Neutral Citation Number: [2021] EWCA Civ 904

Case No: A3/2020/00437

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)
His Honour Judge Eyre QC
[2020] EWHC 5 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2021

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE COULSON

- -

IN THE MATTER OF THE HUT GROUP LIMITED
and
IN THE MATTER OF THE COMPANIES ACT 2006

Between:

ZEDRA TRUST COMPANY (JERSEY) LIMITED	**Respondent /Petitioner**
- and -	
THE HUT GROUP LIMITED & OTHERS	**Appellants/ Respondent**

- -
- -

Lance Ashworth QC and Dan McCourt Fritz (instructed by **Gowling WLG (UK) LLP**) for the **Appellants**
Paul Chaisty QC and George McPherson (instructed by **DWF LLP**) for the **Respondent**

Hearing dates: 18-19 May 2021

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Approved Judgment

Lord Justice David Richards:

Introduction

1. This is an appeal against an order dismissing an application to strike out a petition presented under section 994 of the Companies Act 2006.

2. The petition was presented on 7 January 2019 and alleges that the affairs of The Hut Group Limited (the company) have been conducted in a manner which is unfairly prejudicial to the interests of the petitioner, Zedra Trust Company (Jersey) Limited (Zedra). Zedra, as the trustee of a discretionary settlement (the trust), holds shares in the company which, at the date of presentation of the petition, represented some 8.34% of the issued share capital of the company and 9.63% of the voting rights exercisable at general meetings.

3. The respondents to the petition are the company and 14 individuals who held office as directors of the company for the whole or part of the period between May 2011 and November 2018. It was within that period that the conduct which Zedra alleges to have been unfairly prejudicial occurred. For convenience, I will refer to them as the respondents, although they are appellants on this appeal.

4. The central and, by some distance, the most important complaint made in the petition is that, as a result of issues of shares by the company between 19 February 2016 and 30 May 2018 (the share issues), the relative size of Zedra's shareholding was reduced from 13.12% of the company's issued share capital and 13.28% of the voting rights to 8.34% and 9.63% respectively. Complaints are also made about an alleged failure to comply with an obligation to provide information to Zedra and about alterations to "co-sale" rights in the company's articles of association which adversely affected shares held by Zedra. Events since the presentation of the petition, and indeed since the order under appeal, mean that these alterations to the co-sale rights have ceased to have any impact on Zedra but the allegations are relied on as corroborative of the alleged motives of the respondents in authorising the share issues.

5. By an application notice dated 14 June 2019, the respondents applied under CPR 3.4 to strike out the petition as an abuse of the court's process, or to strike out parts of it, on the grounds that they were improperly pleaded, unsustainable or abusive.

6. The application was heard by His Honour Judge Eyre QC, sitting in the Business and Property Courts in Manchester, on 23 September 2019. He gave judgment on 17 January 2020, dismissing the application. The respondents appeal, with permission granted by Asplin LJ on 7 July 2020.

Sections 994 to 999 of the Companies Act 2006

7. Part 30 of the Companies Act 2006 (the Act), headed "Protection of members against unfair prejudice", confers jurisdiction on the court to give relief where a member of a company establishes "(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": section 994(1).

8. Although expressed in very broad terms, the approach to be adopted in assessing whether conduct is unfairly prejudicial, in the light of the commercial context in which most companies operate and the underlying principles of company law, has been considered and settled by the courts. The leading cases are *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 in this court and *O'Neill v Phillips* [1999] UKHL 24, [1999] 1 WLR 1092 in the House of Lords. In the second of those cases, Lord Hoffmann, repeating in substance what he had said in the first, said at pp.1098-1099:

> "…a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted...there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

9. As was made clear in those cases, the terms on which a member agreed that the affairs of a company should be conducted will usually be found in the articles of association, any shareholders' agreements, the fiduciary (now statutory) duties of directors and the principles of law which limit the power of a majority of members to bind the minority by resolutions in general meeting. There may be cases, such as those discussed by Lord Wilberforce in *Re Westbourne Galleries Ltd* [1973] AC 360 at p.379, where the particular circumstances of the case, normally involving the personal relations between the members of a small company, may subject the exercise of legal powers to equitable restrictions going beyond the articles, agreements and rules of law. However, such cases are not the norm. As Lord Wilberforce said, the company structure "is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small."

10. As will be seen, the circumstances of the present case do not call for the application of the equitable considerations discussed by Lord Wilberforce. The relationship between all the parties has at all times been entirely commercial, as evidenced by the detailed and complex provisions, including those for the protection of members' interests, contained in the company's articles and in the shareholders' agreement to which Zedra acceded when it became a shareholder.

11. The range of relief available to the court where unfair prejudice is established is very broadly stated in section 996, as confirmed by the authorities which, as Vos J (as he then was) said in *Apex Global Management ltd v FI Call Ltd* [2013] EWHC 1652 (Ch), [2014] BCC 286, "all speak with one voice. They show that ss.994-996 provide a wide and flexible remedy…". Section 996(1) provides that the court "may make such order as it thinks fit for giving relief in respect of the matters complained of" and, expressly without prejudice to the generality of that power, section 996(2) specifies in five paragraphs orders that the court may make, including regulating the conduct of the company's affairs in the future, requiring the company to alter its articles, requiring the company to do particular acts or to refrain from doing such acts, and providing for the purchase of any member's shares by other members or by the

company. Whether any order should be made, and if so what order, is left to the discretion of the court.

The facts

12. As the application to strike out the petition was made under CPR 3.4, including on grounds that pleaded allegations of bad faith and improper purpose against the directors were unsustainable on their own terms, the court proceeds on the basis that the allegations of primary fact made in the petition are taken, for the purposes of the application and this appeal only, to be true. Further pleadings and some evidence filed on the application have amplified or clarified those allegations in some respects and we have been informed of some uncontentious facts which have a bearing on the appeal.

