Neutral Citation Number: [2021] EWCA Civ 1943

Case No: A3/2021/0216

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
Mr. Tom Leech QC (Sitting as a Deputy High Court Judge)
[2020] EWHC 3130 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 17 December 2021

Before :

LORD JUSTICE GREEN
LORD JUSTICE NUGEE
and
LORD JUSTICE SNOWDEN

- -

IN THE MATTER OF KINGS SOLUTIONS GROUP LIMITED
AND
IN THE MATTER OF SECTION 994 OF THE COMPANIES ACT 2006

Between :

(1) PRIMEKINGS HOLDING LIMITED
(2) ROBIN FISHER
(3) BARRY STIEFEL
(4) GEOFFREY ZEIDLER

- and -

Respondents to Petition/ Appellants

(1) ANTHONY KING
(2) JAMES PATRICK KING
(3) SUSAN MAY KING

Petitioners/Respondents

- -

Catherine Addy QC and Joseph Sullivan (instructed by **Macfarlanes LLP**) for the **Appellants**
Christopher Newman (instructed by **Claremont Litigation Limited**) for the **Respondents**

Hearing date : 3 November 2021

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on Friday 17 December 2021.

LORD JUSTICE SNOWDEN :

INTRODUCTION AND BACKGROUND

1. This is an appeal from an interlocutory decision in the course of an unfair prejudice petition under Section 994 of the Companies Act 2006 (the "Petition" and "Section 994"). The Petition is only one piece of litigation in a long-running and procedurally complex dispute between the shareholders of Kings Solutions Group Limited (the "Company").

2. The appeal is brought by the main respondents to the Petition (the "Appellants") against the refusal of Tom Leech QC (as he then was) (the "Judge") to strike out a number of paragraphs of the Points of Claim of the Petitioners. The decision of the Judge was included in a lengthy and careful judgment handed down on 19 November 2020: see [2020] EWHC 3130 (Ch) (the "Judgment"). The Judge struck out some paragraphs of the Points of Claim, but refused to strike out others which are the subject of the appeal (the "disputed paragraphs").

3. The main issue on the appeal is whether, and if so, in what circumstances, it is permissible to include in a statement of case in a petition under Section 994, allegations of personal conduct by the respondents to that petition which are not, of themselves, within the scope of Section 994. The appeal also raises questions of abuse of process by re-litigation of matters said to have been decided in other proceedings.

The unfair prejudice jurisdiction

4. Section 994(1) and Section 996(1) of the Companies Act 2006 provide,

> "994. (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.
>
> 996. (1) "If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of."

5. The basic requirements for a petition under Section 994(1)(a) were conveniently and shortly summarised by Floyd LJ in Loveridge v Loveridge [2020] EWCA Civ 1104 at paragraph 41,

> "A number of uncontroversial propositions can be derived from the authorities cited to this court:

i) For a petition to be well founded the acts or omissions of which the petitioner complains must consist of the conduct of the affairs of the company: Hawkes & Cuddy (No 2) [2007] EWHC 2999 at [202] per Lewison J;

ii) The conduct of those affairs must have caused prejudice to the interests of the petitioner as a shareholder: ibid;

iii) The prejudice so caused must be unfair: ibid;

iv) A minority shareholder cannot normally complain of conduct which is in accordance with the company's constitution unless he can establish a breach of the rules on which it is agreed that the affairs of the company should be conducted, or the use of those rules in a way which equity would regard as contrary to good faith: O'Neill v Phillips [1999] 1 WLR 1092 at 1099 A-B per Lord Hoffmann;

v) Although the term "legitimate expectation" has been used in connection with establishing equitable restraint on the exercise of constitutional power, that expression does not have "a life of its own", supplanting traditional equitable principles: ibid at 1102 B-F.

6. The background to the litigation was set out at length in the Judgment. It was not materially disputed for the purposes of the argument on the appeal and I shall summarise it as briefly as possible.

The Company

7. The Company is a holding company for a group of operating companies which provide security and fire services to domestic and commercial customers. It has a subsidiary, Kings Security Systems Limited ("KSSL"), which is a respondent to the Petition, but, like the Company itself, played no active role in the appeal.

8. Prior to the events giving rise to the disputes between the parties, all of the shares in the Company were held as to 20% by the First Petitioner ("Anthony King"), as to 40% by his parents, the Second and Third Petitioners ("Mr. and Mrs. King"), and as to 40% by a family trust called the JPK No 1 Discretionary Settlement (the "Trust"). The Petitioners were each directors of the Company.

The Transaction in 2013

9. The litigation between the parties stems from a transaction (the "Transaction") involving an acquisition of the majority of the equity shares and a capital investment in the Company by the First Appellant ("Primekings"). The Second Appellant ("Mr. Fisher"), and the Third Appellant ("Mr. Stiefel"), are directors of Primekings.

10. The Transaction was completed on 20 December 2013 and comprised a number of features:

i) Primekings purchased the ordinary shares held by Mr. and Mrs. King for £2 million. £750,000 of the purchase price was payable immediately. The balance of £1,250,000 was to be paid whenever and as soon as Primekings, acting reasonably and in good faith, determined that the Company could lend or distribute sufficient funds to pay this sum but with the intention of paying it entirely by the third anniversary of completion. As events turned out, the Company did not have sufficient funds to fund the payment of the additional £1,250,000, but Primekings paid this sum from its own resources in instalments to Mr. and Mrs. King, making the final payment on 31 March 2015.

ii) Mr. and Mrs. King were allotted six B shares which carried no voting rights but were redeemable over a period of three years at £500,000 per share if the EBITDA of the Company was equal to or greater than £3,000,000 or in accordance with a detailed formula if the EBITDA of the Company was less than that figure. The Company's obligation to redeem the shares was, however, dependent upon it having sufficient distributable profits to do so (or other monies which could be lawfully applied for their redemption).

iii) Primekings agreed to subscribe for further ordinary shares in the Company for £1 million.

iv) Primekings granted Anthony King a put option entitling him to require Primekings to acquire up to 50% of his shares on or after the third anniversary of the date of completion (the "Put Option"). Under the terms of the Put Option, the price payable for the option shares was their "fair value" which was defined to be the price as agreed between Anthony King and Primekings, or in the absence of agreement, as calculated by an independent accountant on certain stated assumptions. The Put Option provided that the independent accountant was to act as expert and not as arbitrator, was to be appointed by the board of directors of the Company, and his fees were to be borne equally by Anthony King and Primekings, who would be jointly and severally liable for such fees.

11. The effect of the Transaction was that, on completion, Primekings became the owner of about 76% of the ordinary share capital of the Company, and Anthony King and the Trust retained the balance of approximately 24%. In November 2014 Primekings reduced its shareholding from about 76% to about 60%, leaving Anthony King and the Trust holding the remaining 40%.

12. On completion of the Transaction, Mr. and Mrs. King resigned as directors of the Company and were replaced by Mr. Fisher and Mr. Stiefel. A Mr. Peter Swain was also appointed as a director at the same time. Anthony King remained a director of the Company and also acted as the managing director of KSSL. On 23 April 2014 Mr. Swain resigned as a director and on 28 July 2015 the Fourth Appellant ("Mr. Zeidler"), became a director of the Company. Mr. Zeidler was later also appointed to be a director of KSSL and the Chairman of the boards of directors of both companies.

The Misrepresentation Claim

13. At or shortly after payment of the final instalment of the purchase price for the shares of Mr. and Mrs. King in March 2015, the Petitioners sent a letter before action to Mr. Stiefel, Mr. Fisher and Mr. Swain. On 15 July 2015 the Petitioners issued proceedings

under CPR Part 7 against (among others) Primekings, Mr. Fisher and Mr. Swain (the "Misrepresentation Claim"). Neither Mr. Stiefel nor Mr. Zeidler were parties to the Misrepresentation Claim. The Company was initially named as a claimant, but this was done without authority, and the claim in its name was discontinued.

14. The essence of the Misrepresentation Claim was an allegation that in the course of events leading up to the conclusion of the Transaction in December 2013, Primekings and the individual defendants connected with it had made fraudulent misrepresentations to the Petitioners about the unwillingness of the Company's bankers, GE Money, to continue to support the Company. It was also alleged that the defendants had conspired to deceive and exert economic duress upon the Petitioners to agree to the Transaction on disadvantageous terms. The Petitioners claimed rescission of the Transaction, alternatively damages.

15. The Misrepresentation Claim was defended and came on for trial before Marcus Smith J at the end of April 2017 and the first half of May 2017. About a week after the representatives of GE Money had given evidence, on 15 May 2017 the Petitioners announced to the court that they wished to discontinue the Misrepresentation Claim. Their counsel then made a fulsome apology on their behalf, apologising unreservedly for the serious allegations made in the claim and stating that those allegations and the assault on the reputations of those involved were unreservedly withdrawn.

16. Marcus Smith J then made an order recording that the Petitioners had filed and served a notice of discontinuance. He ordered the Petitioners to pay the costs of the claim on an indemnity basis to be assessed (if not agreed), with an interim payment on account of £1.7 million to be paid by 12 June 2017 (the "Interim Costs Order").

17. The Petitioners failed to make the payment as required by the Interim Costs Order. The defendants to the Misrepresentation Claim then sought to enforce the Interim Costs Order. On 3 August 2017 Deputy Master Cousins granted final charging orders over their shares in the Company and a number of properties to secure payment of the Interim Costs Order (the "Charging Orders").

18. On 24 August 2017 Deputy Master Linwood also made orders requiring each of the Petitioners to attend for oral examination under CPR 71. Those examinations took place on 11 and 12 October 2017 and were adjourned with liberty to restore.

The Part 8 Claim

19. After having obtained the Charging Orders and conducted the oral examinations, by a Claim Form under CPR Part 8 dated 27 October 2017, the defendants to the Misrepresentation Claim applied for an order for sale of the Petitioners' shares in the Company (the "Part 8 Claim" and the "Part 8 Claimants"). That claim was listed for a hearing before Deputy Master Cousins on 23 March 2018. The Petition was presented four days before that hearing. Mr. Newman told us that this was because the Petitioners feared losing their shares in the Company, and hence losing their standing to petition under Section 994.

20. At the hearing before the Deputy Master on 23 March 2018, Anthony King appeared in person and represented his parents. The Deputy Master refused an application by Anthony King for an adjournment, and rejected his arguments on behalf of the

Petitioners that the proposed order for sale would be unfair or inappropriate in light of the presentation of the Petition. Deputy Master Cousins decided to make an order for sale and refused an application by the Petitioners for permission to appeal.

21. The parties were asked to agree a form of order, but were unable to do so, and hence the order for sale was not perfected or sealed. The decision to make an order for sale was then reviewed by Deputy Master Cousins and was the subject of a written judgment given on 23 May 2018. In that judgment, the Deputy Master reconsidered the various arguments that had been advanced and confirmed his decision to make an order for sale. He indicated that the parties should seek to agree appropriate directions for sale, and suggested a mechanism for the valuation of the shares by an independent valuer to be chosen by agreement or by the court.

22. The parties were, however, unable to agree the mechanism. By this stage, the Petitioners were represented by leading and junior counsel instructed on a *pro bono* basis and they renewed the arguments at further hearings which led to another written judgment of Deputy Master Cousins on 6 August 2018. In that judgment, the Deputy Master considered and rejected arguments on behalf of the Petitioners that the order for sale should, as a matter of discretion, be stayed pending determination of the Petition. Paragraph 36 of the Deputy Master's judgment included the following,

> "(4) … unless and until the [Petitioners] are successful in seeking permission to appeal the Final Charging Orders, out of time, and thereafter are successful in overturning those Orders, and/or are successful in overturning the Order for Sale of the Shares on appeal, in my judgment, no challenge could be mounted on the basis that that they have been prejudiced by the making of the Charging Orders, or indeed the Order for Sale of the Shares. The only prejudice occasioned to the [Petitioners] is the fact that they are obliged to pay a considerable sum of money enshrined in the Costs Order made following the conclusion of the Original Proceedings.
>
> …
>
> (8) Further, it is somewhat challenging to understand how the Costs Order the subject matter of Final Charging Orders, upon which the Order for Sale was founded, can somehow be the subject matter of consideration during the course of the hearing of the Section 994 Petition, absent any appeal. It is possible that the Companies Court may find some difficulty in being seised of this issue when the Final Charging Orders have never been the subject matter of an application for permission to appeal, and permission to appeal has been refused in so far as the Order for Sale is concerned. The principles of *res judicata* must apply unless and until the Final Charging Orders and/or the Order for Sale of the Shares is/are overturned on appeal.
> …
>
> (10) For all the reasons set out in this Further Judgment, and in the exercise of my discretion in this regard, I do not consider that

> it is appropriate having regard to all the circumstances that it is a proper exercise of the Court's discretion to stay the Order for Sale pending the conclusion of the Section 994 Petition.
>
> (11) I also agree with Leading Counsel for the [Part 8] Claimants that it cannot remotely be successfully asserted that in pursuing the Claimants' desire to seek satisfaction of the large Costs Order, which still remains unpaid, in some way the Claimants have acted unfairly, or there is an abuse of process, or they are seeking some form of collateral advantage, or stifling of the [Petitioners'] case. The Claimants have been pursuing their legitimate interests in seeking such satisfaction. Insofar as the assertion made that there is a "real goal" behind the Claimants' aims, it is perfectly legitimate for the Court to order a Sale of the Shares in the present circumstances in accordance with the terms laid down by the Articles. In effect, the Shares are to be transferred to the First Claimant in accordance with the procedure laid down in the Articles, subject to a fair valuation."

23. A further hearing before Deputy Master Cousins was fixed for 17 October 2018 to determine the precise form of the order for sale. However, a few days before the hearing, the Petitioners paid the sum of about £1.88 million in belated satisfaction of the Interim Costs Order (and interest). Following extensive argument on 17 October 2018, the Deputy Master delivered a further written judgment on 17 December 2018, ordering the Petitioners to pay the costs of the Part 8 Claim to be assessed on the indemnity basis. The Deputy Master based that decision on the repeated unmeritorious applications by the Petitioners to seek adjournments of the proceedings or to reargue issues that had already been determined at an earlier stage. That order was not appealed.

