Case No: CR-2013-003499 (NO.1805 OF 2013)

Neutral Citation Number: [2018] EWHC 2807 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2018

Before:
SIR NICHOLAS WARREN

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IN THE MATTER OF BANKSIDE HOTELS LIMTED

AND IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN:-

NICHOLAS JOHN CLWYD GRIFFITH

Petitioner

- and -

(1) **MAURICE SALEH GOURGEY**
(2) **TRUCHOT TRUSTEES LIMITED**
(3) **ROBERT LEWIS and NICHOLAS EDWARD REED**
(4) **(as Joint Trustees of the estate of Robert John Hodge)**
(5) **BANKSIDE HOTELS LIMITED**

Respondents

AND

Case No: CR-2013-003500 (No. 1806/2013)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF PEDERSEN (THAMESIDE) LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

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

Case No: CR-2013-003502 (No. 1807/2013)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF G & G PROPERTIES LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

B E T W E E N:-

NICHOLAS JOHN CLWYD GRIFFITH

Petitioner

- and -

(1) **NEIL JOSEPH GOURGEY**
(2) **CHARLES DUNCAN GOURGEY**
(3) **ROBERT LEWIS and NICHOLAS EDWARD REED**

(as Joint Trustees of the estate of Robert Hodge)
(4) **G & G PROPERTIES LIMITED**

Respondents

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

Hearing dates: 30 and 31 July 2018

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Judgment

Sir Nicholas Warren :

Introduction

1. I have already given a judgment in these petitions **("the first Judgment").** This judgment should be read with the first Judgment. I do not repeat the material in it. I adopt the definitions which I adopted in the first Judgment. I now have before me applications by Mr Griffith to amend the Bankside and G&G petitions and by Mewslade to amend the Pedersen petition and corresponding applications to amend the PoC.

The applicable principles

2. In paragraphs 10 to 27 of the first Judgment, I addressed the general principles applicable to applications to strike out pleadings and to applications to amend pleadings. I do not repeat them here although I highlight the following:
    a. The principle that a party's case is defined by their pleading is of particular importance in the case of petitions under section 994: see paragraph 16.
    b. The test of attribution of unfairly prejudicial conduct to a respondent is whether the respondent is connected with the conduct in a way which would make it just to grant a remedy against them or whether they were concerned either directly or indirectly in conducting the affairs of the company in an unfairly prejudicial manner: see paragraph 22.
    c. The relief must be proportionate to the conduct complained of and the petitioner must specify the relief sought: see paragraph 24.
    d. A party seeking to amend must fully particularise the proposed amendments: see paragraph 26.
    e. The court must be satisfied that the amended claim has a real, as opposed to fanciful, prospect of success. The case must be better than merely arguable: see paragraph 27.
3. In relation to the test described at b. of the preceding paragraph, (the *F&C* test stated by Sales J) it is worth referring to the further elucidation of Asplin J in *Re TPD Investments Ltd* [2017] EWHC 657 (Ch) at [158] to which Mr Lightman has referred me. She said this:

> "… in order to contemplate such an order it is necessary, as Sales J put it, that the defendant in question is so connected to the unfair prejudice in question that it would be just in the context of the statutory scheme to grant a remedy against him. I agree with Mr Mallin that merely being connected with the acts complained of cannot be enough. If that were the case, personal liability would be imposed in most cases because a company acts through its board of directors. As a matter of logic, more is necessary. In some circumstances, no doubt, relevant factors would be whether the company in question had been a mere cypher for the individual and whether that individual had benefitted, for example, from the diversion of the company's business or had otherwise benefitted from the unfairly prejudicial conduct."

The Bankside amendment application

4. In the first Judgment, I effectively struck out the claims against Truchot. Truchot's strike out application had been listed to be heard in the window 16 to 20 April 2018. On 11 April, Mr Griffith served an application seeking to re-amend the Bankside Petition (as well as to amend further the PoC) in the form attached to the application ("**the first proposed amendments**"). This application was supported by the 10th witness statement of Paul Caldicott. Mr Caldicott stated that the amendments arose out of matters which emerged in the course of Truchot's earlier successful application to establish that it had not been served with the Bankside petition. No explanation has ever been given about why this application was served so long after Mr Anderson's judgment on 10 November 2017 or why the allegations could not have been included in the amended Bankside petition served on 29 November 2017.
5. Mr Parker's skeleton argument for the April hearing said nothing of substance about the amendment application. In fact, it turned out that he did not wish to make the application. This was because his primary case was that the Bankside petition was well-founded against Truchot without amendment; and he no doubt feared that, if the Bankside petition were amended, it would open up the possibility of the other respondents being able to plead in full to all of the allegations contained in it, notwithstanding the order striking out their defences.
6. In his oral presentation in resisting Truchot's strike-out application, Mr Parker argued that there is no material distinction to be drawn between Mr Gourgey and his family trust: at the inception of the company, Mr Gourgey's entitlement to 50 per cent was put in the name of the family trust and Mr Gourgey thereafter conducted the affairs of the company on the basis that those shares were, to all intents and purposes, to be treated as his. In a note handed to me on the second day of the hearing (after completion on the first day of his oral submissions on this aspect of the case), it was argued:
    a. that Truchot took its shares "subject to the equitable constraints imposed by the Understanding (and subject to the possibility of its being ordered to buy-out the minority shareholder)";
    b. that certain passages in the Points of Defence served by the other respondents were relevant to the position of Truchot: according to Mr Parker, those respondents acknowledged that Mr Gourgey and Truchot could be treated interchangeably for the purposes of sections 994 and 996. I would add, however, as I noted in the first Judgment, that it has never been Mr Parker's argument that the Trust is a sham; and
    c. that Mr Gourgey had been in the habit of holding himself out as having Truchot's complete authority.
7. These were all arguments which I had in mind when I delivered the first Judgment. I rejected them, indicating, albeit *obiter*, that I would also have rejected any application to amend in the form of the first proposed amendments. At paragraph 152 of the first Judgment I said this:

> "I hope that I made it clear at the hearing [that is to say in April] 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."

8. No further proposed amendment was, however, put forward at the hearing (which ran for 3 days on 19, 20 and 23 April 2018). A draft of the first Judgment was sent to Counsel for

correction, in the usual way, on 3 May. On the morning of the hand-down on 9 May, a further draft re-amended Bankside petition was produced on behalf of Mr Griffith, which was circulated to the parties and to me. Mr Parker indicated a wish to apply to amend the Bankside petition in that form ("**the second proposed amendments**"). No application had been issued and Truchot and the other respondents were not in a position to make submissions in relation to the proposed amendment. There would not have been time, in any event, for an application to be heard on 9 May. I therefore adjourned the hearing. It was anticipated that the matter would go off until June. In the event, a convenient date for Counsel and myself could not be found until the end of July. And it was not until 13 July, more than 2 months after the hand-down of the first Judgment, that an application was issued to re-amend the Bankside petition in the different form attached to that application ("**the third proposed amendments**"). That is the application which is now before me.

9. The application is not supported by any evidence other than the brief contents of the notice itself. This is surprising given that I had said that a formal application to amend should be made explaining precisely the evidential basis for the proposed amendments and why they were being sought at that point of time and given what I had said in the first Judgment about the principles applicable to amendment applications.
10. In summary, Truchot contends, first, that the entire application is an abuse of process in the light of my observations that the April hearing was the time for making any application and in the light of the absence of any proper evidence in support of the application. It contends, secondly, that the third proposed amendments do not cure the defects identified in the first Judgment and that even the amended claim against Truchot does not have a real prospect of success. Accordingly, the application should be dismissed.
11. Logically, I suppose, I should deal with the abuse argument first. However, I would not want to leave the substance of the amendments unresolved even if I were to hold that the application is an abuse. I propose to deal with the substance of the amendments before dealing with the abuse issue.

The third proposed amendments

12. I have already considered at some length, in the first Judgment, the first proposed amendments. I do not propose to say anything about the second proposed amendments since no application has been made in relation to them and they have been superseded by the third proposed amendments. The structure of the third proposed amendments is significantly different from that of the first proposed amendments although some of the substance is the same. In what follows, I will deal with the amendments to the Bankside petition but the same considerations apply to the corresponding amendments to the PoC.
13. The amendments are nearly all to be found in the 24 sub-paragraphs of the new paragraph 3A. As Mr Thompson says in his helpful skeleton argument, the bulk of the amendments for which permission is now sought formed part of the first proposed amendments, either word for word or in substance, or were part of the oral submissions made by Mr Parker or were included in the further written submissions from him, all of which submissions I addressed in the first Judgment. Although what I said there in relation to the first proposed amendments was not by way of decision, I see no reason now to depart from what I did say and it is to be taken as part of my decision in relation to the current

application. Accordingly, the real question, in my view, is whether the third proposed amendments add anything of substance to the first proposed amendments and, if they do, whether the third proposed amendments fall within the general principles which I have discussed.

14. Turning briefly to some of the 24 sub-paragraphs:
    a. Sub-paragraphs (1) and (2) reflect in substance paragraph 89 and 90 of the first proposed amendments. They are not, in any case, contentious.
    b. Sub-paragraph (3) pleads that Mr Gourgey nominated the trustee (the trustee is now Truchot but it was not the original trustee and was not therefore nominated) "to hold the shares that represented his entitlement to hold 50% of the shares in Bankside" and that no consideration was given other than, possibly, par value. These points were addressed by Mr Parker in his oral submissions at the April hearing. I dealt with the consideration point in paragraphs 52 and 53 of the first Judgment, from which it is apparent that I do not consider that there is anything in the point. Although sub-paragraph (3) refers to Mr Gourgey having "nominated" the trustee, it is quite clearly not part of Mr Griffith's case that the trustee was a mere nominee since it is accepted that the trust is not a sham.
    c. Sub-paragraph (5) refers to paragraph 3 of the Fifth Schedule of the Settlement, which is the provision to which I was referring in paragraph 62.c of the first Judgment. The point of substance which sub-paragraph (5) adds is that "the anticipated willingness of the trustee to leave the management of the shareholding to Mr Gourgey was reflected in [paragraph 3]". Sub-paragraph (6) alleges that this provision was viewed by the trustee as expressly authorising it not to interfere with the management of Bankside "the trustee being desirous of not doing so". And it alleges that Truchot has not interfered with the management or conduct of Bankside's business.
    d. As to sub-paragraph (5), I do not consider that the inclusion of this perfectly standard trustee exoneration provision in the Settlement reflects the willingness alleged. But even if it did, Truchot was not a party to the Deed of Settlement, becoming the trustee at a later date. It became trustee upon the terms of the Settlement as it found them. The presence of this provision tells us nothing at all about Truchot's willingness to leave the management of the shareholding to Mr Gourgey.
    e. As to sub-paragraph (6), the substance of the allegation of an absence of interference was to be found at paragraph 95 of the first proposed amendments. I addressed this aspect in paragraphs 71 and 72 of the first Judgment. Sub-paragraphs (5) and (6) do not address the deficiency of pleading which I identified. The allegation that the exoneration provision was viewed in the way that is alleged gets Mr Griffith nowhere. The trustee only obtains protection if it has no notice of any act of dishonesty or misappropriation; the purpose of the provision is to absolve the trustee from taking no part in the day to day affairs of the company so as to allow it to leave the conduct of the business to the businessmen who run the company. It is not alleged – it would be an extraordinary allegation in any case – that Truchot (or even "the trustee") viewed the provision as authorising non-interference even in cases of dishonesty or misappropriation of assets of which it did have notice. In any case, no such notice

is alleged. I do not consider that the presence of the exoneration provision and the pleaded case about how it was viewed by the trustee (even assuming that a reference to the trustee includes an allegation against Truchot) lends any support to Mr Griffith's case.

f. The substance of sub-paragraphs (7) and (9) was present in the first proposed amendments at paragraphs 92 and 93 save that sub-paragraph (9) states that the changes did not affect the arrangements between Mr Gourgey and Truchot with respect to control of the 50% shareholding. That saving may well be true, but that is only of relevance if the arrangements prior to the changes were objectionable. The pleading stands or falls with the other aspects of the third proposed amendments.