13. The business of the company is described in the petition as that of an international technology company focusing on digital retail in the beauty and wellbeing sectors. It was incorporated as a private company in 2008**,** although the business was started a few years earlier, and has grown rapidly, in part through the acquisition of brands and other businesses. Significant amounts of new capital were raised through the issue of shares to institutional investors. In September 2020 the company's shares were listed on the London Stock Exchange and we were told that its market capitalisation is now some £6 billion.

14. During the period relevant to the petition, from 2011 to 2018, the company had a complex share capital structure. From 31 May 2011, it comprised four classes of ordinary shares (A, B, C and D), various classes of shares with limited capital rights (A, A1, A2 and so on) (collectively 'the A Shares') and Deferred Shares. Subsequently further classes of A Shares were created and issued. Many of these classes were created for the purpose of the acquisition of businesses or new injections of capital. We were told that, as part of the listing of the company's shares, the capital structure was considerably simplified, with a single class of ordinary shares replacing the A Shares and the A and B Ordinary Shares.

15. In brief, the rights which were attached to the different classes of shares, so far as relevant, may be summarised as follows. The A Ordinary and B Ordinary Shares and the A Shares ranked pari passu for dividends. On a return of capital, there was a waterfall, with the holders of each class of A Shares receiving the amounts subscribed by them respectively but no more, in descending order (A Shares followed by A1 Shares and so on), and the balance being paid pari passu among the holders of the classes of Ordinary Shares. A similar provision applied for the proceeds of share and asset sales (as defined in the articles). Voting rights were confined to the A and B Ordinary Shares, with each such share carrying one vote. The holders of A Shares had the right, exercisable at any time, to convert some or all of their A Shares into B Ordinary Shares on a one-for-one basis. Conditional on a listing, all A Shares, and the C and D Ordinary Shares, would automatically convert into B Ordinary Shares.

16. Prior to May 2011, Zedra and Oliver Nobahar-Cookson owned all the shares in Cend Limited (Cend) which carried on business as an online retailer trading as "MyProtein". The business had been founded by Mr Nobahar-Cookson and he was a director of Cend. As I understand it, he was the settlor of the trust. By a share purchase agreement dated 31 May 2011, the Company acquired all the shares in Cend

in consideration for a cash payment of £31,171,182 and the issue of 153,904 A Ordinary Shares and 153,904 A4 Shares, valued at £26.5 million, to Zedra. The A4 Shares were created for the purposes of the acquisition and Zedra was at all times the only holder of A4 Shares. In or about October 2011, Zedra acquired 52,068 A2 Shares which, combined with its other shares, gave it 13.2% of the company's issued share capital and 13.37% of its voting rights.

17. As part of the transaction, Zedra acceded by a deed of adherence dated 31 May 2011 to a shareholders' agreement made in 2010 (the shareholders agreement) when shares had been subscribed by an institutional investor.

18. In exercise of rights under the terms of the share purchase agreement, Zedra appointed Mr Nobahar-Cookson as a director of the company on completion of the agreement. He remained a director until his resignation on 15 October 2012, when he was replaced by a Mr David Golden. Mr Golden resigned on 19 March 2013 and Zedra did not thereafter exercise its right of appointment until 20 February 2019. Mr Nobahar-Cookson had resigned as a director in circumstances where claims and counterclaims were being made under the share purchase agreement. The petition alleges that this was an acrimonious dispute which led to the resignation and to an irretrievable breakdown in the personal and professional relationship between Mr Nobahar-Cookson and other directors. The claims and counterclaims were tried by Blair J in October 2014. Damages of £4.3 million were awarded on the company's claim and £10.8 million on the sellers' counterclaim: see [2014] EWHC 3842 (QB).

19. It is convenient to deal with further material facts and developments in the context of the allegations made in the petition.

The petition

20. The allegations of unfair prejudice made in the petition, although linked, essentially come under three heads. They are: the removal and variation of co-sale rights as they affected the A4 Shares; the diminution in the relative size of Zedra's shareholdings; and a failure by the company to provide information.

Head (i): Removal and variation of co-sale rights

21. "Co-sale rights" were conferred by article 6 of the company's articles. It applied if Matthew Moulding (the founder of the company) or his wife wished to transfer any shares, with immaterial exceptions. In that event, the selling shareholder was required to procure the purchaser to make an offer to purchase a proportion of the A Shares of all classes, and also of any A Ordinary Shares owned by the trust, on the same terms and conditions, including as to price, as the sale by the selling shareholder.

22. A special resolution was passed on 7 August 2014 which, among other alterations to the articles, had the effect of removing the co-sale rights as they applied to the A Ordinary Shares owned by the trust.

23. The respondents' case is that this removal of co-sale rights from the A Ordinary Shares held by Zedra was not deliberate but was made in error. Before the presentation of the petition, they said that they would propose a resolution to restore the rights, although they had not done so by the date of presentation. That step was

taken after the petition was presented. They also say that the removal of these rights was ineffective because it was made in breach of section 630 of the Act, which requires a variation of class rights to be approved by the class affected, presumably relying on *Cumbrian Newspapers Group Ltd v Cumberland & Westmoreland Herald Newspaper & Printing Co Ltd* [1986] BCLC 286 to show that, as regards the co-sale rights attached to its A Ordinary Shares, Zedra constituted a separate class.

24. A further alteration to the co-sale rights was made on 5 September 2017. The co-sale rights were removed from all classes of A Shares except A2 and A4 Shares, but co-sale rights were conferred on B Ordinary Shares arising from the conversion of all classes of A Shares except A4 Shares. While this benefitted Zedra as the holder of A2 Shares, it was prejudiced as the only holder of A4 Shares. In that capacity, it could either retain its A4 Shares with co-sale rights but limited capital rights or convert them into B Ordinary Shares with unlimited capital rights but no co-sale rights. On the face of it, this appeared to discriminate against Zedra as the holder of A4 Shares.

25. In addition, on 5 September 2017, all the holders of A Shares, except Zedra, converted their shares into B Ordinary Shares. At the same time, the company declined to allow Zedra to inspect the register of members, which would have disclosed the conversions, and permitted inspection in December 2017 only after an order of the court requiring it to do so. Zedra then inferred that the other holders of A Shares had converted their shares into B Ordinary Shares because an event was anticipated that would make those shares more valuable and it therefore followed suit by converting its A4 Shares into B Ordinary Shares, but of course lost the co-sale rights.