Detailed assessment of costs

24. On 2 April 2019 the defendants to the Misrepresentation Claim applied for a detailed assessment of the costs of the Misrepresentation Claim. The notice of commencement stated that their incurred costs were £2,370,878.51. That was later amended to £2,452,657.51. On 21 May 2019, as Part 8 Claimants, they also applied for a detailed assessment of the costs of the Part 8 Claim. The notice of commencement stated that the costs of the Part 8 Claim were £363,295.46.

25. The Petitioners applied for the detailed assessment proceedings to be stayed pending the determination of the Petition on the grounds that there was a substantial overlap or "commonality" of issues between the costs assessments and the Petition. It was said that the costs claimed had been fraudulently overstated as part of the same campaign of unfair prejudice of which complaint was made in the Petition.

26. That application for a stay was heard in August 2019 and was rejected by Master Whalan in a judgment given on 19 December 2019. The Master made it clear that costs judges were accustomed to resolving allegations of misconduct involving a party or his legal representatives. He also held that the nature of the serious allegations made against the defendants to the Misrepresentation Claim/Part 8 Claimants and their legal representatives meant that if the Petitioners wished to allege that the bills had been

fraudulently overstated, they should do so at the earliest opportunity in the assessment proceedings. Master Whalan's decision was not appealed.

27. At the time of the Judgment which is the subject of this appeal, the detailed assessment of those two sets of costs had not taken place. That has now occurred. The detailed assessment hearing was listed for 12–17 November 2020. On 11 November 2020, Anthony King provided an amended points of dispute discontinuing the allegations of fraud and relying only on points concerning the reasonableness of the costs. Notwithstanding the earlier decision of Master Whalan, Anthony King indicated an intention to raise the allegations of fraudulent inflation of the bills of costs in the Petition and in a new claim in conspiracy which the Petitioners had started in the Commercial Court. The document repeated the argument that Master Whalan had rejected, that the costs assessment was not the appropriate venue for determination of the allegations of fraudulent inflation of the bills of costs.

28. Final certificates of costs were issued by Master Whalan on 18 November 2020 (the "Final Costs Certificates"). These were in the sum of £2,220,181.73 plus interest and costs to 17 November 2020 of £505,973.14, giving a total of £2,726,154.87 in respect of the Misrepresentation Claim; and £355,235.06 plus interest and costs to 17 November 2020 of £56,306.78, giving a total of £411,541.84 in respect of the Part 8 Claim.

The Conspiracy Claim

29. As indicated above, by a Part 7 claim form dated 5 February 2020 the Petitioners commenced proceedings alleging an unlawful means conspiracy (the "Conspiracy Claim"). The defendants were Primekings, Mr. Stiefel, Mr. Fisher, Mr. Swain and the solicitors and leading counsel who had acted for the defendants in the Misrepresentation Claim. The essence of the allegation of conspiracy was that the defendants had a common design to pressurise the Petitioners to discontinue the Misrepresentation Claim, and for Primekings to obtain their shares in the Company at an undervalue. It was alleged that the defendants had misled the Petitioners and their lawyers into believing that they would face orders for adverse costs in a greater amount than the defendants knew that they would incur; that they had misled Marcus Smith J into making the Interim Costs Order; and that these deceptions were covered up by the submission of a fraudulently inflated bill of costs in relation to the Misrepresentation Claim. Among other things, the Petitioners claimed that but for the alleged conspiracy, they would have won the Misrepresentation Claim and not have had to pay the Interim Costs Order.

30. The Conspiracy Claim was pending at the time of the Judgment. However, the defendants to the Conspiracy Claim had applied in May 2020 to strike it out or for reverse summary judgment. That application was heard by Cockerill J for six days in February 2021. In a comprehensive reserved judgment delivered in April 2021, Cockerill J struck out the Conspiracy Claim in its entirety and certified it as having been totally without merit: see [2021] EWHC 1045 (Comm).

31. The first basis for Cockerill J's decision was that on an analysis of the pleaded case no complete cause of action was or could be advanced. However, as a second and independent ground for her decision, Cockerill J considered the effect of the Final Costs Certificate relating to the Misrepresentation Claim. The judge analysed a number of

authorities on abuse of process, including in particular Johnson v Gore Wood [2002] 2 AC 1, together with the decision in Drukker v Pridie Brewster [2006] 3 Costs LR 439 on the scope of a costs assessment.

32. Cockerill J concluded that the allegations of fraudulent inflation of the defendants' costs in relation to the Misrepresentation Claim could and should have been raised in the detailed assessment proceedings, and that the Petitioners' attempt to run those points in the Conspiracy Claim was a blatant attempt to go behind both the decision on the detailed assessment and the decision of Master Whalan not to stay that detailed assessment. Accordingly, Cockerill J concluded that, independently of her decision that the Conspiracy Claim did not disclose a complete cause of action, this element of the Conspiracy Claim was an abuse of process and should be struck out.

33. Permission to appeal Cockerill J's decision was refused by Males LJ on 26 July 2021. Among other things, Males LJ confirmed that it was for the costs judge hearing the detailed assessment to determine whether the costs claimed had been incurred and were reasonable, and that this included determining any issues of alleged fraud. Males LJ concluded that Cockerill J was right to hold that having chosen to abandon their claims that the costs had been fraudulently inflated in the assessment proceedings, the Petitioners were not entitled to pursue them in the Conspiracy Claim.

The Petition and Points of Claim

34. As indicated above, the Petition was presented on 19 March 2018, shortly before the first hearing in the Part 8 Claim. The Petition alleged that the affairs of the Company have been conducted by Primekings, Mr. Fisher, Mr. Stiefel and Mr. Zeidler in a manner which was unfairly prejudicial to the interests of the Petitioners. It sought an order for the buy-out of the Petitioners' shares in the Company on a pro rata basis without discount for minority holdings and after making due allowance for the matters complained of.

35. After a stay in mid-2018 to allow compliance with a Pre-Action protocol, the Points of Claim in the Petition were eventually served on 21 January 2019. The Points of Claim are a very lengthy document running to 69 pages containing 260 paragraphs divided into twenty sections.

36. The disputed paragraphs with which this appeal is concerned all relate to events at the time or after the Petitioners discontinued the Misrepresentation Claim. They are included in Extracts (4), (5) (in part) and (6) – (14) of an Appendix to the Judgment, and for convenience are set out in the Appendix to this judgment. In summary, those paragraphs contain allegations,

    i) that Primekings attempted to acquire Mr. and Mrs. King's B shares for (at most) £10,000 through seeking an order for sale in the Part 8 Claim (Extract 4, paragraph 96e of the Points of Claim);

    ii) that Primekings applied for and obtained the Interim Costs Order on the basis of submissions that referred only to its budgeted costs and not its actual costs as a tactical decision to avoid having to disclose to Marcus Smith J that its true costs were higher (Extract 5, paragraphs 104 and 105 (first six words));

iii) that Primekings obstructed the exercise of the Put Option by refusing to agree to the appointment of an independent valuer unless Anthony King paid his share of the valuer's fees in advance rather than from the proceeds of sale (Extract 6, paragraphs 127 to 136 and paragraph 228b);

iv) that the Part 8 Claimants applied for and obtained the Charging Orders over the Petitioners' shares (Extract 7, paragraphs 137 to 139);

v) that Primekings procured personal service on Anthony King on a Sunday of the summons for an examination under CPR 71 (Extract 8, paragraphs 168 to 171);

vi) that lawyers conducting the examination under CPR 71 on behalf of Primekings asserted that the costs of the Misrepresentation Claim exceeded £3 million and made statements that were interpreted by Anthony King and James King as an indication that Primekings was trying to obtain the Petitioners' shares at less than their true value (Extract 9, paragraphs 175 and 176);

vii) that (at the time of the Points of Claim) Primekings had not applied for detailed assessment of the costs of the Misrepresentation Claim because (it could be inferred) its costs were not greater than the amount of the Interim Costs Order (Extract 10, paragraphs 182 and 183);

viii) that the Part 8 Claim was structured and pursued by the Part 8 Claimants in a manner calculated to result in the acquisition of the Petitioners' shares on unfair terms and at an undervalue (Extract 11, paragraphs 184 to 191);

ix) that the Petitioners paid the amount of the Interim Costs Order (Extract 12, paragraph 195);

x) that after payment of the Interim Costs Order, the defendants to the Misrepresentation Claim wrongly contended that they were owed more money in respect of the costs of that claim (Extract 13, paragraphs 196 and 197); and

xi) that the Part 8 Claimants asserted that they were entitled to more costs in respect of the Part 8 Claim than they had included in two summary costs schedules placed before Deputy Master Cousins for the purposes of obtaining a payment on account in respect of the costs of the Part 8 Claim (Extract 14, paragraphs 198 to 203).

37. From these summaries it can be seen that the disputed allegations related to conduct of the Appellants in respect of three matters: (i) obtaining the Interim Costs Order and enforcement of it through the Charging Orders, the examinations under CPR 71, and the Part 8 Claim; (ii) obstruction of Anthony King's exercise of the Put Option; and (iii) pursuit of costs against the Petitioners in respect of the Misrepresentation Claim and the Part 8 Claim.

38. The Appellants applied to strike out these allegations on the basis that even as pleaded, these allegations could not amount to conduct of the affairs of the Company for the purposes of Section 994(1)(a), and/or were an abuse of process. As I shall explain, the key to understanding the decision of the Judge not to strike out these paragraphs lies in three paragraphs of the Points of Claim which were not themselves sought to be struck

out. In those paragraphs, the Petitioners described what they defined as "the Campaign" in which they alleged the Appellants had participated, together with the alleged consequences which that Campaign had for the business of the Company.

39. The relevant paragraphs which defined "the Campaign" were paragraphs 106 and 107,

> "106. It is to be inferred from the facts set out below that, following the discontinuance of the Misrepresentation Action (and quite possibly much earlier), Primekings (and its directors Mr. Fisher and Mr. Stiefel) decided that they were going to:
>
> a. Take steps to obtain the shares held by the King family for as small a cost as possible.
>
> b. Deliberately exclude [Anthony] King and his parents from the business (both KSGL and KSSL), and take whatever steps were necessary to do that, whilst taking steps to ensure that [Anthony] King could not compete with the business.
>
> c. As far as possible, deprive the Kings of the ability to vindicate their legal rights under the Articles, the Subscription Agreement and the general law, including by depriving them of funds.
>
> 107. The Kings contend that the pursuit of those goals ('the Campaign') by the Respondents amounted to and continues to amount to unfairly prejudicial conduct of the affairs of the Company because:
>
> a. The pursuit of the Campaign is not in the best interests of the Company as a whole having regard to, inter alia, the need to act fairly as between members;
>
> b. By pursuing the Campaign Mr. Stiefel, Mr. Zeidler and Mr. Fisher, as directors of the Company:
>
> > i. Are putting themselves in a position where their personal interests conflict with the interests of the Company, in breach of s.173 of the Companies Act 2006.
> >
> > ii. Are not exercising powers for the purposes for which they were conferred, and instead are doing so for the improper purpose of the Campaign.
> >
> > iii. Have done very significant damage to the business, by excluding Anthony King from the business, by spending Company money on matters which do not benefit the Company, and by damaging its credit rating and reputation.

> c. The pursuit of the Campaign by the Respondents amounts to a concerted exercise by the majority to exclude the minority from participation in the management of the Company and to acquire the shares of the minority for an undervalue.
>
> d. In any event the individual actions taken are themselves unfairly prejudicial conduct of the affairs of the Company as set out below."

40. The paragraph alleging that the Campaign had caused harm to the business of the Company was paragraph 233,

> "The Campaign has had serious consequences for the business and has very significantly contributed to any decline in its fortunes:
>
> a. Money and management time that could have been spent on investment, servicing customers, and business development, has been squandered on the Campaign. Expenditure on legal expenses has fed through (it is to be inferred) into increased borrowing … at interest rates of circa 9%.
>
> b. The repeated failure to file accounts on time has damaged the credit rating of the company and its standing with lenders. As Anthony King reported to the board on 31 August 2016:
>
> > "The damage caused by not filing our accounts on time is unquantifiable, it has cost the business around £60,000 in professional fees alone, but how much it has cost us in lost business and opportunities we will never know. Never have so many eyes been on the business after the loss of the Co-op, both existing clients and potential clients. Co-op distribution have now also terminated their contract and it will cease in September effecting a further 16 staff, Pure Gym will now only pay our contract on a monthly basis as opposed to upfront 12 months billing and we believe they are looking at taking the CCTV monitoring in house and Kwik Fit have confirmed they would only like to extend their renewal on October 1st by 3 months. Clearly people are very nervous".
>
> c. The concerted and unjustified efforts of the Respondents (via the Campaign) to damage the reputation of [Anthony] King will, it is to be inferred, have seriously damaged the reputation of the Company itself because of the close association between the Company and the Kings, as its founders. Likewise, the exclusion of the Kings from the Company and the attempt to distance the business from the King family by

> rebranding it has deprived the Company of the positive benefits to be derived from the Company's association with the King family, from its longevity as a business, and from the benefit of Anthony King's skills and reputation.
>
> d. It is to be inferred from the matters set out herein, including the Respondents' wilful disregard of the best interests of the Company in failing to file accounts on time, their pursuit of the Campaign at the expense of the Company, and in their own reliance on the recent asserted poor financial performance of the Company as supporting a low valuation for the Petitioners' shares, that the Respondents have in other respects damaged at least the short term financial position of the business in ways that are unfairly prejudicial to the Petitioners. The Petitioners reserve the right to amend following disclosure and the taking of an equitable account."

