CR-2019-000431

Neutral Citation Number: [2019] EWHC 803 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF THE SKY WHEELS GROUP LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

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

Date: 01/04/2019

Before :

ICC JUDGE BARBER

- -

Between :

PETER DAVID SCHOFIELD

Applicant

- and –

CHRISTOPHER STEPHEN JONES

Respondent

- -

Alexander Robson (instructed by **Freeman Fisher LLP**) for the Applicant
Douglas Cochran (instructed by **JMW Solicitors LLP**) for the Respondent

Hearing date: 28 February 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

ICC Judge Barber

1. This is the application of Peter David Schofield, a director of The Sky Wheels Group Limited ('the Company'), for an order pursuant to Section 306 of the Companies Act 2006 that a general meeting of the company be held at which the attendance of one member will constitute a quorum. The Respondent, Mr Christopher Stephen Jones, opposes the application.

2. The Company provides services ancillary to air transport. It has two members, comprising the Respondent and David William Schofield. There is a dispute as to whether the share split is respectively 35/65 or 5/95, but it is not disputed that (i) the Respondent is the minority shareholder (ii) the Respondent has no right in the nature of a class right and (iii) David Schofield is the majority shareholder.

3. There are four directors, of whom three (Lee Cullen, David Schofield and Peter Schofield) support the application. The fourth director is the Respondent.

4. The three directors who support this application (who include the majority shareholder) believe that the Respondent has acted in serious breach of statutory and fiduciary duties owed by him as a director to the Company and wish to call a general meeting of the Company in order to consider his removal as a director. Amongst other things, it is alleged that the Respondent set up an offshore bank account in the Cayman Islands and channelled Company profits to that account, triggering an investigation not only by the Company but also by the Respondent's former wife, who has obtained, or is in the process of obtaining, bank statements for the Cayman Islands account by way of a third party disclosure order in ancillary relief proceedings. It is also alleged that the Company is in the process of paying in excess of £500,000 to one of its customers as a result of the Respondent's wrongful activity, that the Respondent has improperly used the Company credit card and Company funds for his own purposes, that the Company has paid in excess of £80,000 in respect of tax on the Respondent's overdrawn director's loan account, and that the Company has direct evidence of text messages sent by the Respondent to an employee of the Company suggesting a scheme to defraud the Company, involving the repair and service of British Airways equipment. The Respondent denies any wrongdoing.

5. The Articles of Association of the Company provide (by Article 4) that "One member may constitute a quorum where the Company is a single member company". As the Company is not a single member company, Section 318(2) of the Companies Act 2006 applies, which requires two qualifying persons to be present.

6. Without the Court's assistance, a general meeting of the Company cannot be quorate unless the Respondent agrees to attend. The Applicant maintains that the Respondent is frustrating efforts to remove him as a director by failing to attend a general meeting or to agree to the meeting going ahead in his absence. It is in these circumstances that the present application has been brought.

Background

7. In 2014 the Respondent suffered a marriage breakdown which led to a diagnosis of depression. Matrimonial proceedings commenced thereafter and, in or about

November 2017, the Respondent ceased to attend the Company premises on a regular basis. The reasons put forward for this cesser of attendance, in the evidence before me, range from the Respondent taking the decision to take some time off from the business (see the Respondent's former solicitors' letter of 27 April 2018 at page 3), to David Schofield instructing the Respondent no longer to attend the Company's premises (see draft s994 petition at para 23). This issue is not currently before me to determine, however. Suffice it to state that it is common ground that the Respondent ceased to attend the Company premises on a regular basis in or about November 2017.

8. In or by February 2018, the Respondent was placed on garden leave pending full investigations. By letter dated 27 February 2018 from the Company's then solicitors, Lopian Wagner, to the Respondent, the Company confirmed that the Respondent had been taken off the bank mandate and alleged that funds had been misappropriated by the Respondent from the Company's bank account (and the Company credit card wrongly employed) for the Respondent's personal use. The alleged misappropriations included payments to the Respondent's solicitors and his wife's solicitors in the divorce proceedings.

9. By letter dated 27 April 2018, the Respondent's (then) solicitors, Turner Parkinson, claimed that the Respondent had not been in possession of a Company credit card since August 2017 *'and only used the Company credit card for business prior to then*'. They further claimed that items of personal expenditure from Company funds by the Respondent '*all appear as entries on our client's directors loan account.*' The letter made reference to a possible unfair prejudice claim and requested that the Respondent's name be restored to the bank mandate for the Company's bank account. This request was refused.

