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Case No: CR-2022-003204

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

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 6 October 2023

Before:

INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

- -

IN THE MATTER OF CONTINGENT & FUTURE TECHNOLOGIES LIMITED (Company No. 120350038)

AND IN THE MATTER OF THE COMPANIES ACT 2006

Between:

IONUT COSMIN ONEA	**Petitioner**
- and -	
(1) TAIWO AYOYUNDE ALEGBE **(2) RAJPAL SINGH WILKHU** **(3) CONTINGENT & FUTURE TECHNOLOGIES LIMITED**	**Respondents**

- -

Mr Alexander Halban (instructed by DWF Law LLP) for the Petitioner
Mr Daniel Lightman KC and Mr Mark Baldock (instructed by Claremont Litigation Limited) for the First and Second Respondents

Hearing dates: 13-14 July 2023

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JUDGMENT

This judgment was handed down remotely at 4.00pm on 6 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

ICC JUDGE GREENWOOD:

[A] Introduction

1. Section 994 of the Companies Act 2006 provides for a "*member of a company*" to apply to the court by petition for an order in circumstances where the affairs of the company have been conducted in a manner unfairly prejudicial to his interests as a member. On 21 September 2022, Mr Cosmin Onea presented such a petition ("**the Petition**") in respect of the affairs of the Third Respondent, Contingent & Future Technologies Limited ("**the Company**"). This is my judgment on an Application dated 27 October 2022, made by the First and Second Respondents, respectively, Mr Taiwo Alegbe and Mr Rajpal Wilkhu, represented by Mr Daniel Lightman KC and Mr Mark Baldock of counsel, to strike out and/or stay the Petition in whole or in part, fundamentally on the basis that Mr Onea - as he accepts - is not, and was not when the Petition was presented, a registered member of the Company.

2. The Company is a supply chain technology company, which provides customers with tools for procurement decision making. It was incorporated on 5 June 2019 and its "*founders*" were Mr Onea, Mr Alegbe and Mr Wilkhu. On incorporation, of its 1,000,000 issued shares, Mr Onea and Mr Wilkhu each held 30%, and Mr Alegbe held 40%; each was a member. On 12 October 2021, the Company purported to dismiss Mr Onea as an employee for gross misconduct, and it removed him from office as a director. In addition, it resolved to treat him as a "*Bad Leaver*" under its Articles of Association, as a result of which his shares were automatically converted into "*Deferred Shares*" and transferred to Mr Wilkhu in return for their nominal value, a negligible sum. As a further result, on 15 December 2021, Mr Onea was removed from the Company's register of members; he therefore ceased to be, and has not since then been, one of its members.

3. Mr Onea denies that these steps were properly or lawfully taken. His case is that his dismissal and exclusion, and ultimately the transfer of those shares which he was entitled to retain, were wholly unjustified, and amongst other things comprised conduct of the Company's affairs which was unfairly prejudicial to his interests as a member. Within the present proceedings on the Petition, he therefore seeks, in addition to relief under section 994, certain other declarations and orders concerning his shareholding, and in consequence, an order under section 125 of the Companies Act 2006 that the Company's register of members be rectified with retrospective effect, to show him as a member holding 120,000

ordinary ("*Good Leaver*") shares in the Company at all material times since before the presentation of the Petition. Although not identical, and although certain other significantly less serious allegations of unfairly prejudicial conduct are also made, the alleged grounds for rectification of the register of members (ultimately, that Mr Onea was not in fact a "*Bad Leaver*") are therefore substantially similar, and certainly very closely linked, to those alleged in support of the unfair prejudice claim (that he was unfairly dismissed, excluded, and critically, that he was wrongfully deprived of his "*Good Leaver*" shares, which he seeks now to compel Mr Alegbe and/or Mr Wilkhu to buy from him at a fair value under section 994).

4. In addition, are two other sets of proceedings.

   4.1. First, on 8 November 2021, the Company began proceedings against Mr Onea in the Chancery Division of the High Court ("**the Confidentiality Proceedings**") claiming relief in respect of alleged breaches of confidentiality and unauthorised access to the Company's IT systems. Messrs Alegbe and Wilkhu are not parties to the Confidentiality Proceedings, which are listed for a five-day trial in a window between 30 October and 10 November 2023. In the meantime, by virtue of an order made by Ms Joanne Wicks QC (sitting as a Deputy Judge of the High Court) on 27 June 2022 (on the return date of an interim injunction made on 9 November 2021 on the Company's application on short notice to Mr Onea) the statements of case are not to be provided to any non-party. Accordingly, they were not in the evidence or materials before me, although as explained further below, I was referred to a case summary and list of principal issues which I understood to have been produced for the purposes of a CCMC before Deputy Master Teverson on 9 September 2022.

   4.2. Second, on 28 January 2022, Mr Onea brought a claim in the Employment Tribunal claiming, amongst other things, constructive unfair dismissal ("**the Employment Proceedings**"). On Mr Onea's application, on 11 July 2023, by Order of Heather Williams J, the Employment Proceedings were stayed pending the outcome of the Petition and the Confidentiality Proceedings.

5. In those circumstances, by their Application, Messrs Alegbe and Wilkhu apply:

5.1. first, to strike out the Petition in its entirety because Mr Onea is not a member of the Company, and therefore does not have standing to present a petition under section 994 of the 2006 Act; it was argued that in consequence the Petition discloses no reasonable grounds for bringing the claim, and is bound to fail; on the same basis, the Applicants seek summary judgment on the whole claim under CPR Part 24;

5.2. second, alternatively, to strike out the Petition in its entirety as an abuse of the court's process because:

5.2.1. when he presented the Petition, Mr Onea knew that he was not a member, and therefore knew that he lacked standing; and/or,

5.2.2. it is an abuse to apply for rectification of the Company's register of members under section 125 of the 2006 Act by means of a petition presented under section 994, rather than by means of a Part 8 Claim Form, issued in accordance with paragraphs 2 and 5 of CPR PD 49A; and/or,

5.2.3. it is an abuse by means of an unfair prejudice petition under section 994 to advance a claim made primarily against the company, which is only ever a nominal party to such proceedings, with correspondingly limited freedom and entitlement to incur legal costs in that capacity;

5.3. third, again alternatively but on the same bases, to strike out paragraphs (1)-(4) of the Prayer (which concern rectification and its consequences) and, as in Re Starlight Developers Ltd, Bryan v Arpan [2007] EWHC 1660 (Ch), to stay the remainder of the Petition whilst directing Mr Onea to commence rectification or other appropriate proceedings in order first to establish his standing as a member, subject to a condition that a failure to commence such proceedings within a limited period would result in the automatic dismissal of the Petition;

5.4. and finally, alternatively, to stay the Petition pending the determination of the Confidentiality Proceedings. Given the Order of Heather Williams J referred to in the previous paragraph, a second further alternative, that the Petition be stayed pending the outcome of the Employment Proceedings, was not pursued.

6. In opposition to the Application, in essence, Mr Alexander Halban of counsel, appearing on behalf of Mr Onea, argued that the Application is arid, contrary to authority, and that the relief sought based on Mr Onea's lack of standing would involve a substantial waste of time and costs in service of no real practical or valuable purpose. In his submission, the court should direct a "*preliminary issue*" (but in effect a split trial) as prefaced at paragraph 71 of the Petition ("*If and to the extent that any Respondent disputes* [his] *standing* …") at the first stage of which it should determine the overlapping and closely linked questions of Mr Onea's standing and whether or not the Company's affairs have been conducted in a manner unfairly prejudicial to his interests as a member (as for example did Roth J, without comment on this issue, critical or otherwise, in Re I Fit Global Ltd, Blunt v Jackson [2013] EWHC 2090 (Ch), following a direction made previously by Registrar Derrett).

7. As to the Confidentiality Proceedings, Mr Halban said that to stay the Petition pending their outcome would be "*plainly wrong*", both because no restriction has been imposed by any order made in those Proceedings on the use of confidential materials by Mr Onea in these unfair prejudice proceedings, and because many of the issues raised in the present proceedings – for example, whether or not Mr Onea was validly dismissed – are simply not raised in the Confidentiality Proceedings. In any event, those Proceedings will be concluded long before any trial in the unfair prejudice proceedings.

8. On Mr Onea's case, the Application therefore raises issues of discretionary case management, to be resolved in accordance with the overriding objective.

9. The remainder of this judgment is divided as follows:

   9.1. at paragraphs 10-39, I set out the factual and procedural background to the dispute and Application;

   9.2. at paragraphs 40-106, insofar as relevant, I set out the applicable legal principles in connection with: (i) standing in respect of unfair prejudice petitions, as to which my conclusions are summarised at paragraph 85, (ii) other procedural aspects of unfair prejudice proceedings at paragraphs 86-96, (iii) procedural aspects of rectification applications under section 125 of the 2006 Act at paragraphs 97-100, (iv) strike out, summary judgment and abuse of process at paragraphs 101-104, and (iv) stays pending the outcome of other civil proceedings at paragraph 105;

9.3. at paragraphs 107-126, I consider the parties' arguments and set out my conclusions.

[B] The Background

10. On the same day that the Petition was presented, the court gave directions of its own motion, as is usual, providing amongst other things for Points of Defence by 4pm on 31 October 2022, Points of Reply by 4pm on 28 November 2022, and a CCMC on 15 February 2023. The Application was issued on 27 October 2022 and listed for directions on 18 November 2022. On 16 November 2022, ICC Judge Prentis, by consent, vacated the CCMC and in effect stayed any further progress in the unfair prejudice proceedings pending the outcome of the Application. He ordered that if appropriate, further directions could be given by the court at that stage (which will have been reached following this judgment). As a result, the Respondents are yet to serve Points of Defence and state their case.

11. In support of their Application, Messrs Alegbe and Wilkhu have served two witness statements, both made by their solicitor, Mr Stephen Inglis of Claremont Litigation Ltd, on 27 October 2022 and 28 April 2023, and in response, Mr Onea has served one, made by his solicitor, Mr Daniel Williams of DWF Law LLP, on 10 March 2023.

12. From those statements, from the allegations made in the Petition itself, and from the judgment given in the Confidentiality Proceedings by Ms Wicks QC on 27 June 2022, the background, in terms substantially undisputed for the purposes of the present Application, is as follows.

13. On 9 August 2021, the Company brought disciplinary action against Mr Onea and suspended him pending an investigation. By his suspension letter, Mr Onea was told that his email account had been suspended and that he no longer had access to the Company's IT network.

14. On 13 August 2021, Ms Kamila Kolasinska (the Company's Head of Legal & Operations) emailed Mr Onea to say that his work email had not in fact been suspended and he should still use it for his communications with the Company's employees. On 24 August 2021, Mr Alegbe emailed Mr Onea to confirm that his access to the account had not been suspended, to ensure that Mr Onea had access to information he may need for the disciplinary

investigation. In addition, Mr Alegbe said that if Mr Onea needed to "*collect*" evidence from the computer network, he would need the Company's supervision.

15. An investigation meeting was held on 16 August 2021, with Mr Wilkhu as investigator, at which the Company's allegations against Mr Onea were presented. Mr Onea denied all of them including on the basis that they were misconceived, contradicted by contemporary documents and witnesses, and/or were stale (dating back over a year).

16. On 15 September 2021, a disciplinary hearing took place, and on 20 September 2021, the Company issued a final written warning to Mr Onea.