The Judgment (in relevant parts)

41. The Judge's analysis of the allegations that could properly be included in a petition under Section 994 rightly centred on the judgments of the Court of Appeal in Graham v Every [2015] 1 BCLC 41. At paragraphs 93-96 of his Judgment, the Judge identified the propositions that he derived from that authority, and formulated the issue that he considered arose in the instant case,

> "93. … the general proposition which I derive from Graham v Every [is] that the actions of a shareholder or even a third party may give rise to actionable unfair prejudice where they are combined with acts or omissions or other conduct on the part of the company.
>
> 94. However, in my judgment Graham v Every also stands for a second, and narrower, proposition. The real difference between the judgments of Arden LJ and Vos LJ (on the one hand) and McCombe LJ (on the other) was that the majority considered it necessary for the petitioner to plead (and then prove) the causal connection or link between the actions of the shareholder or third party and the conduct of the company's affairs which led to the unfair prejudice: see, in particular, the last sentence of [41] (Arden LJ) and the second sentence of [81] (Vos LJ).
>
> 95. In Graham v Every the Court accepted that it was arguable that there was such a causal link or connection because of the way in which the directors were remunerated. By failing to comply with the pre-emption provision the respondent obtained greater control over the company and was able to dictate the dividend policy and the remuneration which the petitioner was to receive.

> 96. Given the very wide-ranging allegations made in the Points of Claim, it seems to me that this is the real issue to which the present application gives rise. Have the Petitioners pleaded a clear link or causal connection between the actions of the Respondents and the conduct of the Company leading to the prejudice of which they complain? I also bear in mind that in Graham v Every the Court of Appeal was (if necessary) prepared to give the petitioner time to make good the defects in his pleaded case and to give particulars of that connection."

It is clear that the Judge regarded the two propositions to which he referred as cumulative – i.e. that proposition (2) acted to limit the potential width of proposition (1).

42. After setting out this analysis, the Judge's reasons for refusing to strike out the disputed allegations can best be seen in paragraphs 126 and 127 of his Judgment. Those paragraphs related to the allegation that Primekings obstructed Anthony King from exercising the Put Option. In these two paragraphs, the Judge indicated that if the allegation on obstructing the exercise of the Put Option had stood alone, he would have accepted the submission that the allegation did not amount to conduct of the affairs of the Company, not least because the failure by Primekings to acquire Anthony King's shares pursuant to the Put Option could not possibly have prejudiced his ability to influence or control the conduct of the affairs of the Company. The Judge then continued,

> "126. However, in the present case the Petitioners also allege that this conduct formed part of the Campaign to deprive them of their shares, to exclude them from the business of the Company and to deprive them of their ability to vindicate their legal rights: see paragraph 106. No application has been made to strike out that paragraph nor indeed to strike out other allegations relating to the Campaign which clearly do involve the conduct of the Company's affairs….
>
> 127. I turn therefore to the question which I posed in [96] (above). Have the Petitioners pleaded a clear link or causal connection between the actions pleaded in paragraphs 127 to 136 and the conduct of the Company leading to the prejudice of which they complain? Not without some hesitation, I have to come to the conclusion that the Petitioners have pleaded a sufficient link or connection. I say this for the following reasons:
>
> i) One difficulty which I found with the Points of Claim is that no clear attempt has been made to distinguish between (i) conduct of the Company's affairs, (ii) unfairness and (iii) prejudice. As the citation from Loveridge v Loveridge makes clear these are three separate questions. In the Points of Claim there is a tendency to run them together. See, for example, the last sentence of paragraph 136 where the obstruction of the exercise of the put option is described as "unfairly prejudicial conduct of the affairs of the Company".

> ii) Nevertheless, the Petitioners have alleged prejudice which they have suffered in their capacity as members of the Company. In paragraph 233 they plead that money which could have been spent on the Company's operations has been squandered on the Campaign and legal expenses have led to increased borrowing. They also plead that the Campaign has damaged the Company's reputation and that the pursuit of the Campaign has damaged its short term financial performance in ways that are prejudicial to them.
>
> iii) In marked contrast to the narrow and more focussed allegations in Graham v Every, these complaints are both wide and sweeping. But in my judgment this should make no difference as a matter of pleading. I am satisfied that if these allegations are true, they would demonstrate a sufficient causal connection between the conduct of the Applicants in their personal capacity, their conduct of the affairs of the Company itself and the prejudice which the Petitioners claim to have suffered.
>
> iv) Put another way, if the Petitioners prove at trial that the Applicants have mounted a campaign to use all of the means at their disposal (including their powers as directors, their rights as shareholders and their rights as judgment creditors) to force the Petitioners [to] sell their shares at an depressed value, this may justify relief under section 996. I say it may justify relief because the Petitioners will have to demonstrate that the specific conduct of the Company on which they rely was unfair.
>
> v) I stress that all of these allegations are strongly contested by the [Appellants]. They deny that there was (or is) any Campaign or that it had (or has) the purpose alleged by the Petitioners. If they establish this at trial, then they will also satisfy the Court that any attempt to obstruct Anthony [King]'s exercise of the put option did not amount to conduct of the affairs of the Company. But that must be an issue for trial and cannot be determined on this application."

The Judge cross-referred to and repeated such reasoning when refusing to strike out the other disputed allegations: see e.g. paragraph 129 of the Judgment.

43. So far as the arguments on abuse of process were concerned, the Judge dealt with the disputed paragraphs in two groups. At paragraphs 130-131 of his Judgment, the Judge described the first group as relating to the allegations concerning the Part 8 Claim and the attempts by the Appellants to obtain an order for sale of the Petitioners' shares. He identified these allegations as those in paragraph 96e and 104 of the Points of Claim, together with Extracts (7), (11), (12) and (14). The Judge's reference to paragraph 104 appears to be an error: that paragraph of the Points of Claim (together with the first six words of paragraph 105) refers to the obtaining of the Interim Costs Order from Marcus Smith J at the end of the Misrepresentation Claim.

44. At paragraph 131 of his Judgment, the Judge stated,

> "(i) Ms. Addy did not submit that the three judgments of Deputy Master Cousins were *res judicata* in these proceedings and in my judgment she was right not to do so. Those decisions did not give rise to a cause of action estoppel or an issue estoppel: see Virgin Atlantic v Zodiac Seats at [17]. The Part 8 Claim was not a claim for unfair prejudice under Section 994 and the Deputy Master was not asked to decide any of the issues identified by Floyd LJ in Lovegrove.
>
> (ii) However the issues which the Deputy Master had to decide and the arguments which were presented to him are almost identical to the issues in these proceedings. In particular, Anthony and leading counsel both argued that the Primekings Parties were using the Part 8 Claim for an improper purpose, namely, to stifle the Petitioners' rights by forcing a sale at the very low valuation placed on them by Mr Eastaway. The Petitioners make identical allegations in Extract (14): see, in particular, paragraph 186. The Deputy Master rejected those arguments and held that there was no abuse of process or collateral advantage of stifling of the Petitioners' rights."

The reference to Extract (14) was a typographical mistake: it should have been to Extract (11).

45. The Judge then continued, at paragraph 131(iii)-(vi),

> "(iii) In my judgment, this attempt to re-litigate issues which have already been decided would normally be an abuse of process. However, in deciding this point I must adopt the two stage approach identified by Lord Bingham in Johnson v Gore Wood … and consider whether there are special circumstances which excuse such an abuse. Mr. Newman identified two special circumstances which, in my judgment, excuse the Petitioners' attempt to re-litigate these issues.
>
> (iv) First, the application which the Deputy Master had to determine was whether to stay the order for sale pending the determination of the Petition. He was shown the Petition and it was submitted to him that there was clear overlap between the issues which he had to decide and the issues in the Petition. Although he expressed the view that it "was challenging to understand" how the issues before him could be the subject of consideration in the Petition, he did not decide that issue and clearly accepted that it was for the Companies Court to decide: see paragraph 36(8) of his second judgment.
>
> v) Indeed, it would in my judgment have come as some surprise to the Deputy Master and the parties if the effect of his judgment had been to prevent the Petitioners from pursuing the

> related allegations in the Petition. He was being asked to decide whether he should stay the Part 8 Claim not to decide those issues once and for all.
>
> vi) Secondly, as Mr Newman pointed out, the Deputy Master did not hear oral evidence and cross-examination. In context, he was clearly entitled to take the view that the Primekings Parties were entitled to enforce their legal rights as judgment creditors with the benefit of the charging orders over the shares. In the present context, however, it will be crucial for the Petitioners to establish by cross-examination that the Applicants had the purpose pleaded in paragraph 106. As I have stated, if they are able to do so, this may justify relief under Section 996."

46. The second group of disputed paragraphs was described by the Judge in paragraph 130 of his Judgment as relating to the enforcement of the Interim Costs Order and the assessment of costs more generally. The Judge primarily identified these paragraphs as forming Extracts (8) – (10) and (13), and outlined the arguments of counsel in relation to those Extracts. He then stated at paragraph 138,

> "I am not prepared to strike out Extracts (7) to (14) [sic] for the following reasons:
>
> (i) I accept Mr Newman's submission that there is no general "proper forum principle". I also accept his submission that the costs judge is highly unlikely to make findings which will assist the judge hearing the Petition to determine whether the detailed assessments formed part of the Campaign.
>
> (ii) Moreover, it seems to me unlikely that it will add very significantly to the time and costs of the Petition if the Petitioners are permitted to take the allegations in Extracts (7) to (14) [sic] to trial."

The Judge appears to have included Extracts (7) and (14) in this group even though he had also included them in the first group because they related to the obtaining of the Charging Orders and the amount of costs of the Part 8 Claim respectively. The inclusion of Extracts (11) and (12) (relating to the conduct of the Part 8 Claim and payment of the Interim Costs Order) appears to be an error.

47. In a further and final set of sub-paragraphs of paragraph 138, the Judge repeated his more general concerns and reasons for refusing to strike out the disputed paragraphs,

> "(iii) Nevertheless, at the end of this judgment I am left with a serious concern about the proliferation of claims brought by the Petitioners all arising out of their own decision to discontinue the Misrepresentation Claim in circumstances where they accept (and, indeed, affirmatively assert) that they will be unable to pay the costs if they lose.

> (iv) I am also left with a serious concern that the allegations in the Points of Claim travel well outside the normal boundaries of an unfair prejudice petition and if it had not been for the "Campaign" allegation and the allegation of prejudice in paragraph 233 I would have struck them out.
>
> (v) However, I have found that those allegations are arguable and I accept Mr Newman's general proposition that in the absence of any finding of abuse or application for reverse summary judgment, I should permit them to go to trial. It seems to me that it would go well beyond the proactive case management of the kind considered in [Re Unisoft Group (No.3) [1994] 1 BCLC 609 and Re Coroin Ltd (No.2) [2014] BCC 14] to strike out allegations which may have a real prospect of success in the absence of any relevant abuse of process."

The Arguments on the Appeal

48. On this appeal, Ms. Addy QC's primary submission was that the correct reading of the majority judgments in Graham v Every is that personal conduct may properly be pleaded in a petition under Section 994 where such conduct *of itself* gives rise to, or enables, relevant conduct of the affairs of the company (which *in turn* is alleged to be unfairly prejudicial to a petitioner). In other words (she submitted), personal conduct of the respondents to a petition can only be pleaded and relied upon if it is *causative* of acts or omissions which are allegedly unfairly prejudicial conduct of the affairs of the company. She submitted that the Judge was right to have identified this in paragraphs 94 and 95 of his Judgment by referring to the need for a "causal connection or link" (paragraph 94) and a "causal link or connection" (paragraph 95). However, she submitted that the Judge went wrong in his subsequent application of this principle to the disputed allegations in the Points of Claim.

49. Ms. Addy also contended that the Judge had been wrong not to strike out the disputed paragraphs relating to the obtaining of the Interim Costs Order, the charging orders and pursuit of the Part 8 Claim as an abuse of process. She contended that these were vexatious attempts by the Petitioners to reopen issues that had been finally decided by Marcus Smith J and Deputy Master Cousins and not appealed; and that the "special reasons" that the Judge identified for not striking out the relevant paragraphs were misconceived.

50. In addition, although this argument had not been made before the Judge due to the timing of the assessment of costs, Ms. Addy submitted that following the issue of the Final Costs Certificates, it would now be an abuse of process for the Petitioners to advance any allegation based upon a contention that the true costs incurred by the Appellants in defending the Misrepresentation Claim or pursuing the Part 8 Claim were any less than the amounts which had been certified, or that there had been fraudulent inflation of the relevant bills. In that respect, Ms Addy also relied on the judgment of Cockerill J striking out the Conspiracy Claim, and Males LJ's refusal of permission to appeal that decision.

51. Mr. Newman's contention (before the Judge and on appeal) was that the judgments in Graham v Every should not be read narrowly. He contended that given the breadth of

the statutory remedy in Section 994, it was legitimate to plead personal conduct of the respondents which had a factual connection with conduct of the affairs of the company directly falling within the section. He submitted that provided that the link between the allegations of personal conduct and the allegations of conduct of the affairs of the company "makes sense from a case management perspective" the court should permit allegations of personal conduct to remain on the pleadings in a petition under Section 994. Mr. Newman clarified that this meant that such allegations should be permitted to remain on the pleadings and to be raised at trial where it would be unfair to the petitioner to decide the case without taking both allegations into account.

52. On the facts of the instant case, Mr. Newman contended that the Judge was right to find that the necessary link was provided by the allegation of the existence of the Campaign involving both conduct of the affairs of the Company and personal conduct by the Appellants, together with the alleged harm to the Company as pleaded in paragraph 233 of the Points of Claim. Mr. Newman also submitted that the court should be wary of striking out allegations in a case such as this where disclosure had yet to take place which would allow the Petitioners to provide further particulars of their allegations.

53. Mr. Newman rejected the suggestion that there was any abuse of process in the continued pursuit of the relevant paragraphs of the Points of Claim. He said that the Judge was right to find that the decision of Deputy Master Cousins in the Part 8 Claim had been of limited scope and that there were special reasons justifying the allegations going to trial in the Petition. He also contended that in so far as the Appellants' arguments depended upon the issue of the Final Costs Certificates and the judgment of Cockerill J in the Conspiracy Claim, these were matters that ought to be the subject of a new application to the High Court by the Appellants, rather than being determined on this appeal.