10. Following exchange of further correspondence and receipt of a schedule prepared by the Company which detailed items of alleged personal expenditure by the Respondent, Turner Parkinson changed their stance on expenditure to an extent. By their letter dated 17 July 2018, they maintained that '*the Company credit card was returned in October 2017 at the latest*', that the Respondent recalled asking for the credit card to be cancelled when he returned it; and that the Company credit card details '*were inadvertently left on our client's iTunes and Amazon accounts*' after he handed back the card. This explanation did not sit readily with their earlier assertion that the Respondent '*only used the Company credit card for business*'.

11. Turner Parkinson's letter of 17 July 2018 also acknowledged that a number of heads of expenditure listed in the schedule prepared by the Company were items of personal expenditure on the part of the Respondent, commenting as follows:

'*2(a) HCE Group - we understand that this relates to a personal matter in relation to our client and this sum can be added to our client's director's loan account;*

(b) As set out above, our client accepts that sums paid to iTunes and Amazon are his personal expenditure and can be added to his director's loan account;

(c) BDO LLP relates to our client's divorce proceedings and can be added to his director's loan account; …

(h) The invoice from McCormacks relates to our client's legal costs and should be added to his director's loan account;…

(k) All of the costs for Lund Bennett, McCormacks and DWF Legal relate to our client's legal expenses and should be added to his director's loan account…'

12. The assertion that all such items of personal expenditure could be *added* to the Respondent's loan account did not sit well with Turner Parkinson's earlier assertion (by letter of 27 April 2018) that such items '*all appear as entries on our client's directors loan account.*'

13. Turner Parkinson's letter of 17 July 2018 also contained a section described as a letter before claim, which alleged, inter alia, unfair prejudice and concluded by reserving the Respondent's right to present a petition pursuant to section 994 of the Act, '*seeking an order that your client purchase our client's shares*.'

14. In the meantime, the Company's investigations into the Respondent's conduct were continuing. By letter dated 25 July 2018, W Legal (solicitors by then acting for the Company and the Applicant) sent a formal letter before action to the Respondent's solicitors, alleging a series of breaches of duty on the part of the Respondent in numbered paragraphs and inviting a 'full and transparent explanation' within a given timetable. The allegation at paragraph number 9 of the letter was headed 'Secret and unlawful profit' and provided as follows: 'Our client is currently investigating your client's setting up of an offshore bank account and the siphoning of the Company's profits to that account. A forensic examination is being undertaken and we will provide you with further details when it is complete.'

15. Turner Parkinson responded by letter dated 9 August 2018. Whilst the letter ran to five pages, the response to paragraph 9 was simply: '*Our client does not intend to respond to this entirely baseless and unsubstantiated allegation*.'

16. The Applicant (and the other directors save for the Respondent) maintain that the responses of the Respondent to the questions raised of his conduct as a director have been wholly inadequate. It is clear from Mr Wagner's statement in support of this application that investigations are continuing. Mr Jones' statement in response to the application did not address any of the allegations listed in Mr Wagner's statement or meet them with a composite denial.

17. On 12 October 2018, a statutory demand dated 5 October 2018 was served by the Company upon the Respondent, demanding payment of £418,609.28. The Respondent is disputing the statutory demand and has applied to court to set it aside.

18. On 6 November 2018, the Company received a request in writing from the majority shareholder, David Schofield, that a general meeting be called with the purpose of considering a resolution to remove the Respondent as a director of the Company. Pursuant to that request, on 6 November 2018, the Company sent notice of a general meeting to the Respondent. The purpose of the meeting was expressly stated as being for the proposed resolution that the Respondent be removed as a director of the Company and the meeting was scheduled to take place on 13 December 2018. In the event, the Respondent declined to attend and the meeting was inquorate.

19. On 15 January 2019, this application was issued.

20. On 28 January 2019, the Respondent's new solicitors, JMW Solicitors LLP, served a draft petition on W Legal, seeking relief for unfair prejudice pursuant to Section 994 of the Companies Act 2006. By paragraph 35 of the draft and the prayer for relief, the Respondent sought a purchase of his shares in the Company. As at the date of the hearing of this application, no section 994 proceedings had been issued.

