**Approved Judgment**

**Neutral Citation Number [2024] EWHC 2789 (Ch)**

**CR 2024 000236**

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

**IN THE MATTER OF 36 BOURNE STREET LTD**
**AND IN THE MATTER OF THE COMPANIES ACT 2006**

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

Date: 6/11/2024

**Before** :

**ICC JUDGE BARBER**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**JOANNE BRIERLEY**

**Petitioner**

**- and –**

**(1) CHRISTOPHER HOWE**
**(2) 36 BOURNE STREET LTD**

**Respondents**

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**Mr Andrew Sutcliffe KC and Mr George Eyre** (instructed by **Hewlett Swanson)** for the **Petitioner**
**Mr Nigel Dougherty** (instructed by **Cooley (UK) LLP**) for the **Respondent**

Hearing dates: 1 July and 19 July 2024

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# Approved Judgment

This judgment was handed down remotely by email and MS Teams. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30 a.m. on 6 November 2024.

## ICC Judge Barber

1. This is Mr Howe's application for an order pursuant to CPR 3.4(2)(a) and/or 3.4(2)(b) striking out sections E1 and E2 of a s.994 petition presented against him by the Petitioner on 16 January 2024. The application is opposed.

### Background

2. Mr Howe (hereafter 'the Respondent') is a well-known interior, furniture and fabric designer. Following his graduation from Goldsmiths Art College in 1986, he acquired his first shop at 36 Bourne Street, London. His sole trader business initially traded under the name 'Christopher Howe' and, from a starting point of furniture restoration and gilding, soon expanded to the restoration and retailing of antiques, antique lighting and furniture making, securing an early commission for the National Gallery.

3. In 1992, the Respondent's wife began a fabric business known as 'Bourne Street Linen', which sold household Irish linen (both vintage and newly woven) from the shop at 36 Bourne Street. Later, the products sold developed into printed cotton.

4. In 1995, the Respondent acquired an additional showroom on Pimlico Road. This expansion coincided with the launch of a collection of a new range of 'Made by Howe' furniture and lighting.

5. In 2002, the fabric business of 'Bourne Street Linen' was merged with the Respondents' furniture and lighting business.

6. From 2005, the Respondent's sole trader business expanded into leather, fabrics and wallpaper. These aspects of the business were largely conducted from the premises at 36 Bourne Street.

7. In 2008, the Respondent's daughter, Holly, asked the Respondent if he could offer her college friend, the Petitioner, an internship. The Respondent agreed to do so. The unpaid internship took place between September and December 2008.

8. The Petitioner graduated in Art in the summer of 2009. Thereafter she began working full-time in the Respondent's business, initially being paid by the Respondent personally.

9. In or about 2010, it was agreed that the Petitioner would focus on helping to develop the Respondent's leather fabrics and wallpaper business, conducted from 36 Bourne Street, whilst the Respondent would focus on the rest of his business, working from the larger showroom on Pimlico Road.

10. By 2013, the Respondent had decided to run his business through a company. In February 2013, the Respondent's business (including the leather fabrics and wallpaper business) was taken over by a newly incorporated company known as Howe London Limited. Howe London Limited is (and was at all material times) wholly-owned by the Respondent and trades under the name 'Howe London'. At all material times, the Respondent has been sole director and sole shareholder of Howe London Limited.

11. Following the incorporation of Howe London Limited in February 2013, the Petitioner was employed by and paid a salary by Howe London Limited: Petition ('PoC') at [11].

12. It is common ground that, in the spring of 2014, the Respondent proposed to the Petitioner that the leather, fabrics and wallpaper business of Howe London Limited should be separated into a new company, whose day-to-day affairs would be managed by the Petitioner.

13. There is a degree of consensus (but only a degree) as to what happened next.

**The 'Initial Agreement': spring 2014**

14. The Petitioner alleges that, in the spring of 2014, a 'specifically enforceable' agreement arose. At PoC [16], the Petitioner pleads as follows:

> '… in the spring of 2014, [the Respondent] proposed to [the Petitioner] that:
>
> (1) the leather and fabric business of Howe London be separated into a new company whose day-to-day affairs would be managed by [the Petitioner]; and
>
> (2) [the Respondent] would transfer a 5% shareholding in the new company to [the Petitioner] each year for the following five years, up to a maximum 25% shareholding, if the new company achieved annual revenue targets, which would be set at the beginning of each trading year'.

15. At PoC [17], the Petitioner alleges that she accepted the Respondent's proposal orally and that, in the spring of 2014:

> 'the parties thereby entered into a contract on the terms particularised above (the "Initial Agreement"). The Initial Agreement was specifically enforceable by [the Petitioner].'

16. The reference to 'the parties' at PoC [17] appears in context to be a reference to the Petitioner and the Respondent. As at the spring of 2014: (i) 36 Bourne Street Ltd was not even incorporated; and (ii) the leather, fabrics and wallpaper business remained owned by Howe London Limited. There is no mention in the Petition of the impact or otherwise of section 51 of the Companies Act 2006 in these respects.

17. The Respondent denies that any such binding agreement was reached in the spring of 2014 (or at any other time).

**Incorporation of 36 Bourne Street Ltd: September 2014**

18. It was not until some months later, in September 2014, that 36 Bourne Street Ltd was incorporated, initially under the name Howe Leather, Textiles & Wallpaper Ltd ('the Company'). As at the date of incorporation of the Company, (i) the Respondent was the Company's sole director and (ii) the Company's issued share capital comprised one single share, held by the Respondent.

19. The Company did not commence trading immediately. Before it could do so, the business of leather fabrics and wallpaper would need to be taken out of Howe London Limited by way of a statutory demerger. The statutory demerger did not take place until 2015.

20. On 19 June 2015, the Company changed its name from Howe Leather, Textiles & Wallpaper Ltd to 36 Bourne Street Ltd.

21. On 23 February 2016, the Petitioner was appointed as a director of the Company. It is common ground that she continued to be paid a salary.

22. Shortly thereafter, in April 2016, the Company commenced trading, initially with stock transferred from Howe London Limited. At this stage, the Respondent remained sole shareholder of the Company, holding the one issued share.

**Performance target: 2016-2017**

23. It is common ground that, in the summer of 2016, in discussions between the Petitioner and the Respondent, a performance target was set for the Petitioner. The target was that the Company should achieve revenue of £280,000 in its financial year 1 August 2016 to 31 July 2017.

24. The Petitioner maintains that the agreed reward was that the Respondent would 'transfer a 5% shareholding in the .. [Company] to [the Petitioner]': PoC [16.2], [25].

25. The £280,000 revenue target was reached at around the end of April 2017. It is common ground that the Petitioner and the Respondent agreed at around that time that the Petitioner was entitled to a 5% shareholding in the Company immediately.

**The 'Initial Agreement – as varied': April-July 2017**

26. The Petitioner alleges that in or around April/May 2017 (or by July 2017 at the latest - PoC [32] and [33]), the Initial Agreement (as defined at PoC [16]-[17]) was varied by oral agreement. The variation alleged to have been agreed was 'to dispense with the provisions of the Initial Agreement that required [the Petitioner] to meet specified financial targets each year and to replace them with a requirement that [the Petitioner] should perform to the reasonable satisfaction of [the Respondent], to be assessed annually'; such assessment to be undertaken in good faith, and not arbitrarily or capriciously: PoC [33].

27. As pleaded by the Petitioner, the alleged variation was prompted by the Respondent's desire

> 'to avoid a situation where [the Petitioner] was forced to focus solely on the Company in pursuit of financial targets rather than assisting Howe London when that was required': PoC [32.1].

28. I shall refer to this alleged varied agreement as 'the Initial Agreement (as varied)'.

29. The Respondent accepts that 'in principle' discussions took place between the Petitioner and the Respondent in April and May 2017, but says that these were against

the backdrop of a shared understanding that professional (including tax) advice was required before anything could be agreed.

**Email of 13 July 2017**

30. It is common ground that on 13 July 2017, the Respondent sent an email to Ms Hall of the Company's solicitors and others in respect of a proposed enterprise management incentive scheme ('EMI scheme') under discussion at the time, referring to a plan for options to be given to the Petitioner (expressly subject to annual growth targets being set and met), such that she might receive up to 25% of the shares in the Company over time – and possibly more. The Petitioner relies on this email at PoC [29]. The Respondent says that ultimately the proposals came to nothing.

**Subdivision of the Company's share capital: July 2017**

31. On 13 July 2017, a resolution that the Company's sole £1 share be divided into 100 £0.01 shares was formally passed. Notice of the subdivision was given to Companies House on or around 26 July 2017. All 100 shares remained held by the Respondent at this stage.

**Draft Shareholders' Agreement**

32. Between July and September 2017, the Company's solicitors drafted a shareholders' agreement. This was sent out in draft to the Petitioner and the Respondent in September 2017 and included terms restricting the transfer or disposal of shares in the Company. Whilst this was never signed by the Petitioner and the Respondent, the Petitioner alleges that 'the parties accepted its terms by their conduct', albeit without pleading any alleged conduct relied upon for these purposes: PoC [42].

33. The Respondent maintains that the draft shareholders' agreement was one of several documents prepared at the time that a possible EMI Scheme was under consideration and was never finalised or agreed, as ultimately any thoughts of an EMI Scheme were dropped.

34. It is common ground that the proposed EMI Scheme was abandoned in or about December 2017.

**Transfer of 10% shareholding by the Respondent to the Petitioner: July 2018**

35. It is common ground that the Respondent transferred 10% of his 100% shareholding in the Company to the Petitioner on 29 July 2018. The parties are not agreed, however, as to the basis upon which this transfer took place.

**The 'Initial Agreement' – Further Variation: July 2018**

36. The Petitioner maintains that the 10% shareholding was transferred to her in July 2018 pursuant to a further variation of the Initial Agreement (as defined). At PoC [45]) she pleads as follows:

> 'On or around 10 July 2018, [the Respondent] and [the Petitioner] again discussed the Initial Agreement and agreed that it should be further varied, such that [the Petitioner] was entitled

> to a 10% shareholding in the Company immediately and a further 40% at the rate of 5% per year over the following 8 years, providing a maximum 50% shareholding in the Company. As had been agreed in 2017, [the Petitioner's] entitlement to an increased shareholding was dependent on her performing to [the Respondent's] reasonable satisfaction, such assessment to be undertaken in good faith, and not arbitrarily or capriciously'.

37. In this regard the Petitioner relies (at PoC [46]) on an email dated 11 July 2018 which she sent (on the Respondent's case, without his prior knowledge or consent) to some of the Company's advisers, Ms Aylwin and Mr Hussein. By that email the Petitioner stated (inter alia) the following:

> '[The Respondent] has agreed to let me have 50% overall, so we are equals, over 10 years, meaning I can get another 5% on 01/08/19, and the same every 12 months thereafter as long as he is 'happy' for the next 8 years.
>
> 'Happy' is something we have discussed in detail. We have a plan of what we are trying to achieve and I am working on realising it, and making the business into what we want it to be, in a steady and healthy way, never cutting corners, while still aiming for growth. Its [sic] all based on a huge amount of communication and trust. We cannot put proper turnover targets in place for me, as they are a waste of time as that is not how [the Respondent] is judging me…'

38. The Respondent denies that any firm or unqualified agreement to transfer 49%/50% of the shares in the Company to the Petitioner was reached in July 2018 or at all. In broad terms, he maintains that (i) he agreed to 'gift' (by transfer) 5% of his 100% shareholding in the Company to the Petitioner as she had attained the revenue target of £280,000 for the year ending 31 July 2017 that they had expressly agreed and that (ii) in July 2018, at the Petitioner's 'insistence', he agreed to 'gift' (by transfer) a further 5% of his shareholding in the Company to her, as she had worked hard the previous year. He says that any discussions of arrangements that would result in the Petitioner receiving further shares in the Company were at all material times understood by both the Petitioner and the Respondent to be subject to legal (including tax) advice and ultimately came to nothing.

**The '49% Agreement': June 2019**

39. The Petition goes on to allege that some 11 months later, on 25/26 June 2019, the Petitioner and the Respondent (with emphasis added):

> 'reached a new agreement, alternatively further varied the Initial Agreement, such that [the Petitioner] was *immediately* entitled to a 49% shareholding in the Company and to 49% of its profits, *at no additional cost* and in consideration of the time, effort and resources she *had* committed to the Company (the "49% Agreement")': PoC [51].

40. In support of this allegation, the Petitioner refers to quoted extracts from email correspondence exchanged on 27 June 2019, set out in sub-paragraphs at PoC [52].