THE APPEAL IN RELATION TO SECTION 994

The scope of statements of case in a petition under Section 994

54. Since both parties accepted that Graham v Every was the most relevant authority on the scope of petitions and statements of case under Section 994, it is necessary to refer to it in some detail. The case concerned what was alleged to have been a "quasi-partnership" company formed to run an ice bar and restaurant. Among other issues, the judge at first instance had struck out an allegation in the petition under Section 994 that one of the respondent shareholders (Mr. Every) had bought all of the shares of two other shareholders (amounting to 26.6% of the total issued shares) (the "impugned shares") without those shares having first been offered pro rata to all of the other shareholders. This was alleged to have been a breach of a common understanding between all of the shareholders at the formation of the company as to how the company would be run, which had been recorded in part in a written "heads of agreement".

55. In her judgment in the Court of Appeal on this issue, Arden LJ (as she then was) first held that mere breach of a pre-emption agreement would not in itself constitute the conduct of the affairs of the company or an act or omission of the company within Section 994, because the act of purchasing the shares would not be carried out by the company or on its behalf: see paragraph 30. Arden LJ then rejected a suggestion that there had been any prejudice caused to the petitioner (Mr. Graham) by the way that the impugned shares had been voted at any company meetings: see paragraph 36.

56. However, Arden LJ then held, at paragraphs 37-41, that the judge had been wrong to strike out the allegation. She stated,

> "37. The requirement in section 994 for an "act or omission of the company" means that the petitioner must identify something which the company does or fails to do. The alternative requirement - that "the company's affairs are being or have been conducted in a manner that is unfairly prejudicial" to members or the petitioner - does not contain the same stipulation. Mr Graham can rely on the actions of some other persons, including his fellow shareholders. But the actions must still amount to the conduct of the company's affairs.
>
> 38. On its own, non-compliance with a pre-emption agreement for the sale of shares in the company would not be an act which amounts to the conduct of the company's affairs since the events have nothing to do with the company save when the shares are registered in the names of the new holder, which is a purely ministerial act. An act done in the conduct of the shareholder's personal affairs is not the conduct of the company's affairs.
>
> 39. However, Mr. Stewart [counsel for Mr. Graham] puts the point more widely than this. And it is true to say that, if Mr Graham establishes his allegation about the terms of the heads of agreement, then, in so far as those terms set out how the company's business is to be run, breach of those terms would fall within section 994(1).
>
> 40. In the normal way, pre-emption agreements fall outside section 994(1) but in the present case the directors were, as I have explained, not to be remunerated by salary but by way of dividend. Thus the size of a director's shareholding would dictate his reward for his work on the company's business. How directors were to be remunerated and the company's distributions policy are within the conduct of the company's affairs. So, by denying Mr Graham's pre-emption right at a time when Mr Graham was still a director, Mr Every was arguably interfering with the way in which the parties had agreed that the company would remunerate its directors.
>
> 41. On this basis, there is sufficient for this court to allow the allegation to stand on the basis that Mr Graham provides proper particulars to justify Mr Stewart's submission to us that the non-compliant share purchase allegation is an allegation that the affairs of the company have been or are being conducted in a manner which is unfairly prejudicial to the interest of Mr Graham as a member. There is a possibility that he will be able to do so. The point is important because Mr Graham seeks an order that his present shareholding ought to be valued on the basis that he could have acquired the impugned

> shares. However, Mr Stewart's submission to us can only be made good if there is an appropriate link between the impugned share sale allegation, the conduct of the company's affairs, unfair prejudice to Mr Graham and the relief."

57. Arden LJ viewed the breach of the pre-emption agreement and the alteration of the proportions in which the shares in the company were held as arguably having a direct impact upon the way in which the parties had agreed that shareholder/directors of the company were to be remunerated for their work in the company's business by way of payment of dividends on their shares. This provided what Arden LJ referred to as the "appropriate link" between the breach of the pre-emption agreement which otherwise could not be regarded as conduct of the company's affairs within Section 994, and those matters that did constitute conduct of the affairs of the company falling within Section 994.

58. Vos LJ agreed with Arden LJ. He commented, at paragraphs 81-83,

> "81. … the petition as presently drafted pleads both that (a) the consequence of the respondents' conduct was that Mr Graham sought to and was unable to increase his influence within the company: i.e. that he was diluted, and that as a result (b) the affairs of the company have been conducted in a manner that is allegedly unfairly prejudicial to his interests. It is true that these allegations are not particularised in the way they should be, and that they do not explain how it is alleged that Mr Every used his control of the impugned shares to take decisions of which Mr Graham did not approve, or why the non-compliant share purchase caused Mr Graham any loss in the way that the company's affairs were thereafter directed, but those lacunae can be dealt with in the way that Arden LJ has suggested.
>
> 82. As Mr Stewart explained in argument, the allegation is, in effect, that the respondents denied Mr Graham the additional shares he ought to have had, and have thereafter used their greater control of the company's affairs to his disadvantage by, for example, excluding him from the management of the company and reducing the (greater) profit share he would otherwise have had. These matters have been unfairly prejudicial to his interests.
>
> 83. In a quasi-partnership, it is common for a group of partners to act in such a way as to reduce another partner's shareholding in a variety of different ways. It would be surprising if such conduct, if proved, could not, at least in theory, be prayed in aid in seeking to establish under section 994(1)(a) of the Companies Act 2006 that the company's affairs were being conducted in a manner that was unfairly prejudicial to the interests of the diluted member. After all, in such situations, the whole purpose of diluting the member inappropriately or unlawfully is to reduce his control of or influence in the quasi-partnership so that it will act more closely in accordance with the

> wishes of the majority, and in their interests. Moreover, the sub-section was amended to introduce the interests of "members generally" as well as the interests of "some part of [the] members". That change underlined the fact that the unfair prejudice in question might depreciate the business of the company as a whole, not just some members' interests."

59. As is apparent from paragraph 82, Vos LJ was persuaded not to strike out the allegation because of the possibility that the petitioner could demonstrate that the respondents had used the greater control of the company's affairs that they had obtained by their acquisition of shares in breach of the pre-emption agreement to cause the company to act to his prejudice, e.g. by voting at a general meeting to remove him as a director, or because he would receive a lesser profit share from that which he might otherwise have received when dividends were declared. The situations envisaged by Vos LJ were thus ones in which the subsequent actions of the company or the conduct of its affairs would be causally connected – at least on a "but for" basis – to the changes in shareholdings resulting from the earlier breach of the pre-emption agreement.

60. The third member of the Court of Appeal, McCombe LJ, agreed in the result, but approached matters on a wider basis that Arden and Vos LJJ. He stated,

> "68. One of the problems that, to my mind, has long beset litigation under section 994 of the 2006 Act and its predecessors, has been the tendency (to some extent to be found in this case) of engaging in satellite litigation by way of applications to strike out petitions on pre-conceived technicalities.
>
> 69. The words of the section, which my Lady has set out in her judgment, could not be more general. The purpose of the section was to provide a practical remedy for unfairly prejudicial conduct in the running of a company's business. It sought to remedy the undue technicality that had developed with regard to the operation of section 210 of the Companies Act 1948 and to develop the practical law relating to the break-up of quasi-partnership relations that came from the seminal judgment of Lord Wilberforce in Re Westbourne Galleries [1973] AC 360.
>
> 70. It seems to me that, inadequately pleaded as this petition is, in the various respects identified in my Lady's judgment, what is being alleged here is a systematic exclusion of Mr Graham from the management of this joint venture company. One of the elements of that alleged exclusion is said to have been the failure by three of the parties, and I include the first respondent in this, to adhere to the provisions of clause 5 of the Heads of Agreement. If that is correct, the failure to observe the requirements of that clause was an essential feature of the unfairly prejudicial conduct alleged in the petition overall. In my judgment it would be artificial to strike out this allegation on the basis that, looked at in isolation, it might not be an "act of the company". It seems to me that fails to give due regard to the general words of section 994(1)(a) which speaks of the

> company's affairs being "conducted in a manner that is unfairly prejudicial…etc."."

61. I consider that to the extent that the Judge identified, in paragraphs 94 and 95 of his Judgment, the need for a causal connection to exist between the personal actions of the shareholder or third party and some other act or omission constituting conduct of the company's affairs within Section 994, this was a correct analysis of the majority judgments in Graham v Every. I also consider that the Judge was correct to identify that Arden LJ and Vos LJ differed from McCombe LJ, who was in the minority in his view that an allegation of personal breaches of the pre-emption agreement could be pleaded simply because they were alleged to have been an essential part of a plan by the respondents leading to the exclusion of the petitioner from management.

62. The justification for the approach evident in the majority judgments in Graham v Every is, in my judgment, underpinned by consideration of the principles of pleading which govern the contents of a statement of case. Those principles were stated by Males J (as he then was) in Grove Park Properties v Royal Bank of Scotland [2018] EWHC 3521 (Comm) at paragraph 24,

> "Statements of case should be as concise as the nature of the case allows and should plead only material facts, that is to say those which are necessary to formulate a cause of action or defence, not background facts or evidence: Tchenguiz v Grant Thornton LLP [2015] EWHC 405 (Comm). It is wrong in principle to plead matters which do not support or relate to any of the remedies sought and to plead immaterial matters with a view to obtaining more extensive disclosure than might otherwise be ordered: Charter UK Limited v Nationwide Building Society [2009] EWHC 1002 (TCC) at (the second) [15]. To do so is likely to complicate or confuse the fair conduct of proceedings."

See, to similar effect, the statements by Christopher Clarke LJ in Hague Plant v Hague [2014] EWCA Civ 1609 at [76] and [78], and by Cockerill J in her judgment in the Conspiracy Claim at paragraphs 148-150.

63. The principle that statements of case should only set out the facts that go to make up each essential element of the cause of action relied upon is particularly relevant to pleadings in unfair prejudice petitions. There has, from the early days of the unfair prejudice jurisdiction, been a clear tendency for petitions and pleadings in such cases to seek to raise myriad grievances and complaints of diverse forms of misconduct against the respondents to the petition. This experience has been especially prevalent in cases in which it is alleged that the company is a quasi-partnership so that equitable considerations are in play. Such wide-ranging allegations are often then said to require extensive disclosure and a lengthy trial at which the entire history of the formation and breakdown of the relationship between the parties is gone through in enormous detail.

64. These problems were clearly identified by Harman J in Re Unisoft Group Limited (No.3) [1994] 1 BCLC 609 at 610-611 as follows,

> "The [words of section 459 of the Companies Act 1985] … are, on the face of them, extraordinarily wide and general. They

> allow, on the face of them, every sort and kind of conduct which has taken place over an almost unlimited – certainly upwards of 20 years – periods of time in the management of a company's business to be dug up and gone over. The words are, however, limited by the reference to 'the company's affairs' in respect of which the conduct must be alleged.
>
> The section also enables a member to apply to the court on the ground that 'any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial'. Again the words are wide and anything that the company does or fails to do can be relied upon. But wide as the category of acts may be it is necessary that the act or omission is done or left undone by the company itself or on its behalf….
>
> The acts of the members themselves are not acts of the company nor are they part of the conduct of the affairs of the company and cannot found a petition under section 459.
>
> Petitions under section 459 have become notorious to the judges of this court – and I think also to the Bar – for their length, their unpredictability of management, and the enormous and appalling costs which are incurred upon them particularly by reason of the volume of documents liable to be produced. By way of example on this petition there are before me upwards of thirty lever-arch files of documents. In those circumstances it befits the court, in my view, to be extremely careful to ensure that oppression is not caused to parties, respondents to such petitions or, indeed, petitioners upon such petitions, by allowing the parties to trawl through facts which have given rise to grievances but which are not relevant conduct within even the very wide words of the section."

65. A similar point was made by Arden LJ in Re Coroin Ltd [2014] BCC 14 at paragraphs 13-14. After setting out Section 994(1), Arden LJ commented,

> "13. The requirements relevant to this appeal are that: (1) there is an act or omission on the part of the company; and (2) that act or omission is unfairly prejudicial to [the petitioner].
>
> 14. These requirements are cumulative. If the court concludes that the first requirement is not satisfied, the second requirement does not arise. Moreover there is nothing to stop the court considering the requirements on the basis most favourable to [the petitioner] and, if it concludes that the case could not succeed on that basis, restricting its consideration of other issues raised. Cases under Section 994(1) can be very resource-intensive … Courts must, where possible, find ways and means of reducing the hearing times for these cases. In this case it may have been possible for significant amounts of court time to have

> been saved by focusing on the statutory requirements for an act or omission of [the company] which is unfairly prejudicial."

66. I respectfully agree with the observations of Harman J and Arden LJ. Although designed to overcome some of the limitations which beset the oppression remedy under section 210 of the Companies Act 1948, neither section 459 of the Companies Act 1985 nor Section 994 were drafted on the basis that a shareholder could simply complain, for example, that "a course of conduct in relation to the company" had unfairly prejudiced his interests. The potential breadth of what is now Section 994 has been limited and kept within manageable bounds by the express statutory requirements that the acts complained of must either (i) be an act or omission of the company, or (ii) be conduct of the company's affairs rather than acts done in the conduct of a shareholder's personal affairs.

67. Satisfaction of these requirements should not be overlooked or minimised. Petitions and statements of case in unfair prejudice cases should make it clear which limb of Section 994 is being relied upon and should contain a concise statement of the facts upon which the petitioner relies to make out that requirement. On the basis of the majority judgments in Graham v Every, it may be legitimate for a concise statement of personal acts of the respondents which are causally connected to an act or omission of the company, or causally connected to conduct of the company's affairs, to be included to support the primary allegation. There is, however, no such justification for allowing other allegations of personal conduct of the respondents, which are not causally connected to an act or omission of the company, or not causally connected to conduct of the affairs of the company, to be included in a statement of case under Section 994.