The Law

21. Section 306 of the Companies Act 2006 provides:

> "(1) This section applies if for any reason it is impracticable –
>
> (a) to call a meeting of a company in any manner in which meetings of that company may be called, or
>
> (b) to conduct the meeting in the manner prescribed by the company's articles or this Act.
>
> (2) The court may, either of its own motion or on the application –
>
> (a) of a director of the company, or
>
> (b) of a member of the company who would be entitled to vote at the meeting,
>
> order a meeting to be called, held and conducted in any manner the court thinks fit.
>
> (3) Where such an order is made, the court may give such ancillary or consequential directions as it thinks it expedient.
>
> (4) Such directions may include a direction that one member of the company present at the meeting be deemed to constitute a quorum.
>
> (5) A meeting called, held and conducted in accordance with an order under this section is deemed for all purposes to be a meeting of the company duly called, held and conducted."

22. The leading case on section 306 is the decision of the Court of Appeal in Union Music Ltd v Watson [2003] EWCA Civ 180, [2003] 1 BCLC 453. This was a decision under section 371 of the Companies Act 1985, which was in the same terms as section 306 of the 2006 Act. The principles to be derived from the judgement of Peter Gibson LJ in that case are helpfully summarised by Mr Richard Sheldon QC (sitting as a deputy

High Court judge) in Vectone Entertainment Holding Ltd v South Entertainment Ltd [2004] EWHC 744 (Ch), [2004] 2 BCLC 224 at [32], as follows :

> "(a) Section 371 of the Companies Act 1985 is a procedural section intended to enable company business which needs to be conducted at a general meeting to be so conducted. A company should be allowed to get on with managing its affairs without being frustrated by the impracticability of calling or conducting a general meeting in the manner prescribed by the articles and the Act."
>
> (b) Where there is a majority shareholder and no class rights attaching to a particular class of shares which the convening of a general meeting is designed to override, the court in exercising its discretion under s 371 will consider whether the company is in a position to manage its affairs properly and will take into account the ordinary right of the majority shareholder to remove or appoint a director in exercise of his majority voting power.
>
> (c) The fact that quorum provisions in the articles require two members' attendance is not in itself sufficient to prevent the court making an order under s371 to break a deadlock in favour of a majority shareholder who is seeking a proper order, such as the appointment of a director, which he has the right to procure in ordinary circumstances.
>
> (d) Section 371 is a procedural section not designed to affect substantive voting rights or to shift the balance of power between shareholders in a case where they had agreed that power should be shared equally and where the potential deadlock is something which must be taken to have been agreed for the protection of each shareholder. However, a quorum provision is not in itself sufficient to constitute such an agreement."

23. On the issue of jurisdiction, I was also taken to paragraph 49 of Smith v Butler [2012] EWCA Civ 314 per Arden LJ (with emphasis added):

> "That leaves the question whether the judge erred in making an order under section 306 of the 2006 Act. This applies where it is "impracticable" to hold a meeting of a company. In this case, the quorum required by the Company's articles for general meetings is two members, present in person or by proxy. Although the articles state that one of those persons present must be Mr Smith, in practice Mr Butler must also be present, as they are the only two members of the Company. Thus Mr Butler's attendance at general meetings of the Company is necessary to make up the quorum and without his presence the meeting cannot conduct any business. He can, therefore, easily thwart the holding of a general meeting to consider a resolution

> for his removal by simply not turning up. He had indeed threatened to take that course. Accordingly, in my judgement, the judge was *entitled, and bound*, to find that it was "impracticable" to convene and hold a company meeting to consider a resolution for Mr Butler's removal. The jurisdictional requirement of section 306 was fulfilled."

24. On present facts, the Applicant submits that jurisdiction under Section 306 of the Companies Act 2006 is engaged for the same reason as that explored in Smith v Butler. I accept that submission. The Respondent can and has thwarted the holding of a general meeting by not turning up and by refusing to agree to the meeting taking place in his absence. It is clearly 'impracticable' to hold a meeting of the Company. The jurisdictional threshold for granting relief under s306 is cleared.

25. On behalf of the Respondent, Mr Cochran of Counsel conceded that the jurisdictional threshold was cleared, but submitted that it would be inappropriate for the court to exercise its discretion to grant relief under section 306 in this case. Mr Cochran argued that this was a case where the Respondent's allegations of unfair prejudice had been set out as long ago as 27 April 2018 and that, whilst section 994 proceedings had not yet been issued, a draft unfair prejudice petition had been sent to the applicant solicitors on 28 January 2019. He submitted that to grant an order under s306 where the sole purpose of the proposed meeting was to remove the Respondent as a director, against the backdrop of intimated s994 proceedings, would be wrong and would accentuate (on the Respondent's case) the unfair prejudice that he was already suffering.