26. In paragraphs 27 and 37 of the petition, Zedra alleges that, in respect of the alterations in co-sale rights made in 2014 and 2017, combined in the latter case with the refusal to permit inspection of the register of members, "the Company and its directors acting in bad faith and/or for an improper purpose" removed the co-sale rights attached to the A Ordinary Shares in 2014 and preferred the interests of the Converting Shareholders to the interests of Zedra as a holder of A4 Shares in 2017, in each case in "breach of the duties set out in paragraph 9 above". As with paragraph 27, this is primarily an allegation of breach of duty against those individual respondents who were directors at the time, which may also involve an alleged breach of clause 6.1 of the shareholders agreement as regards the shareholder directors.

27. These allegations need some unpacking. The allegations are primarily, and perhaps exclusively, of breach of duty by the directors. However, as required by the Act, the alteration of the articles to vary or remove co-sale rights must have been made by a special resolution passed by the members, not by the directors. However, it is almost certainly the case that the resolutions were put to the members by the directors and I read the allegation to be that, in doing so, the directors acted in breach of duty. The refusal to permit inspection of the register of members in 2017 was an act of the directors (or some of them). In paragraph 3 of the points of reply, speaking generally of the petition, Zedra pleads that its claims are not advanced against the individual respondents solely and exclusively in their capacity as directors or by reason of their conduct solely in that capacity. It pleads that five of them were also shareholders (the shareholder directors) and that, as such, they owed "relevant obligations to Zedra including, inter alia, pursuant to clause 6.1" of the shareholders agreement as both directors and shareholders.

28. By clause 6.1, the shareholders who were parties to the shareholders agreement agreed to exercise their voting rights as shareholders and directors to procure the proper maintenance and observance of the agreement and the articles. Without expressing a view on the point, I can see that it is arguable, by virtue of clause 6.1, that the duty of the shareholder directors to exercise their powers as directors in good faith and for a proper purpose was owed to Zedra as well as to the company. In terms of a basis for relief under sections 994-996, however, I doubt whether it adds anything of substance.

29. The respondents do not appeal against the judge's refusal to strike out the allegations of unfair prejudice in paragraphs 27 and 37, on the grounds of their sustainability.

30. However, in the course of the hearing it emerged that the co-sale rights were removed for all shares as part of the capital reorganisation prior to the listing. No occasion for the exercise of co-sale rights in fact occurred prior to their removal, with the result that Zedra has not suffered any prejudice, although I can see that it could be said that it suffered contingent prejudice at the time of the alterations to the co-sale rights. Among the relief sought in the petition are orders that the articles be altered to reinstate the co-sale rights formerly attached to the A Ordinary Shares, which as earlier mentioned was in fact done after the presentation of the petition, and to confer co-sale rights on the B Ordinary Shares converted from A4 Shares.

31. Because of the complete removal of the co-sale rights, there is no prospect of this relief being granted, as I understood Mr Chaisty QC for Zedra to accept. The petition also seeks the payment of equitable compensation by the directors involved in these events. Given that Zedra does not appear, in the event, to have suffered any loss, there does not seem to be any prospect of any such order for compensation.

32. The result is that, although the petition discloses an arguable case of unfair prejudice as regards the co-sale rights, there is little or no prospect of the grant of any relief to remedy it. If the petition were limited to these allegations, there does not appear to be any basis on which it could proceed. However, if there are other sustainable allegations, which could result in relief and which are in any relevant respect corroborated by these allegations, such as showing a propensity or motive to exercise powers so as to discriminate unfairly against Zedra, the allegations can properly remain in the petition.

Head (ii): diminution in the relative size of Zedra's shareholding

33. The petition states Zedra's shareholding as at 18 February 2016 as representing 13.12% of the company's issued share capital and 13.28% of its voting shares. In paragraph 41, Zedra pleads that since that date its "percentage shareholding in the Company has progressively and substantially diminished as a result of the following share allotments and/or purchases (the "Share Issues")". A table sets out 10 issues of shares between 19 February 2016 and 30 May 2018, which have had the effect of reducing the relative size of Zedra's shareholding to 8.34% of the issued share capital and 9.63% of its voting shares. Apart from the dates of these share issues, no information concerning them is pleaded.

34. I should set out Zedra's pleaded allegations as regards these share issues in full:

"44. Since 18 February 2016 the Company and its directors acting in bad faith and/or for an improper purpose have taken steps to dilute Zedra's minority shareholding in the Company which is a breach of the duties set out at paragraph 9 above.

44.1 In breach of the Information Obligation, the Company and its directors failed or failed adequately to inform Zedra of the Share Issues or their consequences prior to the dates set out above. On the contrary:

(1) On a date unknown and without giving prior notice to Zedra, the directors unilaterally elected to disapply the Information Obligation in breach of Clause 15.5 of the SHA which provides that no modification, amendment or waiver of any of the provisions of the SHA shall be effective unless made in writing specifically referring to the SHA and duly signed by the Company and a Shareholder Majority (as defined) at the date such modification, amendment or waiver is agreed. Zedra relies on Gowling's letter dated 11 May 2018 which stated that Clause 4 of the SHA was "no longer operative as originally drafted" but without specifying when or by what legal mechanism Clause 4 had ceased to have effect.

(2) The directors deliberately concealed relevant information from Zedra by wrongly withholding inspection of the Company's register of members until November 2017 as set out at paragraph 37.3 above.

44.2 Further, the directors did not offer Zedra the opportunity to participate in the Share Issues pro rata or at all. Specifically, during the period of the Share Issues set out above the directors failed to make any or any reasonable inquiries with Zedra as to whether it wished to subscribe for more shares in the Company and if so at what price. Had such inquiries been made and had the shares been offered at an affordable price, Zedra would have elected to participate in the Share Issues so as to maintain its financial interest in the Company.