17. On the same day, 20 September 2021, the Company extended Mr Onea's suspension and commenced a further set of disciplinary proceedings (in fact the third, the second having been started on 20 August 2021, but terminated on 20 September 2021) on the grounds that he had breached the terms of his earlier suspension. The breaches alleged were that during the period of his suspension, Mr Onea had accessed the Company's IT systems without authorisation and downloaded various documents. In particular, the Company alleged that Mr Onea had accessed its IT system without authorisation, on 64 occasions, 57 of which were on 4 October 2021, as set out in a spreadsheet provided to Mr Onea on 11 October 2021 ("**the Access Spreadsheet**").

18. The allegations of unauthorised access on 4 October 2021 transpired to be false. In fact, it was Mr Wilkhu, as the Company's IT administrator, who had accessed Mr Onea's Company user account on 4 October 2021 and carried out the 57 actions in Mr Onea's name. Despite the Company's initial denial that Mr Wilkhu had done so (including when applying for an interim injunction on 9 November 2021) it later admitted that fact. In her judgment of 27 June 2022, Ms Wicks QC said, at [31], in respect of the witness statement of Ms Kolasinska relied on by the Company at the hearing on 9 November 2021:

> "*In my judgment this evidence was seriously deficient. First, it makes no reference to access by Mr Wilkhu on 4 October. Indeed, the natural inference to be drawn was that the Claimant did not have full control over the IT systems until 9 October. Secondly, it characterises the actions of the Defendant, or purported actions of the Defendant, as "synonymous with downloading", which was not the case. Thirdly, it asserts that the Defendant was not correct to say that it was the IT administrator who had accessed the*

system when that plainly was correct in relation to the entries for 4 October, and the Claimant had not taken the basic steps I have outlined above to check whether what the Defendant was saying was accurate. Fourthly, the evidence implies that the Claimant had checked the system for records of the CTO or CEO taking steps in relation to the files, when it had not. These were further breaches of the duty of full and frank disclosure."

And at [33], she said:

"*The 4 October allegations were material in two ways. First, they formed the vast majority of the allegations of unauthorised access. Otherwise, in Ms Kolasinska's own words, there were only a "handful of incidents", and these were all events for which the Defendant had an explanation. The sufficiency of that explanation is a matter for trial, but it was clearly key that there were apparently 57 unauthorised movements on the system for which he could not offer an explanation. Moreover, the apparent downloading of a large number of documents on a single day gives a completely different impression to the reality. It is suggestive of a disgruntled employee downloading a cache of confidential information to use in competition with or against an employer. Secondly, the 4 October allegations were material because the evidence relating to 4 October clearly influenced the Defendant's refusal to give an injunction* (sic) *and it was that refusal to give an undertaking which was the reason why Sir Anthony Mann granted an injunction*."

19. Finally, having also found that the Company subsequently exacerbated its failure to give full and frank disclosure, first by failing to correct the position swiftly on learning the truth, and second, by refusing to disclose the Google audit logs which would have revealed what Mr Wilkhu did on 4 October (as a result of which Mr Onea eventually made an application for their preservation on 28 March 2022) the Deputy Judge concluded, at [38]:

"*The overall picture, therefore, is one in which, firstly, there may well be an innocent explanation for the way in which the Access Spreadsheet was originally created. But, secondly, upon the Defendant raising the issue, the Claimant failed to take steps to check the accuracy of what the Access Spreadsheet said. Thirdly, no explanation at all has been given for the obviously false evidence in Ms Kolasinska's first witness statement. And, fourthly, the Claimant sought to hide the position by failing to give a*

proper explanation for the error to the Defendant or to produce the audit logs which would have shown the true position."

20. To mark the court's evident displeasure, it was ordered: (i) that the Company should pay the costs of the hearing on 9 November 2022 (if any costs had been incurred by Mr Onea, who had been a litigant in person, but assisted by a member of the Chancery Bar Litigant in Person Scheme), (ii) that the Company was not to have 50% of its costs of the application in any event, and (iii) that the Company was to pay 50% of Mr Onea's costs of the application, assessed on an indemnity basis, in any event.

21. As regards the seven remaining instances of access referred to in the Access Spreadsheet, Mr Onea denied (and denies) that they were unauthorised, on grounds that the Company had permitted him to access the system to find information for the disciplinary proceedings and/or that he had been supervised at the time.

22. On 11 October 2021, Mr Onea submitted his resignation for constructive dismissal as a result of the Company's alleged repudiatory breach of his service agreement by bringing the various disciplinary proceedings against him. He also filed a whistleblowing report setting out his concerns about certain alleged actions of Mr Alegbe.

23. On the following day, 12 October 2021, the Company purported to dismiss Mr Onea for alleged gross misconduct for breach of the terms of his suspension, including by reference to his alleged unauthorised access to the IT system on 4 October 2021, since acknowledged by the Company and confirmed by the court to be false.

24. At the time of Mr Onea's dismissal, the Company had adopted Articles of Association which provided for a mechanism by which, if a "*Founder*" (defined as one of Messrs Alegbe, Wilkhu and Onea) was a "*Bad Leaver*" their shares would be converted into "*Deferred Shares*" and could be offered and ultimately transferred to the remaining Founders. That mechanism was contained in the following provisions of the Articles.

    24.1. Pursuant to Article 11.1, if a Founder became a Bad Leaver, their entire shareholding, defined as "*Founder Shares*", would automatically convert into Deferred Shares as at the date of the Founder's dismissal or resignation, as the case may be. Deferred Shares confer no voting or dividend rights. A Bad Leaver was a

Founder, on or before 9 October 2024, "*who becomes a Leaver at any time during the Relevant Period as a consequence of: (a) such Founder's dismissal by the Company (or any member of the Group) for cause, where "cause" shall mean: (i) grounds of fraud or gross misconduct of the Founder .... (b) such Founder's voluntary resignation as an Employee …*"

24.2. Pursuant to Article 11.2, if a Founder became a "*Good Leaver*", a set percentage, defined as the "*Leaver's percentage*", would be deemed unvested and automatically convert into Deferred Shares, but the balance would be retained by the Founder. A Good Leaver was, so far as is relevant, a "*Leaver, other than (a) a Bad Leaver or whom the Board ... determines is not a Bad Leaver*."

24.3. On the basis that Mr Onea either resigned his appointment on 11 October 2021, or was dismissed on 12 October 2021, his Leaver's Percentage was 60%. In other words, the number of his shares which would convert into Deferred Shares would be 300,000 ordinary shares x 0.6, being 180,000. The balance, of 120,000 shares, would be retained by Mr Onea if - but <u>only</u> if - he was a Good Leaver.

24.4. Article 11.6. permitted the Founders, other than the departing individual, to determine that "*a Transfer Notice shall be deemed to be given in respect of all (or part only) of their respective founder shares which were to convert into Deferred Shares* …"

24.5. Article 11.9. provided that any shares in respect of which it is resolved there shall be a deemed transfer notice shall be offered to the remaining Founders "*on a pro rata basis to the number of Equity Shares held by them*."

24.6. Pursuant to Article 12.2, the conversion of shares into Deferred Shares "*shall be deemed to confer irrevocable authority on the Company at any time after their ... conversion ... without obtaining the sanction of such holder(s)*" to "*appoint any person to execute any transfer (or any agreement to transfer) such Deferred Shares to such person(s) as the Company may determine (as nominee or custodian thereof or otherwise)*".

25. In short, if Mr Onea left as a Bad Leaver (for fraud or gross misconduct, but not for "*simple*" misconduct) he would be forced to sell all his shares at nominal value; but if he left as a Good Leaver (defined as someone who leaves not as a Bad Leaver), he would be forced to sell his unvested shares (60% at the time) for nominal value, but he could retain the remaining 40% of his shares, 120,000 shares ("*the Good Leaver Shares*").

26. In the event, the Company resolved to treat Mr Onea as a Bad Leaver. Accordingly, on 27 October 2021, Ms Kolasinska sent an email to Mr Onea in which she said:

> "*We hereby give notice that, as a result of you being deemed a Bad Leaver under the Company's Articles of Association, the Company intends to apply Article 11.1 in respect of 84,000 of your shares (converting these shares to Deferred Shares), and Article 11.6 in relation to 216,000 of your shares (transferring these shares to Raj and Tai on a pro-rata basis).*
>
> *We attach the documentation to implement the transfers. Please sign and return these at your earliest convenience.*
>
> *To the extent that we do not hear from you by 5 pm on Tuesday 2nd November 2021, we note that the Articles contain a mechanic (sic) allowing the Board to convert your shares to Deferred Shares or sign the stock transfer forms on your behalf. If this is the case, then this will be done without reference to you.*
>
> *We would be grateful for your co-operation here*."

27. On 2 November 2021, Mr Onea replied:

> "*Given I have been unfairly and unlawfully dismissed I do not intend to sign this as I don't believe it is the appropriate step until all matters are resolved.*
>
> *If you intend to follow the mechanism within the articles I will lodge a claim with the Companies Court pending resolution of the Employment Tribunal. This will have to be disclosed to all shareholders and investors and will have an adverse impact on the Company. This is not what I propose and it's not the best for the Company.*
>
> *Please defer from dealing with the shares until all the matters are resolved*."

28. In the event, on 15 December 2021 (and despite the Company having previously purported, on 3 November 2021, to act in accordance with Ms Kolasinska's email of 27 October 2021) the Company's directors resolved in writing to "*ratify the automatic conversion of 300,000 ordinary shares of £0.0001 each in the capital of the Company*", to approve the appointment of Mr Alegbe to execute stock transfer forms in favour of Mr Wilkhu, and to acknowledge that the re-designation of a portion of the shares as Deferred Shares (about which Ms Kolasinska had informed Mr Onea) was invalid "*because the Relevant Shares automatically converted into Deferred Shares on the Effective Termination Date in accordance with article 11.1 of the Articles*."

29. Pursuant to that resolution, Mr Alegbe executed a stock transfer form in the name of Mr Onea, in favour of Mr Wilkhu, in respect of Mr Onea's 300,000 Deferred Shares, and it was recorded in the Company's register of members that Mr Onea ceased to be a member on 15 December 2021.

30. In the meantime, on 8 November 2021, the Company began the Confidentiality Proceedings and, as explained, on 9 November 2021 applied for, and was granted, an interim injunction in the Chancery Division on the basis of Mr Onea's alleged breaches of confidentiality and unauthorised access to its IT systems, including those, representing a significant majority, which later transpired to be "*obviously false*".

31. On 27 June 2022, shortly after the injunction return date, Ms Wicks QC made an Order, in terms which Mr Halban told me had been proposed by or on behalf of Mr Onea (Mr Halban having appeared at the hearing) for the delivery up and deletion of any further information which Mr Onea retained, save for specific documents which would be relevant and disclosable in the Employment Proceedings and in any future unfair prejudice proceedings (including therefore the present proceedings) which documents would be held in a confidentiality club by the parties' solicitors. Accordingly, paragraph 5 of the Order stated:

    "*Pending the trial or further Order in these proceedings, if the Defendant wishes to use the documents and information identified in Appendix I and (subject to paragraph 6 below) Appendix 2 to the Defendant's Defence and Counterclaim or any part thereof for any purpose other than:*

    ...; or

for the purposes of making disclosure in the employment proceedings brought by the Defendant against the Claimant in the Employment Tribunal or in unfair prejudice proceedings that the Defendant may bring against the Claimant's shareholders and/or the Claimant;

the Defendant's solicitors must seek prior consent for any such use and purpose from the Claimant's solicitors ....."

32. In other words, Mr Onea does not need the Company's permission to use the identified documents and information in the present proceedings. In any event, as Mr Halban pointed out, the Company itself would be required to disclose to Mr Onea any relevant documents on disclosure.

