

ON APPEAL FROM THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
CHANCERY APPEALS (ChD)  
MR JUSTICE MARCUS SMITH [2025] EWHC 1898 (Ch)

BETWEEN:

MAGIC INVESTMENTS S.A.

Appellant  
(Petitioner)

and

(1) RALPH THIERRY BROADBENT  
(2) THE GREATER GOOD FRESH  
BREWING CO LIMITED

Respondents  
(Respondents)

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APPEAL SKELETON ARGUMENT  
(OF THE APPELLANT)

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*References to pages of the Appeal bundles are in the form [CORE/page] and [SUPP/page].*

*References in the form [J/para] are to paras of the judgment of Marcus Smith J 25/7/25 at [CORE/99].*

*References in the form [T/line/para] are to the transcript of the hearing before Marcus Smith J 7/5/25 [SUPP/527].*

*References in the form [ICCJ/para] are to paras of the judgment of Dep ICCJ Agnello KC 19/4/24 at [CORE/187].*

**A. INTRODUCTION**

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1. Magic Investments SA (“**Magic**”) petitioned [CORE/224] under ss. 994-996 of the Companies Act 2006 (“**CA 2006**”) for relief for unfair prejudice in the conduct of the affairs of The Greater Good Fresh Brewing Ltd (the “**Company**”).
2. By order dated 19/4/24, Deputy ICC Judge Agnello KC (the “**ICCJ**”) [CORE/215] summarily dismissed Magic’s petition on the application of the First Respondent (“**Mr**

**Broadbent**”), a founder and director of the Company, heard only 1 month before trial. As a consequence, the trial date was lost.

3. Magic appealed with permission granted by Trower J, by order dated 18/10/24 [SUPP/521]. By order dated 25/7/25 [CORE/85], Marcus Smith J (“**the Judge**”) dismissed Magic’s appeal in respect of the ICCJ’s order 19/4/24.
4. This is a second appeal. Permission to appeal was granted by order of Miles LJ dated 14 November 2025 on Grounds 1 and 2 [CORE/114], who was satisfied that these grounds raised important points of principle: CPR 52.7(2)(a). The important points of principle identified by Magic are:

**Ground 1:** whether and in what circumstances a company can properly offer shares at an undervalue to existing shareholders where the threat of financial dilution amounts to coercion of those shareholders to provide further capital. The Judge’s decision on this point conflicts directly with the reasoning in Pettie v Thomson Pettie Tube Products Ltd 2001 S.C. 431 (without engaging with that reasoning) and does not recognise the general principle that a company is obliged to get full value for any issue of shares. Further, the Judge’s decision on this point may be taken as condoning such offerings to shareholders at an undervalue as a means of coercing further capital (something which a conventional analysis, Magic submits, would regard as improper).

**Ground 2:** whether there is anything which precludes a company from conferring on one person a right to appoint a director by agreement with that person (absent the agreement of all shareholders).

(Miles LJ did not grant permission to appeal on Grounds 3 and 4, as those ‘*do not add to the substance of grounds 1 and 2*’ - they relied on the same substantive arguments, but sought permission on the ‘*other compelling reason*’ limb: CPR 52.7(2)(b)).

5. This Skeleton addresses Magic’s appeal. Mr Broadbent has filed a Respondent’s Notice, but not yet any Skeleton Argument in support of that. Necessarily, Magic will address Mr Broadbent’s Respondents’ Notice after it has seen the arguments in support.

## B. OUTLINE FACTS

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6. The Company is a start-up business, incorporated on 6/4/10, which sells an innovative home-brewing kit (**[J/1]**). Mr Broadbent founded the Company with Mr Dixon and was a director (and CEO) of the Company, as well as being a major shareholder.

### **Magic's investment in the Company**

7. Magic was an early investor, subscribing in 2021 for 103 shares at a total price of £996,131.54 (£9,671.18 per share), on terms set out in an agreement dated 26/3/21 **[CORE/219]** (the “**Subscription Agreement**”). Magic’s subscription assumed a valuation of the Company of c. £45m (4653 x £9,671.18): and see 24/3/21 (superseded) **[SUPP/81]**, 25/3/21 **[CORE/223]**, 26/3/21 **[CORE/219]**.
8. Prior to investing, Magic was aware of the existence of shareholder loans, including particularly loans by Mr Broadbent (£1,251,603) and Mr Dixon (£633,601) (the ‘**Founder Loans**’). By clause 4 **[CORE/220]**, the Company and Magic agreed that they would (**[J/5]**, **[J/8]**):