44.3 Accordingly, insofar as the Company purported to obtain Zedra's consent to the Share Issues by giving notice thereof to Zedra, such consent was improperly obtained, insufficient information having been disclosed to Zedra as to the Share Issues and/or their consequences as set out at paragraph 44.1 and 44.2 above.

44.4 The dilution of Zedra's shareholding in these circumstances was contrary to Zedra's legitimate expectations as set out at paragraphs 16.1 and 22 above and was part of a concerted attempt by the directors to prejudice Zedra's interests as a shareholder which included the actions described at

> paragraphs 24 to 39 above, and so was for an improper purpose.
>
> 45. In the premises, since 18 February 2016 Zedra's shareholding in the Company has been unfairly diluted."

35. Paragraph 44.4 refers to "legitimate expectations" set out in paragraphs 16.1 and 22 of the petition. Paragraph 16.1 refers to Zedra having a legitimate expectation that the company and its directors would not take any step "which unfairly diluted" its shareholding, which does not seem to add anything to Zedra's general legal rights. Paragraph 22 does not refer to a legitimate expectation but to an alleged contractual right to be informed of any proposed action which would cause Zedra's shareholding to fall below 10%.

36. In their points of defence, the respondents deny the allegations of bad faith, improper purpose and unfair prejudice. They also plead, as regards paragraph 44.2, that there was no obligation to offer Zedra (or any other shareholder) an opportunity to participate in any of the share issues or to make any enquiries of Zedra as to whether it wished to subscribe for more shares in the company. They also plead that Zedra did not have the right to veto or block such share issues.

37. In points of reply, Zedra pleads that the directors were obliged under article 3.2 of the company's articles to allot the shares comprised in the share issues "to existing preferential shareholders in proportion to their existing shareholdings" and that the company did not notify Zedra that article 3.2 did not apply nor the reasons why it did not apply. It is not entirely clear what is meant by "preferential shareholders", but I take it to include Zedra in respect of some or all of classes of the shares that it held.

38. This allegation is addressed in a rejoinder served with permission given by Judge Eyre QC. It is pleaded that article 3.2 did not apply to any of the share issues with reasons provided in respect of each share issue.

39. By way of remedy, Zedra seeks equitable compensation from the company and the directors, and it also seeks in paragraph (6) of the prayer for relief:

> "Further or alternatively, an order that the Company issue shares to Zedra in such amount(s) as will remove the dilution caused to Zedra's shareholding in the Company since 18 February 2016 and will restore its shareholding in percentage terms to the level of Zedra's shareholding as at 18 February 2016, alternatively such later date as the Court orders."

Head (iii): failure to provide information

40. Clause 4.2 of the shareholders agreement required the provision of information as follows:

> "The Company undertakes to provide and deliver to each Substantial Shareholder:
>
> 4.2.1 a notice of each meeting of the Board, or any committee of the Board, specifying the nature of the business to be

> transacted at the meeting together with copies of all documents and other information given to the directors in relation to that meeting at least seven days prior to any meeting of the Board (unless the prior consent of a Shareholder Majority has been given to a shorter period);
>
> 4.2.2 minutes of each meeting of the Board or any committee of the Board as soon as they become available and, in any event, not later than 10 Business Days after the date of the relevant meeting; and
>
> 4.2.3 any other information which such Shareholder may reasonably require for the purpose of monitoring their investment in the Company."

A "Substantial Shareholder" is defined as a shareholder, either individually or together with any connected person, holding at least 5% of the issued shares in number. Zedra therefore fell within this category at all material times.

41. Breaches of clause 4.2 are alleged in respect of both the removal of co-sale rights and the share issues. It also founds a separate allegation of unfairly prejudicial conduct, with a claim that the company, and (by virtue of clause 6.1.1) the shareholder directors, are liable in damages to Zedra "in respect of any losses caused to Zedra as a result" of the breaches.

The judgment below

42. The respondents applied to strike out the petition, or parts of it, on several different grounds, most of which are repeated on this appeal.

43. The principal ground for the application was that the petition was in substance a derivative claim within the meaning of section 260 of the Act. In other words, the petition was based on wrongs allegedly committed against the company which was therefore the proper claimant and that Zedra had not applied for, and would not be granted, permission to bring a derivative claim. Referring to the paragraphs of the petition which allege breaches of duty by the directors, the respondents submitted that the central claims of Zedra explicitly relate to breaches by the directors of their duties, which were duties owed to the company (see section 170(1) of the Act). This was fully argued before the judge and he dealt with it in some detail in his judgment at [34]-[64], concluding that the nature of the pleaded prejudice to Zedra and the relief sought by it made this an appropriate claim to be brought under section 994.

44. Although the respondents have not appealed on this ground, it is worth quoting the judge's analysis, because of its relevance to other grounds which form part of this appeal. He said at [56]:

> "In my judgement the Petitioner is correct to say that the claim is properly to be seen as one seeking redress for unfair prejudice. The complaint is in respect of the conduct of the affairs of the First Respondent and the effect of that conduct on the Petitioner's interests as a shareholder. The fact that the

> allegedly wrongful conduct includes breaches of duties which the Second – Fifteenth Respondents owed as directors does not without more mean that the claim is a derivative claim. Instead the nature of the claim must be considered. Subject to consideration of paragraph 4 of the prayer the Petition is not seeking to recover damages for a loss suffered by the First Respondent and there is no suggestion that the First Respondent has suffered loss. It is clear when the body of the Petition is considered that the complaint being made relates to the impact of the alleged actions on the Petitioner as shareholder rather than the impact on the First Respondent. Similarly, when regard is had to the relief being sought the primary relief consists of a number of orders against the First Respondent. Such relief patently is not relief which could have been sought in a derivative claim. It is apparent that redress is being sought for the alleged reduction in the value of the Petitioner's shareholding in relief to the other shareholdings and/or the reduction in the Petitioner's rights in relation to the First Respondent. There is no suggestion that there has been a reduction in the value of the First Respondent as a whole."