41. The Respondent denies the 49% Agreement. His case is that any ongoing discussions of arrangements that would result in the Petitioner receiving further shares in the Company were at all material times understood by both the Petitioner and the Respondent to be subject to legal (including tax) advice and that, ultimately, those discussions came to nothing. In this regard he places reliance (inter alia) upon contemporaneous email correspondence quoted and referred to in his Defence ('PoD') at [123], read in the context of (and to some extent, on its face at least, qualifying) the extracts from correspondence quoted at PoC [52].

**The Z Group meeting: 11 July 2019**

42. It is common ground that on 11 July 2019, the Petitioner and the Respondent attended a meeting at the offices of Z group, together with Mr Hussein and Mark Curtis of Z Group, Ms Aylwin and Ms Consiglio, in order to discuss various methods of the Petitioner achieving 'share acquisition', (including the Respondent 'gifting' shares to the Petitioner) and the tax consequences of such methods. It also appears to be common ground that the July 2019 meeting ended without a resolution.

43. Following the Z Group meeting on 11 July 2019, the Petitioner and the Respondent went to lunch at 'Joe & the Juice' in Wimbledon. The Petitioner alleges that the Respondent assured her during that lunch 'that she could trust him to honour the 49% Agreement and directed her to leave the matter with him' (PoC [57]). The Respondent denies the 49% Agreement and does not admit the assurances alleged to have been given regarding the same on 11 July 2019.

**The Re-Branding: August 2019**

44. It is common ground that, on 6 August 2019, the Company undertook a rebranding exercise, in which references to 'Howe' were removed from the Company's branding and new stationery and other materials were produced that read '36 Bourne Street Ltd … Proprietors C. Howe & J. Brierley'. The Petitioner maintains that the rebranding exercise was 'in recognition of the 49% Agreement' (PoC [58]). The Respondent denies this and maintains that the exercise was undertaken in order to improve the Petitioner's morale.

**Dividends: 2020**

45. It is common ground that, in October 2020, at a time when the Petitioner and the Respondent were the only two directors of the Company, the Company paid dividends to its members in proportions of 90% and 10% to the Respondent and Petitioner respectively. It is not alleged in the Petition that the Petitioner objected at the time, or proposed dividends in different proportions. It is the Respondent's pleaded case that she did not.

**Events leading to the Petitioner's departure: 2021 onwards**

46. In early 2021, the Petitioner travelled to India on Company business. Her trip was extended due to the Covid-19 pandemic. On her return from India on around 29 May

2021, the Petitioner informed the Respondent that she wished to establish her own business. She told him that she wished to leave the Company as an employee and as a director in 18 months and that, in the interim, she would assist him in finding a replacement for her. The Respondent says that he understood this to mean that the Petitioner was resigning with effect from 29 November 2022. At this stage (end of May 2021) it is common ground that relations between the Petitioner and the Respondent were amicable.

47. In October 2021, at a time when the Petitioner and the Respondent remained its only two directors, the Company paid dividends to the Petitioner and Respondent in the proportions 10% and 90% respectively. It is not alleged by the Petition that the Petitioner objected at the time or proposed different proportions. It is the Respondent's pleaded case that she did not.

48. The circumstances in which the relationship between the Petitioner and the Respondent subsequently broke down are contentious. In broad terms, the Respondent maintains that things were running smoothly towards an amicable parting until April 2022, when the Petitioner spoke to a family friend who was a lawyer and started demanding a 49% buy-out as a condition of her departure. The Petitioner (in very broad terms) maintains that she was asserting an entitlement to 49% anyway.

49. The Petitioner did not leave the Company on 29 November 2022. By email dated 9 November 2022, the Petitioner told the Respondent that she would not resign as a director or employee of the Company 'other than as part of a structured agreement for the transfer of my full (49%) interest in the Company/business' to the Respondent and that, until such an agreement was reached, she would continue to work for the Company.

50. Ultimately, attempts to hold a quorate general meeting having proved unsuccessful, on 29 September 2023, the Respondent issued proceedings pursuant to s 306 of the Companies Act 2006, by which he sought a court-ordered meeting with a quorum of one member, in order to consider a resolution to remove the Petitioner as a director of the Company.

51. On 19 October 2023, a consent order in respect of the substantive relief sought in the s 306 proceedings was agreed. The Petitioner was removed as a director of the Company that day (19 October 2023) and was later ordered to pay the costs of the s 306 proceedings, in part on the standard basis and in part on the indemnity basis. She was dismissed as an employee on 6 November 2023.

52. The s 994 petition was presented on 16 January 2024. The Respondent filed a defence on 3 April 2024 and, at the same time, issued the current strike out application. On 21 June 2024, very shortly before the first day of the hearing before me, the Petitioner filed a reply.

## The Petition

53. For the purposes of setting out the background to this matter, in the absence of an agreed statement of facts, reference has been made to matters drawn from the pleadings generally. Consideration of the strike out application under CPR 3.4(2)(a) itself, however, calls for a different approach. For the purposes of the strike-out application

under CPR 3.4(2)(a), the focus of this court is on the Petition alone: HRH the Duchess of Sussex v Associated Newspapers Limited [2020] EWHC 1058 (Ch) per Warby J at [33]. I turn, then, to consider the Petition.

54. In broad summary, the Petition seeks declaratory relief based on constructive trust principles regarding the Petitioner's alleged entitlement to a 49% shareholding and/or findings based in proprietary estoppel that the Respondent is estopped from denying the Petitioner's claimed entitlement to such a shareholding (PoC [96]-[100]). The Petition also alleges that the Company was a quasi-partnership (PoC [66]) and seeks a 49% share purchase order under s 996 CA 2006 on the footing that the 'affairs of the Company have been and are being conducted by [the Respondent] in a manner which is unfairly prejudicial to the interests of [the Petitioner] as a member of the Company.' (PoC [101]).

55. Section E of the Petition is headed 'Unfairly Prejudicial Conduct' and is divided into 5 sub-sections, which are in summary as follows:

(1) section E1 is headed 'Ms Brierley's Shareholding';

(2) section E2 is headed 'Failure to pay Dividend';

(3) section E3 is headed 'Exclusion of Ms Brierley' and sets out alleged acts of exclusion from the management and administration of the Company from 2022 onwards, cross-referring to PoC [62] to [63.19];

(4) section E4 is headed 'Unauthorised Loan and Funding Litigation' and alleges wrongful withdrawal by the Respondent of Company monies, cross-referencing PoC [63.9] to [63.12]; and

(5) section E5 is headed 'The Flat' and alleges use by the Respondent of Company property for personal purposes at less than market value.

**The focus of the strike out**

56. By this strike out application, the Respondent does not seek to strike out section E of the Petition in its entirety. The unfair prejudice complaints pleaded at sections E3, E4 and E5 of Petition (PoC [78]-[93]), whilst contested, do not form part of the strike out application.

57. The focus of the strike out application is on sections E1 and E2 of the Petition (PoC [68]-[77]). As these sections are relatively brief, I shall set them out in full. They provide as follows:

> '**E. UNFAIRLY PREJUDICIAL CONDUCT**
>
> **E1. Ms Brierley's Shareholding**
>
> 68. Pursuant to the Initial Agreement and, later, the 49% Agreement, Ms Brierley is entitled to a 49% shareholding in the Company. However, Mr Howe has failed to give effect to the Initial Agreement and/or the 49% Agreement in that he has refused to transfer more than a 10% shareholding to Ms Brierley

and refused to recognise her entitlement to such 49% shareholding.

69. As is particularised above, the Initial Agreement was made for the purpose of establishing Ms Brierley as a member of the Company. The later variations to the Initial Agreement and the 49% Agreement were made in recognition of Ms Brierley's position as a member of the Company and in recognition of the time, effort and resources she dedicated to the Company from its establishment.

70. For the avoidance of doubt, irrespective of the 49% Agreement, Ms Brierley would have become entitled to a 30% shareholding in the Company by August 2022 pursuant to the Initial Agreement.

70.1 By that time, six relevant trading periods had elapsed and Mr Howe had consistently informed Ms Brierley that she was performing to his reasonable satisfaction and/or had not intimated that Ms Brierley's performance was unsatisfactory.

70.2 Although, as particularised above, Mr Howe began to state that he was dissatisfied with Ms Brierley's performance in 2022, there was no reasonable basis for him to do so. Such statements were made arbitrarily, capriciously and/or in bad faith, for the purpose of denying Ms Brierley shareholding to which she was entitled.

71. In failing to give effect to the Initial Agreement and/or the 49% Agreement, Mr Howe breached his duties to the Company pursuant to the CA 2006. In particular:

71.1 In breach of his duty pursuant to section 171 of the CA 2006, Mr Howe failed to act for a proper purpose of the Company but instead acted for the improper purpose of promoting his own financial interest.

71.2 In breach of section 172 of the CA 2006, Mr Howe failed to act in good faith in a manner likely to promote the success of the Company for the benefit of its members as a whole and, in particular, failed to take into account the need to act fairly as between members of the Company.

71.3 In breach of section 174 of the CA 2006, Mr Howe failed to exercise reasonable care, skill and diligence by failing to organise the affairs of the Company in accordance with the proper position agreed and understood between its directors and members.

71.4 In breach of sections 173 and 175 of the CA 2006, Mr Howe failed to act with independence and/or failed to avoid a situation

in which his personal interests conflicted with those of the Company.

72**.** Further and in any event, Mr Howe's failure to give effect to the Initial Agreement and/or the 49% Agreement is inequitable in circumstances where the Company was a quasi partnership, as particularised above.

73**.** In the premises, Mr Howe's failure to give effect to the Initial Agreement and/or the 49% Agreement has been and is unfairly prejudicial to Ms Brierley's interests as [a] member of the Company.

**E2 Failure to pay Dividend**

74. The Company paid dividends as follows:

74.1 In 2020, Mr Howe was paid a dividend of £20,000.70 whereas Ms Brierley was paid only £2,222.30.

74.2 In 2021, Mr Howe was paid a dividend of £18,000.00 whereas Ms Brierley was paid only £2,000.00.

75. In the premises, the dividends paid to Ms Brierley on both occasions represented 10% of the total dividend payment but, as is particularised above, Ms Brierley was entitled to receive a 49% share of the total dividend payment.

76. In failing to ensure that Ms Brierley was paid the dividends to which she was properly entitled, Mr Howe breached his duties to the Company pursuant to the CA 2006. In particular:

76.1 In breach of his duty pursuant to section 171 of the CA 2006, Mr Howe failed to act for a proper purpose of the Company but instead acted for the improper purpose of promoting his own financial interest.

76.2 In breach of section 172 of the CA 2006, Mr Howe failed to act in good faith in a manner likely to promote the success of the Company for the benefit of its members as a whole and, in particular, failed to take into account the need to act fairly as between members of the Company.

76.3 In breach of section 174 of the CA 2006, Mr Howe failed to exercise reasonable care, skill and diligence by failing to pay sums which were in fact due and owing by the Company.

76.4 In breach of sections 173 and 175 of the CA 2006, Mr Howe failed to act with independence and/or failed to avoid a situation in which his personal interests conflicted with those of the Company.

> 77. In the premises, Mr Howe's failure to ensure that Ms Brierley was paid the dividends to which she was properly entitled is unfairly prejudicial to Ms Brierley's interests as a member of the Company.'

**Respondent's position on the strike-out: overview**

58. The Respondent contends that the complaints set out in sections E1 and E2 of the Petition do not represent 'conduct of the Company's affairs' as alleged at PoC [101] and are therefore not justiciable under s 994 CA 2006.

59. Put briefly, the Respondent maintains that the Petitioner's claims of alleged entitlement to receive additional shares 'by transfer' from the Respondent are pleaded only as a personal arrangement between the Petitioner and the Respondent. This, it is argued, is not an arrangement that would (or is even said to) involve the Company in any way.

60. As a corollary of that, the Respondent contends that the Petitioner's claims of alleged entitlement to receive enhanced dividends are entirely parasitic upon her claims to be entitled to receive additional shares. The Petitioner does not suggest or plead that she has not received the dividends that her registered shareholding entitled her to. Instead, her essential complaint is that the Respondent has received dividends on some of the Respondent's shares when, it is contended, they ought properly to have belonged to the Petitioner. That too, the Respondent argues, is a personal claim as between the Petitioner and the Respondent and does not involve the Company in any way.

61. It is on that basis that the Respondent seeks an order striking out sections E1 and E2 as grounds of 'unfair prejudice' in the Petition.

**Principles**

62. CPR 3.4(2) gives the court power to strike out a statement of case, or part of one, if it appears to the court

> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order.