*‘4.1.1 ... in good faith, use all reasonable endeavours, to amplify and/or amend the Corporate Documents [sc. the then Articles and an existing shareholders’ agreement] ...’;*

*‘4.1.5 Any New Shareholders Agreements shall be substantially in the form of the [2018 SHA], but shall, subject to the other shareholders of the Company agreeing to the same, in addition provide for, inter alia, the following –*

*... B. REPAYMENT / DISCHARGE OF LOAN*

*‘As long as shareholders loans 5 and 6 [sc. the Founder Loans] are outstanding, the distribution to all shareholders will be in accordance with each Shareholder’s pro-rata percentage holdings, and shareholders loans 5 and 6 shall not be repaid prior to a Qualified Transaction.’.*

9. Magic also required and obtained a letter from the Company dated 25/3/21 (the “**Nomination Agreement**”) **[CORE/223]** which provided that *‘[Magic] will be entitled to nominate someone to the board.’* **[J/19-21]**. Mr Broadbent signed it for the Company. According to Magic’s unchallenged factual evidence, South African exchange controls required Magic to have a board seat and this was communicated to the investment bank representing the Company in the context of agreeing the Nomination Agreement.

10. Magic initially nominated Mr Meyer to be a director, who later declined to hold office. Thereafter, the Company refused to permit Magic to nominate anyone else: ¶¶23-24 **Petition [CORE/230]**. In denying that right, Mr Broadbent asserted that Magic had only a ‘one-off’ right of nomination which was used up (email 25/10/21 [SUPP/115]).

### **The Deed of Release and New Articles**

11. On 15/10/21 [SUPP/95, 118], the Company circulated resolutions to adopt new articles (the “**New Articles**”) [SUPP/121], adapted from British Venture Capital Association (“**BVCA**”) articles [SUPP/500]) and a Deed of Release to terminate a previous Shareholders’ Agreement (“**SHA**”) [SUPP/100]. Magic signed both on 28/10/21.

### **The June 2022 Transaction**

12. In 2022, Mr Broadbent referred to an approach by Brewdog to acquire a major stake in the Company based on a valuation of the Company of at least £56m: emails 30/3/22 [SUPP/161] (referencing a hope for a deal at a £100m valuation), 2/4/22 [SUPP/162] (also describing a convertible loan offer to shareholders, referring to £56m as being the ‘*current funding round valuation*’), and 1/6/22 [SUPP/165].
13. On 17/6/22 [SUPP/168], Mr Broadbent put to shareholders the Company’s proposal that they could acquire additional newly issued shares at a price based on a valuation of the Company of only £6m [ICCJ/32], [J/7]. However, Mr Broadbent, took pains to emphasise that this was not the Company’s true value: ‘*I want to stress that we are not saying that this is what the Co is worth (indeed the Brewdog HoT place the valuation at £56m) - this is a mechanism to encourage as many shareholders as possible to participate in this round.*’. In other words, as was clear from Mr Broadbent’s own communication, the share offering was being made at a considerable undervalue. This corresponds with evidence filed on behalf of Mr Broadbent, by Mr Haslam, the chairman of the Company, that the board concluded that the offering ‘*...should be at a discount to what was perceived to be the ‘market price’ of the Company...*’ (¶21 **Haslam [SUPP/289]**).
14. On 20/6/22 [SUPP/172], the Company wrote to shareholders, offering up to £6m in shares at 104p per share (one offer share per existing share) with a stipulation that shareholders who had made loans to the Company (such as the Founder Loans) could convert at the issue price, to satisfy an equivalent subscription entitlement [ICCJ/33], [J/7]. Magic protested the offering [ICCJ/36] [J/7], referring to the Subscription

Agreement, and sought an undertaking that the transaction not be implemented (e.g. email 23/6/22 [SUPP/184] ‘*you are by your conversion of your loans which are not due and or payable are prejudicing [shareholders] financially and legally.*’). Despite this, on 4/7/22 [SUPP/199], the subscription offer was declared unconditional (see [ICCJ/34] [J/7]). Mr Broadbent converted £1,115,440 of his Founder Loans to acquire 1.11m offer shares [J/17].

15. Accordingly, the Company issued and allotted a further 5,557,764 shares, in circumstances where it only received an influx of capital of £3,897,774.40 in cash (plus loan conversions of £1,882,300.16): see email 4/7/22 [SUPP/199].