45. I agree with this analysis of the petition. As regards the proper relationship between petitions under section 994 and derivative actions, consideration of the authorities suggests that it is highly sensitive to the precise circumstances of the case and the relief claimed: see the judgments of Lord Scott in the Court of Final Appeal of Hong Kong in *Re Chime Corporation Ltd* (2004) 7 HKCFAR 546 and in the Privy Council in *Gamlestaden Fastigeheter AB v Baltic Partners Ltd* [2007] UKPC 26, [2007] Bus LR 1521. Whatever that relationship may be, it does not arise in the present case, which does not involve any claim for relief for the benefit of the company, either in substance or even, very largely, in form. The central point in this case is that, while the petition alleges breach by directors of their duties to the company, it does not allege that the company, as opposed to Zedra, has suffered any loss.

46. The other grounds on which the respondents applied to strike out the petition or parts of it were that (i) the court would not have the power to make, or in any event would not make, some of the orders sought, such as for alteration of the articles and for the issue of shares to Zedra, all the more so because it would affect the rights of other shareholders who have not been joined as parties to the petition; (ii) the claims for compensation made by Zedra were claims for irrecoverable reflective loss; and (iii) the allegations of bad faith and improper purpose were unsustainable on the basis of the matters pleaded in the petition.

47. These grounds are repeated by the respondents on their appeal to this court and I will refer to the judge's consideration of them as I address each ground.

Grounds of appeal

48. Although there are six numbered grounds of appeal, essentially they raise three issues.

49. First, grounds 1 to 3 concern the claims for orders that the company's articles be altered to restore Zedra's co-sale rights and that the company issue a sufficient

number of shares to restore Zedra's percentage shareholding to its level as at 18 February 2016. It is said that (i) the court has no power under section 996 of the Act to direct a company to issue shares, or to direct the alteration of a company's articles to confer co-sale rights as claimed; or, alternatively, (ii) the court has no power to do so where (a) allegations of unfairly prejudicial conduct are not made against all the shareholders and/or (b) some shareholders are not joined as parties to the petition; or (iii) there was no prospect of the court making such orders because their effect would be to appropriate the property of shareholders against whom no complaint is made and who are not parties to the petition. The judge should have accordingly struck out the paragraphs in the prayer for relief seeking such orders.

50. Second, ground 4 challenges the decision not to strike out the claims of bad faith made against the directors.

51. Third, grounds 5 and 6 are directed to paragraphs (4) and (5) of the prayer for relief which seek orders for the payment of compensation by the directors to the company and to Zedra. This is put partly on the basis that such claims are for reflective loss.

52. The most substantial of these is ground 4 which I will deal with after the other grounds.

Grounds 1-3

53. In my judgment, these grounds of appeal are misconceived.

54. For the reasons already given, it is unnecessary to consider further the claims for the restoration of the co-sale rights, in the light of the removal of co-sale rights for all shareholders as part of the listing process. As I understood Mr Chaisty to accept, there is now no prospect of the court making such orders.

55. The respondents submitted to the judge that the court would not make an order affecting the rights of persons who were not parties to the proceedings. Applying the reasoning of Vinelott J in *Re a Company (No 007281 of 1986)* [1987] BCLC 593, the judge held that the petition was validly constituted, notwithstanding the non-joinder of the shareholders who were not also directors (the outside shareholders) but the question of joining or notifying the outside shareholders was a matter for case management at an appropriate time. This was not a basis for striking out the petition as an abuse of process. In my judgment, the judge was right to take this approach.

56. Before us, Mr Ashworth QC, on behalf of the respondents, developed a submission that the order for an issue of shares to Zedra sought in the petition would amount to confiscation of the property rights of the outside shareholders without compensation. This would be beyond the relief which Parliament could have contemplated might be granted under section 996 and it would constitute a breach of the rights of the outside shareholders under Article 1 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms (A1P1) which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international law."

57. The submission in short was that an issue of shares to Zedra would, by diminishing the rateable interests of the outside shareholders in the company, diminish the value of their shareholdings, without compensation. This would amount to confiscation of their property.

58. I am prepared to accept that an issue of shares for no consideration, or for substantially less than their value, is capable of amounting to a deprivation of the property rights of innocent shareholders and that it is capable of amounting to a breach of their rights under A1P1. To take an extreme example, an order that required a company to issue shares equal to 99% of the enlarged capital without any, or adequate, consideration or compensation would be capable of falling within A1P1 by depriving the existing shareholders of almost their entire interest in the company, in circumstances where either they were guilty of no wrongdoing or the order was disproportionate to any wrongdoing of which they were guilty. The level of dilution does not have to be so extreme to amount to a breach of A1P1, and I will assume that it is sufficient if it is material.

59. It goes without saying that the court on this, or any other petition, would not knowingly make an order that contravened rights under A1P1, as enacted in English law. Mr Ashworth submits that it would be impossible to make the order for the issue of shares to Zedra without contravening the rights of the outside shareholders. I am unable to follow this submission. It pre-supposes that the order would necessarily involve the issue of shares to Zedra for no consideration (by a capitalisation of reserves) or for inadequate consideration, but that is not the case. The issue to Zedra could be achieved by ordering those respondent directors shown to have been guilty of wrongdoing to pay up the shares at full value to be issued to Zedra. To the extent that they did not have the financial resources to do so, that would limit the number of shares that could be issued to Zedra. Plainly, however, that is not something that can be determined at this stage but would be addressed, if the petition succeeded on its merits at trial, when the court considered the question of relief. An alternative means of achieving the same result would be to order the wrongdoers to transfer shares to Zedra although, depending on the number of shares held by them, this might also not provide the full relief to which Zedra would otherwise be entitled.

60. I would not therefore allow the appeal on any of grounds 1 to 3.

Grounds 5 and 6

61. Under these grounds, the respondents challenge the judge's decision not to strike out paragraphs (4) and (5) of the prayer for relief, which are as follows:

> "(4) An order that the directors of the Company involved in the breaches of duty pleaded at paragraphs 27, 37 and 44 above pay equitable compensation to the Company for such breaches and out of the proceeds thereof the Company compensate Zedra in respect of the following losses:
>
> (i) Zedra's loss since 7 August 2014 of the co-sale rights attaching to the A Ordinary Shares held by Zedra as set out at paragraph 29 above.