68. In that respect, I do not accept Mr. Newman's contention that provided that the link between the allegations of personal conduct and the allegations of conduct of the affairs of the company "makes sense from a case management perspective", the court should permit such allegations of personal conduct to be pleaded on the basis that it would be "unfair" to the petitioner to decide the case without taking both allegations into account. Effective case management is a matter of procedure and requires a substantive frame of reference. Simply asking the court to apply a generalised test of "unfairness" to determine what allegations can be advanced is, for the reasons set out above, unprincipled. It also calls to mind the observations of Lord Hoffmann in O'Neill v Phillips [1999] 1 WLR 1092 at 1098,

> "In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history … that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J. said in In re J.E. Cade & Son Ltd [1992] BCLC 213, 227: "The court … has a very wide discretion, but it does not sit under a palm tree".

Analysis of the disputed paragraphs of the Points of Claim

69. The need for careful identification of what can properly be included in a petition or statement of case under Section 994 is particularly relevant in the instant case. As I have indicated above, the Points of Claim are an extensive, rather than a concise, document. They are repetitive and are drafted in a narrative (and at times hyperbolic) style more reminiscent of an advocacy piece for the opening of a trial. As the Judge observed in paragraph 127(i) of his Judgment, the Points of Claim also frequently do not differentiate between the essential elements of a petition under Section 994.

70. Moreover, paragraph 234 simply asserts in a generalised manner that,

> "the matters set out in V, VII and IX-XIV of these Points of Claim constitute unfairly prejudicial conduct of the affairs of the Company."

That portmanteau style of pleading is inappropriate. It even includes, for example, the allegation to which I have referred in paragraph 36(ix) above, namely that the Petitioners paid the amount of the Interim Costs Order to the defendants to the Misrepresentation Claim (paragraph 195 of the Points of Claim). How that conduct by the Petitioners themselves in (finally) complying with an order of the court could constitute conduct of the affairs of the Company, or could have resulted in any such conduct, entirely escapes my understanding.

71. Although the Judge correctly analysed Graham v Every in paragraphs 94 and 95 of his Judgment, I accept Ms. Addy's submissions that he then did not correctly apply his analysis to the disputed allegations in the Points of Claim.

72. The errors in the Judge's reasoning started at paragraph 96 of his Judgment, when he reformulated the requirement which he had identified from Graham v Every as a requirement for the Petitioners to show "a clear link *or* causal connection" (my emphasis) between the personal actions of the Appellants and the conduct of the affairs of the Company. To the extent that this reformulation signified that some other type of "link" rather than a causal connection between the personal actions of the Appellants and the conduct of the affairs of the Company would suffice to enable the personal actions to be pleaded, then for the reasons that I have explained, I consider that it was wrong.

73. That error was then carried through into the Judge's reliance on the alleged existence of "the Campaign", together with the allegations of the spending of Company money on the Campaign, and the allegations of damage to the reputation and short-term financial performance of the Company as a result of the Campaign, as his main justification for not striking out the disputed allegations: see e.g. paragraphs 127(ii) and (iii) and 138(iv) of the Judgment (above).

74. The Judge appears to have reasoned that because it was alleged that Company money had been spent on the Campaign, and since the personal actions of the Appellants were also alleged to have been part of the Campaign, then it was legitimate to include the personal actions forming part of the Campaign in the Points of Claim. Alternatively, the Judge seems to have accepted that because it was alleged that the Campaign had caused damage to the reputation and short-term financial performance of the Company,

then since the Campaign included some conduct which could amount to conduct of the affairs of the Company, the fact that the personal actions of the Appellants were also alleged to have been part of the Campaign meant that it was legitimate to include those personal actions in the Points of Claim.

75. In my judgment, that reasoning did not follow the requirements of the majority of the Court of Appeal in Graham v. Every and was based upon a logical fallacy. Even if the Appellants did embark upon "the Campaign" as alleged, this would not amount to a cause of action under Section 994 except if and to the extent that it involved conduct of the affairs of the Company.

76. Further, and as a matter of logic, even if two actions are each said to have been part of an orchestrated plan, it does not follow that both would amount to conduct of the affairs of the Company, and nor does it follow that one would be causative of the other. So, for example, even if Company funds or resources might have been misapplied on some aspects of the Campaign, it does not follow that they must have been misapplied to fund all aspects of the Campaign. And although misapplying Company funds or resources would be conduct of the Company's affairs, it does not follow that the matters to which the funds or resources were misapplied would also constitute conduct of the affairs of the Company so as to justify a separate complaint under Section 994.

77. That point can be illustrated by the fact that although there is a general and unparticularised allegation in paragraph 233 of the Points of Claim that Company funds have been spent on the Campaign, there is no specific allegation that Company funds or resources were used to fund the Appellants' alleged obstruction of the exercise of the Put Option, or their pursuit of the Part 8 Claim, or their applications for detailed assessment of the costs of the Misrepresentation Claim and the Part 8 Claim.

78. Apart from a Micawberish (and disputed) assertion that disclosure would be bound to reveal something in this respect, "because it is just the way things work in the real world", the only supposed evidence that Mr. Newman could point to in support of an allegation that Company funds or resources had been spent on such matters were three entries in the bill submitted by the Part 8 Claimants' solicitors in relation to the Part 8 Claim. These entries showed the Part 8 Claimants' solicitor making a brief telephone call to Mr. Zeidler to inform him of the outcome of one of the hearings before Deputy Master Cousins. The solicitor also charged for taking time to consider information from Mr. Zeidler as to the timescale for filing of the Company's accounts and the valuation of some of the Company's shares at about the time Deputy Master Cousins was considering what order for sale to make in the Part 8 Claim. Those entries did not suggest that the Company had paid for any such services by the solicitor; there was nothing to suggest that Mr. Zeidler had acted improperly in responding to the solicitor's phone calls or inquiries; and still less was there any basis upon which it might be concluded that such matters meant that the pursuit of the Part 8 Claim amounted to conduct of the affairs of the Company.

79. Nor was the Judge right to place reliance upon the equally unparticularised and general allegations that pursuit by the Appellants of the Campaign had caused harm to the value of the Company or its reputation. Whether or not the Company was harmed by the Campaign says nothing about which element of the Campaign might have caused such harm or, more relevantly, whether any such element amounted to conduct of the affairs of the Company.

80. With those observations I turn to deal specifically with the disputed paragraphs which the Judge refused to strike out.

Obstruction of exercise of the Put Option (paragraphs 127 to 136 and 228b)

81. As with the pre-emption provision in Graham v Every, the Company was not a party to, and had no interest in the performance of the Put Option, which was a personal matter between Anthony King and Primekings. Hence the personal conduct of Primekings in allegedly obstructing the exercise of that Put Option could not conceivably amount to an act or omission of the Company or any conduct of its affairs.

82. Moreover, to the extent that the complaint is that because the exercise of the Put Option was frustrated, Anthony King was unable to reduce his shareholding and thus his influence in the Company, it is impossible to see how that could amount to conduct of the affairs of the Company (still less the exclusion of the Petitioners from involvement in the Company of which complaint is made).

83. It is also alleged that Primekings refused to cooperate in the exercise of the Put Option in order to deprive Anthony King of the funds with which to pay the Interim Costs Order and thus render his shares at risk of being "seized" in the Part 8 Claim. Again, such alleged conduct on the part of the Appellants could not conceivably amount to conduct of the affairs of the Company and is not alleged to have led to any such conduct.

84. The only other feature of the alleged Campaign to which that allegation might go is the suggestion in paragraph 106(c) of the Points of Claim that the Appellants did what they could to prevent the Petitioners vindicating their legal rights under the Company's articles, among other things by depriving them of funds. Although the wrongful denial of a shareholder's ability to exercise his rights under the company's constitution could plainly fall within Section 994, there is no indication in the Points of Claim of why or how the Petitioners' ability to exercise any such rights was in any way affected by Anthony King not being paid money for sale of his shares under the Put Option.

The Interim Costs Order and steps to obtain payment of it (paragraphs 96e, 104, 105 (part), 137-139, 168-171, 175-176 and 184-191)

85. Obtaining the Interim Costs Order and the charging orders, and the pursuit of oral examinations under CPR 71 and the Part 8 Claim were manifestly not conduct of the affairs of the Company, but were personal actions taken by Mr. Fisher, Mr. Swain and Primekings in the conduct of their own affairs following discontinuation of the Misrepresentation Claim by the Petitioners.

86. It is true that if Mr. Fisher, Mr. Swain and Primekings had succeeded in obtaining and executing an order for sale of the Petitioners' shares in the Part 8 Claim, this would have extinguished the Petitioners' rights as members of the Company. However, by the time of the Judgment it was clear that this would not occur, because the Petitioners had (eventually) paid the amount that they had been ordered to pay under the Interim Costs Order. On that ground alone it is impossible to see how the Petitioners could claim that the personal actions of the Part 8 Claimants had resulted or might result in any conduct of the affairs of the Company.

87. Further, there is an obvious and fundamental difference between the conduct of the respondents in Graham v Every in buying shares in breach of the pre-emption agreement, and the conduct by Mr. Fisher, Mr. Swain and Primekings in trying to recover what they were owed under the Interim Costs Order by obtaining charging orders and an order for sale. In Graham v Every, the dilution of the petitioner's shareholding resulted in him being able to vote fewer shares and to receive less dividends than he was entitled to vote or receive. But in the instant case, if the Petitioners had been forced to sell their shares, this would have been the result of their own failure to pay the Interim Costs Order and the lawful court orders against them which followed that failure.

88. Moreover, as was illustrated by the care taken by Deputy Master Cousins over the terms of the order for sale of the Petitioners' shares, any such sale would necessarily have been pursuant to a mechanism which the court considered to be fair and appropriate to achieve a proper price. The position in which the Petitioners might have found themselves would accordingly have been the position to which the law confined them, and ending up in that position could therefore not be said to be prejudicial to them, still less unfairly so.

Payment by the Petitioners of the Interim Costs Order (paragraph 195)

89. I have already observed that the allegation that the Petitioners themselves eventually paid the amount of the Interim Costs Order to Mr. Fisher, Mr. Swain and Primekings did not involve and could not possibly be said to have been causally connected to any conduct of the affairs of the Company.

The costs of the Misrepresentation Claim and the Part 8 Claim

90. For very much the same reasons as in relation to the pursuit of the Part 8 Claim itself, the pursuit by Mr. Fisher, Mr. Swain and Primekings of the detailed assessment of the costs of the Misrepresentation Claim and the Part 8 Claim could not possibly amount to conduct of the affairs of the Company, and could also not be said to be causatively connected to any other matters which were conduct of the affairs of the Company.

91. The Petitioners had been made the subject of final and binding orders for payment of costs. The pursuit of the detailed assessment of those costs leading to the issue of the Final Costs Certificates did not facilitate or lead to any identifiable conduct of the affairs of the Company or otherwise place the Petitioners in any different position as regards their shareholding in the Company than that in which they were entitled to be.

Conclusion

92. For these reasons, I consider that the Judge was wrong not to strike out the disputed paragraphs of the Points of Claim. Such paragraphs did not themselves amount to, or result in, conduct of the affairs of the Company within the scope of Section 994.

93. Although that conclusion is sufficient to dispose of this appeal, since the question of abuse of process was fully argued, I should also state my views on that question.

ABUSE OF PROCESS

The law

94. The leading modern authority on the principles of *res judicata* and abuse of process is the decision of the Supreme Court in Virgin Atlantic v Zodiac Seats [2014] AC 160. In that case, Lord Sumption (with whose analysis of the principles the other members of the Supreme Court agreed) stated, at paragraph 25, that *res judicata* is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. He concluded that they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation.

95. To that end, in its simplest form, issue estoppel prohibits a party from raising in subsequent litigation an issue which has been raised as a necessary ingredient of a cause of action or defence in earlier litigation between the same parties and which has been decided against that party. Issue estoppel cannot operate between different parties, or where the point was not raised and decided in the earlier litigation. It is also subject to an exception in special circumstances in order to do justice between the parties, for example where further material has become available relevant to the issue which could not, with reasonable diligence have been adduced in the earlier proceedings: see Lord Sumption's analysis at paragraphs 20-22 of Virgin Atlantic v Zodiac Seats of Lord Keith's speech in Arnold v National Westminster Bank [1991] 2 AC 93.

96. It is also possible for an action against a third party to be struck out as an abuse of process if it amounts to an impermissible collateral attack on an earlier court decision. The applicable principles in such cases were summarised by Morritt V-C in Secretary of State v Bairstow [2004] Ch 1 at paragraph 38:

> (a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court…
>
> …
>
> (c) If earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings.
>
> (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be re-litigated or (ii) to permit such re-litigation would bring the administration of justice into disrepute."

See also the recent reaffirmation of this approach by the Court of Appeal in Allsop v Banner Jones Limited [2021] EWCA Civ 7.

97. One illustration of the principle is Taylor Walton v Laing [2008] P.N.L.R. 11 in which a claimant who had failed in a first claim in contract against his counterparty was not permitted to bring a second claim against his solicitor for negligence. The claim against the solicitor was predicated upon an allegation that the true agreement between the claimant and the counterparty had been on terms that had been rejected by the judge in the first case, and that the solicitor had failed to draw up a written document accurately to reflect those terms. The Court of Appeal struck out the second claim as an abuse of process on the basis that it was a collateral attack on the first judgment and brought the administration of justice into disrepute. Buxton LJ concluded, at paragraph [25], that the proper course for the claimant would have been to appeal the first judgment rather than seek in effect to have it reversed by a court of concurrent jurisdiction hearing the second claim. He also observed that if, exceptionally, a second action amounting to a collateral attack on an earlier decision could be brought, it had to be based on new evidence that entirely changed the relevant aspect of the case: see per Lord Cairns LC in Phosphate Sewage v Molleson (1879) 4 App. Cas 801 at 814.

98. As Lord Sumption explained in Virgin Atlantic v Zodiac Seats, the abuse of process doctrine can cover the same ground as issue estoppel, but may also apply in a wider set of circumstances. So, for example, it can classically apply where a party seeks to raise in a second set of proceedings against the same opponent, an issue that was not raised in the earlier proceedings, but could and should have been. This is often known as Henderson v Henderson abuse of process after the case of the same name: see (1843) 3 Hare 100. The leading modern statement of the principle is the speech of Lord Bingham in Johnson v Gore Wood [2002] 2 AC 1 at page 31, where Lord Bingham advocated that the court should take,

> "a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

99. Whilst it will plainly be a more powerful factor in persuading a court that a second action is an abuse of process if the parties are the same as in the first, it is also clear that there need not be a precise identity between the parties for that to be so: see Aldi Stores v WSP Group [2008] 1 WLR 748 at [6]-[10] per Thomas LJ, referring with approval to the dictum of Clarke LJ in Dexter v Vlieland-Boddy [2003] EWCA Civ 14 at [49] - [53].