g. Sub-paragraph (18) is in substance the same as paragraph 98 of the first proposed amendments. I rejected any complaint which Mr Griffith might have against Truchot in relation to this in paragraph 79 of the first Judgment.

h. Sub-paragraph (21) repeats the substance of paragraph 100 of the first proposed amendments that Truchot has not sought to interfere with the management of Bankside. That general allegation remains open to the same criticism as I made in paragraph 83 of the first Judgment. However, it is now pleaded that Truchot has at no time sought to remove Mr Gourgey as a director or suggested that it wished to bring proceedings against Mr Gourgey. Those factual allegations may not be disputed. They are at present not relied on, I should emphasise, as unfairly prejudicial conduct but only as lending support to the case that Mr Gourgey would be allowed by Truchot to control the affairs of Bankside.

i. In my view, these further proposed amendments do not, by themselves, cure the defects which I identified in paragraph 83 of the first Judgment. First, as Mr Thompson has pointed out on previous occasions, Mr Griffith did not himself request Truchot to take any action against Mr Gourgey. Mr Parker repeats his submission that it would have been pointless for Mr Griffith to do so because, to use my words, Truchot was in the pocket of Mr Gourgey. But that, I consider, is to miss the point. It is one thing for Truchot to leave the running of Bankside to the board of directors without taking any real interest in how things were going but it is quite another for it thereby to be taken as sanctioning whatever Mr Gourgey might seek to do, including misappropriating company assets. More importantly, reflecting what I said in paragraph 83, the third proposed amendments do not identify what it is that Truchot should have done. If the fact that Truchot did not seek to remove Mr Gourgey as a director or suggest that proceedings be brought against him is to be relied upon, Mr Griffith needs to establish and plead that Truchot ought to have taken such steps. He does not make such an allegation.

j. Sub-paragraph (22) is substantially to the same effect as paragraph 101 of the first proposed amendments. There is this difference, however. The new allegation is that the application to set aside service on Truchot was made only after a *Beddoe* application in the Jersey court, which Mr Griffith infers was funded by or at the behest of Mr Gourgey or his family, with the application being made in accordance with the wishes of the family. There is nothing in the material before me which would justify that inference being made, although I do not doubt the

genuineness of Mr Griffith's belief that that is so; it can, however, only be mere speculation based on his own view of Mr Gourgey's probity or rather lack of it. But even if the inference is accepted, it is hardly surprising that Mr Gourgey and the family would want Truchot to be kept out of the proceedings. Its involvement would lead to considerable additional cost to the detriment of the beneficiaries (or of Mr Gourgey himself if he were to fund Truchot's participation).

k. It is again appropriate to point out that the matters referred to in sub-paragraph (22) are not relied on as unfairly prejudicial conduct (it is hard to see how they possibly could be) but only as further evidence that Truchot was in the pocket of Mr Gourgey. But here the pleading faces a further problem because, if funding came from the family other than Mr Gourgey and if Truchot made the application in accordance with the wishes of the family (in particular, the beneficiaries who excluded Mr Gourgey himself), it is not at all easy to see how any support is given to a connection between Truchot and the alleged unfairly prejudicial conduct.

15. Before turning to the other sub-paragraphs of paragraph 3A which do contain new allegations, I note Mr Thompson's overarching submission, which is that the proposed amendments advance essentially the same case as that which Mr Parker deployed in argument on the basis of the first proposed amendment. The central contention which he identifies is that the relief sought by Mr Griffith (requiring Truchot to buy out Mr Griffith on a basis expressly intended to compensate him for the consequences of Mr Gourgey's alleged misconduct) should be ordered on the basis that:
    a. Truchot held 50% of the shares in Bankside, which had been settled by Mr Gourgey for the benefit of his family.
    b. It appointed Mr Gourgey as its agent to vote at AGMs.
    c. It did not interfere in the management of Bankside during the period of Mr Gourgey's alleged misconduct in circumstances where it is not asserted that Truchot knew of the alleged misconduct.

    Mr Thompson's submission is that this is the back-bone of the case which I have already rejected in the first Judgment.

16. Mr Thompson then contends that the additional points which Mr Griffith seeks to introduce do not add anything to that central contention. He says that the additional elements are irrelevant, or are not properly pleaded or are hopeless allegations. I take them in turn.
17. Sub-paragraph (4) alleges that Mr Gourgey placed his 50% shareholding in Bankside into the Settlement in the justified expectation that he would be able to control the voting of such shares because of the identity of the beneficiaries (himself and his family) and the trustee's willingness to leave the management of the shareholding registered in its name to Mr Gourgey. This allegation relates to Mr Gourgey's state of mind and says nothing, in my view, about any arrangement or understanding between him and Truchot which would justify the conclusion that there was any relevant connection between Truchot and the allegedly unfairly prejudicial conduct. Sub-paragraph (4) must, of course, be read in the context of the pleading as a whole and in particular with sub-paragraphs (10) and (12) in mind: a detailed textual criticism of the sub-paragraph in isolation may not be justified in the context of the pleading read as a whole. However, so far as concerns the pleaded

case against Truchot, such management does not, for the reasons given in the first Judgment and in addressing management of the shareholding below, justify the conclusion that Mr Gourgey was authorised to act with impunity in his capacity as a director in breach of his fiduciary duty.

18. In saying that sub-paragraph (4) relates to Mr Gourgey's state of mind, I take it to be contended that it was only his expectation that the trustee would be willing to leave the management of the shareholding to him. It is not expressly alleged in this sub-paragraph that the trustee itself at the inception of the Settlement or Truchot when it became trustee had expressed such a willingness. The use of the words "justified" is to be seen as a reflection of the fact (if it is established) that the original trustee and Truchot did in the event leave the management of the shareholding to Mr Gourgey. In any case, even if this is intended as a free-standing allegation that the original trustee and Truchot were from the beginning willing to leave the management of the shareholding to Mr Gourgey, the only facts pleaded which could be relied on to demonstrate such a willingness are found in the Particulars under sub-paragraph (10) which I discuss later.
19. Sub-paragraph (8) is a new allegation that Mr Gourgey represented to Mr Griffith that he had the full authority of "the trustee" in relation to all matters pertaining to Bankside or the 50% shareholding. It is alleged that Mr Griffith relied on that representation "by never seeking to communicate with Truchot when he had cause to complain about Mr Gourgey's conduct of [Bankside's] affairs". Apart from what is said in the application notice, there is no evidence to support the allegation that any such representation was made. It is not even pleaded when or where the representation was made or the gist of the words used. Given (i) that this is a new allegation which had not been made before the third proposed amendments saw the light of day and (ii) what I said in the first Judgment about the need for particularisation and for evidence in support of any amendment application, the absence of evidence about the allegation and an explanation of why the point had not previously been raised is surprising. In my view, the pleading is inadequate to satisfy the requirements for allowing an amendment.
20. Quite apart from that, the new allegation does not relate in a relevant way to the conduct of the affairs of Bankside, but is a matter of the relationship between shareholders *qua* shareholders. The representation, if it was made, does not go to Truchot's own conduct as it is not, as I see it, a relevant factor in assessing whether the necessary connection between Truchot and the alleged unfairly prejudicial conduct exists; that is particularly so given that there is no allegation that Truchot knew of the alleged representation or that it was made on behalf of Truchot or that Truchot had authorised such a representation to be made.
21. Much of the substance of sub-paragraph (10) was to be found in paragraphs 96 and 97 of the first proposed amendments although the drafting is rather different. Paragraph 96 pleaded that Truchot permitted Mr Gourgey to act as its agent in connection with the exercise of its rights as shareholder in Bankside including (a) the grant of retrospective authority to act at certain AGMs (b) the grant of prospective authority to do so at a further AGM and (c) failing to take any steps to procure the holding of AGMs in subsequent years. Those same allegations are now found in the Particulars given under sub-paragraph (10). Paragraph 97 pleaded 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 prevented him from doing so. That allegation is now

found in the second sentence of sub-paragraph (10). In neither case is it said to whom Mr Gourgey held himself out as having the authority alleged. I dealt with those proposed amendments, and rejected them, as being inadequate, in paragraphs 77 and 78 of the first Judgment.

22. Sub-paragraph (10) includes further related allegations. The opening sentence pleads that Truchot has left "the management of the shares themselves wholly to Mr Gourgey, permitting Mr Gourgey to act as its agent in connection with the exercise of its rights as shareholder in [Bankside] such that Truchot was at all material times little more than a cypher for Mr Gourgey". Apart from the particulars which I have already mentioned, no further information is given about any facts or matter which would justify the conclusion that Truchot was little more than a cypher. Even that must be seen as acceptance that Truchot was something more than a mere cypher. The meaning of cypher in this context is, in any case, obscure. It clearly does not simply mean that Truchot was an agent for Mr Gourgey: indeed, Mr Griffith's case appears to be that Mr Gourgey was some sort of quasi-agent for Truchot rather than *vice versa*. I used the word cypher myself in paragraph 109 of the first Judgment but that was in a rather different context where Neil and Charles, who were themselves in a fiduciary position as directors, might be seen as simply doing their father's bidding. The present case is not pleaded as one where Truchot did whatever Mr Gourgey required: rather, it is said that Mr Gourgey did what he liked and Truchot did not object. The same word was used by Asplin J in *Re TPD* at [158] in the passage quoted at paragraph 3 above, where she was discussing the necessary connection for the purposes of section 996. A relevant question might be whether the company (that is to say Bankside in the present case, not Truchot) had been a mere cypher for the individual sought to be made liable. In such a case, liability can be imposed on the individual because the company is a cypher. In the present case, however, Mr Griffith seeks to impose liability on a third party, Truchot, the supposed cypher, which would be a novel and unprecedented situation.
23. I am bound to say that I did not receive a satisfactory explanation from Mr Parker about what this part of his pleading meant.
24. A further new allegation is made in relation to the allegation in paragraph 97 of the first proposed amendments which I have just mentioned. The new allegation is that Truchot had actual or constructive notice that Mr Gourgey was holding himself out as having authority to act on behalf of Truchot in connection with the Settlement. Then it is alleged that the consequence of this is that "as far as the affairs and conduct of [Bankside] is concerned Mr Gourgey is to be treated as the agent of Truchot, or alternatively Truchot is estopped from denying that Mr Gourgey was its agent". In theory, the case which Mr Griffith pleads is plausible but it depends critically, of course, on the facts (facts which must be properly pleaded). However, when one reads on in sub-paragraph (10) to discover the facts on which the allegations of holding out and of actual or constructive knowledge are based, one finds only the Particulars which I have already described. Those Particulars are wholly insufficient to establish either the actual or constructive knowledge alleged. There is no particularisation of the proposed amendment, particularisation being required as a matter of principle. There is no evidence to support such an allegation. Moreover, a case of actual knowledge must be pleaded and, in the context of an amendment application at least, the facts and matters relied on to establish actual or constructive knowledge should be pleaded. In the present case, not only is there

an absence of a proper pleading, there is not even any evidence supporting the application which gives such particulars.