33. The Confidentiality Proceedings are listed for a five-day trial, floating in the week of 30 October 2023. The issues are broadly: (a) whether certain documents are confidential, (b) whether Mr Onea accessed the Company's IT system without authorisation during his suspension on certain dates in August and September 2021, (c) whether he is entitled to retain certain documents for disclosure, (d) his whistleblowing complaint against Mr Alegbe, and (e) his counterclaim alleging that confidential information about his disciplinary proceedings held by the Company was disclosed to a third party (Mr Alegbe's romantic partner, who also worked for the Company) who used them in a letter of claim against Mr Onea alleging defamation (which was not pursued).

34. Despite earlier threats, it was not until 21 September 2022 that the Petition was presented.

35. In respect of his standing, Mr Onea's position, as stated in the Petition, is that he left the Company as a Good Leaver and so retains (or was entitled to retain) his 120,000 Good Leaver Shares. That allegation is made on the basis that:

    35.1. he was not validly dismissed for any misconduct, because his dismissal was based on spurious allegations (including of unauthorised access on 4 October 2021) and false evidence, most of which the Company has admitted was wrong. Instead, his dismissal was pre-orchestrated by the Respondents in order to remove him as a shareholder and hence deprive him of his shares.

35.2. in any event, any misconduct which could be proven against him (which is denied) was not gross misconduct, and under the Articles, the only basis to find that he was a Bad Leaver, and appropriate his shares, was for gross misconduct. Short of that, he retains his Good Leaver Shares, or at any rate, should do so, and is entitled to their return.

36. On that basis, Mr Onea seeks the relief set out at paragraphs (1)-(4) of the Prayer to the Petition, as follows:

> "*(1) That a declaration be granted that the Petitioner holds the Good Leaver Shares, namely 120,000 ordinary shares in the Company (out of the 300,000 shares currently which he formerly held and which are now registered as deferred shares held in the name of the Second Respondent);*
>
> *(2) further or alternatively that a declaration be granted that the Second Respondent holds the Good Leaver Shares on trust for Mr Onea beneficially and/or is liable to account to Mr Onea for them, and orders be granted for the Second Respondent to transfer those shares to Mr Onea and that they be re-designed as ordinary shares;*
>
> *(3) further or alternatively, that an order be granted for the rectification of the register of the Company, pursuant to section 125 of the 2006 Act, to show the Petitioner as the holder of the Good Leaver Shares, 120,000 ordinary shares in the Company, and that direct notice of such rectification be given to the Registrar of Companies;*
>
> *(4) that the Respondents, or any of them, be ordered to pay the Petitioner damages sustained as a result of such incorrect entry in the register*".

37. Paragraph (5) of the Prayer seeks relief available under section 994, but not (in this context) otherwise:

> "*(5) that, the First and/or Second Respondent may be ordered to purchase the Petitioner's Good Leaver Shares (as declared above) at their fair value, to be determined by the Court; alternatively by an independent firm of accountants agreed between the parties, or alternatively appointed by the Court or by the President of the Institute of Chartered Accountants of England and Wales*".

38. In the Petition, in addition to the principal allegations about his exclusion and the wrongful conversion and transfer to Mr Wilkhu of his Good Leaver Shares, Mr Onea also alleges that Mr Alegbe acted in breach of his duties as a director, in that, in broad summary:

38.1. he applied for, negotiated and signed a contract with the MoD on behalf of the Company using a false name and identity, in order (this being Mr Onea's "*best inference*") to conceal the fact of his personal relationship with one Fayola-Maria Jack, a senior official at the MoD, through whom, as a "*personal connection*", the "*deal* [was] *done*", and/or that he concealed from the MoD that Ms Jack was engaged at the time by the Company, as an advisor;

38.2. he caused the Company to pay him 15% commission in April and July 2020 in relation to the MoD contract and a contract subsequently signed with the Cabinet Office (where Ms Jack was a director, from April 2017 to November 2020, and in respect of which, again, Mr Onea infers that Mr Alegbe concealed his relationship and/or Ms Jack's conflict of interest) without Board permission or other entitlement;

38.3. he made false business expense claims in respect of what were, in fact, personal travel arrangements in November 2019 and January 2020, to Venice and Paris, and caused the Company to meet his personal rental obligations on an apartment in New York, where the Company had no office, business or employees.

39. These additional allegations, directed at Mr Alegbe, were the subject of Mr Onea's whistleblowing report sent formally to the Company on 11 October 2021, but dismissed by Mr Kjartan Rist, a director of an investor shareholder in the Company, on 12 October 2021, without further investigation, on the basis that Mr Onea's complaints were unsupported by evidence (which Mr Onea denies, and describes as false). Mr Rist also found that the report had been made maliciously, which again, Mr Onea denies.

[C] <u>The Applicable Legal Principles</u>

[C1] <u>Unfair Prejudice Proceedings: Standing</u>

40. Section 994 of the Companies Act 2006 provides:

"*(1) A member of a company may apply to the court by petition for an order under this Part on the ground -*

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

41. Members of a company are defined in section 112 of the 2006 Act as follows:

"*(1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.*

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company."

42. It was common ground that unless and until the Company's register of members is rectified, Mr Onea is not a member, and that he has not been a member since at least 15 December 2021, before the Petition was presented. Except where provision is made to the contrary, company membership is determined by entry on the register of members; it does not refer to the holding of rights of membership: see Enviroco Ltd v Farstad Supply A/S [2011] UKSC, at [37]-[40].

43. Equally, it was common ground that a court is only able to make an order under section 994 on the application of a member. Subject to section 994(2), which is inapplicable in the present case, no other variety of person has standing. It follows that in certain cases the court will strike out an application made by a person who is not a member, or will otherwise act to prevent it from being pursued. One such case, cited by Mr Lightman, was Atlasview Ltd v Brightview Ltd [2004] EWHC 1056 (Ch), in which Mr Jonathan Crow QC (sitting as a Deputy Judge of the High Court) said, at [31]:

"*In my judgment, there is no proper basis on which Mr or Mrs Barton could be joined as petitioners. There is some latitude in the range of respondents who*

can properly be joined, as will be seen from the discussion that follows: but there is no such latitude in the joinder of petitioners. The right to petition the court under s.459 is conferred only on members and those to whom shares have been transferred by operation of law, and neither Mr nor Mrs Barton falls within those categories. No rights are conferred on them by s.459, and although there may be room for nominal defendants in certain types of proceedings, there is in my view no room for nominal petitioners in this context. Furthermore, a procedural provision such as CPR, r.19.2(2)(a) cannot expand the class of claimants on whom a cause of action is conferred by primary legislation. Indeed, the very wording of the rule shows that that was not its intended purpose. The court's power to add parties under r.19.2(2)(a) is confined to cases where it is desirable "so that the court can resolve all the matters in dispute in the proceedings". Since it is impossible for a "dispute" under s.459 to arise at the suit of a person who is not a member, the rule cannot be invoked to support the joinder of a non-member as a party."

44. On that footing, the Deputy Judge "*removed*" Mr and Mrs Barton as petitioners, neither of whom was a member, and neither of whom asserted or relied upon a right to become a member or to rectify the register. In reaching that conclusion, he rejected the Bartons' opposition based on the fact of Mrs Barton's beneficial interest in the shares held by "JGR" (which was itself both a member and also a petitioner) and based on the alleged desirability of binding them both to the outcome of the proceedings and exposing them (to the advantage of the Respondents) to the possibility of adverse costs orders.

45. No criticism is or can be made of the decision in Brightview. However, the present Application raises a different variety of problem, because unlike the Bartons, Mr Onea asserts a claim, not simply to rectification of the register under section 125 of the 2006 Act, but to retrospective rectification, pre-dating the Petition's presentation. Section 125 provides, in relevant part:

"(1) If -

(a) the name of any person is, without sufficient cause, entered in or omitted from a company's register of members, or

> *(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,*
>
> *the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.*
>
> *(2) The court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.*
>
> *(3) On such an application the court may decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register*."

46. It was not in dispute that in a proper case, the court has the power, by virtue of that provision, to order rectification of the register with retrospective effect: see Re Sussex Brick Company [1904] 1 Ch 598. It was that power that the petitioners sought to rely on in Starlight Developers.

47. In that case, the respondents to an unfair prejudice petition (presented under section 459 of the Companies Act 1985, the predecessor to section 994 of the 2006 Act) applied to strike it out on grounds that the petitioner lacked standing, because he was not a member of the company. It was accepted by the petitioner "*after the recent evidence and the production in court of the company's register*" that he was unable to show that he was, or had ever been, a member. Equally, although "*hotly disputed*" by the respondents, the judge said, at [7], that:

> "*It became common ground before me, first, that the petitioner's claim to rectification raises triable issues and that it is not possible at this stage to describe the petitioner's prospects of obtaining rectification with retrospective effect as fanciful. Secondly, that the petitioner's claim to retrospective rectification is not suitable for summary determination within the procedure*

contemplated by s.359 of the Act and, thirdly, that his claim is not suitable to be dealt with by way of preliminary issue in the s.459 petition itself albeit that the petition seeks such relief as part of the prayer for relief. In my judgment, having looked at the evidence it seems to me that the concessions made by both sides, which are inherent in that common ground, were all rightly and sensibly made."

48. Section 359 of the 1985 Act was the predecessor of section 125 of the 2006 Act, and was in the same terms. Plainly, as explained at [6] of the judgment, having been based on an alleged pre-incorporation agreement with the respondents to allot shares in due course, the grounds for rectification asserted in Starlight Developers were different from the grounds of alleged unfair prejudice.

49. The judge continued, at [8]:

"*The petitioner accepts that the petition must be stayed pending his pursuit of a rectification claim by separate proceedings, and offers to submit now to stringent case management directions for the prosecution of that claim with the sanction that non-compliance with those directions will, unless relieved, lead to the striking out of the petition with costs*."

50. The respondents opposed that outcome. They argued that the petition was an abuse "*committed by the petitioner with his eyes open and that the petition should be struck out*". In reaching his conclusion, Briggs J first referred to Sussex Brick Company (and the court's power to rectify with retrospective effect), and to three cases in which petitions had been struck out because the petitioners were not members, and thus lacked standing (Re a Company No.007827 of 1985 (1986) 2 BCC 98,951, Re a Company No.003160 of 1986 (1986) 2 BCC 99,276, and Re Quickdome Ltd (1988) 4 BCC 296). He noted that in none of those cases was there any suggestion of retrospective rectification of the register.

51. In addition, Briggs J referred to the decision of Brightman J in Re JN2 Ltd [1978] 1 WLR 183, in which a contributories' winding-up petition had been dismissed because there was a triable issue whether the petitioner, who was not a member, was an allottee of shares in the company, with standing to petition on that ground. Brightman J had said:

"*Basically, the dispute is not between the company and a person claiming against the company, but between a shareholder and a person claiming to be a shareholder. Let that dispute be settled first before the company is brought on to the scene by the presentation of a petition. By being brought on to the scene I mean of course as a substantial party. By dismissing the petition the court is not driving a litigant from the judgment seat, or doing any injustice to him. The court will be merely requiring him to establish his right to present a petition before he is permitted to take a step which has such an immediate and potentially damaging effect on the company. In these circumstances I propose to dismiss the petition*."

52. Finally, Briggs J referred to the decision of the Court of Appeal in Re Hoicrest Ltd [2000] 1 BCLC 194, in which a claim for rectification of a company's register of members had been allowed to proceed, notwithstanding the summary nature of that jurisdiction and that the case raised substantial questions of fact. Mummery LJ referred to the recently introduced CPR, which he described as "*applicable to the exercise of the discretion under s.359(3)*" and continued:

"*The overriding objective in CPR, r. 1.1 is more likely to be furthered under CPR, r.1.4 by actively managing this case with appropriate directions than by simply striking it out, thereby leaving it open to Mr Keene to start a Chancery action. The critical issue of fact (i.e., the alleged oral agreement in April 1992) has been identified; full investigation and trial of that issue may be necessary, depending on how the case is pleaded; a timetable needs to be fixed to ensure that the case now progresses quickly and efficiently; it is likely to be more cost effective to proceed in this way than to put Mr Keene to the unnecessary expense of issuing fresh proceedings*."