Analysis

100. I have set out the Judge's reasoning on the abuse of process point in paragraphs 43-46 above.

The Interim Costs Order

101. I consider that the Judge was wrong not to strike out paragraph 104 and the first six words of paragraph 105 of the Points of Claim. Those paragraphs are clearly intended to suggest that Marcus Smith J was in some way misled by the defendants to the Misrepresentation Claim as to the quantum of their costs when he made the Interim

Costs Order in the sum of £1.7 million. In the absence of any appeal against the Interim Costs Order, that order is binding as between the parties to the Misrepresentation Claim, and cannot be called into question as between them in the Petition. It would also clearly bring the administration of justice into disrepute if the Petitioners were permitted, as part of the Petition proceedings against Mr. Stiefel and Mr. Zeidler, to launch a collateral attack on the Interim Costs Order.

Pursuit of the Part 8 Claim

102. As regards the allegations relating to the pursuit of the Part 8 Claim seeking a sale of the Petitioners' shares, the Appellants do not appear to have argued before the Judge that there was an issue estoppel arising from the decisions of Deputy Master Cousins. However, the Judge was plainly correct in his assessment in paragraph 131(ii) of the Judgment that the allegations made by the Petitioners in the Points of Claim are materially identical to the arguments which were made to Deputy Master Cousins in seeking to persuade him either not to make an order for sale at all, or to stay such order pending determination of the Petition. The central submission made by the Petitioners to Deputy Master Cousins was that he should not make an order for sale of the Petitioners' shares or that he should stay any such order because complying with such order would be unfair to the Petitioners and would prejudice them because it would result in the sale of their shares in the Company at an undervalue. That is also the core allegation made in paragraph 186 of the Points of Claim in the Petition.

103. I consider that the Judge was also plainly correct in his assessment in paragraph 131(iii) of the Judgment when he stated that "this attempt to re-litigate issues which have already been decided would normally be an abuse of process." However, the Judge then thought that he had to adopt the "two-stage" approach identified by Lord Bingham in Johnson v Gore Wood and to consider whether there were special circumstances which excused such abuse. I do not think that this was correct, either as a matter of general approach, or on the facts.

104. In Johnson v Gore Wood, Lord Bingham was dealing with Henderson v Henderson abuse of process and indicated that a two-stage approach was not his preferred option, still less a mandated course. He said, at page 31F,

> "While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances."

As I have observed, the instant case is not an example of Henderson v Henderson abuse of process, since (as the Judge himself had identified) the points now sought to be raised in the Petition as regards the pursuit of the Part 8 Claim had been raised before Deputy Master Cousins.

105. It is also not the case that there were any "special circumstances" of the type classically encountered in cases of issue estoppel, such as the introduction by the Petitioners of new factual material that could not with reasonable diligence have been adduced in the first set of proceedings. Nor do I consider that the two points identified by the Judge as special circumstances should have deflected him from the conclusion that he had

reached at his first stage that the allegations in relation to the Part 8 Claim were an abuse of process.

106. The first point identified by the Judge in paragraphs 131(iv) and (v) was that the Deputy Master was only being asked to decide whether to stay the order for sale pending determination of the Petition. The Judge thought that although the Deputy Master expressed the view that it was "challenging to understand" how the issues before him could be decided in the Petition, he had accepted that it was for the Companies Court to decide those issues. The Judge thought that the Deputy Master would have been surprised to find that the effect of his judgment was that the Petitioners would be prevented from pursuing the same allegations in the Petition.

107. I do not think that is a correct analysis or reading of the Deputy Master's decision. In the Part 8 Claim, the argument run by the Petitioners was that if Deputy Master Cousins made an order for immediate sale of the shares, that would be unfair and would cause them prejudice, so that to avoid such a result the order for sale should be stayed to await trial of the issues which had been raised in the Petition. The Deputy Master clearly rejected those arguments and indicated his intention to make a final and binding order for immediate sale which would have disposed of the Part 8 Claim. He did so, as he explained in paragraph 36(4) of his judgment, because,

> "… unless and until the Defendants are successful in seeking permission to appeal the Final Charging Orders, out of time, and thereafter are successful in overturning those Orders, and/or are successful in overturning the Order for Sale of the Shares on appeal, *in my judgment, no challenge could be mounted on the basis that that they have been prejudiced by the making of the Charging Orders, or indeed the Order for Sale of the Shares.* The only prejudice occasioned to the Defendants is the fact that they are obliged to pay a considerable sum of money enshrined in the [Interim] Costs Order made following the conclusion of the [Misrepresentation Claim]."
>
> (my emphasis)

108. I do not read that paragraph as in any way an acknowledgement by the Deputy Master that his making of a final and immediate order for sale of the Petitioners' shares in the Part 8 Claim could conceivably be the subject of challenge under Section 994 on the Petition. Quite the reverse: the Deputy Master plainly thought that the Petitioners could not complain of prejudice resulting from court orders that they had neither complied with nor appealed. Indeed, if the Deputy Master had thought that his making of a final order for immediate sale in the Part 8 Claim could arguably have been the subject of complaint by the Petitioners under Section 994, in my view it is inevitable that he would not have made such an order. That is particularly so given that carrying such order into effect would result in the sale of the shares of the Petitioners and (at least arguably) their loss of standing to continue the Petition.

109. In coming to his view, the Judge relied on the Deputy Master's comments in paragraph 36(8) of the Deputy Master's judgment that he found it,

> "… somewhat challenging to understand how the [Interim] Costs Order … can somehow be the subject matter of consideration during the course of the hearing of the Section 994 Petition, absent any appeal;"

and that,

> "… it is possible that the Companies Court may find some difficulty in being seised of this issue when the Final Charging Orders have never been the subject matter of an application for permission to appeal, and permission to appeal has been refused in so far as the Order for Sale is concerned."

110. Read in context, and in particular by reference to paragraph 36(4), I think that these were rather ironic understatements. The position of the Deputy Master appears clearly from the final sentence of paragraph 36(8) in which he stated, (correctly),

> "The principles of *res judicata* must apply unless and until the Final Charging Orders and/or the Order for Sale of the Shares is/are overturned on appeal."

111. The second point relied upon by the Judge was that although the Deputy Master was clearly entitled "in context" to take the view that the Part 8 Claimants were entitled to enforce their legal rights as judgment creditors, the Deputy Master had not heard oral evidence or cross-examination. The Judge suggested that the Petition would give the opportunity for the Petitioners to use cross-examination to establish that the Appellants were pursuing "the Campaign", which "if they are able to do so, may justify relief under Section 996".

112. There are, I think, (at least) two answers to that. The first is that if the Petitioners had thought that it was necessary for there to be oral evidence or cross-examination to establish that what the Part 8 Claimants were seeking before Deputy Master Cousins was unfair to them, they could have applied for it in the Part 8 Claim. They did not. Moreover, I find it impossible in any event to see how the reasoning of Deputy Master Cousins as to the rights of the Part 8 Claimants to pursue satisfaction of court orders in their favour could have been affected by any such evidence.

113. The second answer is that the Judge made the same mistake that I have identified earlier, of assuming that if it could be shown that the Part 8 Claimants were pursuing "the Campaign", this might fall within Section 994, irrespective of whether any individual parts of that Campaign would amount to conduct of the affairs of the Company.

The costs of the Misrepresentation Claim and the Part 8 Claim

114. As indicated in paragraph 46 above, at paragraphs 138(i) and (ii) of the Judgment, the Judge refused to strike out the allegations concerning the quantum of costs of the Misrepresentation Claim and the Part 8 Claim on the bases (i) that there was no general principle that such matters should be dealt with on the assessment of costs, (ii) that the costs judge was highly unlikely to make findings that would assist the judge hearing the Petition to determine whether the detailed assessments formed part of the

Campaign, and (iii) that permitting the Petitioners to take such allegations to trial would not add very significantly to the time and costs of the Petition.

115. The Judgment was given before the issue of the Final Costs Certificates and the decision of Cockerill J striking out the Conspiracy Claim. Evidence of those matters was permitted to be adduced on the appeal by order of Nugee LJ, and in my judgment it is plainly appropriate that the Appellants should be able to rely upon those matters. The Final Costs Certificates and Cockerill J's judgment speak for themselves, and, contrary to Mr. Newman's submissions, I see no conceivable basis upon which such matters could require any further evidence so that another hearing before the High Court should be required to deal with them: see e.g. Notting Hill v Sheikh [2019] EWCA Civ 1337 at [23]-[28].

116. The central allegations made by the Petitioners (as claimants) in the Conspiracy Claim were described by Cockerill J in her judgment at paragraphs 135-137,

> 135. … The central claim is in conspiracy. The Claim Form alleges that:
>
> "The First to Ninth Defendants have unlawfully conspired to provide false and inflated cost information (including artificial costs budgets) to the Claimants and the Court with a view to causing damage to the Claimants by (a) improperly pressurising the Claimants and their legal team with improper threats of adverse costs (b) obtaining an improper payment on account of costs in favour of the Second to Fourth Defendants in the sum of £1.7m by misleading Marcus Smith J, which payment on account vastly exceeded the actual costs spent."
>
> 136. It also alleges that the First to Tenth Defendants covered up this conspiracy by:
>
> i) Providing false information to a costs draftsman and attempting to launder that false information by submitting it to a Master;
>
> ii) Presenting a fraudulently inflated bill of costs to the Senior Courts Costs Office;
>
> iii) Ensuring the Kings were not provided with any information about the costs fraud;
>
> iv) "Deploying a cynical and determined strategy of delay and obfuscation aimed at ensuring that the Claimants are bankrupted by interim costs orders before key evidence of fraud emerges from third parties, in order to stifle this claim ";
>
> v) Intimidating the Kings and their lawyers to prevent this claim being brought or decided on its facts.

> 137. Particulars of Claim were served on 19 March 2020. As will be discussed further below they allege a "Common Design" with three goals:
>
> i) To pressure the Kings' legal team to discontinue the claim by misleading the Kings into believing they would face adverse costs more than Primekings knew they would incur, and using threatening conduct (the so-called "Discontinuance Goal");
>
> ii) To enrich Primekings by falsely inflating costs that would be incurred to obtain the Kings' shares in KSGL at an undervalue (the so-called "Enrichment Goal"); and
>
> iii) To cover up the above (the so-called "Cover-Up Goal").”

117. It will be seen that these allegations encapsulate (and are certainly not narrower than) the allegations in paragraphs 104 and 105 (first six words), and Extracts (8) – (10) and (13) of the Points of Claim in the Petition. In essence they all depend upon allegations that the Appellants (and others) had conspired to give the Petitioners false information as regards their costs, and to produce and rely upon a fraudulently inflated bill of costs in relation to the Misrepresentation Claim.

118. Having determined that these allegations did not disclose an arguable cause of action in the tort of conspiracy in any event, Cockerill J also went on to address the argument that pursuit of these allegations in the Conspiracy Claim was an abuse of process in light of the issue of the Final Costs Certificates which had finally determined the amount of reasonable and proportionate costs incurred by the defendants to the Misrepresentation Claim: see paragraphs 237 to 291 of her judgment.

119. Having outlined the law on abuse of process, Cockerill J considered an argument by Mr. Newman on behalf of the Petitioners based upon Drukker v Pridie Brewster [2006] 3 Costs LR 439, to the effect that it was not an abuse of process for the Petitioners to seek to run such arguments in the Conspiracy Claim having declined to do so on the costs assessment, because, as a matter of principle, issues requiring oral evidence and cross-examination had to be tried in an action in the High Court and not on a costs assessment.

120. In her judgment, Cockerill J held that there was no such “Drukker principle” as contended for by Mr. Newman. Cockerill J stated, at paragraph 255 of her judgment,

> “On this issue the very clear answer at which I arrive is that there is nothing in the nature of a costs assessment which is unsuited to those determinations. On one level one can see this from the fact that certain of the costs issues which raise questions of fraud were originally taken by the Kings in their Points of Dispute for the detailed assessment – which it will be recalled were served on the same day as the Particulars of Claim in this action. On another level it is a plain matter of logic – the costs assessment process is there to determine what is the enforceable costs

> liability; it would be bizarre if it were to be said to be unsuited to determining issues which go to the heart of whether there is any costs liability at all, or which have a major impact on the amount owing."

121. Cockerill J went on to consider various other arguments advanced by Mr. Newman before concluding, at paragraphs 287-289,

> "287. Having had the decision of Master Whalan not to stay the assessment, the Kings took what was plainly a deliberate decision to remove those points from the Detailed Assessment; it appears that they did so in full knowledge that there was an argument that an estoppel would arise if they argued the points, and given that the point was raised squarely in the Reply to the Points of Dispute they were also alive to the abuse arguments which would arise if they did not. They chose to take that decision based on a desire to run the points in this litigation – the same desire which formed the basis of their arguments (rejected) before Master Whalan. Their reliance on Drukker was manifestly erroneous. Nor can there be any reliance on the supposed reservation of rights in this context. It was made quite clear to the Kings that this was not accepted.
>
> 288. There was time to decide the issues – 7 days had been set aside when the issues were live. The late abandonment of the issues will have led to a waste of court resources vis a vis other litigants. There was, as I have noted, nothing in the issues which was unsuitable for determination in the Detailed Assessment.
>
> 289. It follows that those aspects of the claim which put in issue the recoverability of Primekings' costs of the Misrepresentation Claim, or which take issue with their amount, are abusive and fall to be struck out."