25. As to what I might call the quasi-agency ("Mr Gourgey is to be treated as the agent of Truchot"), this is a novel approach. It is not asserted that Mr Gourgey was in fact Truchot's agent - clearly he was not. It appears to me that this allegation is an unprincipled assertion (with no authority at all supporting it) designed specifically to provide Mr Griffith with a remedy where the law would not otherwise do so. In essence, Mr Griffith's case is that, although Mr Gourgey was not Truchot's agent, he is to be treated as if he were but only for the limited purposes of section 996. I reject that approach.
26. There are further difficulties with that approach. The allegation is in very wide terms, that is to say a quasi-agency extends "as far as the affairs and conduct of [Bankside] is concerned". The Particulars are also wholly inadequate to establish such a quasi-agency even if, in principle, such a legal construct were to be established. Those Particulars are simply the same facts as were relied on in relation to the first proposed amendments and relate to a narrow authority concerning AGMs. The allegation is, in any case, in at least one sense, incoherent. Mr Gourgey could act as Truchot's agent (or be treated as such an agent) only in relation to powers which Truchot could itself have exercised. Truchot, however, had no powers of management of Bankside's affairs: the management of those affairs was the responsibility of the directors. The wide-ranging quasi-agency alleged would have been impossible. This is a point which I addressed in paragraph 78 of the first Judgment.
27. So far as concerns the plea of estoppel, the allegation is that Mr Gourgey is estopped from denying that he was Truchot's agent. This appears to be an allegation of an actual estoppel and not simply that Mr Gourgey is to be treated, for the purposes of section 996, as if he were estopped. If what is alleged is the latter, or what I might call a quasi-estoppel, then it suffers from the same difficulties as the quasi-agency.
28. But if an estoppel as ordinarily understood is alleged, that could only extend to matters in relation to which Truchot could have appointed Mr Gourgey as its agent, matters which would not include management of Bankside's affairs, in contrast with the exercise of Truchot's votes as a shareholder.
29. Quite apart from that, there is no pleading of the facts and matters relied on in support of such an allegation and such details as are given – the Particulars only – are wholly inadequate to establish any estoppel. Further, there is no allegation that any representation on which an estoppel would have to be founded was made by Truchot; the allegation is that the representations were made by Mr Gourgey. If it is suggested that Truchot had actual or constructive knowledge of Mr Gourgey's representations, the same inadequacies as already identified above in relation to actual and constructive knowledge apply. As if that were not enough, it should also be noted that there is no allegation of detrimental reliance by Mr Griffith.
30. The final paragraph of sub-paragraph (10), which is also new, follows on from the Particulars. It pleads a conclusion to be drawn from what had been stated in the Particulars ("Truchot thereby demonstrated..."). I do not understand why the conclusion follows from the facts pleaded in the Particulars. First of all, it is not pleaded that Mr Griffith has suffered any, and if so what, prejudice as a result of the retrospective

ratification of any actions or decisions taken at the relevant AGMs; secondly, it is not pleaded whether, and if so how, any delay in ratification has prejudiced Mr Griffith.

31. In my view, sub-paragraph (10) is inadequate to meet the criticisms which I made in paragraphs 77 and 78 of my first Judgment in relation to the first proposed amendments. It does not satisfy the requirements for permitting amendment.
32. Sub-paragraph (11) is a new allegation to the effect that Mr Gourgey represented that such was his control of the shareholding that all distributions in respect of it were made other than to Truchot on the basis that he was the beneficial owner and that the shareholding was to all intents and purposes his shareholding. As to that, I find it difficult to reconcile with the repeated acceptance by Mr Parker that the Settlement is not a sham (in which context he has not drawn a distinction between the shares in Bankside and any other assets of the Settlement which there might be). In any case, sub-paragraph (11) does not come anywhere near establishing that the Settlement was in any sense a sham. Further, it does not seem to me to have any bearing on the issue of connection between Truchot and the alleged unfairly prejudicial conduct. In that respect, it faces the same difficulties as the pleading concerning the representations alleged in sub-paragraph (8).
33. Sub-paragraphs (12) to (17) are all related. I agree with Mr Thompson when he says that they contain a series of hypothetical allegations essentially as to what Mr Griffith says would have happened if he had approached Truchot and asked it to take action against Mr Gourgey. The first point to make is that, even if Mr Griffith is right to say that Truchot would have refused to take any action against Mr Gourgey, either because it did not want to go against Mr Gourgey's own wishes or because it had no funds to do so, Mr Griffith's complaint against Truchot would, it seems to me, relate to that refusal. The refusal would not establish the connection between Truchot and the alleged unfairly prejudicial conduct on the part of Mr Gourgey which it is necessary to establish in order to found a claim against Truchot under section 996.
34. I agree with Mr Thompson when he says that these sub-paragraphs are a transparent attempt to get round the central problem that Truchot had no knowledge of the allegations of misconduct until March 2016 and was never invited by Mr Griffith to take any steps in response. As he says, a petitioning minority shareholder cannot fix a respondent shareholder with liability for a director's wrongdoings of which the respondent shareholder was unaware simply by asserting that, had they been aware of it, and if they had been asked to take steps to remedy it, they would have refused to do so; responsibility for unfairly prejudicial conduct arises from actual conduct on the part of the respondent shareholder, not from hypothetical conduct which never actually happened. Paragraph 31.2 of the Points of Defence does not, in my view, assist Mr Griffith as against Truchot since that pleading was not Truchot's pleading.
35. Lest it be said that this is to misunderstand Mr Griffith's case, and that sub-paragraphs (12) to (17) are there to demonstrate such a close relationship between Mr Gourgey and Truchot as to lead to the conclusion that there is a sufficient connection between Truchot and the alleged unfairly prejudicial conduct, it must be remembered that, in fact, Truchot was not requested to take action by Mr Griffith and did not, therefore, refuse any request to do so. The only basis (at least, the only basis which would have any relevance to the present proceedings) on which it could be alleged that Truchot would have failed to take action is because Truchot was, to use the same phrase again, in Mr Gourgey's pocket.

Mr Griffith would need to establish that Truchot was in Mr Gourgey's pocket before he could assert that Truchot would not have taken action against Mr Gourgey. The allegation that Truchot would have failed to take action therefore adds nothing to the earlier parts of the pleaded case. If the earlier parts of the pleaded case are inadequate, as I consider they are for the reasons given above, then sub-paragraphs (12) to (17) cannot cure the defects.

36. Mr Thompson makes another point with which I agree. He notes that sub-paragraph (12) alleges an "untrammelled" control by Mr Gourgey "irrespective of whether he was discharging his fiduciary duties as a director". I agree with him that the allegation appears to be that Truchot somehow agreed to hand over its rights as shareholder to Mr Gourgey so completely and without any limitation at all that he was entitled to exercise those rights to cure even his own breaches of duty without any reference to Truchot. That is an extreme allegation which is not supported by the pleaded facts.
37. Sub-paragraph (19) alleges that it is to be inferred that had Truchot known of the present proceedings prior to the Points of Defence being struck out, it would have acted in accordance with the wishes of the beneficiaries and made common cause with Mr Gourgey by authorising his conduct of the proceedings on its behalf. Sub-paragraph (20) then goes on to say that, as Mr Gourgey was the agent of Truchot as regards all matters concerning Bankside's affairs (save for service of proceedings) "it is a privy of Mr Gourgey for the purposes of these proceedings and the doctrine of abuse of process, such that it is bound in all matters pleaded against Mr Gourgey by his failure to plead in respect thereof (following the striking out of the Points of Claim)". As to the alleged agency, I take that to refer to the quasi-agency which I have already addressed. It has never been Mr Parker's argument in either in his written or oral submissions that Mr Gourgey was actually Truchot's agent generally in relation to Bankside's affairs and shareholding but only that he is to be treated as such for the purposes of section 996.
38. Sub-paragraph (19) appears to me to be wholly irrelevant (save perhaps in relation to sub-paragraph (20)), because once again, it addresses a wholly hypothetical situation and because it could not possibly form a basis for granting relief against Truchot. As to its interaction with sub-paragraph (20), it will be seen in a moment that I do not regard that sub-paragraph as well-founded, so that the question of any interaction does not arise. For my part, however, I do not see how sub-paragraph (19) is relevant to sub-paragraph (20): if sub-paragraph (20) is well-founded at all, it will be well-founded regardless of what Truchot would have done
39. In practice, sub-paragraph (20), if it is correct, would have the result that Truchot should be treated as though Mr Gourgey's Points of Defence were its points of defence, and the Points of Defence having been struck out, so Truchot is precluded now from raising its own defence. That would be an astonishing result in all the circumstances of the case. I do not consider it is the correct result.
40. First, since the allegations in relation to the quasi-agency are not sustainable, for reasons already given, there is no basis for the allegation of privity. If, contrary to how I understand the pleading, an actual agency is asserted (contrary to the way in which I understood the case to have been presented by Mr Parker) then the factual basis for that assertion is not pleaded.
41. Secondly, the allegation of privity does not depend on what Truchot would have done if it had been served. If the allegation is good, it would not have been open to Mr Gourgey

and Truchot to have taken different positions even if Truchot had been properly served and had sought to file its own defence. I can see no justification, however, for the conclusion that Mr Gourgey and Truchot could not have filed separate, and perhaps inconsistent, defences.

42. Thirdly, the Bankside petition as currently drafted discloses no basis for relief being granted against Truchot, as I ruled in the first Judgment. If an amendment to the petition is to be allowed in order to establish a case against Truchot, I have no doubt that justice requires that Truchot be allowed to plead to all of the allegations in any amended petition. Indeed, in my view, sub-paragraph (20) gets things the wrong way round. Were the amendments to be allowed, not only should Truchot be allowed to plead in full, but also Mr Gourgey and the other defendants should be allowed to plead in full too notwithstanding that their defences have been struck out. This is for two reasons. The first is that they must be allowed to plead to the new allegations; but if that is to be allowed, as it must be, it would make for an unsatisfactory, if not incoherent, pleading if they were not allowed to plead in full. The second reason is that the court has to be satisfied that there has been unfairly prejudicial conduct before making any order under section 996. The court cannot, as I said in the first Judgment, find that there is unfairly prejudicial conduct *vis á vis* one respondent but not another. Since Truchot must be allowed to raise any matter which goes to the issue of whether the conduct complained of was unfairly prejudicial and must be allowed to adduce such evidence as it wishes, it must be the case that Mr Gourgey and the other respondents can also rely on those points and evidence, otherwise the Court would be being asked to do that which it must not do, that is to say to risk having to decide that the conduct complained of is both unfairly prejudicial and not unfairly prejudicial.
43. Sub-paragraph (23) asserts that the relevant relations between "the trust and Mr Gourgey" are the same as they would be if the trust were a sham. This sub-paragraph appears to be an assertion of the legal consequences of the facts and matters previously pleaded. The pleading appears to acknowledge that the Settlement is not a sham and, as I have said, it is not Mr Parker's submission that it is a sham. But, in order to obtain the remedy which Mr Griffith seeks, the pleading is that something which is not a sham is nonetheless to be treated for the limited purposes of section 996 as if it were a sham. So as well as quasi-agency and quasi-estoppel, we now see another new category, that of quasi-sham. I do not consider that sub-paragraph (23) can stand as a separate and independent allegation. If that is what it is intended to be, it is wholly unparticularised and cannot be allowed in by way of amendment. If, as I think it is, it is a summary way of expressing the conclusion which flows from the pleaded facts, it cannot stand unless the early parts of the third proposed amendments are allowed in by way of amendment. If they are not allowed in, then neither should sub-paragraph (23) be allowed in.
44. Sub-paragraph (24) asserts that it would be contrary to fair commercial dealing if Mr Gourgey were not treated as agent of "the trustee and the trust" for the purpose of the matters that are the subject of the Bankside petition and so that if knowledge of the unfairly prejudicial conduct is a prerequisite for substantive relief against Truchot, Mr Gourgey's knowledge of such conduct falls to be attributed to Truchot. There are a number of things to say about this sub-paragraph.