26. Mr Cochran further argued that the Respondent had been excluded from the business and so was not presently involved in its management or interfering with it. This reflected the statement of Mr Mark Jones of JMW Solicitors LLP, filed on behalf of the Respondent in opposition to the application, which provided (at paragraph 16):

> '[The Respondent] is not functioning as a Director because he has been excluded from the business since February 2018. Since [the Respondent] has been excluded from the Company he has not done anything to frustrate the normal functioning of the Company. The general meeting the Applicant has petitioned the Court for is therefore unnecessary save for the purpose of removing [the Respondent] as a director of the Company'.

27. Developing this argument, Mr Cochran argued that there was nothing to prevent the remaining directors simply managing the business as usual, adding that the Applicant had cited no specific instance where the Company had tried to move forward on any matter of substance (other than removal of the Respondent as director) but the Respondent had refused his consent.

28. Mr Cochran further referred me to the case of Re Sticky Fingers Restaurant Ltd [1992] BCLC 84. In this case, a section 459 petition had been presented on 8 March 1991 and a section 371 application was issued on 23 May 1991. At page 88f, Mervyn J commented as follows:

> 'The difficulty, as I see it, arises from the fact that (a) it may be proper to use s371 to overcome the difficulty of achieving a quorum, but (b) it is not a proper use of s371 to use it indirectly to secure the removal of a director while a s459 petition is pending'.

29. At page 90, Mervyn J added:

> 'It cannot be right that Mr Mitchell's quorum tactics be allowed to stop the company having its accounts, VAT difficulties, etc dealt with. It may be many months before the s459 petition is heard. On the other hand, it would not be right for Mr Wyman, by using s371 for the purposes of constituting an effective board, to be given the opportunity of harming Mr Mitchell, eg by causing him to be dismissed as a director, or by being excluded from any participation in the affairs of the company pending the outcome of the petition proceedings.'

Ultimately, the learned judge granted relief under s371, albeit on terms preserving a level playing field pending determination of the s459 proceedings.

30. Subsequent authorities, however, have served to temper what might otherwise appear, from page 88f of Mervyn Davies J's judgment in Re Sticky Fingers read in vacuo, to be an absolute bar on the use of s371 CA 1985 (now s306 CA 2006) to secure the removal of a director during the pendency of an unfair prejudice petition.

31. In Re Whitchurch Consultants Limited [1993] BCLC 1359, for example, such relief was granted. In Re Whitchurch, Mr and Mrs R were the only directors of the company and held 666 and 334 of the 1000 issued shares of the company respectively. The personal and business relationship between Mr and Mrs R broke down and Mr R requisitioned and convened an extraordinary general meeting of the company to pass a resolution removing Mrs R as a director. No such meeting could be held, however, because Mrs R failed to attend and the meeting was inquorate. Mr R applied for an order under section 371 of the Companies Act 1985. When Mr R's application was on the verge of being heard, Mrs R presented a petition under section 459 of the 1985 Act, alleging that it would be unfairly prejudicial to remove her as a director. Notwithstanding presentation of a s459 petition, Harman J granted relief under s371, holding that the mere existence of a section 459 petition at the date of the hearing of an application under section 371 was not an absolute bar to the court making an order under that section, but was instead something which the court would take into account in considering whether to exercise its discretion to make such an order.

32. This approach is further reflected in the judgment of Mr Anthony Mann QC (as he then was, sitting as a deputy High Court judge) in Re Woven Rugs Ltd [2002] 1 BCLC 324 at [14], in which, again, it was confirmed that the existence of a concurrent s459 petition is not necessarily a bar to the grant of an order under s371; nor is the fact that the results of the proposed meeting would be likely to generate further litigation.