53. At [18]-[22] Briggs J expressed his conclusions:

53.1. "*First, before the coming into force of the Civil Procedure Rules there was a body of authority to the effect that firstly, the restriction as to the types of person with standing to present a s.459 petition should be firmly enforced by striking out non-qualifying petitions. Secondly, in relation to winding-up petitions, a bona fide dispute as to the petitioner's standing to present a petition should lead to the dismissal or striking out of the petition, leaving the petitioner first to establish his or her standing by separate proceedings. Thirdly, no case had established that the principle which I*

have just identified in relation to winding-up petitions should be applied to s.459 proceedings where no winding up is sought in the alternative. Fourthly, in none of the cases under s.459 was it alleged that the petitioner could have perfected his or her standing by retrospective rectification of the register of members and on their facts it seems to me that retrospective relief by way of rectification would not have been obtained even if the allegations relied upon by the petitioners in those cases had been made good."

53.2. that since the introduction of the CPR (and as illustrated by Re Hoicrest) there is a "*possibly greater incentive to fashion a case management solution to the resolution of disputes which, although not raised by an appropriate form of proceedings, need to be resolved, and a case management solution falling short of the striking out or the dismissal of the inappropriate proceedings if some other solution would avoid an unnecessary increase in costs.*" He distinguished Re JN2 as a decision about winding-up petitions, which unlike unfair prejudice petitions, "*produce potentially immediate and damaging consequences for the subject company well in advance of their determination*".

53.3. that the petitioner's claim to retrospective rectification was "*reasonable*" (as had indeed been conceded) and that "*there is therefore a risk that if the petition is struck out now, the time and money so far spent on it will have to be re-spent on a substituted identical fresh petition in due course if this petition is struck out. … [I]f the petition is dismissed with costs now but the petitioner shows later that it was only due to the respondents' fault that the petitioner was not registered as a member throughout, that order may work a real injustice. By contrast, if the petition is stayed now with costs reserved, neither of those two adverse consequences or risks would flow*."

53.4. that "*by contrast no prejudice would be caused to the respondents, still less to the company or third parties, by staying rather than striking out the petition. If the petitioner fails to pursue or to succeed in his rectification claim the petition will in due course be struck out or dismissed, in either case with costs, but if the petitioner succeeds then a fair order for costs reflecting a proper balance between the consequences of the facts then found and the adoption thus far of the wrong procedural*

course by the petitioner can be made by the court without having to guess at matters which have not yet been established one way or the other."

53.5. that in the result, he had a discretion whether to stay or dismiss the petition, and in the exercise of that discretion would stay it as "... *a solution more in accordance with the overriding objective ... on terms as already proffered on behalf of the petitioner, namely that the petitioner will now submit to firm case management directions for the pursuit of the rectification claim with the dismissal of the petition with costs as the sanction for non-compliance*."

54. As to the decision in Starlight Developers:

54.1. it is authority for the proposition that where an unfair prejudice petition is presented by a non-member and retrospective rectification of the register of members is sought within the proceedings on grounds that are arguable, the court is not driven inevitably to strike out the petition: the issue raised is one of discretionary case management, to be considered in accordance with the overriding objective;

54.2. it is not authority for the proposition that the court cannot direct a preliminary issue (or determine standing within the proceedings) - as stated at [7] of the judgment, it was common ground in that particular case, and was conceded by the petitioner, that the issue raised was not suitable to be dealt with by way of "*preliminary issue*". Accordingly, Briggs J did not need to decide whether or not that step was possible in principle (and merely expressed his view that the concession was rightly made).

55. Two other points about Starlight Developers are important to emphasise.

55.1. First, it was not a case, unlike the present, in which the grounds for rectification also comprised or were relied upon as grounds of unfair prejudice; the two applications were factually and evidentially separate and distinct.

55.2. Second, it was not a case, unlike the present, in which the petitioner seems to have known conclusively before commencing the proceedings that he was not a member (although he sought relief as to membership in the prayer to the petition). However, whilst that is so, the petitioner's state of knowledge in that regard appears not to have been material to the outcome, because: (i) it was not referred to in his

reasoning by Briggs J; had it been important, or indeed to any extent relevant, to his decision to stay rather than strike out the petition, I do not doubt that he would have said so explicitly; and (ii) that is all the more so given that he referred specifically to the respondents' argument that the petition was an abuse "*committed by the petitioner with his eyes open"*, an argument which he did not refer to in setting out his conclusions. I infer that he thought it immaterial.

56. In respect of the decision in Re Hoicrest (referred to by Briggs J in Starlight Developers) and more generally regarding the scope of the court's jurisdiction to determine disputes under section 125 of the 2006 Act, I should add that although neither counsel cited it, I referred in argument to the decision of the Privy Counsel in Nilon Ltd v Royal Westminster Investment SA [2015] UKPC 2, which concerned an appeal from a judgment of the Court of Appeal, Eastern Caribbean Supreme Court, Territory of the Virgin Islands in relation to section 43(1) of the BVI Business Companies Act 2004, which provides for rectification of a relevant company's register of members, and is the equivalent in that jurisdiction of section 125 of the 2006 Act.

57. The decision in Nilon Ltd contains a detailed discussion of Re Hoicrest and other rectification cases, as a result of which it was said (at [37]-38]) that two points emerge, first, that the courts have made it clear from the earliest days of the legislation, that the nature of the jurisdiction makes it an unsuitable vehicle if there is a substantial factual question in dispute, and second, that Re Hoicrest "*appears to be alone in deciding that it is sufficient for the applicant to have a prospective right against the company, and not an immediate right, to be entered on, or removed from, the register*." At [49] and [50], it was said that "*in reality*" Re Hoicrest was a case management decision, which "*however sensible it might have been as a matter of case management*" was wrong as a matter of principle, because the jurisdiction is available only where "*the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependent on the conversion of an equitable right to a legal title by an order for specific performance*".

58. In the context of the present case, Nilon Ltd serves to demonstrate that case management powers, however sensibly deployed, cannot properly be used to circumvent or avoid a jurisdictional limitation.

59. In respect of the decision in Starlight Developers, Mr Lightman referred me to the judgment of Mark Cawson QC (Sitting as a Deputy High Court Judge) in Intermedia Productions Ltd v Patel [2020] EWHC (Ch) 473, on the trial of an unfair prejudice petition brought by two petitioners, and in particular to [15] of the judgment, where the Deputy Judge said:

> "*There is no doubt that Mr Patel has locus standi to petition under s.994 as a "member", within the definition in s.112(2) of the 2006 Act, being a person who had agreed to become a member and whose name has been entered on the register of members. However, the same cannot be said of Intermedia whose name does not appear on the register of members, nor is locus standi conferred on Intermedia by s.994(2) of the 2006 Act. Even if, contrary to the petitioners' own now primary case, and the respondents' case, Intermedia was entitled to have the register rectified to show it as a member, the register would require to be formally rectified before locus standi could be conferred to present a petition under s.994, cf. Re Starlight Developers Ltd [2007] EWHC 1660 (Ch); [2007] B.C.C. 929. However, nothing probably turns on this given that one of the petitioners, Mr Patel, plainly does have locus standi in any event.*"

60. I do not read that passage, in the context of that case (which reached trial, but apparently without the issue of standing having been considered or case managed) to mean that a petition presented by a person claiming retrospective rectification must necessarily be either struck out or stayed.

    60.1. First, as the Deputy Judge said, nothing of substance in fact turned on the point, and in the event, it was unnecessary to devote particular attention to it. In fact, the petition was decisively dismissed for numerous reasons, and in his conclusions, the Deputy Judge described the pleaded case as "*deeply flawed*" not least because it was premised on Mr Patel and Intermedia having been majority shareholders entitled to control of the company, which meant that they had other more appropriate methods of vindicating their rights, and that the conduct complained of was not "*unfair*". An alternative case, seeking "*a declaration as to share ownership in favour of Mr Patel, if necessary dismissing the petition at the same time upon the basis of a recital to the effect that I had found that Mr Patel was entitled to control of the company on the basis of the issued shares being held as to one share by him, and as to the other share by Ms Shah (as his nominee)*" was also rejected, for a variety of reasons, including that it had been neither pleaded nor even raised in the petitioner's skeleton argument, but had

emerged during the trial, and that not all interested parties had been joined or served (including, as to service, three of the named respondents, including Ms Shah herself) or were before the court; a further "*fallback position*" based on Mr Patel and Intermedia being minority shareholders was also rejected on various grounds, including that it was "*not the case that the respondents came to trial to meet*".

60.2. Second, it cannot be the case that rectification must be ordered before presentation (or otherwise the petition struck out) because otherwise Starlight Developers would have been wrongly decided, which is not what the Deputy Judge suggested; it is however common ground that no order can be made under section 994 in favour of a person who is not a member, and the language of the judgment in Intermedia is consistent with that proposition; the judgment did not need to deal with the issue of retrospective rectification, or with issues of case management in that regard.

61. I was also referred by Mr Lightman to various cases in which an unfair prejudice petitioner had established his standing by means of proceedings brought and concluded before the presentation of a petition. For example, the decision of Mr John Randall QC (sitting as a Deputy Judge of the High Court) in Hunter v Senate Support Services Ltd [2004] EWHC 1085 (Ch), on the trial an action to impugn the forfeiture of minority shareholdings in the defendant companies, explicitly in order to gain standing to bring unfair prejudice petitions, and of Lawrence Collins J (as he then was) in Re Clearsprings Management Ltd [2003] EWHC 2516 (Ch), in which he referred, at [3]-[4], to prior proceedings for specific performance of a pre-incorporation agreement to issue a 50% shareholding in the company, which were "*merely preparatory to a petition*".

62. Those decisions do no more than illustrate the unexceptional point that a putative petitioner (who is not a member) is invariably free to take steps, including by litigation, to establish his membership and standing before petitioning. They do not illustrate and are not authority for the proposition that he must necessarily do so in every case and regardless of the circumstances, and they did not consider or concern the possibility of doing otherwise. Moreover, both were decided before Starlight Developers, in which Briggs J referred to an earlier "*body of authority to the effect that firstly, the restriction as to the types of person with standing to present a … petition should be firmly enforced by striking out non-qualifying petitions*".

63. I was referred to a single case, decided since Starlight Developers, in which much the approach proposed by Mr Onea was adopted by the court. Re I Fit Global Limited [2014] 2 BCLC 116 is a decision of Roth J on a trial of two preliminary issues ordered by Registrar Derrett: first, whether the petitioner was a shareholder in the company, and second, if he was, whether the alleged matters comprised unfairly prejudicial conduct of the company's affairs. The judge concluded that the petitioner was a shareholder, but had never been a member, if for no other reason than that no register of members had ever existed. He observed that in his petition, the petitioner had sought a declaration as to his shareholding, and added, at [49], "*insofar as it is formally necessary to give him permission to ask in addition for an order for rectification of the register, I shall grant that permission … [S]ince no register exists, I shall hear the parties as to what further order, if any, might be appropriate in that regard*". He said that it was appropriate and would cause no injustice to rectify with retrospective effect. On the second preliminary issue, he concluded that the petitioner had indeed suffered unfair prejudice within the terms of section 994.