45. First, it is not clear what, if anything, this sub-paragraph adds to the earlier contentions in relation to agency and quasi-agency and the same criticisms apply. It is, in any case, not an allegation of actual agency but only an allegation of what I have called quasi-agency.
46. Mr Thompson may well be right to say that the words "fair commercial dealing" are obviously lifted from the formula used by Sales J in *F&C* at [1096], as to which see paragraph 23 of the first Judgment. Sales J was there using the phrase ("the requirement of fair commercial dealing") as an aspect inherent in the statutory regime and which is reflected in the general standard, at a high level of abstraction, of justice to be applied. However, I consider that there is no freestanding criterion of responsibility for unfairly prejudicial conduct or liability in respect of such conduct identified by the absence of fair commercial dealing. As Sales J said, in practice everything will depend on the facts and the court's assessment of whether what was done involved unfairness in which the relevant respondent was sufficiently implicated to warrant relief being given against him. Further, it is impossible to spell agency out of a relationship simply because the relationship involves unfair commercial dealing. The same goes, in my view, for the quasi-agency which I have discussed earlier. The central question, to repeat, is whether there is a sufficient connection between the unfairly prejudicial conduct and a respondent to make it just to impose liability on that respondent.
47. I agree, therefore, with Mr Thompson's submission that what is fair depends on what has been agreed and the legal relationships created. In the present case, those relationships include the trusts of the Settlement and the relationship among the shareholders governed by Bankside's constitutional documents. The pleaded case is insufficient to justify the wider-ranging agency or quasi-agency such as is alleged.
48. In the light of the discussion above, it is my judgment that the amendments sought to be made in paragraph 3A of the third proposed amendments should be refused.
49. That conclusion is fortified by the following consideration. Bankside itself would have no cause of action against Truchot even assuming that Mr Gourgey has been guilty of the unfairly prejudicial conduct which Mr Griffith alleges. There is no question, therefore, of Truchot being liable at the suit of Bankside to make any compensation to it. It inevitably follows that Mr Griffith could not bring a derivative claim against Truchot. This is pertinent in the context of the relief which Mr Griffith is seeking against Truchot, in effect to obtain compensation for the alleged wrongdoing of Mr Gourgey. Given that there is no basis for Bankside (or indirectly Mr Griffith) to claim compensation against Truchot, I do not consider that such relief could be obtained by way of relief in an unfair prejudice petition against Truchot, a minority shareholder, (with no knowledge of the allegedly unfairly prejudicial conduct).
50. That makes it unnecessary to consider whether the application is, in any case, an abuse of process. But I will say something about that aspect.
51. I had indicated that I considered that the April hearing was the time for making any application to amend. Mr Griffith had issued an application to amend (albeit only shortly before the hearing in April) no doubt aware of the deficiencies in the Bankside petition as it stood and notwithstanding the arguments presented by Mr Parker at that hearing to the effect that there was a good claim pleaded against Truchot. The application having been filed, I considered that the April hearing was the time for making it notwithstanding Mr Parker's decision not to proceed with it for the reasons which I mentioned in the first Judgment. However, in the light of the first Judgment, the first proposed amendments

would have been inadequate. I do not consider that it would have been just to prevent Mr Griffith from pursuing a new amendment application taking account of my reasons for rejecting the first proposed amendments if it had been made as soon as possible after the hand-down of the first Judgment. In that context, it was not until receipt of the draft judgment that Mr Griffith and his advisers would have known that I regarded the current version of the Bankside petition as defective and my reasons for that conclusion. I had anticipated (I may have directed) that any new application should be made at least 14 days before the adjourned hearing. That, it should be noted, was in the context of an anticipated hearing date in June. The hearing could not, in the event, be fixed for a date until the end of July. In those circumstances, I find it surprising that Mr Griffith appears to have taken the 14 days requirement literally so that it was not until 13 July that an application to amend was filed, which departed in some significant respects from the second proposed amendments produced just before the hand-down. I would have expected steps to be taken to file the application as soon as possible and well before the end of June. This is a borderline case. It is very much on balance that I reach the conclusion that the present application is not an abuse in relation to paragraph 3A.

52. Although the application is not an abuse, it fails on the merits so far as concerns paragraph 3A of the third proposed amendments for the reasons I have given. In the exercise of my discretion, I refuse to allow those amendments. Similarly, I refuse the corresponding proposed amendments to the PoC.
53. In relation to the paragraph 3A amendments, Mr Lightman makes a number of points, most of which I have addressed already. They include these:
    a. There is no evidence in support. I agree that evidence is important, especially where serious new allegations are introduced: see for instance Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759.
    b. There is no explanation of why the proposed amendments have been put forward at such a late stage.
54. Mr Lightman also submits that, even if some of the amendments were to be allowed, Mr Griffith should not be permitted to plead only against Truchot as the opening words of paragraph 3A purport to do. This point does not arise since I am not allowing any of the amendments to be made. I have in any case dealt with the substance of this submission when dealing with the privity argument raised in sub-paragraph (20).
55. Paragraph 3B of the third proposed amendments refers to the fact (which is not disputed) that Mr Griffith acquired a further 8 shares in Bankside from Mr Hodge's trustee in bankruptcy, bringing his holding from 25% to 33%. This amendment, if allowed, would have the effect of expanding the relief sought in the prayer for relief to include an order that those 8 shares also be bought out on the same valuation basis. Truchot's position and that of all the other respondents is that such an amendment should not be allowed. The point is of no practical consequence to Truchot in the light of my decision refusing the paragraph 3A amendments.
56. It is, however, of significance to the other respondents some of whom, if Mr Griffith succeeds, will be compelled to purchase all 33 of Mr Griffith's shares at the undiscounted value which he asserts and compensating him for the allegedly unfairly prejudicial conduct. A considerable amount of money is likely to turn on it.
57. There is authority which suggests that Mr Lightman and Mr Thompson are right in their submission that a buy-out order should not be made in relation to the additional shares.

In particular, Mr Lightman has referred to the decisions of Kawaley CJ at first instance and of the Bermudan Court of Appeal in *Annuity & Life Reassurance Ltd. V Kingboard Chemical Holdings Ltd* [2015] Bda LR 97, at [92], and [2017] CA (Bda) 3 Civ, at [93], the latter of which establishes the general proposition that "the minority shareholder is not entitled to increase the size of the action by claiming oppression as a result of buying shares in full knowledge of the current position". Or as Kawaley CJ put it, where the minority shareholder purchases with knowledge of the wrongdoing, "it is inherently illogical for the Petitioner to be able to purchase further shares in the Company and assert, in relation to those shares, a valid oppression or prejudice claim".

58. Mr Parker points out, however, that Mr Griffith had a right to purchase a proportion of Mr Hodge's shares under Bankside's Articles and was able to do so at a favourable value. Mr Gourgey's allegedly unfairly prejudicial conduct will have reduced the value of the shares which Mr Griffith was entitled to acquire. Whether Mr Griffith paid a price which reflected the fact that Bankside had paid away the money which he says was wrongfully paid away and the fact that it did not have the benefit of the commercial opportunities which he says Bankside was wrongly deprived of by Mr Gourgey I do not know, although it must be highly unlikely that the price was struck at a higher level on the basis that the moneys had not been paid away and that Bankside retained the opportunities. Mr Griffith will thus have very likely acquired the additional shares at a price lower than that which he would have had to pay in the absence of the alleged unfairly prejudicial conduct.
59. To require Mr Gourgey now to purchase those shares without the minority discount appropriate to a 33% holding and at a price which compensates for the allegedly unfairly prejudicial conduct would be to overcompensate Mr Griffith. But in addition to that, it is to be noted that Mr Hodge himself was complicit in and benefitted from the allegedly unfairly prejudicial conduct on which Mr Griffith now relies; at the very least, Mr Hodge consented to that conduct. It is therefore strongly arguable (and I think probably correct) that Mr Griffith cannot now put himself in a better position so far as concerns the 8 shares acquired from Mr Hodge than that in which Mr Hodge would have been had he retained those shares. However, although Mr Griffith would not, on that basis, be able to enforce a sale of the 8 shares at the enhanced value which he asserts in relation to the 25 shares, it is arguable that Mr Griffith is entitled to some remedy and that the appropriate remedy would be to enforce a sale at a discounted value so that Mr Griffith is not left with an 8% minority holding. It seems to me that these aspects are best dealt with as a matter of remedy by the trial judge in the event that Mr Griffith establishes the unfairly prejudicial conduct alleged. Accordingly, I think that it is right to allow the amendment in paragraph 3B and a corresponding amendment to the PoC without requiring any restriction of the relief sought in the prayer. I cannot see, at present, how dealing with matters in this way and leaving the issue of remedy to the trial judge will cause any prejudice to the respondents other than the need to re-argue the point that, as a matter of principle, Mr Griffith is not entitled to any remedy in relation to the 8 shares, subject however to the following paragraph.
60. The amendment, if it is made, does open up a further issue which is the extent that the respondents are then able to plead a defence. Although no actual amendment is required to the prayer for relief, the actual result of the introduction of paragraph 3B is to expose the respondents to more extended relief than that to which they would have been exposed

under the existing pleading (ignoring the sweeping-up provision of a claim to such other order as the court thinks fit). In my view, the respondents ought to be able to raise any defence to that additional relief sought which they have and should not be prevented from relying on the facts and matters pleaded in the Points of Defence which have been struck out. But once the respondents are permitted to raise defences to the Bankside petition in relation to the 8 shares, it is inevitable that those defences can be reintroduced in relation to the 25 shares. The court cannot possibly reach a conclusion after trial that it is satisfied that there has been unfairly prejudicial conduct in relation to the 25 shares but not in relation to the 8 shares: if the defence and evidence in relation to the 8 shares results in Mr Griffith being unable to satisfy the court that there has been unfairly prejudicial conduct, then he is not entitled to any relief, even in relation to the 25 shares. Mr Griffith must therefore elect whether to amend and thus to allow the respondents to run their defences in full or not to amend and proceed on the basis that the Points of Defence have been struck out. I accordingly make it a condition of permission to make this amendment that the respondents should be permitted to plead in full to the PoC.

Conclusion and disposition in relation to the Bankside petition

61. The amendments sought in paragraph 3A of the Re-Re-Amended Points of Claim (and the corresponding paragraphs of the Bankside petition) are not allowed. Permission is given to make the amendment to paragraph 3B but only on the condition that the respondents may plead in full to the PoC. The application to amend is allowed to that extent but is otherwise dismissed. I have added a post-script to the discussion above in paragraphs 108 to 118 below to address a further argument identified by Mr Parker following delivery of this judgment in draft, an argument which does not cause me to alter the conclusion just stated.

The G&G amendment application

62. Mr Griffith seeks to make some significant amendments to the G&G petition and the PoC. The history of this application is as follows. As recorded in paragraph 113 of the first Judgment, Mr Parker presented some proposed amendments to the G&G petition and the PoC after the end of the April hearing and before I handed down the first Judgment. I had said in the draft judgment that I would hear submissions on the occasion of the hand-down of the approved judgment. On the morning of the hand-down (9 May 2018), Mr Parker emailed a further draft of amendments to the G&G petition (although with no formal application to amend). As with the amendments to the Bankside petition, it was not possible to deal with those amendments on that occasion. A formal application to amend was made on 13 July 2018.
63. Ignoring uncontentious amendments, Mr Griffith seeks to make the following amendments which are to be found in the new paragraph 31A of the G&G petition and which are repeated in paragraph 35A of the PoC. An amendment is also sought to paragraph 19 of the G&G petition to reflect what is already pleaded in paragraph 15 of the PoC. In what follows, I will refer to the numbering in the PoC unless otherwise stated:

a. The amendment to paragraph 19 of the G&G petition seeks to allege that Neil and Charles owed to various companies including G&G the fiduciary duties as set out in the Companies Act 2006 (thus bringing the petition in line with the PoC). The duty under section 172 Companies Act 2006 is referred to as one to promote the success of the company. More accurately, it is to promote in good faith the success of the company.
b. Mr Gourgey nominated his sons to hold his 50% of the shares in G&G: see paragraph 35A(1).
c. No consideration was provided by Neil and Chares for the shares: see paragraph 35A(2).
d. Mr Gourgey placed his 50% shareholding in the name of his sons in the justified expectation that he would be able to control the voting on those shares by virtue of Neil and Charles' willingness to leave the management of G&G and the exercise of rights attached to the 50% shareholding to their father, such that Neil and Charles were "mere cyphers": see paragraph 35A(2).
e. Mr Gourgey made a representation to Mr Griffith that he had the full authority of his sons to act where all matters pertaining to G&G or the shares held by Neil and Charles therein were concerned, which Mr Griffith believed and on which Mr Griffith relied: see paragraph 35A(3).
f. Mr Gourgey's expectation of untrammelled control was justified in circumstances where Neil and Charles would not join with any other shareholder for the purposes of removing Mr Gourgey as director and/or having G&G bring proceedings against him for misappropriations: see paragraph 35A(4)).
g. Mr Griffith relies on an alleged admission in the Points of Defence that Mr Gourgey was Neil and Charles' representative to approve or ratify on their behalf Mr Gourgey's breaches of fiduciary duties: see paragraph 35(B).
h. In breach of their fiduciary duties as directors and contrary to the Understanding Mr Gourgey has without Mr Griffith's approval, and with the support of his sons, caused monies to be paid over or lent by G&G: see paragraph 32 of the G&G petition. The proposed amendments that Neil and Charles also breached their fiduciary duties and that Mr Gourgey had the support of his sons are only being made to the Amended G&G petition, not the PoC, because the PoC already alleges this at paragraph 36.
i. The support of his sons consisted of permitting Mr Gourgey to manage G&G as he saw fit with no restraints being placed on him despite being in a position to supervise and control his conduct by virtue of being a majority on the board and able to outvote him. As a majority, they were able to obtain information and should be taken to have known about Mr Gourgey's breaches of duty alternatively they were reckless as to whether he breached his fiduciary duties. Upon the breaches of duty being pleaded in these proceedings, Neil and Charles responded by stating in paragraph 31.2 of their Points of Defence that they had authorised and/or ratified such breaches of fiduciary duty by Mr Gourgey: see paragraph 36A.
j. Mr Gourgey and his sons failed to respond to a request for financial information made by Mr Griffith's solicitors in August 2012: see paragraph 82.

k. Mr Gourgey has "the full support of his sons" as pleaded in paragraphs 35A – 35B: see paragraph 86.
l. Mr Griffith has been unable to obtain any detailed information from Neil and Charles regarding the use of the G&G and Riverbank sale proceeds: see paragraph 88(20).