63. Practice Direction 3A (Striking Out a Statement of Case) supplements CPR 3.4.

64. The Application Notice in this case relies upon CPR 3.4(2)(a) and (b) both cumulatively and in the alternative.

65. The principles governing a strike-out application are helpfully summarised in HRH the Duchess of Sussex v Associated Newspapers Limited [2020] EWHC 1058 (Ch) per Warby J at [33]:

> '(1) Particulars of Claim must include "a concise statement of the facts on which the claimant relies", and "such other matters

> as may be set out in a Practice Direction": CPR r 16.4(1)(a) and (e). The facts alleged must be sufficient, in the sense that, if proved, they would establish a recognised cause of action, and relevant.
>
> (2) An application under CPR 3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials it should "grasp the nettle": ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725. But it should not strike out under this sub-rule unless it is "certain" that the statement of case, or the part under attack discloses no reasonable grounds of claim: Richards (t/a Colin Richards & Co) v Hughes [2004] EWCA Civ 266 …. Even then, the Court has a discretion; it should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment.
>
> (3) Rule 3.4(2)(b) is broad in scope, and evidence is in principle admissible. The wording of the rule makes clear that the governing principle is that a statement of case must not be "likely to obstruct the just disposal of the proceedings". Like all parts of the rules, that phrase must be interpreted and applied in the light of the overriding objective of dealing with a case "justly and that proportionate cost"…'

66. At [34] in the Duchess of Sussex case, Warby J continued:

> 'In the context of r.3.4(2)(b), and more generally, it is necessary to bear in mind the Court's duty actively to manage cases to achieve the overriding objective of deciding them justly and at proportionate cost; as the Court of Appeal recognised over 30 years ago, "public policy and the interest of parties require that the trial should be kept strictly to the issues necessary for the fair determination of the dispute between the parties": Polly Peck v Trelford [1986] QB 1000, 1021, 1021 (O'Connor LJ). An aspect of the public policy referred to here is reflected in CPR 1.1(2)(e): the overriding objective includes allotting a case "an appropriate share of the court resources, while taking into account the need to allot resources to other cases".

67. On behalf of the Petitioner, Mr Sutcliffe KC submitted that the power to strike out should be used sparingly and only in plain and obvious cases, citing Hughes v Richards, a case included in Warby J's helpful summary set out at [65] above.

68. Mr Sutcliffe also referred me to Three Rivers District Council v Governor and Company of the Bank of England [2003] 2 AC 1 at [97], in which Lord Hope referred with apparent approval to the guidance given by Lord Templeman in Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd [1986] AC 368 at p435H-436A that if an application to strike out involves a prolonged and serious argument the judge

should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for the trial or the burden of the trial itself.

69. Mr Sutcliffe further submitted that it is not normally appropriate to strike out a claim in an uncertain or developing area of law. In such cases, he argued, it is of 'great importance' that the claim is determined on the basis of 'actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strikeout': Barrett v Enfield London Borough Council [2001] 2 AC 550 at 557.

70. Mr Sutcliffe also referred me to the case of Kim v Park [2011] EWHC 1781 (QB) at [40], in which Tugendhat J confirmed that, where a statement of case is found to be defective, it is normal for the court to refrain from striking out without first giving the party concerned an opportunity to amend, provided that there is reason to believe that he will be in a position to put the defect right.

**Section 994 CA 2006**

71. Section 994(1) CA 2006 provides as follows:

> '(1) A member of a company may apply to the court by petition for an order under this Part on the ground -
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.'

72. Perhaps understandably, the parties differed in their approach to s 994(1)(a) CA 2006. Mr Sutcliffe submitted that the words 'company's affairs' are 'extremely wide and should be liberally construed', quoting from the judgment of Stanley Burnton LJ at [50] in Hawke v Cuddy [2009] EWCA Civ 291. He also reminded me of the guidance given by Sir Terence Etherton C (as he then was) in Re Charterhouse Capital Ltd [2015] EWCA Civ 536 at [45]. Whilst misquoted in the Petitioner's skeleton argument, working from the report itself, paragraph [45] of Re Charterhouse provides as follows:

> 'The expression "the company's affairs" in subs.(1)(a) is of wide ambit and plainly covers all matters decided by the board of directors. Equally plainly, it does not extend to matters which are neither effected by the company nor on its behalf but, for example, concern activities of shareholders solely in that personal capacity and as between themselves. Accordingly, actions or omissions in compliance or contravention of the Articles of Association of a company may or may not constitute conduct of the company's affairs within s.994(1) depending on the precise facts…'

73. Mr Sutcliffe went on to submit that additional considerations apply where the company is a quasi-partnership, relying on the judgments of the Court of Appeal and the House of Lords in O'Neill v Phillips, reported respectively at [1998] BCC 405 and [1999] 1 WLR 1092. O'Neill, he contended, was on all fours with the present case and of central significance in the context of this strike-out.

74. Given the Petitioner's reliance on O'Neill and the passages quoted from it during written and oral submissions, I must summarise O'Neill in some detail.

**O'Neill v Phillips: [1998] BCC 405 and [1999] 1 WLR 1092**

75. The case of O'Neill involved both a writ action and an unfair prejudice petition. Both were before the judge at first instance.

76. The short facts of O'Neill are as follows. In 1982 a company known as Pectal Ltd started trading in the business of asbestos removal in Essex. Initially it had 100 issued shares of £1 each, held equally by its two directors, Mr Phillips and Mr Mitchell. In March 1983 Mr O'Neill started to work for the company as an asbestos stripper. In December 1983, Mr Mitchell resigned as a director, left the company and transferred his shares to Mr Phillips, leaving Mr Phillips as sole director and sole shareholder.

77. By 1985 Mr Phillips was sufficiently impressed with Mr O'Neill to given him increased responsibilities. In January 1985, he transferred 25 shares to Mr O'Neill and made him a director of the company. In May 1985, they had an informal discussion in which Mr Phillips expressed the hope that Mr O'Neill would be able to take over running the company in return for a 50% share of the company's profits.

78. That arrangement was then acted on. Mr O'Neill did take over the running of the business and in December 1985, Mr Phillips retired as a director, leaving Mr O'Neill as sole director. Although not so described, he was in fact managing director: [1999] 1 WLR 1092 at 1095.

79. For a period of 6 years or so, from 1985 to 1991, Mr O'Neill occupied the role of managing director and, whilst in that role, 'was credited with half the profits'. When a dividend was declared, Mr Phillips would waive a third of his 75 per cent entitlement in favour of Mr O'Neill to produce equality: [1999] 1 WLR 1092 at 1095F-G.

80. At first instance, Mr O'Neill's entitlement to a 50% profit share whilst occupying the role of managing director was admitted.

81. Mr O'Neill also claimed that he was entitled to a full 50 per cent shareholding in the company, subject to achieving certain targets. This claim was disputed.

82. In February 1989, Mr Phillips was re-appointed a director of the company. Mr Ingram and Mr Harris, two employees of the company, were appointed as additional directors later that year.

83. In 1990, the company started trading in asbestos removal in Germany as well as the UK.

84. In 1991, Mr Phillips grew concerned that Mr O'Neill was not exercising proper care over the running of the company. He raised this with Mr O'Neill in March 1991 and

thereafter started to monitor the performance of Mr O'Neill and of the company more closely. By August 1991 Mr Phillips was concerned about the financial state of the company. In September 1991 he decided to step in and manage the company as a whole and to offer Mr O'Neill a more limited role in the management of either the UK or the German operation. Mr O'Neill opted for Germany. Mr Phillips was appointed managing director of the company as from 1 November 1991.

85. On 4 November 1991 there was a meeting between Mr Phillips and Mr O'Neill, which the judge described as the turning point in the case. At that meeting, 'Mr Phillips informed Mr O'Neill of his disapproval of the manner of Mr O'Neill's management of the German operation. He also told Mr O'Neill that the company was not now going to pay him the additional 25 per cent of its profits, since he was no longer fulfilling the role of managing director': 1998 BCC 405 at 409G.

86. Shortly thereafter, in January 1992, the writ and the petition were issued.

87. The unfair prejudice petition, brought by Mr O'Neill in the context of a quasi-partnership, was ultimately based on two complaints (others having been dropped along the way):

(1) The first was Mr Phillips' termination of the equal profit-sharing arrangement that had been put in place in 1985 when Mr O'Neill took up the role of managing director and ended in 1991 shortly after he ceased to act in that role.

(2) The second was Mr Phillips' repudiation of an alleged agreement for the allotment of more shares.

([1999] 1 WLR 1092 at pp 1095F-G, p 1096E, p1097B).

88. The judge at first instance (Judge Paul Baker QC) rejected these complaints and dismissed the petition on two grounds.

89. The first ground was that any prejudice to Mr O'Neill's interests from the reduction in his profit share and the refusal to allot him more shares was not suffered in his capacity as a member of the company. The profit share was his remuneration for acting as managing director and, even assuming that he was led to expect an enhanced shareholding, the additional shares were likewise a reward and incentive for working for the company. They did not derive from his previously having had a 25 per cent shareholding: [1998] BCC 405 at 411F-412A, 413B; [1999] 1 WLR 1092 at 1097E-F.

90. The second ground was that in any event the petition failed on the facts, as

(1) Mr Phillips had not committed himself permanently and unconditionally to an equal sharing of profits. Mr O'Neill's expectation was to receive 50% of profits as remuneration while he acted as managing director. But if circumstances changed, Mr Phillips was entitled, as controlling shareholder, to redraw Mr O'Neill's responsibilities and remuneration. He had made no commitment which made it unfair for him to exercise this power; and

(2) in the case of the additional shares, the matter had never gone beyond negotiation and Mr Phillips had made no binding promises.

([1998] BCC 405 at 412A-C, 412F; [1999] 1 WLR 1092 at 1097C-D).

91. For similar reasons, the judge dismissed the claim for damages in the writ action, but by consent made an order for an account of undrawn profits. An appeal against the judgment in the writ action was not pursued: [1999] 1 WLR 1092 at 1097D.

92. When the matter reached the Court of Appeal (Nourse, Potter and Mummery LJJ), the focus of the court was described by Nourse LJ at [1998] BCC 405 at 406B-C (with emphasis added) as follows:

> 'The principal question for decision is whether, *on the assumption that there was unfair prejudice in the conduct of the company's affairs*, it was prejudice to the interests of the Petitioners *as members* of the company or to their interests in some other capacity. *Unfair prejudice* is also in issue.'

93. Nourse LJ gave the judgment. He said that 'although the judge found there was no concluded agreement as regards the allocation of further shares in the company' to Mr O'Neill, it seemed 'incontrovertible' that at the beginning of 1991, Mr O'Neill had a 'legitimate expectation' that he would receive them when given targets were reached. Likewise, he had a legitimate expectation of continuing to receive 50% of the profits: [1998] BCC 405 at 412F-G, 414C-D.

94. At 414D Nourse LJ continued (with emphasis added):

> 'On this analysis, taking the broad view which is appropriate, I conclude that the unfair prejudice, *if such it was*, can only have been to Mr and Mrs O'Neill's interests *as members* of the company.'

95. On that basis, Nourse LJ rejected what he described as the '*first ground*' of the judge's decision, that of no prejudice in the capacity of a member: [1998] BCC 405 at 414D-E.

96. Nourse LJ next moved on to what he described as the '*second ground*' of the judge's decision, which Nourse LJ summarised thus (with emphasis added):

> 'that since Mr O'Neill's expectation to receive the additional 25 per cent of the profits could only have been while he continued as managing director, a position from which Mr Phillips, as the controlling shareholder, was entitled to remove him, there was *either no prejudice* to his interests *or*, if there was, it was *not unfair*': 414E-F.

97. He went on to observe:

> 'Nothing turns on whether Mr O'Neill's entitlement to the additional 25 per cent of the profits was to come to an end when he ceased to be managing director of the company or ceased to run it successfully. Mr Hollington accepted that, as a matter of contract, his entitlement could not go on for ever. He nevertheless submitted that to determine it in the circumstances

> in which it was determined was both prejudicial and unfair': 414F-G.

98. Nourse LJ then made reference to a passage from a judgment of Robert Walker J (as he then was) in R & H Electrical Ltd v Haden Bill Electrical Ltd [1995] BCC 958 at 969D, (in brief terms, a 'legitimate expectation of continued participation in management' case) in which, inter alia, Walker J had been critical of a 'summary' ejectment which had occurred without consultation or discussion about the future of the departing member's equity capital.

99. Nourse LJ continued (at 415B-C) (with emphasis added):

> '*Similarly here*, however much Mr Phillips may have been justified in his disapproval of the manner of Mr O'Neill's management of the German operation… he was not justified: *first*, in determining Mr O'Neill's entitlement to the additional 25 per cent of the profits and with it his expectation of receiving further shares in the company; and *secondly*, in effectively forcing him to leave the company, without either giving him notice and an opportunity to defend himself or offering to purchase his existing shares at a fair value, which was clearly more than the par value later proposed. *In acting as he did, Mr Phillips conducted the affairs of the company in a manner which was both prejudicial and unfair to the interests of Mr O'Neill*, likewise of Mrs O'Neill. I would also reject the second ground of the judge's decision.'