33. On behalf of the Applicant, Mr Robson referred me to the case of Smith v Butler [2012] EWCA Civ 314 on the issue of discretion. The primary issue on this appeal was whether Mr Butler, as managing director, had power to suspend Mr Smith and subsequently to instruct solicitors to act for the Company on the applications. There were two consequential issues, however (paragraph 15). The first related to costs and is of no relevance. The second consequential issue, however, is of relevance; this being whether the judge erred in making an order for the convening of a meeting of the Company, with a quorum of one, for the purpose of passing a resolution to remove Mr Butler as a director. Arden LJ (Rimer and Ryder LJJ concurring) dismissed the appeal, holding that the judge's conclusion on the primary issue was correct (albeit for different reasons than those given by the judge). In relation to the second consequential issue, having held that the jurisdictional threshold for granting relief under s306 had been met (para 49), Arden LJ turned to the issue of discretion, stating as follows:

> '51. The judge gave clear reasons for exercising his discretion in favour of Mr Smith. He held that the majority shareholder ought to be entitled to exercise his ordinary voting rights to appoint and remove directors. It was not a case where there were any class rights. It was a case where the will of majority shareholder was being thwarted by the refusal of the minority to attend meetings of the Company so as to render the meetings inquorate (see judgement, paragraph 111). The judge went on to give a number of other reasons. In particular, he held that Mr Butler was motivated by his concern to protect his position as managing director of the Company. He had neither chosen to investigate the cheque fraud nor put in motion any investigation of expense claims by Mr Smith until May 2011 even though Mr Smith had been making claims for expenses openly for a number of years (judgment, paragraph 112(1) and (2)).
>
> 52. Mr Dougherty accepts that there are circumstances in which the court can, in its discretion, make an order under section 306 convening a meeting and directing a quorum of one. He further accepts that the fact that there are special quorum provisions in the Company's articles would not in itself be sufficient to prevent the court making an order under s 306: see, generally, Union Music Ltd v Watson [2003] 1 BCLC 453 and Vectone Entertainment Holding Ltd v South Entertainment Ltd [2004] 2 BCLC 224.
>
> 53. Mr Dougherty submits, however, that the judge should not have made an order convening a meeting of the Company with a quorum of one in this case. He submits that it was plain that Mr Butler had only taken steps to suspend Mr Smith in order to protect the Company's interests. His motive had been improperly characterised by the judge.
>
> 54. We did not call on Mr Berragan to respond to these submissions. In my judgment, the judge's exercise of his discretion is unimpeachable in this court. The shareholders

> have a statutory right to remove a director by ordinary resolution under section 168 of the 2006 Act. Section 168 thus reflects the statutory policy that shareholders should be able to remove a director by ordinary resolution. Section 168 does not override provisions as to the convening or conduct of meetings in a company's articles of association. However, the statutory policy reflected in section 168 must, in my judgment, far outweigh the power which Mr Butler has to paralyse company meetings by staying away. The court is not disturbing the bargain in the articles between the parties as to the balance of power between the shareholders by ordering a meeting with a quorum of one. Only Mr Smith has the benefits of a right to be part of the quorum because of the specific requirement in the articles that he must be counted towards the quorum requirement. Mr Butler enjoys no similar privilege. For the court not to make an order under section 306 on Mr Smith's application would have created a right *ad hoc* in favour of the minority shareholder that was not part of the bargain between the shareholders.
>
> 55. For these reasons, I would dismiss Mr Butler's appeal on this issue also.'

34. I note that Arden LJ expressed similar reasoning (albeit on an obiter basis) in the earlier case of Pringle v Callard [2007] EWCA Civ 1075. In that case one of the heads of relief sought, against the backdrop of a s.459 petition, was an interim injunction to restrain the removal of a director. Short interim relief to that effect had been granted at first instance by Mann J and was one of the matters being challenged on appeal. By the time the appeal came to be heard, the parties had come to terms on that issue. Nonetheless Arden LJ (at paragraph 33) expressed the following view on an obiter basis:

> '33. On that basis paragraph (2) can be discharged and it is unnecessary to decide whether it is appropriate for the court as an interim remedy to prevent the company from exercising its undoubted statutory right to remove a director by an ordinary resolution. We have been taken to the decision of Mervyn Davies J in Re Sticky Fingers 1992 BCLC 84, where the petitioner sought an order of the court under s.371 of the Companies Act 1985 convening a meeting of the company for the purpose of appointing his own director. The court granted that relief on the basis that there was to be an equal playing field and that no steps would be taken to remove the respondent to the petition, although the petitioner was in fact a majority shareholder. That was a very different situation. In essence it is contrary to principle to impose a director on a company. It is highly impractical so to do in any event where there are disputes between the directors or indeed, as here, allegations of improper conduct. Accordingly, the court would have to be extraordinarily cautious before imposing a director on a

company by way of an interim remedy, but as I have said it is not necessary to decide that point.'

Conclusions

35. The Respondent can and has thwarted the holding of a general meeting by not turning up and by refusing to agree to the meeting taking place in his absence. I am satisfied that the jurisdictional threshold for granting relief under s306 is cleared.