64. Many of those amendments are, as can be seen, similar to the amendments which I discussed in relation to the Bankside petition. Mr Lightman includes among his lengthy submissions what are essentially the same submissions as were made by Mr Thompson in relation to the third proposed amendments of the Bankside petition. In particular:
    a. Many of the proposed amendments have already been considered and rejected by me in the first Judgment in relation to Neil and Charles' strike-out application.
    b. Included in the proposed amendments are a number of allegations in relation to which there is no supporting evidence, which is improper as explained by Carr J in *Quah Su-Ling* referred to above.
    c. Many of the allegations are inadequately particularised, contrary to my observations in paragraph 26 of the first Judgment.
    d. The proposed claim against Neil and Charles has no real prospect of success so that the amendments should not be allowed as explained by me in paragraph 27 of the first Judgment.
    e. No explanation is given for the late application. Mr Lightman relies on what Coulson J stated in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) at [19(c)]. The judge said that the history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise. There has to be a good reason for the delay. Mr Lightman drew my attention to this requirement at the hand-down but, as he correctly notes, it has been ignored by Mr Griffith. A related point is made by Rix LJ in *Savings & Investment Bank Ltd v Fincken* [2004] 1 WLR 667 at [76] where the judge perceived the need for a sliding scale in relation to the requirement that the proposed amendments have some prospect of success – the later the amendment, the more it may require to commend it. Similarly, Neuberger J stated in *Goldstein v Leigh* [1998] BCC 800 that the greater the delay on the part of the petitioner, the less likely he is to get the relief sought.

65. From my recital above of the proposed amendments, it can be seen that there are two distinct aspects of Mr Griffith's claim against Neil and Charles. The first is based on the idea that Neil and Charles as holders of the shares were "mere cyphers" for their father; the second is based on the proposition that they breached their fiduciary duties as directors of G&G.

66. These matters were discussed to some extent at the April hearing. The essence of the debate can be seen from paragraph 109 of the first Judgment. I acknowledged that Mr Griffith might have an arguable case but that the relevant material was not pleaded. I suggested that matters might be different if it were alleged that Neil and Charles were aware of Mr Gourgey's actions or were to be treated as knowing of those actions by virtue of their position as directors and that they acted in breach of their fiduciary duties. I also suggested that matters might be different if it were alleged that they were somehow cyphers for their father. There has clearly been an attempt to reflect those suggestions in

the proposed amendments. The question is whether the principles applicable to amendment applications discussed in the first Judgment and briefly revisited above are satisfied. Mr Parker contends that they are. Mr Lightman, of course, contends that they are not. I have received lengthy written and oral submissions from both sides which I do not propose to address in full detail. Mr Parker has presented and explained the proposed amendments. It is, however, the text of the amendments which must be the focus of my consideration. The real issue is whether, as Mr Lightman submits, the amendments should be refused for the reasons which he gives. I propose in due course to take the amendments in turn, bearing in mind the particular criticisms identified in paragraph 64 above. But before I do that, I wish to consider some overarching criticisms made by Mr Lightman.

67. The first relates to Mr Parker's reliance on *Kim v Park* [2011] EWHC 1781 (QB). It is, of course, the general approach that where the court has held that there is a defect in a pleading, it should refrain from striking out that pleading unless it has given the party concerned an opportunity of putting right the defect provided that there is reason to believe that he will be in a position to put the defect right. Mr Parker now seeks that opportunity. However, as Mr Lightman submits, this is only the general approach and the facts of a particular case may be such as to result in a party not being given that opportunity.
68. He has referred to the judgment of Master Matthews in *Jones v Longley* [2016] EWHC 1309 (Ch), where the relevant party (a litigant in person) had had a chance to re-plead his case. The revised version was defective. Even so, the defects might have been cured but the Master declined to allow a further chance for the party to comply with the Rules. One reason for this refusal was that, although the second version was an improvement, it was still defective and it was not for the court to rewrite the statement of case. Mr Lightman places reliance on that because I identified in the first Judgment a number of specific matters which needed to be pleaded but what I said has been ignored. This, he says, is an important factor in the exercise of my discretion to allow an amendment.
69. Turning now to the proposed amendments, the amendment to paragraph 15 (G&G petition) is not opposed.
70. Mr Lightman objects to the new paragraph 35A(1). His objections include these:
    a. He objects that there is no explanation of what is meant by nomination and there is no evidence in support of the allegation of nomination, an allegation which is pure speculation. It is of course the case that the shares were in fact vested in Neil and Charles and not Mr Gourgey and if that is all that is being said, then I think that the pleading of nomination is unobjectionable. It would be better if the pleading made that clear, if that is all that is being alleged in the context of the collaboration referred to. It would be reasonable also to plead that it is to be inferred from the existence of that collaboration and the *prima facie* entitlement of Mr Gourgey to the shares that he consented to the shares being held by Neil and Charles.
    b. He objects that the nomination allegation is irrelevant because it relates to the conduct of Mr Gourgey who is not even a respondent to the G&G petition. It is not, in my view, irrelevant, however, that the shares to which Mr Gourgey was *prima facie* entitled were held by Neil and Charles, since it is material to know the circumstances of their acquisition of the shares.

c. He objects because the nomination point was ventilated at the hearing before me in April. Whilst accepting that Neil and Charles were not lead players, Mr Parker said at the April hearing that this "does not alter the fact that if the sons are the people who are nominated to hold Mr Gourgey's shareholding, they are thereby immunised from the buyout". I think that what Mr Parker was saying is that Neil and Charles are not immunised from a buyout order because of the way in which they acquired their shares, that is to say following the "nomination" from Mr Gourgey. Mr Lightman now says that if Mr Griffith wished to run such a case, he should have pleaded it at the outset; it is now too late to do so, particularly where this point had been previously unsuccessfully ventilated before the court. There is, he says, in any event insufficient particularisation.

d. He objects that the allegation that no consideration was provided by Neil or Charles for the shares is irrelevant, contending that I have dealt with the same allegation in relation to Truchot at paragraph 52 of the first Judgment. As to that paragraph, I did say that it is not the mere ownership of the shares (whether acquired for consideration or not) that provides the necessary connection between a respondent and the alleged unfairly prejudicial conduct. There has to be more; and I gave some examples of factors which might establish the necessary connection. However, the absence of consideration is a factor on which Mr Parker may seek to rely as part of the context and background against which the issue of the necessary connection between Neil and Charles on the one hand and the conduct on the other hand is to be assessed. The position is different from that which I addressed in paragraph 52 of the first Judgment, where I said that there was no sufficient pleading to establish the necessary connection and where the allegation of no consideration was irrelevant because it would not make good the deficiency in the pleading. I did not say that the absence of consideration would always be irrelevant: I simply said that it made no difference to my conclusion. If the pleading had included the factors which I suggested, then the absence of consideration may also have been a factor relevant to the assessment of the sufficiency of those factors in establishing a connection.

e. Apart from the delay point, I would allow the introduction of paragraph 35A(1) provided that some changes are made to it to reflect what I have said in paragraph a. above.

71. Mr Lightman objects to the new paragraph 35A(2). His objections include these:

a. The first objection is that the allegation that Mr Gourgey placed "his" 50% shareholding in G&G in the names of his sons is not supported by evidence. This is not, I think, a fair criticism. The opening words of the paragraph are an introduction to the substantive allegation that Mr Gourgey had a justified expectation that he would be able to control the voting of such shares. In the context of the Understanding which has all along been pleaded, the reference to "placed his 50% shareholding" is clearly saying that the 50% to which he was entitled pursuant to the Understanding was held by his sons. Mr Griffith does not need to produce evidence of that for the purposes of the current application. Subject to the changes to sub-paragraph (1) which I have indicated at paragraph 70a. above, the opening words are unobjectionable.

b. The next objection is that the allegation that Mr Gourgey had an expectation that he would be able to control the voting rights of such shares is (i) unsupported by evidence and (ii) in any case irrelevant in that it relates only to Mr Gourgey's expectation and not to that of Neil or Charles. I have dealt with the similar allegation in relation to Truchot at paragraph 17 above. As with that allegation, the present allegation relates to Mr Gourgey's state of mind and read in isolation says nothing, in my view, about any arrangement or understanding between him and his sons which would justify the conclusion that there was any relevant connection between the sons and the allegedly unfairly prejudicial conduct. However, paragraph 35A(2) must be read in the context of the pleading as a whole and in particular with paragraphs 35A(4), 35B and 36A in mind: a detailed textual criticism of the paragraph 35A(2) in isolation may not be justified in the context of the pleading read as a whole.

c. The next objection is that the allegation that Neil and Charles had a willingness to leave the management of G&G and the exercise of rights attaching to the 50% shareholding in G&G is not supported by evidence: it is pure speculation. It is wholly unparticularised: Mr Griffith is obliged to give particulars of the basis on which it is alleged the Neil and Charles had the willingness alleged at the time the shares were issued. In relation to the Bankside petition, I noted that the only facts pleaded in relation to the similar allegation were found in the Particulars under sub-paragraph (10). In the case of the G&G petition and PoC, there is no equivalent to sub-paragraph (10). Instead, further relevant allegations are to be found in paragraphs 35B and 36A of the PoC.

d. The next objection is that the allegation that Neil and Charles were cyphers is vague and unparticularised. I have already said something about the meaning of cypher at paragraph 22 above in relation to the Bankside petition. In that context, Truchot had no powers of management: the suggestion that Truchot was a cypher for Mr Gourgey could therefore only be made in relation to the exercise of shareholder powers. In contrast, in the context of paragraph 35A(2), the willingness of Neil and Charles pleaded relates not only to the exercise of shareholders' rights but also to the management of G&G itself. It is inherent in paragraph 35A(2) that there is a positive allegation that the sons were in fact willing to leave the management of G&G to Mr Gourgey and not simply that he expected that they would leave management to him since that is the only basis on which the allegation that the sons were mere cyphers could be based.

72. The new paragraph 35A(3) is in similar terms to paragraph 3A(8) of the third proposed amendments to the Bankside petition. What I said in paragraph 19 above in relation to that applies *mutatis mutandis*. Thus, apart from what is said in the application notice, there is no evidence to support the allegation that any such representation was made. It is not even pleaded when or where the representation was made or the gist of the words used. Given (i) that this is a new allegation which had not been made before the proposed amendments saw the light of day shortly before the hand-down of the first Judgment and (ii) what I said in the first Judgment about the need for particularisation and for evidence in support of any amendment application, the absence of evidence about the allegation and of Mr Griffith's reliance on it and the absence of any explanation of why the point had not previously been raised is surprising. In my view, the pleading is

inadequate to satisfy the requirements for allowing an amendment. I would not allow this amendment.