100. Pausing there, Nourse LJ's reference to the 'second ground' of the judge's decision, read in context, is plainly a reference to the 'second ground' which Nourse LJ had summarised at 414E-F as set out at [96] above. The 'also' in the last sentence of the extract set out at [99] above must be read in the context of Nourse LJ's earlier rejection of the 'first ground' at 414D-E; that is to say, having rejected the first ground of the judge's decision, he 'also' rejected the second ground.

101. As later summarised by Lord Hoffman (at [1999] 1 WLR 1092 at 1097H), Nourse LJ had concluded:

> 'that although there was no concluded agreement about giving him more shares, he had a "legitimate expectation" that he would receive them when the targets were reached. Likewise, he had a legitimate expectation of receiving 50 per cent. of the profits. It was therefore unfairly prejudicial of Mr Phillips to deny these expectations without giving Mr O'Neill "notice and an opportunity to defend himself" or offering to buy his shares at fair value'.

102. The conclusions reached by the Court of Appeal at 415B-C, on what was described by Nourse LJ as the 'second ground' of the judge's decision (see [96] and [99] above), involved an 'important additional finding' (Lord Hoffmann at 1097H) that the judge at first instance had *not* made; that of *exclusion from management*. This was apparent from the reference to 'effectively forcing him to leave the company' at 415B-C, in the extract

quoted at [99] above. It is also apparent from a later reference at 415H to Mr O'Neill 'having effectively been forced to leave the company'.

103. As noted by Lord Hoffmann at 1098B-C (with emphasis added):

> 'whereas the judge was considering only the prejudice arising from the termination of the profit-sharing and share allocation arrangements, the Court of Appeal was *taking a more global view* and treating them as part of conduct by which Mr O'Neill was deprived of all participation in the affairs of the company by a kind of *constructive expulsion*.'

104. Nourse LJ also dealt with a further argument that had arisen only at the start of the appeal, when the respondents had sought leave to put in a respondent's notice out of time. The new arguments were dealt with, in the words of Nourse LJ, 'comparatively briefly'. The argument of relevance for current purposes was addressed at 415E-F, in 8 lines of the judgment. The argument, which does not appear to have been the subject of detailed legal submissions, was that:

> 'since the additional 25 per cent of the profits had been paid to Mr O'Neill by Mr Phillips' agreement to waive dividends to the necessary extent, any unfair prejudice had been caused by a shareholder's decision to terminate the waiver and not by the conduct of the company's affairs'.

105. At 415F, Nourse LJ rejected that submission, stating:

> 'Mr O'Neill's entitlement having been to an additional 25 per cent of the profits, it was a matter of indifference to him whether they were paid by Mr Phillips waiving dividends or by the company direct. To base a decision on such a ground would be to draw a distinction without a difference.'

106. The Court of Appeal in O'Neill went on to allow the appeal and ordered Mr Phillips to buy Mr O'Neill's *existing* 25% shareholding at fair value without any minority discount: [1998] BCC 405 at 416D. No order was made in respect of the further 25% shareholding that Mr O'Neill had hoped for, or in respect of the 25% reduction in his profit share: [1998] BCC 405 at 416D-F.

107. In the House of Lords ([1999] 1 WLR 1092), Lord Hoffmann was critical of the Court of Appeal's approach, making clear (at 1102B-F) that the concept of a legitimate expectation 'should not be allowed to lead a life of its own, capable of giving rise to equitable restraints and circumstances to which the traditional equitable principles have no application'.

108. Lord Hoffmann accepted that the company in O'Neill was a quasi-partnership. From that it followed 'that it would have been unfair of Mr Phillips to use his voting powers under the articles to remove Mr O'Neill from participation in the conduct of the business without giving him the opportunity to sell his interest in the company at a fair price' (1102H). The difficulty for Mr O'Neill in that regard, however, was that Mr Phillips had *not* removed him from participation in the business; after the meeting of 4

November 1991 'he remained a director and continued to earn his salary as manager of the business in Germany': 1103B-C.

109. Noting (at 1103C) that the Court of Appeal had treated Mr O'Neill as having been 'constructively removed', Lord Hoffmann turned next to consider the treatment that had led the Court of Appeal to that conclusion, saying at 1103C-1104A (with emphasis added):

> 'To take the shareholdings first, the Court of Appeal said that Mr O'Neill had a legitimate expectation of being allotted more shares when the targets were met. No doubt he did have such an expectation before 4 November and no doubt it was legitimate, or reasonable, in the sense that it reasonably appeared likely to happen. Mr Phillips had agreed, in principle, subject to the execution of a suitable document. *But this is where I think the Court of Appeal may have been misled by the expression "legitimate expectation". The real question is whether in fairness or equity Mr O'Neill had a right to the shares.* On this point, one runs up against what seems to me the insuperable obstacle of the judge's finding that Mr Phillips never agreed to give them. He made no promise on the point. From which it seems to me to follow that there is no basis, consistent with established principles of equity, for a court to hold that Mr Phillips was acting unfairly in withdrawing from the negotiation. This would not be restraining the exercise of legal rights. It would be imposing upon Mr Phillips an obligation to which he never agreed….
>
> The same reasoning applies to the sharing of profits. The judge found as a fact that Mr Phillips made no unconditional promise about the sharing of profits… He deliberately retained control of the company and with it, as the judge said, the right to redraw Mr O'Neill's responsibilities… The consequence was that he came back to running the business and Mr O'Neill was no longer managing director. He had made no promise to share the profits equally in such circumstances and it was therefore not inequitable or unfair for him to refuse to carry on doing so. The Court of Appeal seems to have contemplated that Mr Phillips might have been entitled to do what he did if he had given Mr O'Neill notice of his intentions and treated him more politely at the meeting on 4 November 1991. But these matters cannot affect the question of whether a change in the profit-sharing arrangements was a breach of faith.
>
> It follows in my opinion that there was no basis for the Court of Appeal's finding that Mr O'Neill had been driven out of the company.'

110. Lord Hoffmann next turned to what Nourse LJ had described as the judge's '*first ground*' for dismissing the petition; that any prejudice suffered by Mr O'Neill was not

suffered in his capacity *as a member*. In section 9 of his opinion at 1105D-E, under the sub-heading '*Capacity in which prejudice suffered*', Lord Hoffmann continued:

> 'the judge was considering only the prejudice suffered through not getting a half-share in the profits or the additional shares. It is somewhat unreal to deal with the capacity in which prejudice was suffered in these respects when there was no entitlement in law or equity in the first place. But assuming there had been a contractual obligation, I would not exclude the possibility *that prejudice suffered from the breach of that obligation could be suffered in the capacity of shareholder*.'

111. Ultimately, the House of Lords reversed the Court of Appeal's decision in O'Neill and dismissed the petition.

**Re Coroin Limited (No 2), Graham v Every and Primekings**

112. Mr Dougherty maintained that O'Neill was not a case focussed on the meaning and scope of the threshold requirements of 'act or omission of the company' or 'conduct of the company's affairs' for the purposes of s 994(1)(a) and (b) CA 2006 and accordingly was of minimal significance in the current context.

113. He placed greater emphasis on the guidance given by the Court of Appeal in the more recent cases of Re Coroin Limited (No 2) [2013] EWCA Civ 781, Graham v Every [2014] EWCA Civ 191 and Primekings v King [2021] EWCA Civ 1943 together with the authorities cited with approval therein. These authorities**,** he argued, demonstrate the need for courts to maintain a focus on the conduct of the company's affairs.

114. I turn next to consider these authorities.

115. At first instance in Re Coroin Ltd (No 2) [2012] EWHC 2343 (Ch), David Richards J (as he then was) observed of s 994:

> '626. The section is not directed to the activities of shareholders amongst themselves, unless those activities translate into acts or omissions of the company or the conduct of its affairs. Relations between shareholders inter se are adequately governed by the law of contract and tort, including where appropriate the ability to enforce personal rights conferred by a company's articles of association'

116. On appeal in Re Coroin Limited (No 2) [2013] EWCA Civ 781, addressing the requirements of s 994(1)(b), Arden LJ said:

> '13. The requirements relevant to this appeal are that (1) there is an act or omission on the part of the company and (2) that act or omission is unfairly prejudicial to [the Petitioner].
>
> 14. These requirements are cumulative. If the court concludes that the first requirement is not satisfied, the second requirement does not arise. Moreover there is nothing to stop the court

> considering the requirements on the basis most favourable to [the petitioner] and, if it concludes that the case could not succeed on that basis, restricting its consideration of other issues raised. Cases under section 994(1) can be very resource intensive …This case is an example of a heavy section 994(1) petition since the trial below occupied 30 days of court time. Courts must, where possible, find ways and means of reducing the hearing times for these cases. In this case it may have been possible for significant amounts of court time to have been saved by focusing on the statutory requirements for an act or omission of [the company] which is unfairly prejudicial.'

117. I pause here to note that the foregoing passage was cited with approval by Snowden LJ in Primekings at [66].

118. In submissions Mr Sutcliffe argued that Arden LJ was considering the requirements of s 994(1)(b) in Re Coroin (No 2), whereas in the present case, the Petitioner relied upon s994(1)(a). The requirements of s994(1)(a) are similarly cumulative, however: Primekings at [66]; Graham v Every [2014] EWCA Civ 191 at [37]. It is only if the first threshold requirement is cleared that the court will next consider whether the conduct in question is unfairly prejudicial to the petitioner or members generally.

119. As Arden LJ observed in Graham v Every [2014] EWCA Civ 191 (with emphasis added):

> '37. The requirement in section 994 for an 'act or omission of the company' means that the Petitioner must identify something which the company does or fails to do. The alternative requirement - that 'the company's affairs are being or have been conducted in a manner that is unfairly prejudicial' to members or the Petitioner - does not contain the same stipulation. Mr Graham can rely on the actions of some other persons, including his fellow shareholders. *But the actions must still amount to the conduct of the company's affairs*'.

120. The case of Graham v Every concerned a s 994 petition involving a quasi-partnership company formed to run an ice bar and restaurant. The petitioner had presented the s 994 Petition following his removal as a director of the company. At first instance, the judge had struck out (among other things) an allegation in the petition referred to as 'the non-compliant share purchase' allegation. This was an allegation that one of the respondent shareholders (Mr Every) had bought all the shares of two other shareholders (amounting to 26.6% of the total issued shares) (the 'impugned shares') without those shares having first been offered pro rata to all the other shareholders. This was alleged to have been a breach of a common understanding between all the shareholders when the company was formed as to how the company would be run, which had been partly recorded in written 'heads of agreement'.

121. The petitioner appealed against the strike out of parts of the petition. The respondents cross-appealed, contending that the petition should have been struck out in its entirety.

122. On appeal, the petitioner was presented by Mr Nicholas Stewart QC (as he then was). Reading the judgments of the Court of Appeal as a whole, it is in my judgment legitimate to conclude that Mr Stewart had not appeared at first instance and had only recently been instructed for the purposes of the appeal. He openly accepted that the petition was deficient, outlined matters that he wanted to be able to plead and indicated to the court the timeframe within which he could do so. This stance appears to have informed the manner in which the court approached the appeal. In the opening paragraphs of the first judgment given on appeal, for example, Arden LJ (at [5]) stated:

> '[5] For my part, a key consideration in my decision on the proper disposal of this appeal is that Mr Nicholas Stewart QC, for Mr Graham, candidly accepts that Mr Graham's petition fails to give a large number of the particulars which it ought to give. Mr Stewart has agreed that Mr Graham should give the further particulars which he ought to give within a defined period. In those circumstances, provided that the agreement is appropriately incorporated into an order of the court, I would be reluctant to make an order striking out this petition on the grounds of any pleading point unless it was inevitable that the allegation would fail.'

123. At [6] Arden LJ stated that the judge below had been wrong to strike out the non-compliant share purchase' allegation 'at this stage', adding;

> '[a]s I shall explain, it may involve the unfairly prejudicial conduct of the Company's affairs when the petition is properly particularised'.

124. At [9] Arden LJ added:

> 'The next step will be for Mr Graham to provide particulars of his case. The order of the court would, if my Lords agree, leave it open to the respondents to take such further steps as they may be advised in the light of the particulars which Mr Graham gives'.

125. At [42] Arden LJ went on:

> 'In the light of Mr Stewart's acceptance that the allegations in the petition have to be particularised, I would not strike out this petition at this stage but give Mr Graham the chance to provide the promised particulars. The respondents can apply to the court to strike out the allegation if he does not provide the required particulars.'

126. Both McCombe LJ and Vos LJ agreed that the pleading was deficient ([70] [81] and [85]). Vos LJ was content that any lacunae in particularisation be dealt with in the way that Arden LJ had suggested.