122. I entirely agree with the reasoning and conclusions of Cockerill J, as indeed did Males LJ when refusing permission to appeal. Males LJ stated,

> "There is no reason in principle why an event occurring after issue of the claim should not be relied upon to demonstrate that further pursuit of the claim is an abuse of process. It was for the costs judge to determine whether the costs claimed had been incurred and were reasonable. That included any issue of fraud. I do not read the costs judge as praising the [Petitioners] for deciding to bring their claims in a different forum. Nor did [Cockerill J]. Rather the point was that the applicants were right to drop them. Having chosen to abandon those claims in the costs proceedings, the [Petitioners] were not entitled to pursue them in this action."

123. The same result must follow in the instant case. The proper quantum of the costs incurred by the defendants to the Misrepresentation Claim and the Part 8 Claimants has

been finally determined by the Final Costs Certificates and the Petitioners cannot seek to suggest on the Petition that the true costs were any less. Moreover, having decided not to run the arguments that the Appellants (and others) had been involved in the fraudulent inflation of costs and bills of costs before the costs judge in relation either to the Misrepresentation Claim or the Part 8 Claim, it would be a clear Henderson v Henderson abuse of process for the Petitioners to seek to do so now on the Petition.

124. That conclusion makes it unnecessary to deal in any detail with the reasons given by the Judge in paragraph 138 of his Judgment. Suffice to say that I do not agree with the Judge for the following reasons. First, the appropriate place for the Petitioners to run their arguments on fraudulent inflation of the bills was before the costs judge. Secondly, although the costs judge would not have been in a position to determine whether the inflation of the bills formed part of the Campaign, he would have been in a position to determine whether the bills were inflated at all. Thirdly, as I have indicated, the question of whether there was a Campaign is not, as such, the issue in the Petition. Fourthly, the issue of whether the bills were inflated or not, and what part that might (or might not) have played in any such Campaign would plainly have occupied the parties and the court for a significant additional time at trial: seven court days had originally been set aside for the costs assessment.

POSTSCRIPT

125. After the close of submissions on the appeal, the court was provided by the Petitioners' solicitors with a copy of a letter from the Metropolitan Police which referenced a fraud report that Anthony King had made to the police on 1 September 2021 in relation to the bill of costs of the Misrepresentation Claim. The letter indicated that the report was "an active and ongoing criminal investigation" which it anticipated might take between 6 and 12 months to complete. The letter was provided to the court in support of Mr. Newman's submissions that the case "concerns an evolving situation" which should dissuade the court from striking out the disputed paragraphs.

126. I do not consider that this letter affects the analysis which I have set out above. First and foremost, it has no bearing whatever upon the legal issue as to the matters that can properly be complained of under Section 994. Secondly, in so far as the letter might be said to relate to the abuse of process arguments, it also does not detract from the point that the Petitioners had the opportunity, which they declined, to run their arguments about fraudulent inflation of the bill of costs at the appropriate time before the costs judge. Making a recent complaint to the police does not change that fact. Thirdly, unless and until the judgments and orders relating to costs are set aside, they bind the parties to them and cannot be re-litigated in subsequent civil proceedings.

127. More generally, for the reasons that I have explained, the Petition proceedings must be properly limited in scope and should be conducted with due expedition in accordance with the overriding objective. The court cannot simply put the Petition on hold on a speculative basis to await the outcome of a recently commenced police investigation.

DISPOSAL

128. For these reasons, I would allow the appeal and strike out all of the disputed paragraphs of the Points of Claim.

LORD JUSTICE NUGEE:

129. I agree.

LORD JUSTICE GREEN:

130. I also agree and have nothing to add.

APPENDIX: THE DISPUTED PARAGRAPHS OF THE POINTS OF CLAIM

Extract (4)
Conduct Relating to the B Shares and EBITDA

96e. The efforts of Primekings in the Part 8 proceedings (referred to below) to take the B Shares from the King family for £10,000 (in fact £0 at first) is further evidence of the lengths to which Primekings is prepared to go to deny the King family their lawful entitlements in respect of the B Shares.

Extract (5)
Trial and Discontinuance of Misrepresentation Claim

104. Primekings applied to the Court for a payment on account. In making that application Primekings made no mention of its actual costs and its submissions were made by reference only to its budgeted costs of £1.872m. It is to be inferred that the actual incurred costs of Primekings at that time were not or not significantly greater than that figure, alternatively that Primekings made a tactical decision not to assert a significantly higher costs number in order to avoid the risk that the higher costs figure would have an adverse impact on the Court's discretion .

105. On the basis of those submissions, [Marcus Smith J made an order for a payment on account of £1.7m (plus interest and costs) to Primekings ('the Payment on Account Debt').]

Extract (6)
June 2017 obstruction of exercise of put option

127. By letter dated 16 June 2017, Mr King gave notice that he was exercising his put option in relation to the AK Option Shares (which represented 50%) of his shares in the Company.

128. It was made clear by Mr King at the time (in an email to Teacher Stern dated 31 August 2017) that " *The reason for exercising my 'put option' was to be able to pay down some of the debts that we owe to your client following our withdrawal of our case against them.* "

129. The terms of the put option provided for the put option shares (if their value was not agreed) to be independently valued on a pro rata basis, with no minority discount. The put option shares amounted to 6.65% of the Company's ordinary shares.

130. Transfer of those shares at a properly assessed fair value pursuant to the put option would have immediately brought about a substantial reduction in the Payment on Account Debt, as was Mr King's intention.

131. However, it is to be inferred that Mr Stiefel and Mr Fisher were, pursuant to the Campaign, set on a course of obtaining all of the Kings' shares at a much lower value, this being their true motivation, not the reduction of the Payment on Account Debt. Indeed, a reduction at that time in amount of the Payment on Account Debt was tactically undesirable for Primekings, as that debt provided the only basis for enforcement action against the Kings which could be used to seize ownership of the King' shares.

132. Consequently, Primekings cynically obstructed the exercise of the put option, as described below.

133. Knowing that the King family were in a straitened financial situation (exacerbated by the fact that Primekings, Mr Fisher, Mr Stiefel and Mr Zeidler had ensured that the £70,000 due to Mr King under the Settlement Agreement was not paid to him), Primekings refused to agree the appointment of an independent valuer unless Mr King paid his share of the valuer's fees up front, rather than from the proceeds of sale.

134. It is the Kings' position that Primekings' refusal to cooperate in the exercise of the put option was a breach of contract because:

a. The stipulation in paragraph 5.3 of Schedule 5 to the Subscription Agreement that, " *The fees of the appointed accountants shall be borne equally by the parties, who shall be jointly and severally liable for such fees* " concerned the incidence of those fees, not the timing of payment. There would have been nothing unusual about the fees being paid once the work was done, which fees (in the case of Mr King) could have been paid from the proceeds of sale. Anthony King had made it clear that he was content to have his share of the fees paid from the proceeds of sale.

b. Obstructing the exercise of the put option in this way was contrary to clause 19.1 of the Subscription Agreement, because it prevented the provisions of the agreement from being given full force and effect according to its spirit and intention.

135. Further, whether or not it amounted to a breach of contract, Primekings' refusal to cooperate in the exercise of the put option provides powerful support for the inference of its true intentions, and those of Mr Fisher, Mr Stiefel and Mr Zeidler, as set out herein, because:

a. An independent valuer would have been unlikely to have required payment up front for his or her services, and if payment up front had been demanded, Primekings would have had no difficulty in making such payment.

b. As described below, Primekings subsequently instructed a valuer (Mr Eastaway) to value the Kings' shares applying assumptions that differed very substantially from the (very standard) assumptions required to be made under Schedule 5 of the Subscription Agreement.

c. Primekings positively relied, in the charging order proceedings described below, upon the absence of any payment by the Kings towards the Payment on Account Debt. In a witness statement dated 22 May 2018 placed before Deputy Master Cousins Ms Toomer asserted (at paragraph 15) that " *the Defendants have not sought to sell their shares despite their position…".*

d. The only plausible motivation for Primekings obstructing the exercise of the put option is as set out herein.

136. The obstruction of the exercise of the put option amounted, both in itself and as part of the Campaign, to unfairly prejudicial conduct of the affairs of the Company.

Extract (7)
June Charging orders

137. Having deliberately obstructed this attempt by Mr King (via exercise of the put option) to pay back a significant proportion of the Payment on Account Debt, Primekings then proceeded to obtain charge over assets of the Kings as security for the Payment on Account Debt. In particular in June 2017, Primekings, Mr Swain and Mr Fisher applied for charging orders in respect of:

a. Anthony King's 201 Ordinary Shares;

b. Anthony King's put option of shares exercisable pursuant to schedule 5 of the Subscription Agreement;

c. James Patrick King, Susan Mary King and Amanda Geraldine Crowther as Trustees of the Trust's 402 Ordinary Shares;

d. James Patrick King and Susan May King's 6 B Ordinary Shares.

e. 263 Bradford Road Idle BD10 8SQ, the home of Mr and Mrs King

f. 77 Moorhead Lane, Bradford BD18 4JN the home of Anthony King and Gillian King and their 6 children

g. 103-107 Bradford Road Menston, a commercial property owned by Anthony and Gillian King.

138. Interim charging orders were made on 22 June 2017. These were made final on 3 August 2017.

139. As set out below, Primekings and Mr Fisher subsequently launched an application for an order for sale in respect of the shares only (not the properties), with a view to obtaining an order that the charged shares be sold to them at the lowest possible valuation.

Extract (8)
Service of papers

168. On the morning of 3 September 2017, whilst leaving his property to go to church, Mr King was personally served with papers to appear in court on 11 October 2017 for an examination under CPR 71.

169. That personal service was unnecessary and was intended to intimidate the King family as part of the Campaign and to put pressure on him to accept the terms set out in the 13 June 2017 letter. Up to that point High Court papers had been served by email from Teacher Stern and hard copies by registered post.

170. That service was timed to increase the pressure on the King family in advance of a meeting which Primekings wished to have on 6 September 2017 at which (it is to be inferred) Primekings wanted the King family to agree to hand over their shares in the company in consideration of what was asserted to be a costs debt of £2.7m.

171. Anthony King offered to attend that meeting with his mother on behalf of the family as his father was ill. Primekings were not willing to give any indication as to the agenda for the meeting and following Anthony King's request for clarity around the meeting he received a response on 3 September 2017 stating " *my clients are not prepared to negotiate by email or with you in isolation from your parents* ". It is to be inferred that Primekings wanted to be able to exploit the presence of Anthony King's elderly parents, and considered that Anthony King would not be so easily intimidated. That strategy continues to be evident in the letter sent to James King by Eversheds detailed in section XII below.

Extract (9)
11 and 12 October 2017 questioning

175. On 11 and 12 October 2017 each of the King Family was questioned about their assets before a judge, pursuant to CPR 71, as part of the enforcement of the Payment on Account Debt. The application relating to that process (which must have been approved by Mr Fisher and/or Mr Stiefel), signed by a statement of truth, stated that *"The total costs claim exceeds £3,000,000"* .

176. That hearing was attended by Mr Fisher accompanied by two lawyers from Teacher Stern, a junior barrister and Paul Downes QC. After the questioning of Mr James King on 12 October 2017, Mr Downes told Anthony King and James King that if the Kings handed over all of the shares, and in addition assigned the claim against DWF to Primekings (a significant adverse change from the terms offered in the June 2017 letter), they would get to keep their houses and they might get £100k to rebuild their lives. That statement was made openly because James King had declined to speak on a without prejudice basis with Mr Downes. It reinforces the inference (which naturally arises from the circumstances described herein) that the pursuit of the enforcement proceedings was part of the Campaign to obtain the Kings' shares for less than their true value.

Extract (10)
Pressure exerted by threat of further costs in respect of the Misrepresentation Claim

182. Notwithstanding the obligation on Primekings to commence detailed assessment in respect of the costs of the Misrepresentation Action, its solicitors' request that the normal time period for submitting costs for assessment of 3 months be extended to the end of October 2017, and numerous intimations from its solicitors that it intended to do so, Primekings has still not started detailed assessment more than 19 months after the making of the order directing such costs to be assessed if not agreed.

183. It is to be inferred that Primekings has been unwilling to start detailed assessment even though the rules require it because Primekings believes that that the recoverable costs following any assessment process are likely to be no greater than the payment on account made of £1.7m. That inference is supported by (i) the fact that Primeking's costs were circa £1.4m in February 2017 and the budget for the costs to trial was £1.7m (ii) no greater figure was ever mentioned to Marcus Smith J (iii) Mr Stiefel's offer to accept the B Shares in satisfaction of the legal bill (iv) the inexplicably evasive conduct of Primekings when Mr King has made reasonable requests for details about the costs position. In such circumstances the threat of detailed assessment has been used as an improper pressure tactic in furtherance of the Campaign.

Extract (11)
Part 8 Claim aimed at expropriating shares at an undervalue

184. On 27 October 2017, a Part 8 Claim was issued by Primekings, Mr Swain and Mr Fisher, seeking an order for sale of the Kings' shares.

185. The Part 8 Claim:
a. Must have been in the course of being prepared when the Second Stiefel Threat was made.

b. Was accompanied by a first witness statement from Clare Toomer of Teacher Stern, exhibiting a valuation that had been obtained from Mr Eastaway valuing the King share in total at £164,000, and stating at paragraph 12 that "no payments have been made by any of the Defendants towards the judgment".

c. Sought an Order that the Kings' shares be purchased by Primekings for a price based on Mr Eastaway's valuation, subject to an updating exercise which (it is to be inferred) Primekings anticipated would decrease the price.