73. The new paragraph 35A(4) is in similar terms to paragraph 3A(12) of the third proposed amendments to the Bankside petition. The new paragraph 35A(4) asserts, in addition, a relationship of natural love and affection, although I doubt that that takes matters further. More importantly, it also bolsters the allegation of Mr Gourgey's expectation of untrammelled control by the words "a fortiori where the sons were directors of BHL and the other companies set out below which benefitted from payments made by Mr Gourgey in breach of his fiduciary duties", going on to identify the same companies as are specified in paragraph 3A(13) of the third proposed amendments to the Bankside petition. The reference in paragraph 35A(4) to BHL makes no sense: the reference should surely be to G&G: I imagine that this is an error which has arisen as the result of a failure to alter all of the references in a provision which has been copied across from the Bankside documentation. I shall treat it as a reference to G&G.
74. However, on its face, paragraph 35A(4) (like paragraph 3A(12) of the third proposed amendments to the Bankside petition) appears to be restricted in its terms to an alleged untrammelled control of the shareholding and does not rely on the alleged willingness of Neil and Charles (both directors of G&G) to leave the management of G&G to Mr Gourgey. Accordingly, what I have said at paragraph 36 above would appear to have a resonance in this context also. However, that resonance is, I think, very much dulled by the allegations in paragraph 35B and 36A of the PoC:
    a. Paragraph 35B reflects paragraph 3A(16) of the third proposed amendments in relation to the Bankside petition: in each case, reliance is placed on paragraph 31.2 of the Points of Defence. But there is an important difference. The Points of Defence were not Truchot's points of defence but they were those of Neil and Charles. Thus Neil and Charles must, for present purposes, be taken to admit that Mr Gourgey was their representative authorised to approve or ratify on their behalf all of the breaches of Mr Gourgey's duty alleged, assuming that Mr Gourgey's conduct did amount to breaches of duty. I shall return to the consequences of this later since Mr Lightman's position is that paragraph 31.2 only relates to the sons' powers as shareholders and says nothing about the allegation that they acted in breach of duty in their capacity as directors.
    b. Similarly, paragraph 36A relies on paragraph 31.2 of the Points of Defence. Paragraph 36A also gives particulars of the support given by the sons to Mr Gourgey. In effect, Mr Griffith is saying that they permitted Mr Gourgey to act in breach of duty but failed to supervise or control him in breach of their own duties, since they must be taken as knowing of those particular breaches.
75. I think it best to take Mr Lightman's objections to the new paragraphs 35A(4), 35B and 36A together since those paragraphs are closely related. His objections include these:
    a. The allegation that Mr Gourgey had an "expectation of untrammelled control of the 50% shareholding" is not supported by any evidence: it is pure speculation. It is also irrelevant since it relates only to Mr Gourgey's expectations not those of Neil or Charles.
    b. The allegation that Neil and Charles were aware that the Gourgey family were the beneficiaries of Mr Gourgey's breaches of fiduciary duty to the prejudice of Mr Griffith is not supported by any evidence and is pure speculation. It is also

wholly unparticularised. It is in any case a wholly inadequate plea of knowledge and appears to be inconsistent with paragraph 36A which only alleges that Neil and Charles should be taken to have known of the breaches of duty. Nor is there any particularisation of the allegation that Neil and Charles knew that what Mr Gourgey was doing was a breach of fiduciary duty or that there was prejudice to Mr Griffith. Unless they did know, the necessary connection to found liability under section 996 cannot be established.

c. The new paragraph 35B is irrelevant. Mr Lightman contends that the Points of Defence do no more than state that, had he breached his fiduciary duties, those breaches were authorised or ratified by Mr Gourgey, Mr Hodge and Mr Griffith, it being implicit that Mr Gourgey represented Neil and Charles as shareholders in G&G. This paragraph, according to him, says nothing about the state of knowledge of Neil or Charles of Mr Gourgey's alleged breach of fiduciary duties. Nor does it provide a basis on which to say that there was a sufficient connection between Neil or Charles and the unfairly prejudicial conduct complained of.

d. As to the proposed amendment to paragraph 32 of the G&G petition (no similar amendment being needed to the PoC), the allegations are wholly unparticularised:
    i. There is a failure to specify the dates, the circumstance or the nature of each payment notwithstanding what I said at paragraph 100 of the first Judgment.
    ii. There is a failure to specify, in respect of each of the fiduciary duties identified in paragraph 15, when, how or in what respects Mr Gourgey is alleged to have breached those duties in relation to each of the payments. Any proper pleading would, for instance, need to allege that Mr Gourgey acted in bad faith so far as any breach of the duty referred to in paragraph 15(2) is concerned since that duty is a subjective one.
    iii. There is a failure to specify in what respect each payment is alleged to have been a breach of the Understanding.
    iv. There is a failure to specify what support each of Neil and Charles gave in respect of any of the payments alleged. The new paragraph 36A is a wholly inadequate plea of support.
    v. There is a failure to specify, in relation to each of the fiduciary duties identified, how Neil or Charles is alleged to have breached those duties in respect of any of the payments, a failure identified in paragraph 108c. of the first Judgment.
    vi. There is a failure to explain the relevance of the Understanding to the relief sought against Neil and Charles, a failure identified in paragraph 108d. of the first Judgment.
    vii. There are also the following failures:
        1. To specify how the alleged breaches of the Understanding concern acts or omissions of G&G or the conduct of its affairs.
        2. To specify how the making of the payments is prejudicial to Mr Griffith. It is not enough to establish a breach of duty on the part of the directors; it must be established that those breaches caused Mr Griffith to suffer unfair prejudice in his capacity as a shareholder.

3. To specify in what respects the making of the payments was unfair: conduct can be unfair without being prejudicial, and *vice versa*.

e. In relation to paragraph 36A, Mr Lightman's many objections can be summarised as follows:
   i. The allegation concerning the support given by Neil and Charles "in breach of fiduciary duty" appears to be based on the idea that they were passive directors who allowed Mr Gourgey to manage G&G as he saw fit. This allegation is not supported by any evidence.
   ii. The absence of particularisation of how each duty is breached is significant. Mere inactivity could not be a breach of the duties identified at paragraph 15(1) and (5). Further, an allegation in relation to the duty identified at paragraph 15(2) (the duty to promote in good faith the interests of the company) carries a clear implication of bad faith which itself requires particularisation, which is wholly absent.
   iii. The allegation that Neil and Charles were able to obtain information and should be taken to have known about Mr Gourgey's breach of duty, alternatively that they were reckless as to whether he breached his duties, is wholly vague and unparticularised. Thus it is one thing to say that Neil and Charles were able to find out that the payments were being made: it is something else to say that they should be taken to have known that those payments were in breach of Mr Gourgey's duties. Such an allegation requires full particularisation. This is especially so where Mr Griffith has not particularised the ways in which Mr Gourgey is alleged to have breached <u>his</u> duties. *A fortiori*, the same applies to the allegation of recklessness.
   iv. The last sentence of paragraph 36A relating to paragraph 31.2 of the Points of Defence is again misconceived. Paragraph 31.2 makes clear that what is pleaded relates to Neil and Charles *qua* shareholders. It has no relevance to the allegation that they acted in breach of duty *qua* directors.

f. The allegation in paragraph 82 of the PoC (paragraph 79 of the G&G Petition) that Mr Gourgey and his sons refuse to say what Mr Gourgey has done with the £4 million from the sale of 10 Albert Embankment is stale. The request for information was made in a letter to G&G's directors in August 2012: it is only very recently that Mr Griffith has sought to rely on this failure as against Neil or Charles.

g. The allegation in paragraph 86 of the PoC (paragraph 83 of the G&G petition) that Mr Gourgey has the full support of his sons is vague and unparticularised. I note that the allegation in the PoC concludes "as pleaded in paragraph 35A to 35B above" (with a corresponding statement in paragraph 83 of the G&G petition). It follows that the adequacy of this statement stands or falls with the adequacy of the earlier paragraphs.

h. The allegation at paragraph 88(2) of the PoC (paragraph 86 of the G&G petition) is again stale, being based on correspondence in 2011 and 2012, which has not previously been relied on as against Neil or Charles.

i. The amendments, if allowed, would have a knock-on effect in relation to the relief sought in paragraph (4) of the prayer for relief, that is to say a share-purchase

order. It is plain, accordingly to Mr Lightman, that such relief is not justified in the light of the pleaded allegations. He reserved the respondents' position in the light of the inadequate particularisation which he has identified.

j. The relief sought in paragraph (5) of the prayer for relief, that is to say a share sale order, is objectionable and should be struck out. There is no real prospect of the court making such an order at trial on the basis of the pleaded allegations.

76. In the light of his criticisms of the pleadings, Mr Lightman submits that there is no real prospect of Mr Griffith obtaining any relief against Neil or Charles. In summary, and to borrow heavily from his skeleton argument:
    a. There is a wholesale and unacceptable lack of particularisation of Mr Griffith's central case that payments were made in breach of fiduciary duty.
    b. There is still no properly pleaded case that Neil or Charles was sufficiently connected to the unfairly prejudicial conduct to make it just to impose liability of the sort claimed.
    c. There is no properly pleaded case that anything that was done was prejudicial to Mr Griffith's interests as a member of G&G.
    d. There is no pleaded case that anything that was done in relation to G&G was unfair.
    e. The relief sought against Neil and Charles is excessive and disproportionate to any pleaded claims against them.
77. Although there is force in most of Mr Lightman's criticism, I consider that I must consider the amendments taken as a whole and ask myself whether the G&G petition and the PoC after the proposed amendments disclose an arguable case. In my judgement, they do so in the sense that, had the original pleadings been in that form, an application to strike them out would have failed. That gives rise to two further questions. The first is whether the amendments satisfy the requirements for amendment which I discussed in the first Judgment and earlier in this judgment. The second is whether any abuse of process is involved in the light of the lateness of the proposed amendments and any inadequacy in the pleadings.
78. Dealing with the second of those first, I consider, again very much on balance as with the Bankside petition, that there is no abuse and that, although the application is made at a late stage, it is not, in all the circumstances, right to conclude that the amendments should be refused solely on the ground of delay. My reasons for reaching this conclusion are similar to those in relation to the Bankside petition. In particular, it was not until the strike-out application was made in the G&G petition that it can be said that Mr Griffith should then have recognised any deficiency in his pleadings and taken steps to amend; and it was not until the hearing of the strike-out application that he was finally forced to recognise that some amendment was necessary. He was entitled to wait for my judgment before formulating the necessary amendments and although he could have acted more promptly, I do not consider (very much on balance as with the Bankside petition) that his application should be refused on the grounds of delay.
79. As to the first of the questions raised in paragraph 77 above, it must be recognised that Mr Griffith is not in a position to formulate his case in the detail in which it will need to be presented at trial until after disclosure. He was not involved in the day-to-day management of the company. There is enough in his amended pleading to raise a case which needs to be answered by Neil and Charles. In particular, it is well arguable that, as

directors, they should have known, if they did not in fact know, of Mr Gourgey's activities and of his bringing about the payments of which complaint is made by Mr Griffith. Neil and Charles were both shareholders and directors. If they knew or should have known of Mr Gourgey's allegedly unfairly prejudicial conduct, it is at the very least arguable that the necessary connection is made between them and that conduct to justify relief against them. Further, I consider that it is arguable that one possible order would be that they purchase Mr Griffith's shares; I do not accept Mr Lightman's submission that the relief is so obviously excessive that the claim to it should be struck out. If, after a trial, unfairly prejudicial conduct is established, Mr Lightman may nonetheless satisfy the trial judge that the relief sought is excessive. But at this stage, my function is only to determine whether there is a properly arguable case that the relief will be obtained. In my judgment, there is.

