accept the consequence that the dispute as to unfair prejudice will have to be decided on its merits in the light of all the facts. I consider that it would be wrong to allow an amendment to be made in the future at a late stage when, in practice, it may not be possible to prevent a

hearing against the other respondents being held or perhaps even after it has been actually held - when that would be to allow Mr Griffith to maintain his procedural advantage when he really ought to have taken steps to ensure that the claims against all respondents were heard at the same time. If, nonetheless, Mr Griffith were hereafter to formulate a new case against Truchot and seek permission to amend the petition and PoC, the judge hearing such an application should be made aware of my own, necessarily provisional and obiter, view.

153. There is one other point which I should mention for completeness. The Bankside petition was issued at a time when Mr Griffith held 25 shares. He has since acquired 8 further shares from Mr Hodge's trustee. He now seeks relief in respect of all 33 shares in the form of a buy-out order at the favourable price already claimed in respect of the 8 shares. He has not amended or sought to amend the Bankside petition or PoC to reflect this change in shareholding or extended relief. Mr Lightman contends that an amendment is necessary and that if it is made the respondents will be entitled to respond by way of defence (in which I imagine they will seek to raise again the points raised in the defence which has been struck out). There is no application before me in relation to this aspect of the dispute and I therefore say no more about it.

Summary

154. I grant the applications made by Truchot and by Neil and Charles. I have given my decision in relation to the need for the petitioners to prove their cases and the requirement for evidence notwithstanding the strike-out of the defences of the respondents other than Truchot. This will all need to be reflected in the directions that will need to be made for the further conduct of these petitions. The issue of staying the Bankside petition against Truchot does not arise. I will hear further argument on amendments to the Pedersen and G&G petitions as indicated earlier in this judgment at the hand-down.