127. At [38] of her judgment, Vos LJ concurring, Arden LJ confirmed that:

> '38. On its own, non-compliance with a pre-emption agreement for the sale of shares in the company would not be an act which amounts to the conduct of the company's affairs since the events have nothing to do with the company save when the shares are registered in the names of the new holder, which is a purely ministerial act. An act done in the conduct of the shareholder's personal affairs is not the conduct of the company's affairs.'

128. In the event, on the pleaded facts in Graham v Every, as heavily supplemented, it would appear, by the submissions of Mr Stewart as to what he would plead if given the opportunity, the Petitioner was able to make out the *possibility*, at least, of an arguable case of a causal connection between the breach of the pre-emption agreement and the conduct of the company's affairs.

129. The arguable case of a causal connection came about in this way. At [13] of her judgment, Arden LJ had referred to the shareholders' agreement relied upon by the petitioner, observing:

> 'under the heads of agreement in this case, the directors were not initially to be remunerated by way of salary, and 50% of profits were to be distributed as dividend….'

130. At a later stage of her judgment, having confirmed at [38] the general rule that on its own, non-compliance with a pre-emption agreement for the sale of shares in the company would not be an act which amounts to the conduct of the company's affairs, Arden LJ continued (with emphasis added):

> '39. However, Mr Stewart puts the point more widely than this. And it is true to say that, if Mr Graham establishes his allegation about the terms of the heads of agreement, then, in so far as those terms set out how the Company's business is to be run, breach of those terms would fall within s994(1).
>
> 40. In the normal way, pre-emption agreements fall outside section 994(1) *but in the present case the directors were, as I have explained, not to be remunerated by salary but by way of dividend*. Thus the size of a director's shareholding would dictate his reward for his work on the company's business. How directors were to be remunerated and the company's distributions policy are within the conduct of the company's affairs. So, by denying Mr Graham's pre-emption right at a time when Mr Graham was still a director, Mr Every was arguably interfering with the way in which the parties had agreed that the company would remunerate its directors.
>
> 41. On this basis, there is sufficient for this court to allow the allegation to stand on the basis that Mr Graham provides proper particulars to justify Mr Stewart's submission to us that the non-compliant share purchase allegation is an allegation that the affairs of the company have been or are being conducted in a manner which is unfairly prejudicial to the interest of Mr

> Graham as a member. There is a possibility that he will be able to do so. The point is important because Mr Graham seeks an order that his present shareholding ought to be valued on the basis that he could have acquired the impugned shares. However, Mr Stewart's submission to us can only be made good if there is an appropriate link between the impugned share sale allegation, the conduct of the company's affairs, unfair prejudice to Mr Graham and the relief.'

131. In Primekings, the Court of Appeal confirmed at [61] that the true ratio of the Court of Appeal majority in Graham v Every [2014] EWCA Civ 191 is that there must be a *causal* connection between the personal actions of a shareholder or third party and some other act or omission constituting conduct of the company's affairs, for such matters to be pleaded in support of a claim for relief pursuant to s.994.

132. In Primekings at [66]-[67], Snowden LJ continued (with emphasis added):

> '66. Although designed to overcome some of the limitations which beset the oppression remedy under section 210 of the Companies Act 1948, neither section 459 of the Companies Act 1985 nor Section 994 were drafted on the basis that a shareholder could simply complain, for example, that 'a course of conduct in relation to the company' had unfairly prejudiced his interests. The potential breadth of what is now Section 994 has been limited and kept within manageable bounds by the express statutory requirements that the acts complained of must either (i) be an act or omission of the company, or (ii) the conduct of the company's affairs rather than acts done in the conduct of a shareholder's personal affairs.
>
> 67. *Satisfaction of these requirements should not be overlooked or minimised. Petitions and statements of case in unfair prejudice cases should make it clear which limb of s 994 is being relied upon and should contain a concise statement of the facts upon which the Petitioner relies to make out that requirement*. On the basis of the majority judgments in Graham v Every, it may be legitimate for a concise statement of personal acts of the respondents which are *causally* connected to an act or omission of the company, or *causally* connected to conduct of the company's affairs, to be included to support the primary allegation. *There is, however, no such justification for allowing other allegations of personal conduct of the respondents, which are not causally connected to an act or omission of the company, or not causally connected to conduct of the affairs of the company, to be included in a statement of case under s 994.'*

**Respondent's Submissions**

133. Mr Dougherty emphasised that the requirements of s 994 are 'cumulative' and should be dealt with on a step-by-step basis. The first stage is to ascertain whether the matter complained of qualifies as either 'an act or omission on the part of the company' or

'conduct of its affairs'. It is only if the first requirement is satisfied that the court moves on to consider unfair prejudice: Re Coroin (No 2) [2013] EWCA Civ 781 at [13] and [14]. I accept that submission.

134. Whilst the words 'affairs of the company' may be wide, they are not boundless; they clearly do not capture everything. Ordinarily, breach of a pre-emption agreement will not involve conduct of a company's affairs rather than acts done in the conduct of a shareholder's personal affairs: Graham v Every [2014] EWCA Civ 191 [38]; Primekings at [66].

135. Turning next to consider the Petition itself, Mr Dougherty observed that the Petition was a combination of two distinct complaints. The first was a claim based in trust and proprietary estoppel said to lie between the Petitioner and the Respondent alone (collectively, 'the Trust Claim'). The trust alleged was entirely 'outwith' the Company. This, he argued, was demonstrated by, inter alia, PoC [53], which provides:

> '53. The 49% Agreement was and is specifically enforceable by Ms Brierley. In the premises, by virtue of the 49% Agreement, from 26 June 2019 at the latest, 39 of the 100 shares of the Company that were registered to Mr Howe were beneficially owned by Ms Brierley and held on trust for her by Mr Howe as constructive trustee.'

136. The Trust Claim was further advanced in PoC [96]:

> '96. Ms Brierley is entitled [to] and claims a declaration that 39% of the shares of the Company, or alternatively such other quantity as the Court deems fit, are held on trust for her benefit by Mr Howe as constructive trustee'

137. This, argued Mr Dougherty, was seemingly based on the matters set out at PoC [53]. But again, this was a trust arising outwith the Company. The Respondent is said to hold some of his shares on constructive trust for the Petitioner.

138. The Petitioner's second complaint was said to be founded in unfair prejudice under s 994 CA 2006. There was however nothing in E1 or E2 of the Petition, Mr Dougherty argued, that could properly be said to fall within that category, as no 'affairs of the company' were in fact involved; there was no pleaded act or omission on the part of the Company or any relevant conduct of the Company's affairs. The fact that the subject matter of the claim involved shares in the Company, he argued, did not alter that analysis.

139. The Initial Agreement, as defined at PoC [16]-[17], he contended, was an agreement between the Petitioner and the Respondent, framed in the language of 'transfer'; language consistent with shares already issued. The role of the company in such a context is simply ministerial: Graham at [38].

140. Again, the 49% Agreement, defined at PoC [51], he argued, simply led into PoC [53], which provided that 'by virtue' of the 49% Agreement, the Respondent held shares on trust for the Petitioner. Again, it was not suggested in the Petition that this in any way involved the Company.

141. The complaint advanced in PoC [68] (itself in section E1), was then put (with emphasis added) as follows:

> 'However, [the Respondent] has failed to give effect to the Initial Agreement and/or the 49% Agreement *in that he has refused to transfer* more than a 10% shareholding to [the Petitioner] and refused to recognise her entitlement to *such* 49% shareholding'

142. These allegations, Mr Dougherty argued, were directed solely at the Respondent in his personal capacity as a shareholder. PoC [68] did not plead that the Company was required to do (or abstain from doing) anything.

143. The allegations in section E of the Petition (under the heading 'unfairly prejudicial conduct') were then simply carried forward to PoC [101] which stated that:

> 'By reason of the matter is particularised above, [the Petitioner] avers that the affairs of the Company have been and are being conducted by [the Respondent] in a manner which is unfairly prejudicial to the interests of [the Petitioner] as a member of the Company.'

144. Mr Dougherty submitted that the remainder of section E1 was of no assistance. PoC [69] and [70], he contended, simply asserted what the effect would have been of the agreement the Petitioner says she had with the Respondent. They did not themselves identify anything about the Company having done or not done anything.

145. Mr Dougherty was also highly critical of PoC [71], which pleads a series of breaches by the Respondent of statutory duties owed by him to the Company. For the Respondent to have breached his statutory duties, he argued, there must have been something that the Company was required to do or not to do; yet nothing of the sort was pleaded. He argued that it could not be a breach of a statutory duty owed by the Respondent to the Company for the Respondent not to honour a purely personal arrangement between the Respondent and the Petitioner for the Respondent to transfer some of his shares to the Petitioner.

146. Turning next to PoC [72], which alleges that the Respondent's 'failure to give effect to the Initial Agreement and/or the 49% Agreement' was 'inequitable in circumstances where the company was a quasi partnership', Mr Dougherty argued that the concept of a quasi partnership did not have any relevance to purely personal arrangements, unless the case could be made to fall within the Graham v Every exception, with a sensible causal link pleaded. No such link, he argued, had been pleaded.

147. Mr Dougherty also observed of PoC [72] that again, it is a failure on the part of the Respondent that is alleged. PoC [72] is not couched in terms of any powers that the Company should use and was not using, or should not use and was using: it is simply an allegation that the Respondent has not behaved appropriately in respect of an alleged agreement between two individuals. Fundamentally, he submitted, PoC [72] still fails to tie back to any conduct of the Company's affairs. It could not, he argued, as throughout the Petition, the arrangements have always been pleaded as purely personal arrangements between the Petitioner and the Respondent.

148. Similar observations were made about the concluding paragraph of section E1, PoC [73], which alleges that:

> 'In the premises, [the Respondent's] failure to give effect to the Initial Agreement and/or the 49% Agreement has been and is unfairly prejudicial to [the Petitioner's] interests as member of the Company'.

149. Turning next to section E2, Mr Dougherty contended that PoC [74] simply stated matters of fact and did not identify of itself any unfair prejudice.

150. PoC [75] then asserted (with emphasis added) that the dividends paid to the Petitioner in both 2020 and 2021 represented 10% of the total dividend payment, continuing:

'but, *as is particularised above*, [the Petitioner] was entitled to receive a 49% share of the total dividend payment.'

151. No explanation was given within section E2 itself, he argued, as to why the Petitioner would be entitled to a 49% dividend, given that she was the registered holder of only 10% of the shares. Mr Dougherty contended that, for an explanation, one has to turn back to PoC [51] and [53], which provide (with emphasis added):

> '[51] Following Ms Aylwin's email, during a meeting at the Premises in the evening of 25 or 26 June 2019, [the Respondent] and [the Petitioner] reached a new agreement, alternatively further varied the Initial Agreement, such that [the Petitioner] was *immediately* entitled to a 49% shareholding in the Company and to 49% of its profits, *at no additional cost* and in consideration of the time, effort and resources she *had* committed to the Company (the "49% Agreement")'…..
>
> [53] The 49% Agreement was and is specifically enforceable by [the Petitioner]. *In the premises*, *by virtue of the 49% Agreement*, from 26 June 2019 at the latest, 39 of the 100 shares of the Company that were registered to [the Respondent] were beneficially owned by [the Petitioner] and held on trust for her by [the Respondent] as constructive trustee.'

152. Reading these two paragraphs together, Mr Dougherty submitted, it was clear that section E2 (failure to pay dividend) was entirely parasitic on the share claim in section E1.

153. Turning next to PoC [76], Mr Dougherty was again highly critical of the breach of statutory duty allegations made therein. Nowhere, he argued, was it identified in section E2 why the Company should have departed from the usual rule requiring dividends to be paid to registered holders. If there was a trust claim in relation to shares held by the Respondent, that trust claim would apply equally to any dividends received which were referable to the shares held on trust. This would not, however, relate to the Company at all.

154. Dealing finally with the last allegation in E2, set out in PoC [77], which provides that:

> 'In the premises, [the Respondent's] failure to ensure that [the Petitioner] was paid the dividends to which she was properly entitled is unfairly prejudicial to [the Petitioner's] interests as a member of the Company',

Mr Dougherty submitted that again, there was no indication as to why it was the Company's obligation to ensure that she was paid such dividends or how the Company had failed in any way.

155. Mr Dougherty argued that, in reality, the share and dividend complaints were simply part of the Trust Claim, which was where matters ended up at PoC [96]-[100]. The 'portmanteau' attempt at PoC [101] to rely on all matters pleaded earlier as 'conduct of the Company's affairs' in a manner unfairly prejudicial to the interests of the Petitioner as a member, he contended, was simply to ignore the nature of the claim that the Petitioner had actually advanced in the Petition, which was only a personal arrangement or agreement as between the Petitioner and the Respondent. No agreement involving the Company at all had been pleaded.