80. I should say at this point that I have not overlooked Mr Lightman's submission that paragraph 31.2 of the Points of Defence on which Mr Griffith relies relates only to Neil and Charles' position as shareholders: it is not an admission that they authorised Mr Gourgey's conduct in their capacity as directors. As a matter of strict pleading, that may be correct. But if Neil and Charles permitted Mr Gourgey to speak for them as shareholders in sanctioning conduct which was a breach of Mr Gourgey's duties as a director, it is difficult to see how they could escape liability as directors if that apparent sanction was ineffective (because Mr Griffith did not, contrary to the Points of Defence, himself sanction the conduct). In any case, I consider that the sanctioning by 100% of shareholders of conduct which would otherwise be a breach of duty by a director is participation in the affairs of the company. If it transpires that the sanction is ineffective because one shareholder (Mr Griffith in the present case) did not sanction it, the purported sanction by the other shareholders does not thereby cease to be participation in the affairs of the company.
81. I accept that there are instances of a lack of particularisation but many of these (including ones identified in the first Judgment) relate to deficiencies in the original pleading, for instance details of the payments alleged to have been made. These should be addressed by a request for further information and are not reasons for refusing amendments to other parts of the pleading.
82. I would therefore allow the amendments sought in the G&G amendment application other than that found in paragraph 35A(3) (as to which see paragraph 72 above) but subject to paragraph 70e. above.
83. Absent the amendment, the G&G petition would be struck out in accordance with the first Judgment. It would be wrong, in my judgment, to allow the amendments but to refuse the respondents the right to plead in full to the PoC as amended. The current position is that the Points of Defence have been struck out in relation to the PoC in their current form. But the G&G petition (and thus the PoC) themselves are to be struck out absent any amendment. It is therefore of no consequence that the Points of Defence have been struck out as they are Points of Defence to a non-existent (because struck out) claim. The amendments sought are not trivial; nor do they simply fill in lacunae in a previously pleaded case. They are substantial and plead a serious case which had not previously been raised. If the G&G petition and the PoC are to be amended in this substantial way, it is only fair that the respondents should be entitled to plead to it in full.

84. Accordingly, as with paragraph 3B of the Bankside petition, I make it a condition of permission to make the amendments which I have indicated in paragraph 82 above that the respondents should be permitted to plead in full to the PoC.

Conclusion and disposition in relation to the G&G petition

85. The applications to amend the G&G petition and the PoC in relation to that petition are allowed (save as to paragraph 35A(3) of the PoC and the corresponding paragraph of the petition). But this permission is conditional on the respondents being permitted to plead in full to the PoC. The changes mentioned in paragraph 70e should also be made.

The Pedersen amendment application

86. The history of this application needs to be recorded. The possibility of amendment was first mentioned in a letter from Mewslade's solicitors on 1 March 2018, the stated purpose being "to take account of the position of [Pedersen's] creditors". As Mr Lightman points out, this was some 5 years after the Pedersen petition had been presented and more than 3½ months after Judge Pelling had noted that no relief was (then) being sought against Brentford. It took nearly 4 weeks more for a draft of the amendments to the Pedersen petition and the PoC to be provided.
87. At that stage, the proposed amendments were confined to amending the prayers for relief in each of those pleadings. Mewslade did not propose to plead any further facts or matters in order to justify the further relief sought by the amendments.
88. At the hearing before me in April, Mr Parker stated – I understand this to be for the very first time – that Mewslade intended to make further amendments to the Pedersen petition and the PoC. Since the respondents had had no prior notice of the text of these proposed amendments, and since time was short in any case, I said that I would hear submissions on the proposed amendments when handing down my judgment on the other matters before me. It was agreed that any further draft amendments would be provided by 25 April. On that date, Mr Phillips sent a draft of the amendments to the PoC ("**the April amendments**") but no draft of amendments to the Pedersen petition itself. Mewslade thus did not appear to wish to amend the Pedersen petition other than in accordance with the draft attached to his amendment application dated 10 April 2018.
89. The April amendments did not plead any new factual matters. But they did include a new paragraph 0 which contained words to the effect that, in relation to the Pedersen petition, no reliance would be placed on a number of specified paragraphs of the PoC and stated that the respondents would accordingly not be required to plead to them. The application to amend the Pedersen petition has not been altered to reflect the fact that reliance would not be placed on those allegations: there has been no attempt to remove the corresponding paragraphs of the Pedersen petition. I should say immediately that I consider that, if the PoC are amended to include the new paragraph 0, those corresponding paragraphs should be struck from the Pedersen petition. It would be quite wrong to allow allegations reliance on which Mr Griffith and Mewslade have expressly disavowed to remain in place in the petition.

90. The proposed amendments to the PoC (with corresponding amendments in some cases to the Pedersen petition) which are relevant are ones which relate to the following paragraphs:
    a. Paragraph 0, which I have already described.
    b. Paragraph 3A. Although not mentioned in paragraph 0 as one of the paragraphs on which reliance is not placed in the Pedersen petition, it is expressly stated to be pleaded against Truchot alone. It is now irrelevant since I have refused the amendments seeking to plead a case against Truchot in the Bankside petition.
    c. Paragraph 3B. There is no similar statement in relation to paragraph 3B and it is presumably relied on in the Pedersen proceedings as well. It is not, however, pleaded in the Pedersen petition and cannot, for that reason, be relied on. It is, in any case, not contentious in the context of the Pedersen petition, simply reciting Mr Griffith's acquisition of shares from Mr Hodge's trustee in bankruptcy. It is, however, contentious in relation to the Bankside petition as discussed in paragraphs 59 and 60 above.
    d. Paragraph (8) of the prayer for relief. This claims that, for the purposes of valuing the corporate opportunity allegedly taken from Pedersen by Brentford, there be an inquiry into the profits made by Brentford from the acquisition and development of the hotel project particularised at paragraphs 46 to 63 (and which are found also at paragraph 43 to 60 of the proposed amended petition).
    e. Paragraph (9) of the prayer for relief. This claims in the alternative (although this appears in fact to be Mewslade's primary claim) that Brentford account to Pedersen for all profits found to have been made by the inquiry just referred to, accounting for the sums due within 14 days of the inquiry, and that Pedersen be wound up by the court under the provisions of the Insolvency Act 1986.
    f. Paragraph (10) of the prayer for relief. This claims in the further alternative that Mewslade be authorised to bring derivative proceedings against Mr Gourgey, Neil, Charles and Mrs Nairac (the claim against whom in the Pedersen petition has already been struck out).
91. One result of these amendments is that relief is sought for the first time against Brentford. A further result is that relief is sought, namely an authorisation to bring derivative proceedings, which if granted would in practical terms be indirect relief against non-parties, namely Neil and Charles. And a yet further result is that, again for the first time, an order is sought for the just and equitable winding-up of Pedersen.
92. The purpose of the amendments in paragraph (9) and (10) seeking winding-up and permission to bring derivative claims has been stated on behalf of Mewslade as being to protect the interests of creditors of Pedersen. Whilst it is accepted that a share purchase order may be adequate compensation for Mewslade, it might not be considered to be an appropriate remedy where the position of Pedersen's creditors is taken into account. As it is put on behalf of Mewslade, this is because "it would involve [Mewslade's] shares in Pedersen being acquired on the basis that [Pedersen] had actually received the value of the corporate opportunity when in fact (to the detriment of any other creditors) it had not received that value".
93. I do not consider that there is any reasonable prospect of Mewslade obtaining that relief on the basis on which I have described. The creditors have their own remedies, just as they would have their remedies if Mewslade had not presented the Pedersen petition in

the first place. For instance, they could seek to have Pedersen wound up if their debts are not met, with the liquidator then having appropriate remedies to make good the claim, if any, which Pedersen has against Neil, Charles and Mrs Nairac. I do not know enough about the financial position of Pedersen to know whether it can meet all of its liabilities even without the benefit of the corporate opportunity. If it can do so, relief of the sort claimed is unnecessary. But even if it cannot do so, I can see no reason why creditors should obtain relief by the back door (as I would describe it). Mewslade seeks relief for itself as a result of allegedly unfairly prejudicial conduct. It should form no part of its claim to protect creditors who, as I have indicated, have their own remedies.

94. It may be that Mewslade seeks this relief as an alternative way in which to protect its own position. For instance, if Mr Gourgey were unable to raise the funds to effect the purchase of Mewslade's shares, Mewslade's financial position would be protected if (a) Brentford accounted to Pedersen as sought in paragraph (9) and/or a derivative claim is brought and succeeds and (b) Pedersen were then wound up. This gives rise to at least two issues of principle: the first is whether a winding-up order can be made as part of the relief sought under section 996; the second is whether authorisation in the present case to bring derivative claims should be sought as part of the relief under section 996 or whether such permission should be sought in accordance with the ordinary rules for bringing derivative claims. I have received lengthy submissions on both of these matters.

95. So far as the first issue (winding-up) is concerned, Mr Lightman submits that the court has no power to order winding-up as a remedy under section 996. He may be right, but I do not propose to decide the issue. It is at least arguable that the remedy is in principle available in an appropriate case; it is not an issue which it is appropriate to determine on this amendment application. If the issue arises at all (which will only be the case if Mewslade is successful in establishing relevant unfairly prejudicial conduct), it is one which is more appropriate to be dealt with as part of the argument concerning remedies and it may well be that the judge hearing the petition will not in fact need to determine the issue.

96. So far as the second issue (derivative claims) is concerned, section 260 of the Companies Act 2006 provides that a derivative claim may only be brought in accordance with Part 11 of that Act or pursuant to an order of the court in proceedings under section 994. So far as claims pursuant to Part 11 are concerned, these are dealt with under CPR 19.9, which Mewslade may already have invoked (as to which there is an issue, which I am not in a position to resolve, whether Mewslade has in fact issued appropriate proceedings for that purpose). Given that Neil and Charles are not parties to the Pedersen petition, I do not consider that it would now be appropriate to allow Mewslade to seek this particular head of relief in the Pedersen petition so far as concerns those individuals, especially in circumstances where, on Mewslade's case, there are existing, separate, proceedings under CPR 19.9 including the seeking of permission to bring derivative claims. Although, of course, there will be considerable overlap between the allegations of unfairly prejudicial conduct made against Mr Gourgey and the matters relied on as giving rise to claims by Pedersen against the proposed defendants, the cases are different. If this head of relief were to be granted, I would expect the court hearing the section 994 petition to be provided with precisely the same pleadings and evidence as are envisaged by CPR 19.9. Only in that way can the court hearing the petition be in a position to form a view as to whether permission should be granted. In my view, the case must be properly pleaded in

the PoC at this stage of the proceedings. This is not material the provision of which can properly be delayed until a later stage of the proceedings. Neither the Pedersen petition nor the PoC come anywhere near disclosing the details of any claim against Neil or Charles which the court would require before granting permission to proceed with a derivative claim under Part 11 and CPR 19.9. I would therefore refuse the amendment seeking permission to bring derivative claims against Neil and Charles.

97. Although Mr Gourgey, Brentford and Mrs Nairac, unlike Neil and Charles, are parties to the petition (although I note that the current claim for relief against Mrs Nairac has been struck out), the same considerations apply to them in terms of any claim against them by Pedersen. The pleadings at present do not come anywhere near identifying with the necessary detail the claim which Pedersen would be entitled to bring against any of them. But even if that were not so, I do not consider that it would be appropriate for Mewslade to claim this head of relief (permission to bring a derivative claim) against Mr Gourgey, Brentford and Mrs Nairac in circumstances where such permission must be sought in separate proceedings *vis á vis* Neil and Charles. I would therefore refuse the amendment seeking permission to bring derivative claims.
98. Quite apart from those considerations, the draft amended Pedersen petition does not, so far as I can see, contain any basis on which the court could conclude that Brentford is liable to account to Pedersen for the profits made in the hotel project as sought in paragraph (9). The claim for an account against Brentford by Pedersen made in paragraph (9) must be supported by specific facts, facts which must be pleaded, including allegations relating to Brentford's knowledge and perhaps alleged dishonesty. In my judgment, the same detailed pleading should appear in support of the claim made in paragraph (9) of the prayer for relief in the amended PoC as would be necessary in a direct claim (in separate proceedings) by Pedersen against Brentford; and since the inclusion of this claim by way of amendment is sought, the general requirements for making amendments which I have already discussed must be met. The amended Pedersen petition and the amended PoC come nowhere near providing that required level of detail. Further, there is no allegation that Brentford was concerned in conducting the affairs of Pedersen in an unfairly prejudicial manner. Such conduct has to be shown if Brentford itself is to be made the subject of an order under sections 994 to 996. The nearest one gets is an allegation that Mr Gourgey caused Brentford to take over the hotel project from Pedersen. But no particulars are given of when or how Mr Gourgey is alleged to have done so and nothing is said about Brentford's own state of knowledge. I would therefore refuse the amendment sought in paragraph (9). The same goes for paragraph (8) if that is to be read as asserting a direct claim against Brentford.
99. If, in contrast, paragraph (8) is simply to be read as saying that the corporate opportunity referred to in paragraph 7(a) is to be valued on the basis of the profits made by Brentford, the manner in which those profits are to be ascertained will be a matter to be worked out if and when an order to that effect is made. Unless a direct claim is asserted against Brentford (contrary to the hypothesis now under consideration), it is not apparent how Brentford could be compelled to take part in any account or enquiry. But even if there is some mechanism by which such participation, or provision of relevant information, could be compelled, it is in my view wholly inappropriate that that should be done as part of direct relief against Brentford in the Pedersen petition. I would refuse the amendment sought by paragraph (8) of the amended PoC, expressly leaving it open to the trial judge,

if a buyout order is eventually made, to determine that the *prima facie* value of the corporate opportunity should be, or be reflected by, the profit made by Brentford, and to make such directions as he or she thinks fit for the ascertainment of that profit, hearing submissions from Brentford at that stage if necessary. I would therefore refuse the amendment sought by paragraph (8).