36. On the evidence before me, I am further satisfied that I should exercise my discretion in favour of granting the relief sought under s.306.

37. As noted in Smith v Butler, shareholders have a statutory right to remove a director by ordinary resolution under section 168 of the 2006 Act. Section 168 reflects a statutory policy that shareholders should be able to remove a director by ordinary resolution. This is not a case where there are any class rights at play. This is a case where the will of majority shareholder is being thwarted by the refusal of the minority to attend meetings of the Company so as to render the meetings inquorate. The statutory policy reflected in section 168 must, in my judgment, be afforded considerable weight in determining whether to grant relief under s306 to enable a meeting to be called for the purposes of removing a director.

38. The existence of concurrent s994 proceedings is not necessarily a bar to the grant of an order under s306: see Re Whitchurch Consultants Ltd [1993] BCLC 1359 and Re Woven Rugs Ltd [2002] 1 BCLC 324 at [14]. A fortiori, the mere fact that s994 proceedings have been threatened by the Respondent does not preclude the granting of relief under s306. It is merely a factor to be weighed in the balance.

39. This is clearly not a case in which a s306 application has been launched tactically, in response to s994 proceedings. The timeline summarised in this judgment speaks for itself.

40. I accept that I am not in a position to determine who is right and who is wrong with regard to the various allegations of wrongdoing that each side has made against the other in the correspondence and witness evidence before me. Those allegations will be adjudicated upon in other proceedings. Nonetheless, it is clear that the parties have had a serious falling out, that three of four directors have lost confidence in the fourth, and that the majority shareholder wishes to exercise his statutory right to remove him. I respectfully agree with the obiter view of Arden LJ expressed in Pringle v Callard [2007] EWCA Civ 1075 that, where there are disputes between the directors and allegations of improper conduct, it is 'highly impractical' to impose a director on a company; to deny relief on this application would be tantamount to so doing.

41. I accept that the Company is quorate at board level without the Respondent's cooperation. Board deadlock, however, is not an essential pre-requisite of the grant of relief under s306, although I accept that many of the reported cases involve companies deadlocked at board level. The question whether the Company is deadlocked at board level is a merely one of the factors which falls to be considered

by the court in considering whether to exercise its discretion in favour of granting relief.

42. I accept that the Respondent has not played any part in the day to day running of the Company since February 2018 and has already been removed from the bank mandate on the Company's bank account.

43. Nonetheless, in considering whether the Company is in a position to manage its affairs properly, I must also take account of the fact that, as a de jure director of the Company, the Respondent still has power to bind it. In addition, I take into account the statutory right of the majority shareholder to remove a director by ordinary resolution.

44. I also consider it legitimate to take into account the concerns of the remaining directors that the Respondent's continued connection, if not involvement, with the Company as one of its de jure directors runs the risk of causing reputational difficulties for the Company, now that litigation is in play between the Company and the Respondent, particularly given the allegations in issue.

45. In conclusion I would add that, from the draft petition itself, it appears that even if s994 proceedings are pursued and the Respondent is successful in those proceedings, the Respondent intends simply to seek an order for the purchase of his shares at fair value, not an order that he buys out the majority shareholder. That is to say: the Respondent has played no part in the day to day management of the Company since February 2018 and, from his draft petition, appears to have no intention of playing any such part in the future. This, too, is a factor relevant to my decision to grant relief under s306 in this case. Whilst caselaw in this area is highly fact-sensitive, I do note that this is a point of distinction from cases such as Re Sticky Fingers Restaurant Ltd, where a just and equitable winding up was sought as an alternative to relief under s459 (p87e and 89c), and the Respondent to the s371 application had day to day control of the company pursuant to contractually binding agreements between the parties (p89e). This is an entirely different situation.

46. Counsel for the Respondent was at pains to stress during submissions that the s994 petition exhibited to Mr Jones' statement was 'only a draft' and suggested that other heads of relief might be added in the future. The suggestion that other heads of relief might be added in the future, however, was not on instruction and appeared to be pure speculation. Whilst s994 proceedings have been mooted on numerous occasions in the correspondence before me over the best part of a year, on no occasion in that correspondence was it suggested on behalf of the Respondent that the Company should be wound up on the just and equitable ground, or that the Respondent should buy out the Applicant, only that the Applicant should buy out the Respondent.

47. For all of these reasons, I shall grant the order sought under s306.

ICC Judge Barber