64. As to Re I Fit Global:

    64.1. first, whilst I accept that there is no report of the decision of Registrar Derrett or any explanation of her reasoning in the judgment of Roth J (or whether or not the approach was opposed) it can at least be observed that Roth J determined the issues without any adverse (or indeed, other) comment about the adopted procedure; it might reasonably be inferred that he did not consider it to have been fundamentally flawed or unworkable, or contrary to principle; moreover, having reached his conclusions, he suggested and was willing to allow, insofar as necessary, an amendment of the petition to seek rectification under section 125 – in that regard, he did not require a further originating process to be issued.

    64.2. second, it is clear from the report that the allegations of unfair prejudice, concerning improper use of company moneys and the petitioner's exclusion from management and participation in the affairs of the company, raised issues which went well beyond those of the petitioner's standing.

65. In England therefore, the procedural approach suggested by Mr Halban has been adopted in a single reported case, and I was referred to no case in which it has been considered and rejected. I was however referred to a decision of the New South Wales Court of Appeal in

Treadtel International Pty Ltd v Cocco [2016] NSWCA 360, in which certain proposed amendments were not permitted: "*What Mr Cocco sought to achieve by the contested amendments was to have determined in the same proceedings the very matters on which his standing to apply for a winding up order and for relief in the case of oppression depended. But acceptance of this "cut-through" approach would necessarily introduce additional costly and time consuming contentions relating to alleged oppression and winding up on an asserted just and equitable basis that should not be permitted to go forward in the same proceedings as those in which Mr Cocco sought to establish that he was member, or alternatively, a creditor, of Treadtel*." *per* Gleeson JA at [7].

66. To the same effect, at [99], Barrett AJA (with whom Gleeson and Leeming JA agreed) cited Clearsprings Management, referred to above, in support of the proposition that "*someone wishing to claim a right as a "member" must first obtain entry of their name in the register, if necessary by preliminary proceedings*." At [100], he cited, with approval, the decision of Sifris J in Rodda v Lifestyle Loans Vic Pty Ltd [2015] VSC 628, at [17]-[19]:

> "*Rodda does not fall within the definition of member, and accordingly the oppression provisions are not engaged. It is not desirable that a proceeding of this kind continue as presently framed with the hope that the threshold issue will, as part of the proceeding, be established. This is not only inefficient and undesirable, but is a jurisdictional issue that prevents the matter from proceeding.*
>
> *There is a dispute as to whether Rodda is a member of Lifestyle Loans, and this dispute needs to be resolved before the oppression proceeding continues. It is not desirable to use the very oppression proceeding, which presupposes uncontested membership, to establish the threshold requirement of membership. This is an antecedent issue that requires prior determination.*
>
> *I have considered sealing with the issue relating to contested membership as a preliminary issue within this proceeding. Upon reflection, however, I do not think this is a desirable course. Such a case requires pleadings and appropriate discovery and is best dealt with as a commercial matter, whether in this Court or the County Court. Lifestyle Loans should not endure a proceeding under the oppression provisions, and which may result in its winding-up, in circumstances where the plaintiff does not have a right to bring the proceeding*."

67. Finally, at [102], in his conclusion, Barrett JA said that although there may be occasions on which it is appropriate to determine contested issues of standing on the hearing of the substantive proceedings themselves (for example, where the dispute is one which is "*very easy to decide*") those cases are to be distinguished from cases in which standing raises difficult questions, involving for example contested witness evidence.

68. As to the decision in Treadtel:

68.1. first, it is an Australian decision, and therefore, whilst manifestly worthy of respect, it does not bind an English court;

68.2. second, it seems to contemplate (as did Sifris J in Rodda) that the court has a discretion (despite the single reference to the issue being "*jurisdictional*") - the court considered issues of cost and appropriate, available procedures, such as pleadings and disclosure, and specifically recognised that at least in certain cases, standing could be established at the hearing of the substantive claim; in England, that discretion would be one to be exercised in accordance with the overriding objective;

68.3. third, in my view, the decision in Clearsprings Management, as explained above, whilst an illustration of the stated approach, is not authority for the proposition that it is the required or mandatory approach in every case;

68.4. fourth, in both Treadtel and Rodda, the court referred to the undesirability of a company being exposed to the prospect of a winding-up order in proceedings in which the applicant could not at the outset establish his standing. But as to that, first, there is no application in the present case to wind up the Company, and second, as I shall explain, the English court does not, invariably at least, adopt the same approach.

69. As to the approach in England to issues of contested standing in a winding-up petition presented by an alleged contributory on the just and equitable basis, I was referred to the decision of the Court of Appeal in Alipour v Ary and another [1997] 1 WLR 534, in which a petitioner claimed to be the registered holder of shares in a foreign company, and presented a winding-up petition on the just and equitable ground. There was evidence of a risk of dissipation of the assets and on an *ex parte* application the petitioner obtained the appointment of a provisional liquidator. In the light of allegations made by the directors

that the petitioner's share certificate was a forgery, the provisional liquidator sought the directions of the court. At the hearing, the petitioner accepted that his claim to be a registered shareholder could not be maintained but claimed instead to be entitled to present a petition as an original allottee of the shares. The judge at first instance refused to direct a preliminary issue on the standing of the petitioner and instead dismissed the petition on grounds, amongst others, that the appointment of a provisional liquidator was significantly detrimental to the company and that the petitioner should establish his standing before the petition was presented.

70. The Court of Appeal reversed that decision, and in doing so refused to follow the decision of Brightman J in Re JN2 (referred to by Briggs J in Starlight Developers). At [1997] 1 WLR 534, 546B-C, it was said (in the judgment of the court handed down by Peter Gibson LJ):

> "*The position as we see it, in the light of the authorities as affected by the current procedures of the Companies Court, is this. (1) A creditor's petition based on a disputed debt will normally be dismissed. (2) It will not be dismissed if the petitioning creditor has a good arguable case that he is a creditor and the effect of dismissal would be to deprive the petitioner of a remedy or otherwise injustice would result or for some other sufficient reason the petition should proceed. (3) On a contributory's petition where the locus standi of the petitioner is disputed, the court will consider all the circumstances, including the likelihood of damage to the company if the petition is not dismissed, in determining whether to require the petitioner to seek the determination of the dispute outside the petition*."

71. As to the proposition (derived from Re JN2 by the judge at first instance) that it was a "*valid point of departure*" that a petitioner should establish his standing outside the petition, if it was disputed, the Court said, at 547H-548D:

> "*Whilst we accept that the judge could properly have regard to that factor, in our judgment in the light of the procedural changes since 1977 it is not a factor of great weight. More importantly, the rule of practice must, in the light of In re Claybridge Shipping Co. S.A. [1981] Com.L.R. 107, yield to the interests of justice when a petitioner would probably be left without an effective remedy if the petition were to be struck out. In our judgment the judge erred in not so concluding in the present case. It*

follows that this court is free to exercise its own discretion. We have no doubt, having regard to all the circumstances, that this is a case where the petition should not be dismissed, notwithstanding the dispute as to the petitioner's locus standi, but should be allowed to proceed so that the petitioner is not left without a remedy. It is still open to the directors to establish at the hearing of the petition that the petitioner is not an allottee. Mr. Joffe has not asked us to order a preliminary issue, nor has Mr. Kaye, and we would therefore make no such order."

72. Whilst I accept that in Alipour (unlike the present case) it was of particular significance that the petitioner would probably have been left without an effective remedy had the petition been struck out, in my view the essence of the court's decision was that on a contributory's petition - which has certain features in common with an unfair prejudice petition, both being in substance a dispute between shareholders - where the petitioner's standing is disputed, the court "*will consider all the circumstances, including the likelihood of damage to the company if the petition is not dismissed, in determining whether to require the petitioner to seek the determination of the dispute outside the petition.*" The possibility of the petitioner in that case being left without a remedy was of course a powerful reason to allow the petition to proceed, but it was not a necessary condition; it was a feature of the particular case. Other cases are to be decided on their own facts, "*in all the circumstances*". As was said at 545H: "*It is hard to see why the Companies Court now should normally refuse to determine such a dispute, even if it does relate to the petitioner's locus standi, if the existence of the petition is not likely to cause substantial damage or inconvenience to the company.*"

73. In my view, if, in appropriate circumstances, the court can determine standing at the substantive hearing of a contributory's winding-up petition, it can equally do so, in principle, in the context of an unfair prejudice petition. Indeed, given that unfair prejudice proceedings routinely involve statements of case, costs management, substantial disclosure and written and oral witness evidence, there is no obvious obstacle of procedure or practice which would prevent such a course or for that reason make it inappropriate or unworkable.

74. By contrast, in the case of a creditor's winding-up petition, it is the usual practice of the court to dismiss a petition if there is a substantial dispute about the existence of the petitioner's debt (and thus its standing) as was, for example, explained by Hildyard J in Re Coilcolor Ltd [2015] EWHC 3202 at [32]:

"*The Companies Court has repeatedly made clear that where the standing of the petitioner, and thus its right to invoke what is a class remedy on behalf of all creditors, is in doubt, it is the Court's settled practice to dismiss the petition. That practice is the consequence of both the fact that there is in such circumstances a threshold issue as to standing, and the nature of the Companies Court's procedure on such petitions, which involves no pleadings or disclosure, where no oral evidence is ordinarily permitted, and which is ill-equipped to deal with the resolution of disputes of fact*."

75. That "*essentially pragmatic*" reason was also referred to in Alipour itself at [1997] 1 WLR 534 at 541F-H:

"*The vast majority of petitions to wind up a company are creditors' petitions. The Companies Court procedure on such petitions is ill-equipped to deal with the resolution of disputes of fact. There are no pleadings, there is no discovery and there is no oral evidence normally tolerated on such petitions, even though no doubt pleadings and discovery could be ordered and oral evidence received, and the Companies Court like any other court is perfectly capable of determining such disputes. But that it is only a rule of practice and not one of law for the Companies Court to refuse to determine a dispute on the creditor petitioner's locus standi was made clear in two cases*."

76. In the context of creditor's petitions, in addition to considerations of pragmatism, the court is concerned to prevent a party to a dispute from using the threat of a winding up petition as an improper means of forcing the company to pay a genuinely disputed debt: see for example Parmalat Capital Finance Ltd v Food Holdings Ltd [2008] UKPC 23 at [9], *per* Lord Hoffmann, and Tallington Lakes Ltd v Ancasta International Boat Sales Ltd [2012] EWCA Civ 1712, *per* David Richards J (as he then was) at [5]. Again, that is not a relevant consideration in the context of unfair prejudice proceedings.

77. Mr Halban also placed reliance on the decision of the Court of Appeal in Boston Trust Co Ltd v Szerelmey Ltd [2021] EWCA Civ 1176, which was an appeal against an order giving conditional permission to continue a derivative action. At [2], Sir David Richards (with whom Henderson and Warby LJJ agreed) explained the background:

"*The claimants issued the proceedings, on the basis that they were registered shareholders of the fourth defendant Tellisford Limited (Tellisford). They seek relief on*

behalf of three subsidiaries of Tellisford. After a full hearing of the permission application, Mr Stephen Houseman QC, sitting as a Deputy Judge of the High Court, held that it was a suitable case in which to give permission, save that the claimants were not registered shareholders and did not otherwise have standing to pursue the derivative claims. The claimants had issued proceedings for rectification of the register of members of Tellisford to show them as shareholders and it appeared to the judge that they had at least a good arguable case for rectification. In those circumstances, by an order dated 28 May 2020, he granted permission to continue the action, on the condition that the claimants became registered as shareholders of Tellisford, whether pursuant to their rectification claim or otherwise."