100. As to these matters, Mr Lightman has made lengthy submissions to the effect that any direct claim against Brentford would be time barred. He accepts that there is no statutory limitation period under section 994, but submits that the court should give great weight to any statutory period relating to the underlying claim. There is, I think, considerable force in that point, as there is also in the submission that any underlying claim would be time-barred. In the light of my analysis so far, however, the points do not arise and I propose to say no more about them.

101. Further, in relation to the relief sought against Mrs Nairac (as executrix of her husband's estate), there are these points to make:

a. The first is that no new facts are being relied to justify the grant of the new relief. Whatever may be the merits or otherwise of a separate derivative claim against Mrs Nairac (and it is clear that there are strong arguments for refusing to allow such a claim to proceed), it would be quite wrong to allow indirect relief against Mrs Nairac as sought in paragraph (10) of the prayer for relief in the amended PoC in circumstances where the claim for relief against her in petition has already been struck out as against her. As Judge Pelling noted, it was not alleged that Mr Nairac was involved either directly or indirectly in the transfer of the corporate opportunity to Brentford or in assisting such a transfer. It would, in my judgment, be an abuse of process now to allow Mewslade to seek relief in the petition which is contrary to Judge Pelling's observations; to grant the relief sough in paragraph (10) insofar as it relates to Mrs Nairac would be contrary to those observations.

b. Mr Lightman submits that any claim by Pedersen against Mrs Nairac would now be time-barred. I think that there is considerable force in that argument, although it is not necessary for me to decide the point and I do not do so.

c. The third point is mere speculation on my part and forms no part of my reasoning, but I mention it for completeness. The administration of Mr Nairac's estate may well have been completed and assets distributed. If Mrs Nairac advertised for creditors in the usual way and no claim was made by Pedersen (or Mewslade), then she could be made liable only to the extent of the value of any assets retained by her in her capacity as executrix, which may be nil.

102. It is not necessary for me to rely on delay on the part of Mewslade in seeking the amendments sought in reaching my conclusions. However, delay is relevant in two respects. First, serious delay may lead to the conclusion that an amendment should be refused even if, in itself, it has some merit. Secondly, where there has been delay of any sort, that is a factor to be taken into account in the exercise of the discretion to allow amendment: the greater the delay, the stronger must be the case sought to be introduced by the amendment (see paragraph 64e above).

103. There is no doubt that the amendments in relation to the Pedersen petition are sought at a very late stage - the hearing before me in April was an occasion at which, on Mewslade's case, final orders should be made. There appears to have been no attempt by Mewslade to engage with the guidance given by Coulson J, as to which see paragraph

64e above. The Pedersen petition was presented more than 5 years ago, and yet there has been no explanation of why the proposed amendments were put forward only 3 weeks before the April hearing (which had been fixed in September 2017) which Mewslade saw as a dispositive hearing at which final relief was to be granted.

104. At the very least, this delay is a material factor which lends considerable support to the conclusions which I have reached. But even if I had considered that the proposed amendments had merit, I would regard the lateness of the application, and the absence of any proper explanation for it, as justifying refusal of the amendments and would have reached that conclusion accordingly.

105. There is one final point which I mention for completeness but which forms no part of my decision. It is that, if paragraph 0 of the PoC is introduced by way of amendment and the corresponding paragraphs of the Pedersen petition are struck out accordingly, the petition is a markedly different petition from that which was presented. It is far from clear to me that the petition in that new truncated form would disclose facts which would justify any form of relief which it is appropriate to grant on an unfair prejudice petition.

Conclusion and disposition in relation to the Pedersen petition

106. The amendments sought to be made by paragraphs (8), (9) and (10) of the prayer for relief in the draft Re-Re-Amended PoC are refused. The amendment sought by paragraph 0 of that draft is allowed but only on the basis that the corresponding paragraphs of the Pedersen petition are struck out.

A final observation

107. Any further Points of Defence should contain full details of the respondents' case. In particular, it is to be remembered that the Points of Defence were struck out because of a failure by the respondents to provide the further information which they had been ordered to provide. If it is appropriate for that information to be included in a pleading, then I would expect the respondents to include it in their Points of Defence. Otherwise there will be another round of applications for further information and, potentially, scope for further strike-out applications if it is not provided. This would be a disgraceful waste of the Court's time and of Mr Griffith's resources.

Post-script

108. The judgment above was sent to the parties in draft in the usual way. I have made a number of minor corrections suggested by them.

109. In addition, Mr Parker says that I have failed to address one important argument which he raised and invites me, in the light of *In re M* [2008] EWCA Civ 1261, especially at [38], to reconsider my decision in relation to the Bankside petition. Rather than attempt to re-write the section of the judgment dealing with the Bankside petition, I propose to address his submissions, and those of Mr Thompson in response, in this separate post-script to my judgment. The paragraph numbers of the draft judgment and of this final judgment are the same.

110. Mr Parker says that I have not dealt with an element of the proposed amendments over and above those identified in paragraph 15 above. (That paragraph records Mr Thompson's description of what the central issues were; it was not my own analysis.) His

point is that the position is not simply that Truchot did not interfere but that it could not have interfered, with the management of Bankside and therefore necessarily would not have.

111. He contends that it was this point that was relied on (contrary to paragraph 23 above) for alleging that the Trustee was a cypher (as he now describes it, a "nothing"). He notes that I dealt with the "cypher" allegation on the basis that Truchot did not object to Mr Gourgey's actions but not on the basis that it could not have objected to them. It is this element which he contends means that the position, practically speaking, was the same as if the trustee was "in the pocket of" Mr Gourgey and the same, practically speaking, as if the trust were a sham. He contends that, in paragraph 35 above, I was suggesting that, if circumstances were such that the trustee would necessarily have failed to take action, then a connection is made out. He argues that a connection cannot sensibly be limited to situations where the trustee has expressly agreed not to take action (a sham) and not to situations where the trustee has agreed to accept a position in which he is unable to take action (in relation to which Mr Parker refers to paragraph 36 above). He complains that I did not say whether or not the necessary connection is made out if the trustee could not interfere with the actions of the wrongdoing director from whom the shares derived under arrangements that meant that the trustee could not interfere.

112. As to paragraph 35, the suggestion which Mr Parker imputes to me is not one which I was intending to make and I do not consider that his reading is a proper reading of the paragraph. It will on depend on the precise facts of a particular case whether a connection is made out. Nor is a sham, as that term is ordinarily understood, established merely because the trustee has agreed not to take action: even if the trustees had agreed to act precisely as Mr Gourgey instructed them in relation to Bankside, that does not make the trust a sham.

113. As to paragraph 36, my point was that an allegation that Truchot handed over its rights entirely was an extreme allegation which is not supported by the pleaded facts. I would make the same observation in relation to the oral argument (not to be derived from the pleading or the evidence) that it was impossible for Truchot to interfere. In any case, Truchot's inability to interfere in the management of Bankside stemmed from the fact that management was a matter for the directors. Truchot could, if it had joined with Mr Griffith, have taken steps to assert Bankside's rights against Mr Gourgey. It was not asked to do so, an aspect I have dealt with in the Judgment.

114. As to the point about "cyphers", it is true of any minority shareholder (including Mr Griffith in the present case) or even a 50% shareholder (Truchot in the present case) that it is impossible for them to interfere in the management of the company of which they are a shareholder. It would be wholly wrong to describe such a shareholder (Truchot in the present case) as a cypher, either for the company or for a person (Mr Gourgey in the present case) who had provided their predecessor in title (the original trustee) with the shares.

115. I gave Mr Thompson the opportunity to respond to Mr Parker's submission. His response includes some of the points made above in this post-script. In addition he submits as follows:

    a. The proposition that it was impossible for Truchot to have interfered with the management of Bankside generally was advanced in the Petitioner's oral submissions.

b. However, the main focus of the Third Proposed Amendments was the proposition only that Truchot would not have interfered because it is alleged that it would not have acted contrary to the wishes of the beneficiaries who would not have wanted it to interfere. There is a distinction drawn between the allegation of how Truchot would hypothetically have acted and an allegation that it was subject to an incapacity – the proposition that it could not have taken any action.

c. The only references in the draft re-amended pleading to some element of the incapacity argument are as follows:-

   i. At sub-paragraph (15) of paragraph 3A it is stated, specifically as regards the hypothetical possibility of Truchot commencing proceedings against Mr Gourgey contrary to the interests of the beneficiaries, that Truchot had no financial means to do so and would not have been supported by funding from the beneficiaries. However, Mr Thompson submits, and I agree, that that is patently not the general incapacity argument that is now advanced, which is stated as an inability to interfere "with the management of Bankside" generally. I also agree with him that sub-paragraph (15) is more specific: no particulars sufficient for the purposes of amendment are provided of any more general allegation.

   ii. Sub-paragraph (24) of paragraph 3A provides in its first 6 lines as follows:

   > "Having regard to Mr Gourgey's control of the 50% shareholding registered in the name of the trust through the support of his children…. who have the practical control of the trust in that the trustee cannot act without the approval and financial backing from the family".

   iii. This is an entirely unparticularised contention that Mr Gourgey's children had practical control and, in my view, is insufficiently precise to be allowed by way of amendment. In particular, I do not understand how, on the basis of the pleading, it can be said that the need for financial backing, which would not be forthcoming, from the family establishes the necessary connection between the unfairly prejudicial conduct alleged and Truchot. Nor is it explained how the allegation that the children had practical control of the trust fits with the allegation that Truchot was a chypher for Mr Gourgey.

116. The draft judgment dealt with the proposed allegations made in sub-paragraphs (15) and (24) of paragraph 3 A of the draft re-amended petition at paragraphs 33 to 35 and paragraphs 43 to 47 respectively (the same paragraphs appear above). It is correct that I did not deal in explicit terms directly with the argument that it was impossible for Truchot to have interfered with the management of Bankside generally so that the necessary connection between the alleged unfairly prejudicial conduct and Truchot is established. But in my own defence, I would say that, although I may not have addressed the point explicitly, the matters on which Mr Parker relies to show that it was impossible for Truchot to act against Mr Gourgey's wishes all featured to a greater or lesser extent in the draft judgment and it was at least implicit that those matters were insufficient to establish the necessary connection between the unfairly prejudicial conduct alleged and Truchot. That is why I said what I did in paragraph 23 above.

117. In my judgment, the Third Proposed Amendments do not make an allegation sufficiently supported by evidence that Truchot agreed to divest itself of any ability to "interfere" in Bankside's affairs. The necessary connection between the unfairly prejudicial conduct alleged and Truchot cannot, therefore, be established on the basis of the Third Proposed Amendments. The mere fact that Truchot, as a 50% shareholder, was not able to interfere in the management of Banksides is not sufficient to establish the connection. Mr Parker's further submissions do not persuade me to alter my decision.