156. This, Mr Dougherty contended, was in stark contrast to the facts of Graham v Every, where the petitioner's case (as partly pleaded and partly outlined in Mr Stewart's submissions) was that the petitioner and the other directors were remunerated by the company solely by dividends and not salary, with the result that the impact of denial of a right of pre-emption was to deprive the petitioner of additional shares which were pivotal to the company and the way its affairs were operated. Nothing of that sort, Mr Dougherty observed, was alleged in section E1 or E2, or anywhere else in the Petition. All that appeared in sections E1 and E2 were repeated references to personal obligations of the Respondent.

157. Mr Dougherty reminded me of the numerous cases which have stressed the need for the s 994 jurisdiction to be kept within its proper bounds. He argued that the court should not allow allegations relating to what were essentially trust claims to 'bleed across' and somehow be used to substantiate a claim in unfair prejudice.

158. For all these reasons, Mr Doughtery submitted that the Petitioner should not be allowed to rely on the personal claims between the Petitioner and the Respondent set out in sections E1 and E2 as constituting 'conduct of the Company's affairs' and invited the Court to strike out those sections.

**Petitioner's submissions**

159. Mr Sutcliffe argued that the case of O'Neill of itself demonstrated that the present strike out application was 'misconceived'. He submitted that both the Court of Appeal and the House of Lords in O'Neill had recognised that the repudiation of a personal right to a greater shareholding could be 'conduct of the affairs of the company' within the scope of the unfair prejudice jurisdiction.

160. I have summarised the case of O'Neill at paragraphs [75] to [111] of this judgment. As will be recalled, O'Neill involved an unfair prejudice petition brought in the context of a quasi-partnership on grounds that the majority shareholder had repudiated an agreement that: (i) the minority shareholder would be allotted and issued a 50%

shareholding in the company; and (ii) the company's profits would be shared equally: [1999] 1 WLR 1092 at pp1095F-G, 1096E, 1097B.

161. Mr Sutcliffe argued that it was 'dancing on the head of a pin' to suggest that O'Neill was concerned with the issue and not the transfer of shares. This was 'mere semantics', he argued. The agreement between the two shareholders in the present case, he said, that was the Petitioner was entitled to 'come up' from 10% of ownership of the Company to 49%. Whether this was done by issue of shares to the Petitioner or by transfer of shares from the Respondent 'mattered not'.

162. In this regard Mr Sutcliffe relied upon the response of Nourse LJ in O'Neill at 415F to the argument run by the majority shareholder that his repudiation of the alleged profit-sharing agreement did not concern 'the conduct of the company's affairs' because it had arisen from his personal conduct in ceasing to waive his entitlement to dividends. Such details were similarly 'a matter of indifference' on the facts of the present case, he argued.

163. Mr Sutcliffe also relied upon a passage from the judgment of the Court of Appeal at 415B-C, quoted (somewhat partially) in the Petitioner's skeleton argument as follows:

> 'in determining [the minority's] entitlement to the additional 25 per cent of the profits and with it his expectation of receiving further shares in the company … [the majority] conducted the affairs of the company in a manner which was [unfairly prejudicial]'

164. Mr Sutcliffe submitted that neither of these conclusions (as summarised at [162] and [163] above) had been questioned by the House of Lords on appeal.

165. Mr Sutcliffe further argued that, while the petitioner in O'Neill ultimately failed because it was found that the parties had not reached any binding agreement (1103 per Lord Hoffmann), Lord Hoffmann had recognised that the breach of such an agreement or understanding (in Mr Sutcliffe's words) 'could engage the unfair prejudice jurisdiction in principle', referring, by way of example, to the passage at 1105D-E quoted at [110] above.

166. Mr Sutcliffe also relied upon a passage from Lord Hoffmann's judgment at 1103D-E (quoted at [109] above), in which Lord Hoffmann stated that 'the real question is whether in fairness or equity Mr O'Neill had a right to the shares', submitting that Lord Hoffmann was focussing on the 'right' to the shares rather than the mechanism (transfer or allotment/issue) by which they were received.

167. He also invited the court to note Lord Hoffmann's use of the word 'transfer' rather than 'issue' at 1103F, where Lord Hoffmann had said (with emphasis added):

> 'where, as here, parties enter into negotiations with a view to a *transfer* of shares on professional advice and subject to a condition that they are not to be bound until a formal document has been executed, I do not think it is possible to say that an obligation has arisen in fairness or equity at an earlier stage'

168. I shall deal with each of these points in turn before moving on to Mr Sutcliffe's remaining submissions.

169. With regard to the submissions summarised at [161] and [167] above, the alleged 50% shareholding agreement relied upon in O'Neill was that further shares in the company would be allotted and issued to the minority shareholder. Whilst, occasionally, Nourse LJ and Lord Hoffmann may have employed looser language, referring to the 'transfer of shares', 'giving him more shares', or 'receiving' more shares, it is clear from the documentation in evidence referred to in the judgment of Nourse LJ that what was alleged was an agreement concerning the reorganisation, allotment and issue of further voting and non-voting shares in the company (see by way of example Nourse LJ's judgment at 407H to 408D). The judge at first instance also employed the language of 'allocation' in one of his findings: see Nourse LJ at 408E.

170. An allotment of shares occurs when a person acquires the unconditional right to be included in the company's register of members in respect of the shares: s.558 Companies Act 2006. Where a company has only one class of shares, save where the articles otherwise provide, it is the directors who exercise any power of the company to allot shares of that class: s 550 CA 2006. An allotment triggers certain statutory obligations on the part of the company. As soon as the allotment takes place, the company comes under an obligation to issue share certificates within a two month period (s769(1)(a) CA 2006) and must file Form SH01 within one month of allotment (s 555 CA 2006). The issue of shares, which is separate from allotment, occurs upon registration in the register of members: National Westminster Bank plc v Inland Revenue Commissioners [1995] 1 AC 119 at 126. The requirement to carry out steps of registration, however, flows from the prior allotment.

171. In short, the allotment and issue of shares are processes which undoubtedly involve conduct of the company's affairs.

172. I reject the submission that it is 'dancing on the head of a pin' to distinguish between the transfer and issue of shares. To fail to distinguish between the two would drive a coach and four through the reasoning of Arden LJ in Graham: see Graham at [30]-[32] (and the authorities cited therein), [37] and [38]. The distinction is clear: an allotment/issue of shares undoubtedly involves conduct of a company's affairs. The transfer of shares does not involve conduct of the company's affairs unless it can be shown to fall within the Graham v Every exception, with a sensible causal link pleaded.

173. The passage relied upon from Nourse LJ's judgment at 415F does not assist the Petitioner in this regard. Even leaving aside the facts that (i) Nourse LJ was responding summarily to an argument regarding the profit share agreement, raised at the last minute without the benefit of detailed legal submissions, (ii) the focus of the appeal was elsewhere (see [92] above); and (iii) ultimately the Court of Appeal made no order as regards the profit share (see [106] above), the judge at first instance in O'Neill had found that the additional 25% profit share was *remuneration*, payable while Mr O'Neil acted as managing director of the company: Lord Hoffmann at 1097, Nourse LJ at 414F-G. As made clear in the later cases of Graham v Every at [40] and Primekings at [57], how directors are to be remunerated falls within the conduct of the company's affairs.

174. The passage of Nourse LJ's judgment at 415B-C, as somewhat partially reproduced in the Petitioner's skeleton argument (see [163] above), is of no meaningful assistance either. Even leaving aside the fact that the focus of the appeal was elsewhere (see [92] above), as is apparent from the full passage reproduced at [99] above, the passage relied upon by the Petitioner was said in the context of a 'global' (Lord Hoffmann at 1098B-C) finding by the Court of Appeal that Mr Phillips had by his conduct effectively *excluded* Mr O'Neill from the Company. Whilst this 'global' finding was rejected in the House of Lords, exclusion from the management of a company undoubtedly concerns the conduct of a company's affairs.

175. Mr Sutcliffe's submission that neither of the Court of Appeal's conclusions (as summarised at [162] and [163] above) had been questioned by the House of Lords on appeal is not entirely accurate either. Read in context, the conclusions summarised at [163] were questioned in the House of Lords: see 1098B-C, 1103C-1104A.

176. Moreover ultimately, the process of picking through a reversed Court of Appeal judgment, focussed on other aspects of the s 994 jurisdiction, for any passages which might not have been the subject of express specific disapproval in the House of Lords in O'Neill on a line by line basis, is in my judgment of limited assistance in the present context. As rightly noted by Mr Dougherty, the House of Lords dealt with the case on a broader basis and had no need to 'descend into the weeds' to kill them off one by one.

177. Moreover, even if the Court of Appeal's decision in O'Neill *had not been appealed*, there have been three Court of Appeal decisions directly on point since. To the extent that (in such a scenario) there was any conflict between the Court of Appeal's decision in O'Neill and the later Court of Appeal decisions in Coroin, Graham and Primekings on a relevant point of legal principle going to ratio, the guidance given by Nourse J in Colchester Estates (Cardiff) v Carlton Industries Plc [1986] Ch 80 at 84F-85H would apply.

178. I turn next to Mr Sutcliffe's submission that, while the petitioner in O'Neill failed on the facts (1103), Lord Hoffmann had recognised that the breach of such an agreement or understanding (in Mr Sutcliffe's words) 'could engage the unfair prejudice jurisdiction in principle'. In this regard Mr Sutcliffe had referred, by way of example, to the passage from Lord Hoffmann's opinion at 1105D-E. In this regard I refer to the quoted passage itself, as reproduced at [110] above. Read in context, it is in my judgment plain that the obiter passage relied upon is dealing simply with the question of the *capacity* in which given hypothetical prejudice would have been suffered. It is not addressing the question of whether given conduct amounted to 'conduct of the company's affairs'.

179. I would add that, in any event, on the facts of O'Neill, it was clear that the profit share (as remuneration) and the share claim (relating to the issue and allotment of shares) both did involve conduct of the company's affairs.

180. I turn next to the other passage from Lord Hoffmann's opinion in O'Neill at 1103D-E (quoted at [109] above) relied upon by Mr Sutcliffe. Read in context, Lord Hoffmann was addressing the error of the Court of Appeal in giving the expression 'legitimate expectation' a life of its own. He was not, as Mr Sutcliffe submitted, focussing on the 'right' to shares as opposed to the mechanism (transfer or allotment/issue) by which

they were received. I have already addressed the occasional use of the word 'transfer' at [169] above.

181. For all these reasons, whilst O'Neill is undoubtedly a much-respected foundation stone of the unfair prejudice jurisdiction, in the context of this strike-out application, I do not consider O'Neill to be of the pivotal significance that Mr Sutcliffe suggests. It was not a case focussed on the meaning and scope of the threshold requirements of 'act or omission of the company' or 'conduct of the company's affairs' for the purposes of s 994(1)(a) and (b) and accordingly is of limited significance in the current context.

182. In the current context, the more recent authorities of Coroin, Graham and Primekings are in my judgment of far greater assistance.

183. Moving on to address these authorities, Mr Sutcliffe argued that it was not necessary for the conduct complained of to relate exclusively to the conduct of the company's affairs and that it was common, particularly in quasi-partnership cases, for unfairly prejudicial conduct also to concern private agreements between shareholders. He gave Graham v Every as an example of the circumstances in which an agreement between shareholders, in that case a pre-emption agreement, could form part of a wider agreement between quasi partners concerning the running of the company. In this regard he relied in particular on a passage from the judgment of Arden LJ in Graham v Every at [39]:

> 'if [the minority shareholder] establishes his allegation about the terms of the [shareholders' agreement], then, insofar as those terms set out how the Company's business is to be run, breach of those terms would fall within section 994(1)'

184. Mr Sutcliffe invited the court to draw from that guidance the proposition that the breach of an agreement between shareholders concerning their individual shareholdings will comprise conduct of the company's affairs if the relevant agreement governs 'how the company's business is to be run'.

185. In my judgment, the proposition that Mr Sutcliffe seeks to extrapolate from Arden LJ's remarks is put too broadly. In context, it is clear that Arden LJ was referring in Graham at [39] to the terms relating to remuneration which she had mentioned in Graham at [13]. That is to say: it is not *any* breach of the shareholder's agreement that would potentially qualify as an act or omission of the company or conduct of the company's affairs for the purposes of fulfilling the first threshold requirement of s994, but only a breach of those terms of the agreement which set out how the company's business is to be run. A similar point was made in Re Charterhouse at [45].

186. As later observed by Snowden LJ in Primekings at [57] (with emphasis added):

> '[57] Arden LJ viewed the breach of the pre-emption agreement and the alteration of the proportions in which the shares in the company were held as arguably having *a direct impact upon the way in which the parties had agreed that shareholder/directors of the company were to be remunerated* for their work by way of payment of dividends on their shares. *This* provided what Arden LJ referred to as the 'appropriate link' between the breach of the

> pre-emption agreement which otherwise could not be regarded as conduct of the company's affairs within s 994, and those matters that did constitute conduct of the affairs of the company falling within s 994'.