78. By the time the appeal was heard, the register of members had been rectified with retrospective effect, and the significance of the point raised had thus been "*much reduced*". It was nonetheless determined, "*both because it raised an issue of principle with potential impacts beyond this case and because the judge's order for conditional permission should not remain in place if we were satisfied that it should not have been made.*"

79. In the event, the Court set aside the judge's conditional permission order, and substituted an order giving unconditional permission, essentially for two reasons.

80. First, at [42], Sir David Richards said: "*The claimants' standing to bring the present proceedings is, as the judge correctly said, "the threshold question". As the claimants were not members of Tellisford, and did have not standing on any other basis, they had no basis in law on which to bring the proceedings. It is only if a claimant has standing, that the issues as to whether the court should give permission for the proceedings to continue arise, however strong on those issues the claimant's case may appear to be. Unless a claimant can cross the threshold, there is no warrant for examining and deciding the issues that are contingent upon it. As Henderson LJ observed in argument, by granting permission, albeit conditionally, the judge was accepting that there was a state of facts to justify the grant of permission at that very point, but that was to beg the question of whether there was standing to make the application at all.*" In other words, the judge had made an order <u>on the application itself</u> but before and without deciding whether or not the applicant had standing to advance it – before the claimants had "*crossed the threshold*".

81. Second, at [43]: "*There is a further substantial reason for deciding the threshold issue before deciding whether permission should be granted. The judge himself remarked ... that the starting point must be that the court's power to grant permission is exercisable in the circumstances pertaining at the time that such permission is sought or granted. The grant of permission is a single step, requiring the determination or assessment of a number of issues. It is therefore not only appropriate but also necessary that permission is not granted until all those issues have been determined. An issue like standing can quite properly be taken as a preliminary issue, leaving the assessment of the other elements to a later time (assuming only no change in standing in the meantime). To determine all the issues, but leave standing undecided, is to invite the problem that the assessment of those issues might be different by the time that standing had been determined*." In other words, the question of permission must ultimately be considered and determined on a single occasion, as at a single point in time, taking into account all relevant matters, even if certain disputed matters or issues relevant to that question have been determined previously. The judge had fractured the process, purporting to reach a final conclusion but without having determined standing; that approach was impermissible, other perhaps than in the most exceptional cases. Mr Halban relied upon the comment in this paragraph, that an "*issue like standing can quite properly be taken as a preliminary issue"*, and I note (from the judgment at [28]) that the judge at first instance had commented that the point "*might have been a candidate for determination as a preliminary issue, as has been done in some other cases, but none of the parties suggested or sought it*."

82. Finally, having referred to Starlight Developers, Sir David Richards said, at [45]: "*In my judgment, the grant of conditional permission was not a course which was properly open to the judge and the appropriate course was to adjourn or stay the permission application pending determination of the rectification application within a reasonable time. There are no circumstances in the present case which would have made this an inappropriate order to make*." As he had explained earlier, at [40]-[41], the question was not really one of "*jurisdiction*" ("*... it would be a strong thing to say that the High Court, a court of unlimited jurisdiction, wholly lacked jurisdiction to attach a condition to the grant of permission …*") but "*whether it can ever be right to grant conditional permission in favour of a claimant who lacks standing, save perhaps in the most exceptional circumstances*".

83. As to the decision in Boston Trust Co Ltd:

83.1. first, it is a decision reached in a statutory and procedural context quite different from that of the present case; it is therefore not necessarily appropriate to treat it as describing the approach applicable in the present case;

83.2. second, in the context there under consideration, the point to emerge was that the court cannot (certainly should not other than in rare cases) purport finally to determine the merits of an application for permission, whilst at the same time postponing to a subsequent occasion, or leaving undecided, the disputed issue of the applicant's standing. Ordinarily, standing must first be determined, whether within (as a preliminary issue) or separately from the proceedings in question (which may for that reason be stayed);

83.3. third, I accept that in that context, the suggested usual practice is that the court should adjourn or stay the permission application, pending, within a reasonable time, determination of an application for rectification of the register of members or the taking of such other steps as may be necessary to give the claimant standing. But that is not inconsistent with the possibility (certainly in the context of other varieties of application) that standing might in some cases be determined on the same occasion as the application is finally determined - the possibility and propriety of that approach will depend on the particular case and context, as explained above in connection with creditors' and contributories' winding-up petitions;

83.4. fourth, I do not accept, as was suggested by Mr Lightman, that it undermines the proposal to determine Mr Onea's standing and questions of unfair prejudice on the same occasion, at the same trial; that, I think, would be to misconstrue, or attach undue breadth of significance to the words at [42], that unless "*a claimant can cross the threshold, there is no warrant for examining and deciding the issues that are contingent upon it*"; I understand those words to mean that in the particular context under consideration, the court ought not to examine and determine the application but leave outstanding the issue of the applicant's standing. But in any event, that is not what Mr Halban proposes. Neither does he deny the proposition that no order can be made under section 994 unless and until such time as the petitioner's standing has been established.

84. Ultimately, in the present context, I derived limited assistance from the decision in Boston Trust Co Ltd.

85. In summary, for the purposes of this application, the relevant principles regarding standing are, in my view, as follows.

85.1. Subject to the provisions of section 994(2), the court is only able to make an order under section 994 on the application of a member; the point is one of jurisdiction; no other variety of person has standing to apply; there is "*no room for nominal petitioners in this context*" (*per* Mr Jonathan Crow QC sitting as a Deputy High Court Judge in Atlasview Ltd, above at paragraphs 43-44). In appropriate cases therefore, the court will exercise its undoubted power to strike out or otherwise dismiss a case brought by a person without standing, and certainly, "*before the coming into force of the Civil Procedure Rules",* there "*was a body of authority to the effect that ... the restriction as to the types of person with standing to present a* [section 994] *petition should be firmly enforced by striking out non-qualifying petitions*", *per* Briggs J in Starlight Developers.

85.2. In certain cases in which membership and standing were known to be disputed, the putative petitioner has therefore chosen first to establish his rights in separate "*preparatory*" proceedings: see for example, Hunter and Re Clearsprings Management. No criticism was or could sensibly be made of that approach, which Mr Lightman said ought to have taken by Mr Onea. Although Mr Lightman described it as the "*orthodox*" approach, I would not adopt that description, because it tends to suggest the existence of a single universally or presumptively preferred approach to every case, which I would reject. I do however agree that in very many cases it will be an entirely appropriate course (and in many cases, in effect, the only appropriate course).

85.3. Nonetheless, in a case in which the petitioner's disputed right to membership is advanced in the petition itself (such as the present case, and such as Starlight Developers, where the claim was included in the prayer for relief) and particularly so if the claim is to retrospective rectification of the register and the petition does not raise a claim to a winding up order, the court is not driven inevitably to strike out the proceedings, but should give consideration to the possibility of fashioning an

appropriate alternative case management solution to the resolution of a genuine dispute which needs to be resolved: the court is required to give effect to the overriding objective of dealing with cases justly and at proportionate cost.

85.4. Thus, in Starlight Developers, in the exercise of that discretion, Briggs J refused to strike out the proceedings, and instead stayed the petition on terms that the petitioner began and pursued expeditiously a separate claim to rectification; in Re I Fit Global, Roth J resolved issues of both standing and unfair prejudice at the same trial, on a single occasion, pursuant to the directions made by Registrar Derrett. Those possibilities cannot exhaust the various case management alternatives available to the court; each case will have its own features, and each will require separate consideration. The powers available to the court, set out at CPR Part 3, are extremely wide. They include powers to try two or more claims on the same occasion, to direct a separate trial of any issue, and to decide the order in which issues are to be tried. There is no reason in the present context to preclude the potential use of any of these or the court's other powers. I note for example that in Starlight Developers, Briggs J "*having looked at the evidence*" agreed with the concession made by counsel for the petitioner that his claim was not suitable to be dealt with by way of a preliminary issue in the unfair prejudice proceedings. He did not however suggest that such a step would in all cases be impermissible as a matter of principle, or that some other, quite different procedure might not be more appropriate (such as that adopted in Re I Fit Global); he merely decided between the two argued opposing alternatives – either to strike out or stay.

85.5. As explained above at paragraphs 59-60, I do not understand Intermedia Productions Ltd to contradict that position. In particular, I do not accept it is authority for the proposition that a petitioner or putative petitioner must necessarily, in every case, establish his standing before being permitted to pursue or continue an unfair prejudice petition (which must therefore either be struck out or stayed in the meantime); that would be to narrow, without any good reason, the court's wide powers of case management. Even in Treadtel International Pty Ltd, which is not in any event an authority in this jurisdiction, the court seems to have contemplated that it had a discretion to direct a preliminary issue or the determination of standing at the trial of the substantive claim itself. In that case, in deciding against the petitioner's proposed

"*cut-through*" approach, the court therefore considered matters of cost and procedure, as well as that the petitioner sought a winding up order against the company – it weighed up matters of "*efficiency*" and "*desirability*"; it considered the particular features of the case before it. Further, I did not understand Mr Lightman to suggest that the approach taken in Re I Fit Global - the approach advocated by Mr Halban in the present case - was necessarily wrong or somehow, as a matter of principle, unavailable to the court in all cases, although he did submit that without any knowledge of the basis on which Registrar Derrett had directed a single trial, little or no weight should be attached to her decision or to the case as an example of a possible approach. Were it to be made, I would reject criticism of the approach in Re I Fit Global; Roth J, as I have noted, appears to have had no difficulty in applying it, even in a case in which the allegations of unfair prejudice went well beyond the issues raised in connection with standing; in my view it was an approach that was open to the court; it fulfilled a proper purpose.

85.6. Finally, the proposition that in the present context, if appropriate, the court is able to resolve disputed issues of standing within the proceedings themselves, whether as a preliminary issue or at the final hearing, is supported by the decision of the Court of Appeal in Alipour, in the somewhat analogous context of a contributory's winding-up petition, in which it was said that "*where the locus standi of the petitioner is disputed, the court will consider all the circumstances, including the likelihood of damage to the company if the petition is not dismissed, in determining whether to require the petitioner to seek the determination of the dispute outside the petition*", and that "*It is hard to see why the Companies Court now should normally refuse to determine such a dispute, even if it does relate to the petitioner's locus standi, if the existence of the petition is not likely to cause substantial damage or inconvenience to the company*." For good reason, creditors' winding up petitions are treated differently, as I have explained, both because of the nature of the Companies Court procedure on such petitions and because the court is astute to prevent creditors' petitions being used as an improper means of forcing payment of genuinely disputed debts. Neither consideration arises in the present case, where there is no claim to a winding up order, and where the court's procedure for the determination of the unfair prejudice claim (involving costs management, statements of case, disclosure and witness evidence) is eminently well suited to the determination of the disputed issue of membership.

85.7. In conclusion, the question is ultimately one of discretionary case management, to be decided in every case, in all the circumstances of that case. It is for the court and the parties to fashion an appropriate, just and proportionate process.

[C2] Unfair Prejudice Proceedings: Other Procedural Aspects

86. There was no dispute in respect of the following points.

87. First, an application for relief under section 994 of the 2006 Act must be made by petition, because that is an explicit requirement of the statute; no other form of originating process is valid; a failure to proceed by petition is not a procedural irregularity that can be waived. Thus, in Re Osea Road Camp Sites Ltd [2005] 1 WLR 760, an application for relief commenced by Part 7 claim form, rather than petition, was struck out by Pumfrey J, both because it was without merit and because it was irretrievably and "*fatally*" procedurally flawed.