(ii) The preferential treatment of Converting Shareholders since 5 September 2017 to the detriment of Zedra as set out at paragraph 39 above.

(iii) The dilution of Zedra's shareholding in the Company since 18 February 2016 as set out at paragraphs 44 and 45 above.

(5) Further or alternatively, an order that the directors of the Company involved in the breaches of duty pleaded at paragraphs 27, 37 and 44 above pay equitable compensation to Zedra for such breaches in respect of the losses pleaded at paragraphs 27, 39, 44 and 45 above."

62. The respondents seek to strike out the relief sought in those paragraphs on the grounds that it is barred by the rule against reflective loss.

63. As with grounds 1 to 3, this seems to me to be misconceived. It is apparent from the petition that none of the matters complained of caused any loss at all to the company. The alleged loss was suffered by Zedra in its capacity as a member. It was the removal of its co-sale rights, the failure to offer shares to it for subscription, and the failure to provide it with information, that constitute the unfairly prejudicial conduct alleged in the petition. This is not a case in which the petitioner is seeking to recover for itself compensation in respect of loss suffered by the company. Whatever the relationship between the rule against the recovery by shareholders of reflective loss and relief under section 996, it is not an issue that arises in the context of this petition.

64. It is true that paragraph (4) of the prayer for relief rather oddly seeks the payment of compensation to the company which it would then apply in paying compensation to Zedra. The judge thought that it was best read as a form of indemnification. I can see that, if Zedra recovered damages against the company for breach of its obligation to provide information to Zedra under clause 4.2 of the shareholders agreement, the company might have a claim against those directors who caused the company to be in breach of clause 4.2. That is not, however, what is sought by paragraph (4) which pre-supposes a liability of the directors to pay compensation to the company, independently of any liability of the company to Zedra.

65. I do not consider that paragraph (4) can be retained, at least in its present form, and I am also unable to see its value even if it is reformulated as an indemnity, given that Zedra seeks in paragraph (5), and the court can clearly grant, an order for the payment of compensation or damages by any wrongdoing directors directly to Zedra.

66. As regards paragraph (5) of the prayer for relief, the respondents submit that, as the directors did not owe Zedra any fiduciary or statutory duties, there is no basis for an award of compensation to be paid by the directors to Zedra. This is not a sustainable argument. Zedra's complaint is of conduct by the directors which was unfairly prejudicial to its interests as a member. The relevant conduct took the form of alleged breaches by the directors of their statutory duties. This formulation of unfair prejudice is entirely in line with the approach adopted by this court in *Re Saul D Harrison &*

Sons plc and by the House of Lords in *O'Neill v Phillips*. It is not dependent on showing a fiduciary or statutory duty owed by directors to shareholders personally. Once unfair prejudice is established, the court has the wide powers to grant relief conferred by section 996, as discussed above, and they plainly include the power to order wrongdoing directors to pay compensation to the petitioner.

67. I would therefore strike out paragraph (4). I would not at this stage strike out paragraph (5) but, for the reasons given below, I would strike out the references in it to paragraphs 44 and 45 of the petition. Whether paragraph (5), as amended, should be retained at all is a matter for consideration at the case management conference to which I later refer. There is no purpose in its retention, unless Zedra can show an arguable basis that it has suffered any loss from the amendments to the co-sale rights.

Ground 4

68. Ground 4 raises a focused challenge to the pleading of unfair prejudice as it applies to the share issues between February 2016 and May 2018 which resulted in the diminution of the relative size of Zedra's shareholding.

69. Before the judge, the respondents argued that the facts pleaded in the petition could not properly support or sustain the pleaded inference of bad faith or improper purpose against the respondents as regards either the co-sale rights or the share issues. They submitted that Zedra would have to plead proper facts against each of the individual respondents identifying what each of them was alleged to have done, all the more so as not all the respondents were directors at all material times.

70. In dealing with this, the judge remarked that "the underlying themes are that the relevant actions had no legitimate commercial purpose (though I note that this allegation is not made in relation to the dilution of the Petitioner's shareholding) and that the actions were accompanied by the concealment of or the failure to disclose information in breach of the Information Obligation" and that account was also being taken of the combined effect of the matters alleged. He said at [85]:

> "The Petitioner's case is by no means bound to succeed and there is considerable scope for questioning whether it will establish the factual basis of its allegations but that is not currently the issue. If the Petitioner does establish at trial that there were repeated actions which were harmful to it; which lacked a proper commercial purpose; and which were accompanied by a failure on the part of those taking the actions to disclose information which should have been disclosed then it will be open to the court to infer that the actions were undertaken in bad faith. Not only will it be open to the court to make such an inference but, on the assumption of such findings, it will be the more likely inference. It follows that the Petitioner has set out matters capable of giving rise to the findings it seeks."

71. The judge also took the view that the case was adequately pleaded against each individual respondent, because "it sets out the dates of the relevant actions which are said to have constituted unfair prejudice and contends that they were the actions of

those who were directors at the time acting collectively…Moreover, it is to be noted that an important aspect of the case being put by the Petitioner is the allegation of a collective "ganging up" against it rather than a series of separate actions by individual respondents".

72. I have earlier said that, as regards the allegations concerning the co-sale rights, sufficient facts are pleaded from which findings of breach of duty might be made, although they would not of course necessarily be made.

73. The real issue is whether there are sufficient facts pleaded from which findings of bad faith and/or improper purpose could be made as regards the share issues.

74. I have earlier set out in full the relevant part of the petition. What is immediately striking is that no challenge is made to the commercial legitimacy of any of the share issues. Indeed, no information at all is pleaded about the share issues apart from their dates and their effect on the relative size of Zedra's shareholding. We were told in the course of argument that all the share issues were made for cash, but there is no suggestion in the petition, or in the points of reply, that the shares were issued at anything less than full value or that the company had no legitimate reason for raising fresh capital. Share issues in those circumstances will necessarily have diminished the relative size of Zedra's holding but not its value. Indeed, the respondents plead that Zedra's shareholding increased in value from £28 million in May 2011 to £161.9 million at the date of the petition in January 2019, an allegation which is not specifically challenged in the points of reply. Nor is there any pleading of the persons to whom the shares were issued. If the shares were issued to new investors or indeed to existing outside shareholders, any diminution in the relative size of Zedra's shareholding would be matched by a similar diminution in the relative size of the shareholder directors' holdings.