187. As made clear by Snowden LJ in Primekings, there must be a *causal connection* between personal actions or inactions of a shareholder or third-party and relevant conduct of the affairs of the company within s 994, for such matters to be pleaded in support of a s 994 claim: Primekings at [61] and [67].

188. Importantly, the 'conduct of the affairs of the company' so caused must also, *in turn,* have caused unfair prejudice to the petitioner as a member: Primekings at [5], citing with approval a passage from the judgment of Floyd LJ in Loveridge v Loveridge (No 1) [2020] EWCA Civ 1104 at [41](ii) and (iii).

189. The foregoing requirements were in my judgment very ably summarised in the reported submissions of Ms Addy QC in Primekings at [48]:

> '[48] … personal conduct may properly be pleaded in a petition under s 994 where such conduct *of itself* gives rise to, or enables, relevant conduct of the affairs of the company (which *in turn* is alleged to be unfairly prejudicial to a petitioner). In other words … personal conduct of the respondents to a petition can only be pleaded and relied upon if it is causative of acts or omissions which are allegedly unfairly prejudicial conduct of the affairs of the company.'

190. In addressing the issue of causation, Mr Sutcliffe took me at some length through provisions in the Petition which he maintained were examples of 'conduct of the Company's affairs' arising directly from the agreements or understandings between the shareholders. These included (i) the Company borrowing sums of money from the Petitioner totalling £15,500 (PoC [49.2], [49.4]) (ii) the Company renting part of the Petitioner's home at a reduced rate (PoC [35], PoC [38]) (iii) the work undertaken by the Petitioner for the Company in arranging a sales trip to Los Angeles (PoC [49.1]) (iv) the work undertaken by the Petitioner and her father in repainting free of charge some new premises in Camberwell taken on by the Company (PoC [49.3]); (v) a business plan the parties met to discuss in July 2019 (PoC [54]) (vi) a meeting with Z Group on 11 July 2019 (PoC [55]), (vii) a rebranding of the Company (PoC [58]) and (viii) a general allegation that the Petitioner had relied upon the 49% Agreement and the Respondent's alleged assurances 'by dedicating substantial time, effort and resources to the Company…' (PoC [59]).

191. Some of these examples had also been mentioned in the Petitioner's skeleton argument, by which it was asserted at paragraph 52 (with emphasis added):

> 'Each of those matters plainly comprises conduct of the "affairs of the Company" and took place *solely because of* the Initial Agreement and (later) the 49% Agreement'.

192. Mr Sutcliffe developed the same argument in oral submissions. He invited the court to 'take two obvious examples' - listing the allegations that the Company took loans from

the Petitioner and that the Company had rented part of the Petitioner's home at an undervalue – and argued:

> 'Those actions undeniably comprise conduct of the Company's affairs and on the Petitioner's case - which must be accepted for the purposes of this application - there is a causative link between those acts and personal conduct with which E1 is concerned. Those actions would not have taken place if the parties had not reached the agreement with which E1 is concerned'.

193. As rightly observed by Mr Dougherty, however, this argument demonstrates a fundamental misunderstanding about the guidance given by Snowden LJ in Primekings: see Primekings at [5], [61] and [67]. Not only must there be a *causal connection* between personal actions or inactions of a shareholder or third-party and conduct of the affairs of the company, the 'conduct of the affairs of the company' *so caused* must *in turn* have caused unfair prejudice to the petitioner as a member. This latter requirement is entirely lacking in the examples relied upon by Mr Sutcliffe in submissions, as summarised at [190] above. For the most part they were simply acts of reliance forming part of the Trust Claim.

194. To take one of the various examples relied upon (use of the Petitioner's home at an undervalue): even assuming that the Company's use of part of the Petitioner's home may be termed 'conduct of the Company's affairs', it is not conduct of the Company's affairs that gives rise to any unfair prejudice complained of by the Petitioner in the Petition. Whilst it may be relevant in some way to the Petitioner's Trust Claim, it has no bearing on the unfair prejudice claims pleaded.

195. The same point arises in relation to the allegation at PoC [54] regarding the parties meeting to discuss a business plan in early July 2019. Mr Sutcliffe submitted in this context, drawing on the language of Graham at [39], that 'the 49% Agreement gave rise to conversations between P and R as to how business was to be conducted'. Again, however, whilst discussing a business plan may be described as conduct of the Company's affairs, this is not conduct of the Company's affairs pleaded as having caused unfair prejudice to the Petitioner.

196. The same point applies in relation to the allegation of rebranding at PoC [58]; again, the conduct of the Company's affairs in question (the rebranding) is not conduct pleaded in the Petition as giving rise to unfair prejudice suffered by the Petitioner.

197. The same point applies mutatis mutandis to all the other examples summarised at [190] above.

198. Mr Sutcliffe also relied in the same vein upon an allegation at PoC [92] (in broad terms a complaint that the Respondent didn't pay a market rent for his use of a flat owned by the Company). This paragraph however forms part of section E5, a separate head of unfair prejudice which is not the subject matter of the strike out.

199. Mr Sutcliffe next argued that a causal link could be shown between the 49% Agreement and conduct of the Company's affairs, on the grounds that 'it was the Petitioner's insistence that the Respondent honour the agreement that led to her exclusion from the Company'. It was well established, he argued, that exclusion from management will

ordinarily fall within the category of 'conduct of the company's affairs' in quasi partnership cases.

200. In my judgment this argument suffers from several difficulties.

201. The first is that the 'conduct of the company's affairs', in the context of the argument summarised at [199] above, is the Petitioner's alleged *exclusion, not* the Respondent's refusal to honour the Initial or 49% Agreement or the Petitioner's insistence that he do so. The Petitioner's *exclusion* is a separately pleaded head of unfairly prejudicial conduct set out in E3, a section of the petition which is not the subject of the strike out.

202. The second is that the Petition does not plead any direct causal link between the Petitioner's insistence that the Respondent honour the 49% Agreement and the Petitioner's exclusion from the Company. The Petitioner's skeleton argument (at [54]) relied on PoC [63] in this regard. Mr Sutcliffe in oral submissions relied on PoC [60]-[64]. There was, however, some considerable distance between the summaries of those paragraphs put forward repeatedly in oral submissions and what was in fact set out in PoC [60]-[64] in black and white, as I observed at the time.

203. Mr Sutcliffe's attempts to rely upon PoD [61]-[62] instead served little purpose either. For the purposes of a strike-out application under CPR 3.4(2)(a), the focus of court is on what is pleaded in the Petition: HRH the Duchess of Sussex v Associated Newspapers Limited [2020] EWHC 1058 (Ch) per Warby J at [33].

204. To the extent that the Petitioner also sought to argue that the Respondent's repudiation of, or failure to honour, the Initial Agreement and/or 49% Agreement (rather than the Petitioner's insistence that he honour the same) *of itself* caused the Petitioner's exclusion, this argument runs into the additional difficulty (over and above not being pleaded) identified by Arden LJ in Graham at [36] and noted in Primekings at [55]; the removal of a director requires only an *ordinary* resolution, which the Petitioner could not have blocked even if she had acquired a 49% shareholding in the Company.

205. In relation to section E2 (payment of dividends), Mr Sutcliffe reminded me that it is well established that the payment of (or failure to pay) dividends is treated as conduct of a 'company's affairs' and can support a claim for unfair prejudice. In this regard I was referred by way of example to In re A Company (No 00370 of 1987) [1988] 1 WLR 1068 per Harman J at 1073, Croly v Good [2010] EWHC 1 (Ch) at [3]-[4], [97], [100], Graham at [40], [82] and Primekings at [59].

206. I accept that that complaints regarding dividends are common in unfair prejudice petitions. Whilst that is the case, however, the complaint as pleaded in the Petition is not put on an established basis. As pleaded, E2 does not raise a conventional complaint, such as that more should have been paid out by way of dividends from the Company. Read in the context of the Petition as a whole, it raises a complaint that the Petitioner did not receive the dividend payments that she *would* have received *had she been registered holder of 49% of the shares in the Company*.

207. Mr Sutcliffe argued that the dividends claim was not parasitic on the shareholding claim. He maintained that the 49% Agreement had two distinct limbs – a share agreement and profit share agreement.

208. Mr Sutcliffe also urged the court not to overlook the relationship between Sections E1 and E2. He referred me to Primekings at [57] when, commenting on Graham, Snowden LJ had observed that the breach of the pre-emption agreement 'arguably ha[d] a direct impact upon the way in which the parties had agreed that shareholder/directors of the company were to be remunerated'. On the facts of Graham, this was the appropriate link which prevented the claim being struck out. Mr Sutcliffe maintained that the same observations applied to Sections E1 and E2 of the Petition.

209. The difficulty with these arguments is that this was not how the Petitioner's case was pleaded in the Petition.

210. Mr Sutcliffe is correct to observe that E2 did not in terms allege that the Respondent was under a personal obligation to pay the Petitioner a dividend in accordance with her true shareholding, but rather, that the Respondent 'fail[ed] to ensure that Ms Brierley was paid the dividends to which she was properly entitled' (PoC [76]). But there is no allegation that the Company was required to pay dividends on any different basis than to the registered holders of its shares. Unless the Company was required to do (or not to do) something, there is no basis for saying that the Respondent (as a director) failed to discharge his duties to the Company.

211. In the Petition, the basis of the Petitioner's alleged entitlement to 49% of the dividends is not particularised in E2 itself. PoC [75], which forms part of E2, states simply, with emphasis added, '*as is particularised above*, [the Petitioner] was entitled to receive a 49% share of the total dividend payment'. The reference to particulars given 'above', read in the context of the Petition as a whole, is a reference back to PoC [51] and [53], which, it will be recalled, provide as follows (with emphasis added):

> '[51] Following Ms Aylwin's email, during a meeting at the Premises in the evening of 25 or 26 June 2019, [the Respondent] and [the Petitioner] reached a new agreement, alternatively further varied the Initial Agreement, such that [the Petitioner] was *immediately* entitled to a 49% shareholding in the Company and to 49% of its profits, *at no additional cost* and in consideration of the time, effort and resources she *had* committed to the Company (the "49% Agreement")'…..
>
> [53] The 49% Agreement was and is specifically enforceable by [the Petitioner]. *In the premises, by virtue of the 49% Agreement*, from 26 June 2019 at the latest, 39 of the 100 shares of the Company that were registered to [the Respondent] were beneficially owned by [the Petitioner] and held on trust for her by [the Respondent] as constructive trustee.'

212. Reading these two paragraphs together, in the context of the Petition as a whole, in my judgment Mr Dougherty is correct in submitting that section E2 (failure to pay dividends) is entirely parasitic on the share claim in section E1.

213. As pleaded at PoC [51] and [53], the 49% Agreement is a purely personal agreement between the Petitioner and the Respondent. It does not involve the Company. This is readily apparent from the pleaded effects of the 49% Agreement, set out at PoC [53]. In this regard the second sentence of PoC [53], commencing, 'In the premises' is

particularly pertinent. The allegation at PoC [53] is that from 26 June 19 at the latest, 39 of 100 shares registered in the Respondent's name were held on trust for the Petitioner. No separate reference to dividend entitlement is included in PoC [53]. It is the alleged entitlement to the shares that carries with it the entitlement to corresponding dividends. The two go hand in hand.

214. The parasitic nature of the dividend complaint is reflected throughout the Petition. PoC [62] for example, complains of the Respondent's suggestions 'that he would not recognise [the Petitioner's] entitlement to a 49% shareholding in the Company'. No separate mention is made of any dividend entitlement in that paragraph. At PoC [66.6], reference is made to the Respondent's repeated assurances 'that she would be granted a greater shareholding…' No mention is made of any separate assurances regarding dividends. Similarly, under the heading 'Relief', PoC [96] seeks a declaration that 39% of the shares in the Company are held on trust by the Respondent for the Petitioner. No separate mention is made of dividends. Similar observations apply in relation to relief sought in respect of the proprietary estoppel claim at PoC [97]-[100]; again, the focus is on the shares with no separate reference to dividends. The prayer for relief seeks acquisition of the Petitioner's shares on the basis that she holds 49% of the shares in the Company; there is no specific head of relief sought of an account of 39% of profits from 26 June 2019.