88. As to the procedural point, at [12]-[15], the judge explained that by virtue of the 1985 Act (the claim was made under section 459 of the 1985 Act, but nothing turns on that) the use of a petition was mandatory, not directory: "*there is only one gateway through which a member of a company who alleges unfair prejudice may pass, and that is through the gateway of a petition to the court.*"

89. Further, and crucially, he held that a failure to use a petition was not "*an error of procedure*" within the meaning of CPR 3.10. Those words were not apt to relate to requirements imposed by statute (other perhaps than those underlying the CPR). Rule 3.10 did not therefore give jurisdiction to dispense with the requirements of the Companies Act. He doubted (but did not need to decide, because the claim was without merit in any event) that the court had power to give permission to amend in order somehow to transform one form of originating process (a claim form) into another (a petition).

90. The point has been confirmed more recently, for example, by Chief ICC Judge Briggs in Evans v Eurokey Properties Ltd [2020] EWHC 1047 (Ch), at [14].

91. Second, it was common ground that given an otherwise validly constituted petition, it is permissible, in appropriate circumstances, to add or make claims other than under section 994, and other than in a petitioner's capacity as a member. Thus, in Re Asa Resource Group

plc [2018] EWHC 1102 (Ch), Morgan J gave permission to add, by amendment, various claims including damages for unlawful means conspiracy, and for breach of a contract made between one of the petitioners and the company itself: "*So, what has been added, amongst many other things, are claims by the petitioners for personal losses distinguished from claims to recover the losses of the Company for the Company and, significantly, there is a claim against the Company for damages for breach of contract.*" [18].

92. In that case, the application to amend was opposed, on various grounds, including that the petitioners should bring separate or "*new*" proceedings. That objection (and all of the others) was rejected: "*...it appears to me to be sensible to have these allegations made and considered in the context of the allegations made elsewhere in the petition having regard to the significant degree of overlap between the sets of allegations*." [20]. The point was one of case management.

93. Third, similarly, it was common ground that the respondents to a petition might themselves bring counterclaims and other additional claims other than by cross-petition under section 994, and again therefore, other than in their capacity as a member: see HRH Prince Abdulaziz Bin Mishal Abdulaziz Al Saud v Apex Global Management Ltd [2014] EWCA Civ 1106, at [67].

94. These cases therefore make clear:

    94.1. that unfair prejudice proceedings commenced by petition might provide an appropriate and proper means and occasion on which to litigate discrete common law claims which would otherwise be pursued by Part 7 claim form; no separate or parallel originating process is necessarily required; and,

    94.2. that the company itself might, in the context of those claims, be compelled, as a respondent, or might itself choose, as a counterclaimant, to participate actively in the litigation.

95. Fourth, as to the company's typical role in typical unfair prejudice proceedings, again, it was common ground that such claims are usually treated, in substance, as comprising a dispute between the company's shareholders and/or other controllers, and that the role of the company, as a named respondent, is usually therefore limited to giving disclosure or

participating only where the relief sought may affect it directly, for example where a share purchase order is ought against the company itself: see for example, King v Kings Solutions Group Ltd [2022] EWHC 1099 (Ch), at [56], *per* Leech J. It is therefore ordinarily the case that the company's money should not be expended in defence of such proceedings: see Re Crossmore Electrical and Civil Engineering Ltd (1989) 5 BCC 37, 379G-H, *per* Hoffman J (as he then was). That is not however to say that the company's participation and expenditure is invariably improper.

96. Moreover, if the company's role in the litigation is outside the scope of the claim advanced under section 994 (as for example, would have been the position in Re Asa Resource Group plc in which it was a defendant to a contractual damages claim) then the company is likely to have a compelling reason to participate actively and independently, and to incur cost in doing so. There is a distinction between the company's (ordinarily limited) role in respect of a claim under section 994, and its (quite possibly active, direct and costly) role in respect of claims advanced directly either by or against it outside the scope of section 994 but in the same proceedings (such as, therefore, a claim to rectification of the register of its members).

[C3] Rectification Applications under Section 125 of the 2006: Procedural Aspects

97. Paragraphs 2 and 5 of PD 49A provide that an application for rectification of the register of members under section 125 of the 2006 Act "*must be started by Part 8 Claim Form*". Mr Lightman described the requirement to use a Part 8 Claim Form as "*mandatory*". Mr Onea's failure to do so in the present case was one of the bases upon which it was said that the claim was abusive and that the Petition, or that part of it, should be struck out.

98. Certainly, in the usual case, it would not be appropriate and there would be no reason not to proceed by means of the Part 8 procedure. That may perhaps reflect (although I heard no submissions on this point) the traditional approach that an application under section 125 is not suitable if there are substantial issues of fact (as mentioned above at paragraph 57, and as reflected in the point made by Briggs J in Starlight Developers, that the petitioner in that case had rightly conceded that "*his claim* [was] *not suitable for summary determination within the procedure contemplated by* [section 125] *of the Act* …" (emphasis added) (see paragraph 47 above)).

99. In my view however:

99.1. first, at most, a claimant's failure to use a Part 8 Claim Form to apply for relief under section 125 would be a procedural irregularity which the court could waive or remedy under CPR Rule 3.10 by some appropriate means, as in Manolete Partners PLC v Hayward & Barrett Holdings Ltd [EWHC] 1481 (Ch), in which Chief ICC Judge Briggs allowed a claim under section 423 of the Insolvency Act 1986 which ought to have been commenced by Part 7 Claim Form, but which had in fact been commenced by Insolvency Act application, nonetheless to proceed subject to payment of the appropriate (Part 7 claim) fee. The position is fundamentally distinguishable from the use of the wrong originating process to commence a claim under section 994 (as in Re Osea Road Camp Sites Ltd) where the only available originating process is stated explicitly by statute.

99.2. second, as mentioned above, it is in any event at least doubtful that all claims to rectification, regardless of their nature and scope, are necessarily suitable for determination under section 125. But in such cases, the court would doubtless have the power to grant relief, and to do so in proceedings appropriately commenced by Part 7 Claim Form (and indeed, that appears to have been what was contemplated by Briggs J in Starlight Developers). Section 125 cannot be exhaustive of the court's power to grant relief in respect of a company's register of members.

99.3. third, as explained above, a claim for relief outside section 994 may, in appropriate circumstances, be raised and advanced by means of an unfair prejudice petition. In principle, that would include a claim directed at the establishment of company membership, whether made under section 125 or otherwise (and which would otherwise be made by Part 7 or Part 8 Claim Form). Re I Fit Global is an example of a case in which a single originating process, an unfair prejudice petition, was used to bring a claim to membership, and to relief under section 994.

100. In conclusion, the mere fact of a rectification claim being made by petition (or some originating process other than Part 8 Claim Form) does not render it an abuse; on the contrary, it may be wholly appropriate; at most it would be a procedural irregularity.

[C4] Strike Out, Summary Judgment and Abuse of Process

101. There was no issue regarding the law in these respects.

102. The court may strike out a statement of case pursuant to CPR r.3.4(2) where it discloses no reasonable grounds for bringing or defending the claim and/or it is an abuse of the court's process of otherwise likely to obstruct the just disposal of the proceedings.

103. As to whether a statement of case discloses no reasonable grounds, the test is whether the claims are "*bound to fail*": see the White Book at Vol.1, 3.4.2. There is no real difference between the test under r.3.4(2)(a) and in respect of summary judgment under r.24.2(a)(i), other than that the court, under r.24.2(b), must also be satisfied that there is no other compelling reason for a trial.

104. As to whether proceedings are abusive, the categories are many and not closed. Where abuse is established, the court has a discretion regarding the appropriate and proportionate response – striking out tends to be viewed as a remedy of last resort. I accept that it may be an abuse for a claimant to issue or continue a claim knowing that he has no cause of action (see Munday v Hilburn [2014] EWHC 4496 (Ch) at [16] *per* Nugee J, and Pathania v Adedeji [2014] EWCA Civ 681 at [15] *per* Floyd J) or to use the wrong procedure to claim certain relief (as in Menjou v Secretary of State for Justice [2021] EWHC 1231 (QB) where the claimant attempted to evade the provisions of CPR Part 54 governing judicial review applications, by issuing a Part 8 Claim Form) or to fail to comply with the CPR or its Practice Directions (see Cable v Liverpool Victoria Insurance Co Ltd [2020] EWCA Civ 1015 at [44], *per* Coulson J, where he cited cases that "*involved the deliberate understating of the value of the claim on the claim form in order to avoid paying higher court fees*"). Essentially, an abuse of process involves the use of the court's process for a purpose or in a way which is significantly different from the ordinary and proper use of that process.

[C5] Stay Pending Outcome of the Other Civil Proceedings

105. There was no dispute that the court has the power, where just and convenient to do so, to stay civil proceedings either generally or until a specified date or event, including pending the conclusion of connected or parallel proceedings, in order to avoid, for example, a multiplicity of proceedings involving the same parties and the same issues: CPR 3.1(2)(f).

106. Where an applicant applies for a stay of one set of proceedings on the basis of parallel civil proceedings, "*the burden lies upon the applicant seeking a stay to demonstrate, through cogent evidence, that there are sound reasons for a stay in the circumstances of the particular case*": Wakefield v Channel Four Television Company [2005] EWHC 2410 (QB) at [11], *per* Eady J.

[D] Discussion and Conclusions

107. As stated above (but repeated for convenience) the Applicants seek:

107.1. first, to strike out the Petition in its entirety because Mr Onea is not a member of the Company, and therefore does not have standing to present a petition under s.994 of the 2006 Act; it was argued that in consequence the Petition discloses no reasonable grounds for bringing the claim, and is bound to fail; on the same basis, the Applicants seek summary judgment on the whole claim under CPR Part 24;

107.2. second, alternatively, to strike out the Petition in its entirety as an abuse of the court's process because:

107.2.1. when he presented the Petition, Mr Onea knew that he was not a member, and therefore knew that he lacked standing; and/or,

107.2.2. it is an abuse to apply for rectification of the Company's register of members under section125 of the 2006 Act by means of a petition presented under section 994, rather than by means of a Part 8 Claim Form, issued in accordance with paragraphs 2 and 5 of PD 49A; and/or,

107.2.3. it is an abuse by means of an unfair prejudice under section 994 to advance a claim made primarily against the company, which is only ever a nominal party to such proceedings, with correspondingly limited freedom and entitlement to incur legal costs in that capacity;

107.3. third, again alternatively but on the same bases, to strike out paragraphs (1)-(4) of the Prayer (which concern rectification and its consequences) and, as in Starlight Developers, to stay the remainder of the Petition whilst directing Mr Onea to commence rectification or other appropriate proceedings in order first to establish his

standing as a member, subject to a condition that a failure to commence such proceedings within a limited period would result in the automatic dismissal of the Petition.

107.4. and finally, alternatively, to stay the Petition pending the determination of the Confidentiality Proceedings.

108. Against this, in essence, Mr Halban argued that the most appropriate course would be to direct a "*preliminary issue trial*" at which to decide issues of both standing and the First and Second Respondents' liability for unfair prejudice, reserving any further issues of, or concerning, Mr Onea's remedy under section 994 (including any relevant share valuation in the event of a share purchase order) to a further trial. As I said during the hearing, it does not seem to me that this course, whatever its merits, would be described appropriately as entailing the determination of a "*preliminary issue*". More accurately described, Mr Onea seeks a "*split trial*", as is comparatively commonplace in the context of unfair prejudice proceedings: see Re Tobian Properties Ltd [2013] 2 BCLC 567, at [27], *per* Arden LJ. To some extent, the label attaching to Mr Onea's preferred course might be thought immaterial, but: (i) although not unrelated, there is a real and significant distinction between the two which ought to be observed (see for example, the Chancery Guide at 6.10 – 6.16); and (ii) given the difference, the authorities concerning factors relevant to the court's power to order a preliminary issue, such as Steele v Steele [2001] CP Rep 106, cited by Mr Halban, will not necessarily be relevant, or entirely so, to the court's power to order a split trial.