186. The Part 8 Claim was structured and pursued in a manner calculated to result in an expropriation of the Petitioners' shares on terms that were unfair to the Petitioners in at least the following respects, which it is to be inferred that the Respondents knew and intended for the reasons set out below:

a. The Part 8 Claim sought to bring about a sale at a price substantially lower than the price that would have been determined by the application of the valuation mechanism set out in the Subscription Agreement. This fact, and the Respondents' knowledge of it, is demonstrated by:
    i. The difference between the assumptions that Mr Eastaway was instructed to make, and made, and the assumptions mandated by the Subscription Agreement; and
    ii. The Respondents' obstruction of Anthony King's attempted exercise of the Put Option over his shares, which would have resulted in a sale of those shares to Primekings pursuant to the mechanism set out in the Subscription Agreement, and the acknowledgement made on their behalf by Counsel during the Part 8 proceedings that this may give rise to a damages claim by Anthony King for breach of contract.

b. The Part 8 Claim sought to force a sale by reference to a valuation date that was prejudicial to the Petitioners, and was known and intended by the Respondents to be prejudicial to the Petitioners and correspondingly advantageous to Primekings, because, as the Respondents were aware:
    i. The valuation was made at a time and in a manner that maximised the adverse impact of the Respondents' unfairly prejudicial conduct of the affairs of the Company as described above. By way of example:
        1. It included the impact of the damage to the group's credit rating caused by the late filing of accounts; Mr Eastaway's report expressly relied upon the fact (drawn from the 2017 CEO's report exhibited to Mr Eastaway's valuation) that "The business has a credit score of zero due to late filing of accounts which is causing issues with creditors and suppliers";
        2. By adopting a net asset valuation approach (which was in any event unwarranted from a valuation perspective) Mr Eastaway's valuation directly reflected the adverse

impact of the Respondents' expenditure of Company money on the pursuit of the Campaign, including in particular the costs of the Bribery Action.

ii. The adoption of a net asset value approach not only reflected, but locked in the effects of such conduct. Mr Eastaway's valuation contained no or no proper attempt to estimate the future profits of the Company, having regard to the plans which it is to be inferred that its management in fact had to generate such profits over whatever planning horizon(s) they were working to.

iii. The Respondents thereby sought to deprive the Petitioners of the ability to sell on the advantageous terms (which they had bargained for) in the future, for example pursuant to the "tag along" rights in the Articles giving the Petitioners the right to sell their shares at the same time, and on the same terms, as a sale by Primekings of its own stake.

c. The Part 8 Claim sought to force a sale at a lower price than would have resulted from a valuation following the principles applicable in the context of Section 994 proceedings. The present proceedings, seeking an order for sale, had been issued before the Part 8 Claim came on for hearing before Deputy Master Cousins. Rather than agreeing to a sale based on the principles applicable in Section 994proceedings, recognising, as they should have done, that there had been unfairly prejudicial conduct of the Company sufficient for a Section 994buy-out order to be made, the Respondents resisted a stay of the Part 8 Proceedings and vigorously pressed ahead seeking to obtain a sale at a lower value.

d. The instructions given to Mr Eastaway included the instruction to assume the sale of the Kings' shares would be in individual parcels, with minority discounts applied to each. (Leading Counsel for the Respondents subsequently to Deputy Master Cousins conceded that that particular assumption should not have been made and the valuation should be adjusted to remove its effect. It is to be inferred that the Respondents were content for that concession to be made because by the time it was made, the impact of all the other instructions given to Mr Eastaway was that the value attributed to the Company was so low that the discounting had limited impact.)

e. The instructions given to Mr Eastaway included the instruction to assume that the shares should be valued on the basis of a forced sale, as expressly contrasted with a "willing buyer/willing seller" basis. As at least Mr Stiefel and Mr Fisher would have known, as qualified accountants, the making of such an assumption was inconsistent with the standard accounting definitions of fair value. Mr Eastaway relied upon this assumption, among others, to explain the dramatic difference between his valuation of the Company and the valuation produced by Costas Constantinou of Smith & Williamson, the expert instructed by the Respondents in the context of the Misrepresentation Action. Mr Constaninou's valuation report was dated 10 February 2017, only 8 months earlier than Mr Eastaway's report. Mr Constantinou's opinion was that the value of the Company's voting shares as at 24 January 2017 was £10.3m, assuming that the Company would have sufficient distributable reserves to make the expected pay out of B ordinary shares.3 In the absence of any explanation having been provided by the Respondents as to why they considered it necessary to instruct a different valuer, rather than to instruct Mr Constantinou to update his valuation, it is to be inferred that there is no innocent explanation for doing so.

f. The instructions given to Mr Eastaway included an instruction that the shares be valued on the basis that no warranties would be given in connection with the transfer of the shares. As at least Mr Fisher and Mr Stiefel would have known, a normal valuation process would have

involved the assumption that the terms of sale included the warranties that would normally be included in an arm's length transaction between a willing buyer and a willing seller.

g. The instructions given to Mr Eastaway included an instruction that the shares be valued on the assumption that the shareholding was subject (in the hands of the purchaser) to the obligations and rights of third parties set out in the Company's Articles. As the Respondents would have appreciated, that assumption bore no relation to the commercial and legal reality, which was that a purchaser of all of the Company's shares would not need to be concerned about such matters because (i) there would be no other shareholders following such a purchase, and in any event (ii) the purchaser could alter the Articles.

h. The instructions given to Mr Eastaway included the expression of opinion that there was no prospect of any payment being made to the holders of the B Shares. Mr Eastaway's report dated 16 October 2017 adopted that opinion, apparently without any proper process of analysis as its validity. The logic behind that assumption, namely that the Company would never make any distributable profits or have 'other monies' available, is plainly inapplicable to a company trading as a going concern. It is to be inferred from (among other things) the preparation of accounts on a going concern basis and the continued support of the Kirsh group for the business, that the Respondents in fact expected the Company to continue to trade as a going concern and believed that in due course it would generate distributable profits sufficient to redeem the B Shares in full and thereafter generate ongoing profits for the ordinary shareholders.

i. Mr Eastaway's attribution of a negligible value to the B Shares was also inconsistent with his attribution of some (albeit low) value to the ordinary shares, because Mr and Mrs King are entitled to be paid the whole of the at least £2,133,000 price of the B Shares before any profits become available for distribution to the holders of the ordinary shares.

187. As the Respondents knew and intended, the overall impact of the instructions given to Mr Eastaway was to produce a valuation which bore no resemblance to the commercial reality of the Petitioners' position, in which they have a 40% stake in a very substantial business, with tag along rights to ensure pro rata participation in any sale of the whole, together with the right to receive £2,133,000 in respect of the B Shares as and when the Company was lawfully able to pay it, and with rights under Section 994of the Companies Act to protect them against any unfairly prejudicial conduct by the majority.

188. At a hearing on 31 May 2018, Leading Counsel for the Respondents made the submission that " *in effect, the order sought [by the Petitioners in the Part 8 Claim] is that the court stays execution so that they can benefit from the labour and efforts of those running the company over the years to come* ". It is to be inferred that the inverse of that submission reflected the true motivation of the Respondents, namely, to prevent the Petitioners from participating in or receiving a fair price reflecting or even remotely approaching the true commercial value of Company, which included its potential to make future profits.

189. The Respondents' intention, by the pursuit of the Part 8 Claim, to bring about a result that was unfairly prejudicial to the Petitioners is to be inferred from all the circumstances set out herein, fortified in particular by the following facts and matters:

a. The Respondents' own previously expressed views about the value of the business and/or the Kings' shares. By way of example only:

i. Mr Stiefel stated on 17 May 2017 that " *The chances of KSGL reaching £100m is good and there is no reason why it should not* ".
ii. Around 6 April 2017, Mr Stiefel told Steve Evans (the former COO of KSSL) that Primekings would consider an offer of £20m for the Kings' 60% stake in the business.
iii. In October/November 2017 the Kings indicated a willingness to buy back the business at a premium which would have covered the Payment on Account Debt and debts owed to the Kirsh group. Teacher Stern stated that such a sale was 'of no interest' to their clients.
iv. The terms of transfer sought to be achieved by the charging order proceedings were much more disadvantageous to the Kings even than the already unfair terms proposed in the 13 June 2017 letter. That letter indicated that the Respondents appreciated that the Kings' shares were worth more than the Kings' liability in respect of the costs of the Misrepresentation Action.

b. The money Primekings has been willing to spend on a Campaign aimed at obtaining the shares, including on the Bribery Action, which greatly exceeded the value of the shares as asserted for the purposes of the Part 8 Claim by the Respondents.

c. The pressure for a result exerted by Primekings on their solicitors which led those solicitors to make an improper threat to report the Deputy Master in an email sent to the Court on 26 April 2018 without a copy being sent to the solicitors for the Kings.

d. The fact that the amount that would have been realised by the Respondents from the Part 8 Claim would not appreciably have reduced the Payment on Account Debt, and indeed the effect of the Part 8 Claim was likely to increase that debt, once legal costs had been taken into account.

190. The pursuit of thePart 8 Claim amounted, both in itself and as part of the Campaign, to unfairly prejudicial conduct of the affairs of the Company within the meaning of Section 994. It forms an integral and important part of a course of conduct, involving the direct exercise of powers held by the individual Respondents as directors of the Company and KSSL, and Primekings as the Company's majority shareholder, (as well as the exercise of rights held individually) that has been pursued with the objective of expelling the Kings from participation in the management of the Company and expropriating their shares for less than their fair value.

191. Further or alternatively, the fact and manner of the Respondents' pursuit of the Part 8 Claim is highly relevant to the existence and scope of the Campaign, the unfairness of other conduct pleaded herein amounting to conduct of the affairs of the Company, including the inferences to be drawn as to the intentions and objectives of the Respondents, and to the relief that it is appropriate to grant in respect of such conduct.

Extract (12)
Payment of the Payment on Account Debt

195. In October 2018, the Payment on Account Debt was repaid in full, thus bringing the Part 8 claim to an end. That payment came about when the Kings received a substantial payment from DWF's insurers relating to the services provided by DWF in connection with the Misrepresentation Action. Prior to that time the Kings were not in a position to pay off the Payment on Account Debt, as the Campaign had been effective in ensuring that they were not in a position to do so.

Extract (13)
Letter wrongly asserting more money owed

196. In a letter dated 30 October 2018 to Mr Anthony King, the Respondents (through their solicitors) asserted that:

a. " *you and your parents continue to owe significant sums of money to our clients under the Costs Order* ." That statement was plainly wrong as a matter of law – the Petitioners have no legal liability to pay unassessed costs.

b. " *our client is entitled to updates in matters that affect its position as a judgment creditor and you should therefore be transparent and forthcoming about any significant changes in your financial position* ." That statement was also plainly wrong as a matter of law, as *Primekings* was no longer a judgment creditor. In any event a judgment creditor has no such entitlement as a matter of law.

c. "*our client has a fixed charge pursuant to the final charging order dated August 2017* ." That was plainly incorrect. The Payment on Account Debt had been paid in full and Primekings had agreed (as it had to) that the charge be discharged. On 16 October 2018 at 18.14 Teacher Stern had stated to RPC in correspondence, " *We acknowledge receipt of £1105 and agree to the discharge of the charging orders* ."

197. In the circumstances, the letter of 30 October 2018 amounted to harassment and it is to be inferred that it was sent on the instruction of the Respondents in order to add further unfair pressure on the King Family pursuant to the Campaign, and/or represented an unwarranted attempt to extract confidential information about the financial position of the Kings to which the Respondents had no entitlement.

Extract (14)
Costs of the Part 8 Claim

198. At the hearing on 17 October 2018, Primekings applied for an order for costs, and in the course of doing so placed two Costs Schedules before Deputy Master Cousins indicating that costs totalling £199,621.80 had been incurred. The covering letter stated: "Absent any proper explanation by your clients as to how, at the eleventh hour, they have been able to make (part) payment, it is our clients' position that their costs should be awarded on the indemnity basis, to be assessed if not agreed. On that basis, we will be seeking a payment on account in the sum of £120,000.".

199. On 21 December 2018 Teacher Stern wrote to RPC stating: " *Our clients' costs schedules total £199,621.80 although we put you notice that actual billed costs are more significant. Those costs will of course be a matter for detailed assessment pursuant to paragraph 47 the Judgment. For the purposes of seeking to agree a payment on account, our clients propose that your clients pay £180,000 by 15 January 2019, with the balance to be assessed (if not agreed)* ."

200. RPC immediately responded asking Teacher Stern to clarify (1) whether the bill that their clients would submit for Detailed Assessment would exceed the signed Costs Schedules of £199,621.80 that had been placed before Deputy Master Cousins, and if so (2) by how much, and (3) why such sum was not included in the Costs Schedules put before the court.

201. On 24 December 2018 Teacher Stern wrote asserting that there were approximately £130,000 of additional costs (exclusive of VAT and excluding work post receipt of Judgment) and asserting that Primekings statements of costs " *were conservatively prepared in an effort to avoid further cost of dispute, expected on the basis of your client's claimed penury to be difficult to recover and on the basis of standard assessment. They are no longer applicable to the ordered indemnity basis assessment and we expect that a substantial additional part of our billed costs will be fully recoverable on the indemnity basis* ." That was factually and legally wrong – the original statements had been prepared in the knowledge that the Respondents would be seeking the assessment of such costs on the indemnity basis and in circumstances where it was known that the Petitioners had been able (as explained above) to repay the Payment on Account Debt, and there was no legitimate reason for the Respondents to claim further costs that had not been included in the schedules.

202. It is to be inferred that the costs figures provided to Deputy Master Cousins represented the costs that the Respondents genuinely believed at the time to be properly recoverable on the indemnity basis (and which they believed could be relied upon without risking adversely influencing the Deputy Master's discretion as to the costs order to be made). Consequently, the assertion of an additional entitlement to costs represented an improper attempt to exert pressure on the Petitioners, in furtherance of the Campaign. That inference is strengthened by the fact that (i) this is not the first occasion on which the Respondents have asserted that they have incurred properly recoverable costs which exceed schedules relied on at hearings (they did the same thing in relation to the costs of the Misrepresentation Action), and they have a track record (in relation to the costs of the Misrepresentation Action, as described above) of being unwilling to subject such costs to detailed assessment, or substantiate them in any meaningful way.

203. The exertion of pressure in that way demonstrates that the Campaign, funded by the Company, is still in full flow notwithstanding the initiation of these proceedings and the repayment of the Payment on Account Debt. Actions taken which are calculated or likely to reduce the ability of the Kings to seek an effective remedy from the Court

Additional disputed paragraph

228. …
b. The Respondents prevented Mr King from exercising his put option in June 2017 as set out above.