215. Mr Sutcliffe's attempts to recast the 49% Agreement, in the language of Graham, as arguably having a direct impact upon the way in which the parties had agreed that shareholder/directors of the company were to be *remunerated*, do not reflect the pleaded case. The Petition pleads that the Petitioner was paid a salary. There is no suggestion in the Petition that her remuneration was to be determined by reference to a percentage shareholding. The culmination of the various personal agreements alleged between the Petitioner and Respondent was the 49% Agreement. The Petitioner's pleaded case is that the 49% Agreement was either a 'new agreement', or that it further varied the earlier 'Initial Agreement'. Either way, as pleaded, the 49% Agreement replaces, or supersedes, the earlier agreements pleaded. As pleaded at PoC [51], the 49% Agreement is couched in terms of what was said to be an *immediate* entitlement to a 49% shareholding in the Company and 49% of its profits, (with emphasis added) '*at no additional cost'.* The consideration, comprising 'time, effort and resources she *had* committed to the Company', is pleaded as *past* consideration. The effect of the 49% Agreement is then pleaded at PoC [53]; a constructive trust involving only the Petitioner and the Respondent. As Mr Dougherty rightly noted, it is a trust 'outwith' the Company.

216. In this context Mr Sutcliffe's attempts to rely upon Nourse LJ's comment in O'Neill at 415F, regarding the 'form' rather than the substance of a profit share agreement, do not assist. In O'Neill, the profit share arrangement had the requisite causal link required by Graham/Primekings: the profit share represented remuneration from time to time payable in consideration for Mr O'Neill's *ongoing* services as managing director.

217. That is not how the Petition in the present case is pleaded. The 49% Agreement pleaded is a personal arrangement between the Petitioner and the Respondent but does not have the requisite causal link required by Graham/Primekings. As pleaded, to adopt the language of Arden LJ in Graham at [39], with emphasis added, the 49% Agreement is not an agreement setting out terms regarding 'how the Company's business is *to be* run'.

218. Mr Sutcliffe reminded me that it is not normally appropriate to strike out a claim or part of a claim in an uncertain or developing area of law, relying on Barrett [2001] 2 AC 550 at 557. I accept that as a principle. In this case, however, the issues under consideration have been the subject of very clear guidance by the Court of Appeal in the three decisions of Coroin (No 2), Graham and Primekings. The guidance given in Primekings in particular, as the culmination of the three decisions, could not be clearer.

219. I also remind myself of the guidance given by Warby J in the Duchess of Success case at [33], reproduced at [65] of this judgment. It is a fundamental requirement of particulars of claim that the facts alleged must be sufficient to establish (if proved) the cause of action pleaded. In a clear case, the court should 'grasp the nettle.'

220. Mr Sutcliffe also referred to certain procedural considerations which, he argued, the court should take into account. He submitted that it was 'routine' for conduct forming the basis of unfair prejudice petitions, particularly those concerning a quasi-partnership, also to be capable of forming the basis of other claims between the shareholders. In this regard he referred me to the case of Wootliff v Rushton-Turner [2016] EWHC 2802 (Ch), in which Mr Registrar Briggs (as he then was) had refused to strike out a claim for wrongful dismissal within an unfair prejudice petition concerning a quasi-partnership. Reference was also made to the case of Croly at [24] and J&S Insurance & Financial Consultants Limited [2014] EWHC 2206 at [25] and [36].

221. Mr Sutcliffe argued that irrespective of the strikeout application, the court would be required to hear evidence and decide the basis upon which the Company was formed, whether it was a quasi-partnership, and the rules on which it was agreed that the affairs of the Company should be conducted; together with the promises made by the Respondent to the Petitioner in respect of her shareholding and whether the Initial Agreement and the 49% Agreement were in fact reached. The court would also have to consider the roles in fact performed by the Petitioner and the Respondent in the conduct of the Company's affairs, including the extent to which the Petitioner relied upon representations concerning her shareholding in the Company and whether the Respondent holds 39% of the shares of the Company on trust for the Petitioner and/or whether his conduct has given rise to proprietary estoppel in respect of the same. The strike-out sought, he argued, would be 'futile'.

222. In my judgment, case management considerations should not be permitted to undermine the key threshold requirements of the s 994 jurisdiction. This was made clear by the Court of Appeal in Re Coroin (No 2) when reviewing the approach adopted by David Richards J (as he then was) at first instance. As noted by Arden LJ in Re Coroin (No 2) at [11], s 994 is a purely statutory jurisdiction. That means, in particular, that it cannot be exercised unless the requirements of s 994(1) are fulfilled.

223. If the complaints pleaded at E1 and E2, read in the context of the Petition as a whole, are not justiciable under s 994, they cannot be relied upon for the purposes of the Petitioner's s 994 claim and must come out of section E. The fact that some (but not all) of the alleged facts making up the complaints in E1 and E2 may still have relevance in the context of the Trust Claim does not detract from this conclusion. The Trust Claim is pleaded elsewhere in the Petition and will not be affected by the removal of E1 and E2. The mere fact, however, that it will still be open to the Petitioner to pursue the Trust Claim if E1 and E2 are struck out does not mean that no purpose will be served by striking out sections E1 and E2. The primary purpose is clear: it is to ensure that any

claim brought under s 994 meets the statutory threshold requirements of s 994(1): Re Coroin (No 2) at [11].

224. In Primekings, Snowden LJ had to deal with a similar case management argument to that pursued in the present case. At [51] he said (with emphasis added):

> '[51] Mr Newman's contention (before the Judge and on appeal) was that the judgments in Graham v Every should not be read narrowly. He contended that given the breadth of the statutory remedy in s 994, it was legitimate to plead personal conduct of the respondents which had a factual connection with conduct of the affairs of the company directly falling within the section. He submitted that provided that the link between the allegations of personal conduct and the allegations of conduct of the affairs of the company *'makes sense from a case management perspective'* the court should permit allegations of personal conduct to remain on the pleadings in a petition under s 994….'

225. Having considered (with approval) the guidance given by Harman J in Re Unisoft Group Ltd (No 3) [1994] 1 BCLC 609 at 611 and by Arden LJ in Re Coroin (No 2) [2013] EWCA Civ 781 at [13]-[14], and having made the other observations in Primekings at [66]-[67] reproduced at [132] of this judgment, Snowden LJ continued at [68] (with emphasis added):

> '[68] In that respect, I do not accept Mr Newman's contention that provided that the link between the allegations of personal conduct and the allegations of conduct of the affairs of the company '*makes sense from a case management perspective'*, the court should permit such allegations of personal conduct to be pleaded on the basis that it would be 'unfair' to the petitioner to decide the case without taking both allegations into account. *Effective case management is a matter of procedure and requires a substantive frame of reference….*'

226. I respectfully agree. Observing the 'substantive frame of reference' is of paramount importance in a s 994 context, for, as noted by Arden LJ, s 994 is a purely statutory jurisdiction and cannot be exercised unless the threshold requirements of s 994(1) are fulfilled: Re Coroin (No 2) at [11]. Numerous authorities have now stressed the need for the s 994 jurisdiction to be kept within its legitimate bounds.

227. I also reject the suggestion that striking out E1 and E2 will not benefit the proceedings from a case management perspective in any event. Containing the s 994 claim within legitimate bounds will save significant time and costs. The removal of E1 and E2 will obviate the need to address in disclosure, evidence and submissions each threshold element of s 994(1) in relation to the share and dividend complaints. It will also obviate the need to address, in disclosure, evidence and submissions, each of the statutory duties under ss171-175 CA 2006 alleged in E1 and E2 to have been breached in connection with the share and dividend complaints, a process which would involve considerable time and costs and would (in the case of s174 CA 2006) potentially involve exploring counterfactuals: see Cohen v Selby [2001] 1 BCLC 176. Absent sections E1 and E2, (i) the remaining unfair prejudice complaints set out in E3 to E5 and (ii) the Trust Claim,

can simply be pursued within their own respective legal frames of reference, bringing much needed clarity to the proceedings overall and thereby increasing prospects of settlement. In this regard, I agree with Mr Dougherty that the court should not allow allegations relating to what are essentially personal trust claims to 'bleed across' and somehow be used to substantiate a claim in unfair prejudice.

## Conclusions

228. As made clear in Re Coroin (No 2) at [14], the jurisdictional threshold requirements of s 994(1) are cumulative. If the first requirement is not met, the second requirement does not arise.

229. In my judgment sections E1 and E2, considered in the context of the Petition as a whole, do not clear the first jurisdictional threshold of s 994 and are liable to be struck out. The Petitioner's claims to receive additional shares 'by transfer' from the Respondent are pleaded only as a personal arrangement between the Petitioner and the Respondent. It is not an arrangement that would or is said to involve the Company in any way. The Petitioner's claims in respect of additional dividends are entirely parasitic upon her claims to receive additional shares. That too is a personal claim between the Petitioner and the Respondent and is not a matter that involves the Company in any way.

230. In the language of Primekings, in relation to E1 and E2, no causal connection has been pleaded between the alleged personal conduct of the Respondent as a shareholder and relevant conduct of the Company's affairs causing unfair prejudice to the Petitioner. Without it, the claims raised in E1 and E2 under s 994 are in my judgment bound to fail.

231. In addition, quite independently of the foregoing conclusions, in my judgment the misfeasance allegations in E1 and E2 at PoC [71] and [76] are embarrassing and are liable to be struck out in any event. They are entirely lacking in conventional particularity and simply do not make any sense when read in the context of the Petition as a whole. In this regard I accept Mr Dougherty's submissions on the same as summarised at [145] and [153] above.

232. I accept that where a statement of case is found to be defective, the court in its discretion may refrain from striking out without first giving the party concerned an opportunity to amend, if there is reason to believe that he will be in a position to put the defect right: Kim v Park [2011] EWHC 1781 (QB) at [40].

233. In this case, however, the court does *not* have reason to believe that the Petitioner will be in a position to put the defect right. In marked contrast to the petitioner in Graham, the Petitioner in this case did not come to court acknowledging the deficiencies of the Petition and outlining a strategy proposed to remedy the same. No application for permission to amend has been issued nor any draft amendments produced. The Petitioner's opening stance was that the strike-out application was 'misconceived'. Only one or two fairly minor specific amendments were mentioned, in passing, as possibilities, during the course of submissions, but these of themselves would not have resolved matters. One such suggestion was an amendment to PoC [63], for example, to plead a direct causal link between the Petitioner's insistence that the Respondent honour the 49% Agreement and the Petitioner's exclusion from the Company. For reasons already explored, this would achieve nothing; see [199] to [204] above.

234. It is not for this court to attempt to 'second-guess' how the Petitioner might re-plead her case if given the chance to start again. Whilst there were some attempts in submissions to present the 49% Agreement, in the language of Graham, as arguably having a direct impact upon the way in which the parties had agreed that shareholder/directors of the company were to be *remunerated*, this did not reflect the pleaded case (see [215] above) and flew in the face of the Trust Claim (see for example PoC [51] and [53]).

235. In short, the court does not have reason to believe that the Petitioner will be in a position to put right the defects identified in E1 and E2, read in the context of the Petition as a whole.

236. Moreover, even if the court did have reason to believe that the Petitioner could put right the defects in E1 and E2, in my judgment it would not further the overriding objective for this court, in the exercise of its discretion, to refrain from striking out E1 and E2 at this stage.

237. This is not a case in which the Respondent's stance in relation to E1 and E2 will (or should) have come as a surprise to the Petitioner. It is clear from the party correspondence before me that the Respondent's solicitors, by letters dated 17 February 2023 and 17 March 2023, long before presentation of the Petition on 16 January 2024, flagged the need to identify relevant conduct of the Company's affairs for the purposes of a s 994 petition.

238. The strike out application itself was issued in April 2024 and not heard until July 2024, allowing the Petitioner a further 3 months between receipt of the strike-out application and the hearing itself in which to review her position. The first hearing of the strike-out application on 1 July 2024 was then adjourned part-heard to 19 July, allowing a further 2 weeks or more, following exchange of skeleton arguments and close of the Respondents' oral submissions on 1 July 2024, for further reflection. Yet still the Petitioner's stance at the resumed hearing was to defend the Petition as it stood and to maintain that the strike-out application was misconceived.

239. For the reasons explored in this judgment, the share and dividend complaints are essentially part of the Trust Claim. The Trust Claim is pleaded elsewhere in the Petition and will not be affected by the removal of E1 and E2. If the Petitioner considers that any minor knock-on amendments are required to ensure preservation of the Trust Claim, the court can hear submissions on the same when dealing with consequentials. Striking out E1 and E2 now will bring the benefits summarised in [227] above. In contrast, declining to strike out at this stage and instead allowing an opportunity to apply for permission to amend would in my judgment be contrary to the overriding objective, triggering further contested interlocutory hearings, exacerbating costs and delaying the ultimate final disposal of the proceedings for no good or proportionate purpose. In this regard I have regard in particular to CPR1.1(2)(b) (saving expense), (c) (dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party), (d) (ensuring that the case is dealt with expeditiously and fairly), and (e) (allotting to it an appropriate share of the court's resources, whilst taking into account the need to allot resources to other cases).

240. For all these reasons, I shall order that sections E1 and E2 be struck out.

241. I shall hear submissions on costs and any other consequentials on the handing down of this judgment.

**ICC Judge Barber**