The Applicants' First and Third Alternatives: the Establishment of Standing

109. It is artificial to deal separately with the Applicants' first and (insofar as based on Mr Onea's present lack of standing) third alternatives; they are both concerned with the appropriate reaction to the same problem, and I shall therefore deal with them together, before considering whether my conclusions are affected by the Applicants' allegations of abuse. The relevant principles are summarised above at paragraph 85: the question is ultimately one of discretionary case management, to be decided in every case, in all the circumstances of that case. It is for the court and the parties to fashion an appropriate, just and proportionate process; the court is not driven inevitably to strike out the proceedings.

110. The material circumstances, and in this respect my conclusions, are as follows.

111. First, in my view, as matters stand, Mr Onea's claim to retrospective rectification of the register of members on the basis that he left the Company as a "*Good*" rather than a "*Bad Leaver*" (and has therefore at all material times since before the Petition was presented been entitled to 120,000 "*Good Leaver Shares*") is credible and based on reasonable grounds; it has, at least, a real prospect of success.

112. In particular, as I have explained, the Company dismissed Mr Onea, or purported to do so, on 12 October 2021, for alleged gross misconduct, including by reference to the allegation that he gained unauthorised access to its IT system on 4 October 2021. That allegation was subsequently withdrawn by the Company and described by the Court as having been "*obviously false*", access having in fact been gained by Mr Wilkhu, as the Company's IT administrator, albeit in the name of Mr Onea. It was the Company's own evidence, in the words of Ms Kolasinska, that as to alleged unauthorised access, apart from the alleged events of 4 October 2021, there were only a "*handful of incidents*" (comprising 7 of the alleged 64 occasions of unlawful access). That circumstance alone must tend to diminish the basis upon which Mr Onea was dismissed, and lend support to his case (albeit of course not before me for final determination) that his dismissal was unjustified, and was instead pursuant to a pre-orchestrated plan to deprive him of his shares and end his participation in the Company's affairs. In any event, I did not understand Mr Lightman to argue that Mr Onea's claim was, in this respect, unarguable or plainly without merit, or not genuinely advanced.

113. Second, this is a case (unlike both Starlight Developers and, certainly to some extent, Re I Fit Global) in which, as I have described, the allegations of unfair prejudice are very substantially similar to the grounds on which the petitioner claims an entitlement to retrospective rectification of the register. I accept that they are not wholly identical, and I accept that the Applicants are yet to serve Defences, but it is plain nonetheless that there will be very significant common territory.

114. Third, Mr Onea does not seek a winding-up order against the Company.

115. In those circumstances, I do not accept that it would be just to strike out the Petition, and effectively compel Mr Onea to commence fresh proceedings in which to establish, if he can, his membership, before commencing fresh proceedings under section 994. In my view, in substance, that step would be inconsistent with the approach taken by Briggs J in

Starlight Developers, and in any event, is not justified by reference to the court's duty to manage cases in accordance with the overriding objective. As in Starlight Developers, if the Petition were now to be struck out in its entirety, with costs payable to the Applicants, but Mr Onea were subsequently to show that he was at all times entitled to membership and was only removed from the register due to the fault of the Respondents, there is a risk that the order would (to adopt the words of Briggs J) "*work a real injustice*". Mr Onea would be compelled to spend time and money reproducing steps already taken, and the costs paid to the Applicants would almost certainly be irrecoverable.

116. The real issue in this case is whether to adopt the Applicants' third alternative (to strike out paragraphs (1) – (4) of the Prayer, and otherwise stay the Petition pending proof of membership in proceedings to be commenced and concluded separately, as, essentially, in Starlight Developers) or the Petitioner's preferred course (to order a split trial, as in Re I Fit Global). In my view, the Petitioner's suggestion is plainly preferable; it is quicker, fairer and more efficient:

116.1. it will avoid two different courts (judges) having to deal with very substantially similar facts and matters but for different purposes; there is advantage (both for the parties and the court) in one judge dealing comprehensively at a single trial with such closely related issues by reference to all of the available evidence, and in these issues being case managed together;

116.2. all relevant persons are joined to the Petition; all would be involved and entitled and to some extent bound to participate in the whole split trial process and all would be bound by the outcome; any risk of conflicting findings is avoided;

116.3. a split trial will be quicker and almost certainly cheaper than the alternatives; the Applicants' suggestion entails a very real risk of delay, duplication and wasted cost and time; indeed, the Applicants' proposals raise the possibility of three trials (one to establish membership, one to establish unfair prejudice, and one to deal with issues of share valuation if appropriate);

116.4. a split trial is unlikely to cause the Applicants prejudice, or sufficient prejudice, to outweigh its advantages: on any view there will be substantial and costly proceedings in which many of the same issues between the same parties will be raised

and determined – short of compromise, that much is inescapable; given that inevitability, it is preferable that as many aspects and consequences of those same issues are considered in one set of proceedings, sooner rather than later; whilst true that if Mr Onea fails in respect of standing, the Applicants will have had to deal also with certain additional issues particular to the unfair prejudice claim, the risk and cost of that eventuality is outweighed by the described benefits;

116.5. it is the course adopted without obvious difficulty in Re I Fit Global Ltd – a case in which it which there appears to have been less common ground between the issues regarding standing and those regarding unfair prejudice than in the present case;

116.6. it follows that I do not accept Mr Lightman's argument that to direct a split trial (albeit possible in principle) would be to act beyond the boundaries of reasonable case management.

The Applicants' Second and Third Alternatives: Abuse of Process

117. Having reached that view, the next question is whether or not my conclusions are affected or undermined by the arguments that the proceedings are an abuse of process (and so should be struck out, wholly or in part). In my judgment they are not: the proceedings are not abusive; but in any event, even if they were, the court has a discretion regarding relief, and in the present circumstances, the appropriate order is to direct a split trial, for the reasons stated above. My reasons are as follows.

118. First, it was of course common ground that Mr Onea knew that he was not a member, and knew that he did not have standing to apply as a member when the Petition was presented; it is for that reason that he seeks rectification. Mr Lightman described Mr Onea's approach as "*brazen*", pursued in the face of his opponents' warnings that it was inappropriate.

119. For the following reasons, I do not accept that in consequence of Mr Onea's knowledge of his lack of standing (rather than, or in combination with, its mere fact) the Petition comprises, and must be struck out as, an abuse of process:

119.1. to take that step would be inconsistent with the approach taken in Starlight Developers, in which, as I have explained, the claim to rectification was made in the

petition itself, and in which therefore the petitioner must have known before commencement, to some degree, that he was not a member, and did not have standing;

119.2. in substance, it would also be inconsistent with Re I Fit Global Ltd, since in those proceedings there must have come a point at which the petitioner knew that he was not a member, and on Mr Lightman's argument, from that moment, it would have become and been an abuse of process to continue to pursue the proceedings (and indeed, with cases such as Alipour, in which standing is determined at trial);

119.3. if it is correct (as I have held) that the court has case management powers sufficient to direct the determination of the membership issue within the proceedings, then necessarily it is not abusive to ask the court to exercise them;

119.4. finally, even in cases of established abuse, the court has a discretion how to react - striking out, although commonplace, is not an inevitability; in my judgment, in the present case, as explained above, to strike out the Petition would be inefficient, unjust and disproportionate; the issue can be determined at trial.

120. Second, as I have explained above at paragraphs 99-100, the mere fact of a rectification claim being made by petition (or by some originating process other than Part 8 Claim Form) does not render it an abuse; on the contrary, it may be wholly appropriate; at most it would be a procedural irregularity. In the present case, given the scope and nature of the dispute regarding Mr Onea's membership, I am in any event doubtful that it would have been procedurally appropriate to make the claim under CPR Part 8 rather than Part 7, and if it could have been made under Part 7, it can, in principle, equally be made by petition. But aside from that:

120.1. as I have held, the Petition can be case managed to allow for the determination of the issue at a split trial, and in my view that is, in this case, the fair and appropriate course, as in Re I Fit Global; it is not abusive to seek that process; and,

120.2. even if I were wrong, and to seek rectification of the register by means of an unfair prejudice petition is invariably, or is in this case, a procedural irregularity, I would be prepared to waive it.

121. Finally, as to the argument that it is an abuse by means of an unfair prejudice petition to advance a claim made primarily against the company, which is only ever a nominal party to such proceedings:

121.1. first, I do not accept that Mr Onea is in fact pursuing that course – the Petition seeks rectification and a damages remedy under section 125, but in addition seeks a share purchase order, which is relief that can only be given under section 994; whilst true that the prayer in the draft petition sent by DWF to Messrs Alegbe and Wilkhu under cover of letters before action dated 14 June 2022, contained a statement that "*The Petitioner will elect at trial whether he pursues* [a share purchase order] *in addition to the relief* [under section 125 of the 2006 Act]", those words were removed before presentation. The Petition simply seeks, as is commonplace, at paragraph (5), a share purchase order at a fair value. Indeed, I note that even in their letters before action, DWF said that "*the most likely order to be granted (and that which our client will seek) is an order that the shareholders that have caused the unfair prejudice or the Company itself purchase our client's 120,000 shares in the Company for fair value*".

121.2. second, as a matter of law, as I have explained above at paragraphs 95-96, there is in any event a distinction between the company's (ordinarily limited) role in respect of a claim under section 994, and its (quite possibly active, direct and costly) role in respect of claims advanced directly either by or against it outside the scope of section 994 but in the same proceedings, such as Mr Onea's claim to rectification of the register of the Company's members. As in Re Asa Resource Group plc, there is no necessary abuse (and no abuse in the circumstances of the present case) in the pursuit of a claim directly against the company advanced under the banner of an unfair prejudice petition.

The Applicants' Fourth Alternative: Stay Pending the Confidentiality Proceedings

122. In my judgment, for the following reasons, there are no grounds on which to stay the Petition pending the outcome of the Confidentiality Proceedings.

123. First, although the Confidentiality Proceedings will (for the purposes of deciding whether the Company is entitled to permanent injunctive relief) determine whether or not Mr Onea is entitled to retain and/or use certain of the Company's documents and/or

information, that issue does not affect his right to use and disclose those disputed documents in the present Petition proceedings. That is clear from the express terms of the Order made by the Deputy Judge on 27 June 2022 and explained above at paragraph 31. It follows that contrary to Mr Lightman's principal argument in support of a stay, there is no need to await the outcome of the Confidentiality Proceedings in order to know whether the disputed documents are capable of being used and disclosed in the present proceedings: there is no impediment to their use. Further, as Mr Halban pointed out, the documents, if relevant, would have to be disclosed by the Company and/or the other Respondents to the Petition in any event.

124. Second, whilst there is clearly some overlap between the proceedings, it is not sufficiently substantial to justify a stay. The Confidentiality Proceedings concern, as outlined above at paragraph 33, issues of documentary confidentiality, access and use: the Company seeks permanent injunctive relief. However, only Mr Onea and the Company are parties, and the proceedings will not determine, for example, whether or not Mr Onea was properly dismissed, whether he was a "*Good*" or "*Bad Leaver*", or whether he is entitled retrospectively to be a member - let alone whether he has been unfairly prejudiced in that capacity, is entitled to a remedy as a result, and if so what.

125. Third, the Confidentiality Proceedings are listed for trial beginning in the week commencing 30 October 2023. They will likely be concluded (and their final effect capable of being considered) far in advance of the Petition proceedings, and at a point before the Petition proceedings have advanced very much further.

126. Accordingly, for all the reasons given, the Application is dismissed. I will, if necessary, hear the parties as to the appropriate form of order required to reflect my judgment.

Dated: 6 October 2023