75. It is hard to think of any case – we were referred to none and I have been unable to find any – where an issue of shares is challenged as made in bad faith and/or for the improper purpose of diluting an existing shareholder's interest without reference to the terms or circumstances of the share issue itself. So, for example, in *Re Chime Corporation Ltd* the main allegation in the petition was that Mrs Wang had used the control of the company which she enjoyed in her husband's absence to issue shares to herself and thereby dilute his shareholding from 56.67% to 0.09% and increase her shareholding correspondingly. In *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, the intended effect of the impugned share issue was to increase the holding of a minority shareholder to give it control at the expense of the joint majority shareholders whose holdings were reduced from 55% to a minority position.

76. In the absence of any challenge to the commercial purpose or the terms of the share issues or to the choice of allottees, it is difficult to ascribe bad faith or an improper purpose to the decision to make the share issues. Zedra relies in the petition on three or four matters. I will consider these individually and then in combination.

77. First, the company and its directors failed, or failed adequately, to inform Zedra of the share issues or their consequences before they were made. The same complaint is made in other respects in the petition and, while combined with other factors, it might form part of a basis from which bad faith and/or improper purpose could be inferred in relation to the share issues, it cannot do so on its own.

78. Secondly, it is alleged that the directors deliberately concealed relevant information from Zedra by wrongly withholding inspection of the register of members between 7 July and 5 December 2017. Only two of the share issues occurred during that period, with five issues being made between 19 February 2016 and 31 May 2017 and a further three issues being made in 2018. Inspection of the register by Zedra after the court's order made in November 2017 did not disclose any information which has been pleaded in support of the alleged bad faith or improper purpose and I am unable to see any substantial connection between the withholding of inspection and the alleged bad faith or improper purpose.

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

80. Insofar as Zedra might be relying on some expectation, short of a legal right, that it would first be offered shares, this is not in my judgment sustainable. First, this is not, for the reasons given earlier, a case in which "legitimate expectations" or the equitable constraints on the exercise of legal rights have any part to play. Second, when Zedra acceded to the shareholders agreement, it expressly agreed, in the deed of adherence, that it would not have the benefit of a provision which limited the allotment of new shares without the prior consent of members holding shares carrying 10% or more of the voting rights (paragraph 1.7 of schedule 3).

81. In paragraph 44.4, it is alleged that the "dilution of Zedra's shareholding in these circumstances…was part of a concerted attempt by the directors to prejudice Zedra's interests as a shareholder…and so was for an improper purpose". It should first be noted, as regards a "dilution" of Zedra's shareholding, there is no allegation that its value declined, which would have occurred if the new shares had been issued for less than full value. More importantly, this allegation presupposes that the purpose, or a purpose, of the share issues was to prejudice Zedra's interests as a shareholder but that is the very matter that must be capable of being established by reference to the pleaded facts.

82. In considering the allegations regarding the share issues, I have kept well in mind the authorities on striking out unfair prejudice petitions to which Mr Chaisty rightly referred us. In *Re Saul D Harrison plc*, Hoffmann LJ accepted that the power of court to strike out a petition should be exercised only in a plain and obvious case. In *Re Copeland & Craddock Ltd* [1997] BCC 294, this court refused to strike out a winding-up order as a possible remedy in a shareholder's petition. Although Bingham LJ thought that it was very close to the borderline where striking out would be appropriate, he was "not quite persuaded that the claim is unarguable whatever comes out relevant to the petition on discovery and in the course of oral argument": see p.300. It must be noted, however, that it was just one of the possible remedies, not the

allegations of unfairly prejudicial conduct, which the respondents there sought to strike out. In *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171, Peter Gibson LJ, again addressing whether the court would grant relief rather than whether particular allegations were arguable, said that a court was entitled to take a pragmatic view that a petition should not proceed to trial where the likelihood of the trial judge exercising his discretion to grant the claimed relief is so remote as to be perfectly hopeless. In that case, this court affirmed the decision at first instance to strike out the petition.

83. In that case, Peter Gibson LJ quoted with approval from the judgment of Hoffmann LJ in *Re Saul D Harrison Ltd* where, having referred to the need to show that a case is plainly and obviously unsustainable before it can be struck out, he said that "the consequences for the company mean that a court should be willing to scrutinise with care the allegations in a s.459 petition and, if necessary, the evidence proposed to be adduced in support, in order to see whether the petitioner really does have an arguable case. This is particularly so when the petition rests on allegations of bad faith akin to fraud".

84. We were also referred to a well-known case in the context of litigation generally, *Three Rivers DC v Bank of England* [2003] 2 AC 1. There, too, Lord Hope of Craighead, giving the leading majority judgment, said at [55]: "of course, the allegation of fraud, dishonesty or bad faith must be supported by particular facts. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out".

85. In my judgment, the matters pleaded in support of this central allegation of bad faith and/or improper purpose as regards the share issues are incapable of establishing the allegation, whether taken individually or together.

86. There was some argument before us as to whether the ground of appeal for which the respondents had obtained permission encompassed a contention that the pleaded matters were incapable of supporting the allegation of bad faith and/or improper purpose as regards the share issue. It was said in ground 4 that the judge erred in refusing to strike out "those parts of the petition that pleaded bad faith against every director, and in impliedly holding that evidence as to the state of mind of an unspecified subset of directors could support an inference as to the state of mind of other directors". It continued that in pleading bad faith against a group of directors, "it is necessary to particularise the statements, actions and states of mind of each individual on which allegations are based". If he had done so, the judge would have struck out, among other paragraphs, paragraph 44.

87. The suggestion was that this raised only the issue as to whether the allegation of bad faith was sufficiently pleaded against the respondents individually, not collectively. In my view, this is a distinction without a difference. If the pleading is unsustainable against any of the respondents, as I consider it to be, it cannot be sustainable against them collectively. The ground of appeal, and the notice of appeal, make clear that the respondents seek the striking out of the entirety of paragraph 44.

88. In any event, Mr Chaisty was able to, and did, deal with this part of the appeal. More than that, his junior, Mr McPherson, prepared overnight with impressive speed a draft

amended petition which was produced to us at the start of the second day of the hearing.

89. Mr Chaisty made clear to us that he was not seeking permission to amend the petition in the form put before us. He emphasised that more time would be needed before any application to amend, should it become necessary, was made.

90. It is obviously not appropriate that we should scrutinise this draft as we would if an application to amend had been made, but if in our view it is in any respect manifestly incapable of remedying the existing defects, it would be remiss of us not to say so. In that respect, I would make the following comments, while making it clear that I am not giving any implicit approval to any other amendments appearing in the draft.

91. Paragraphs 20A and 20B refer to the articles adopted in May 2011. As mentioned above, and as the petition itself alleges in paragraph 27, new articles were adopted in August 2014. Either those articles or perhaps further articles, but certainly not those adopted in May 2011, were in force, and were different in relevant respects, when all the share issues were made. The reference therefore to the "Article 3.2 Obligation" in paragraph 20A appears to be misplaced. Even by reference to article 3.2 in the 2011 articles, paragraph 20A is wrong in saying that existing shareholders had pre-emption rights over new shares "unless otherwise determined by special resolution"; article 3.2 provided other exceptions. The statement that the articles (and perhaps the shareholders agreement) fell to be construed against factual matters concerning the particular circumstances of Zedra and the parties' intentions in May 2011 are, in the light of the authorities on the construction of articles of association, problematic: see *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693.

92. The pleading of implied terms in paragraph 21C and the legitimate expectation in paragraph 22 (as amended) are more than problematic. It is pleaded that the following were implied terms of the shareholders agreement (to which Zedra became a party by virtue of the deed of adherence executed on or about 31 May 2011) for so long as Zedra continued to retain a shareholding in excess of 5% of the issued share capital of the company: (i) the company was bound to give reasonable notice to Zedra of any prospective share issue which would reduce its percentage shareholding; (ii) the company was bound to give Zedra a reasonable opportunity of making an offer to purchase shares in response to such a prospective share issue; and (iii) the company would not unreasonably and/or arbitrarily and/or capriciously refuse such an offer by Zedra.

93. I accept, of course, that we have not heard full argument on this suggested pleading, but the prospect of such terms being implied into complex and detailed commercial agreements appears to be very small indeed. This is all the more the case, given that Zedra expressly agreed in the deed of adherence that it would not have the benefit of the company's covenant in the shareholders agreement (schedule 3, paragraph 1.7) not to issue new shares without the consent of those members holding shares carrying 10% or more of voting rights at general meetings.

94. The alternative pleading in paragraph 22 of a legitimate expectation or understanding to the same effect is irreconcilable with the decisions and reasoning in *Re Saul D Harrison & Sons plc* and *O'Neill v Phillips.*

Individual respondents

95. It became clear in the course of the hearing, and in particular from information provided in the draft amended petition, that there are two respondents, Rachel Horsefield and Zillah Ellen Bing-Maddick, who were not directors at any of the times at which it is alleged that the directors acted in breach of duty and against whom no allegations are made. In those circumstances, it seems to me that they should be removed as parties to the petition.

96. Zedra objects to this course on the grounds that it is alleged in paragraphs 28-29 and 38-39 that, as at the date or presentation of the petition, the company had failed or refused to alter the Articles to reinstate the co-sale rights attached to Zedra's A4 shares and to confer co-sale rights on B Ordinary Shares held by Zedra following conversion of its A4 shares. Ms Horsefield and Ms Bing-Maddick were directors before and at the time of the presentation of the petition and it is said that they are therefore guilty, with all the other directors, of unfairly prejudicial conduct in failing or refusing to procure the company to alter the articles in these respects. I do not accept this objection. Unlike the position of the other directors, against whom allegations of breach of duty are expressly made, no such allegations are made against these two respondents. There is no pleaded basis for allegations of unfairly prejudicial conduct against them personally.

Disposal

97. For the reasons given above, I would strike out paragraphs 40 to 45 which contain the allegations of unfairly prejudicial conduct in relation to the share issues. In consequence, I would strike out the prayer for relief as it relates to those allegations, which includes paragraphs (4)(iii) and (6), and the remaining references to paragraph 44 in paragraphs (4) and (5). As the co-sale rights have been removed for all shareholders, I would also strike out paragraphs (2) and (3) of the prayer for relief. There is no prospect of the court making the orders sought in those paragraphs. Further, and in any event, I would strike out the entirety of paragraph (4) of the prayer for relief which is misconceived in seeking the payment of compensation to the company.

98. There remains a claim for the payment of compensation to Zedra by the directors involved in the steps taken as regards the co-sale rights. Even if the allegations as regards those steps were established, there is at present no pleaded basis, nor has any basis been suggested, for thinking that Zedra suffered any financial loss as a result of those steps. Nonetheless, rather than striking them out now, I think they are better considered at the case management conference to which I refer below.

99. This leaves the claims based on the alleged failure, in breach of the shareholders agreement, to provide information to Zedra. Zedra seeks a declaration that this obligation is binding on the company and "its director shareholders" (by which must, I think, be meant those parties to the shareholders agreement who are directors). It also seeks damages from "the shareholder directors" for breach of the obligation to provide information. As Coulson LJ commented in the course of argument, this would appear to be at most a claim for damages for loss of a chance to subscribe for shares, if it had been notified of proposed share issues. It is essentially a claim for damages

for breach of contract and, if nothing else of the petition survives, it may be that it would be better proceeding as a part 7 claim, rather than a petition under section 994.

100. I would propose that the petition, in its reduced form, be remitted to a High Court Judge for a case management conference, at which the future of the petition and any further applications by the parties, including any application to amend the petition, can be considered.

Lord Justice Coulson:

101. I agree.

The Master of the Rolls:

102. I also agree.