### C. THE PETITION

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16. Magic presented the Petition on 5/12/22 alleging unfairly prejudicial conduct of the Company’s affairs on 3 principal bases (¶¶25-27 Petition [CORE/230]):
  - a. in breach of the Nomination Agreement, the Company had failed and refused to permit Magic to nominate an individual (after Mr Meyer) to act as a director of the Company (the “**Board Seat Allegation**”);
  - b. in breach of the Subscription Agreement, the Company had failed to use reasonable endeavours in good faith to amend the existing SHA so as to provide that the Founder Loans would only be repayable in the event of a Qualified Transaction (the “**SHA Amendment Allegation**”);
  - c. further, Magic complained about the issue of new capital by way of the share offering to existing shareholders and conversion of loans owed to Mr Broadbent and Mr Dixon into equity (the “**June 2022 Transaction Allegation**”).
17. Mr Broadbent’s application [SUPP/243] to strike out and/or for reverse summary judgment (the “**Summary Disposal Application**”) was issued on 20/12/23, the day before Mr Broadbent was due to provide trial witness statements (following extensions), which Mr Broadbent then failed to do until 19/2/24. The grounds on which Mr Broadbent sought summary disposal were set out in a table [SUPP/338]. So far as the Nomination Agreement was concerned, there was no argument by Mr Broadbent that it was not a contract.

## D. THE ICCJ'S JUDGMENT

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18. On 12/4/24, the ICCJ heard the Summary Disposal Application, just in excess of 1 month before the trial fixture, commencing 14/5/24. On 19/4/24 [CORE/187], the ICCJ delivered an oral judgment, holding each of Magic's allegations of unfair prejudice to be fanciful and that there was no real prospect of relief against Mr Broadbent. The ICCJ principally held as below (see the Judge's summary at [J/13]):
19. **As regards the Board Seat Allegation:**
- a. The ICCJ rejected Mr Broadbent's argument that there was a right only to nominate once [ICCJ /25]), but also found that there had only been one (successful) attempt to nominate [ICCJ/43].
  - b. However, the ICCJ held that, as a matter of construction of the Nomination Agreement, Magic had obtained merely a right to nominate (i.e. suggest) someone for consideration as a director, not to have its nominee appointed: [ICCJ/22-24] and see [ICCJ/43].
  - c. A right to have a nominee appointed would have to be in Articles or a SHA [ICCJ/23].
  - d. Even if the right was to have a nominee appointed, there was no unfair prejudice: Magic's nominee would owe the same duties as other directors: [ICCJ/40], and see [ICCJ/43-44].
  - e. On one reading, the ICCJ also held that the Nomination Agreement was in any event superseded by the New Articles and the Deed of Release (although this did not affect claims arising before then) [ICCJ/62-63]. However, Marcus Smith J concluded at [J/21], that that the ICCJ had not actually reached this decision.
20. **As regards the SHA Amendment Allegation:** The ICCJ held that was no breach of the restrictions in (or envisaged by) the Subscription Agreement on the basis that the ICCJ interpreted the word "payment" as meaning payment in cash, rather than also including payment in kind by conversion of the Founder Loans into shares [ICCJ/52-52], [ICCJ/60-61].

21. **As regards the June 2022 Transaction Allegation:**

- a. The ICCJ held that Conversion of the Founder Loans was not repayment and so did not fall foul of any restriction in the Subscription Agreement (i.e. the ICCJ relied upon her finding in relation to the SHA Amendment Allegation) [ICCJ/52-53, 58].
- b. On one reading, the ICCJ again also held that the Deed of Release and New Articles superseded the Subscription Agreement [ICCJ/62-63]. Again, however, Marcus Smith J concluded that she had not done so.

22. **As regards all of Magic's allegations,** the ICCJ concluded that even if Magic's allegations were made out, there was no more than a fanciful prospect of a share purchase order against Mr Broadbent [ICCJ/80-82]. This was because of the ICCJ's view that the Petition failed to identify any wrongdoing by Mr Broadbent or that he controlled the Company or the board.

**E. THE APPEAL TO MARCUS SMITH J**

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23. By appeal notice 10/4/24 [CORE/162] on the grounds at [CORE/174], Magic appealed the ICCJ's Order 19/4/24 [CORE/215] (and her Order 26/4/24 [CORE/217] as to costs).
24. On 18/10/24, Trower J granted Magic permission to appeal on all of its grounds [SUPP/497].

**Magic's arguments before Marcus Smith J**

25. In summary, Magic contended (see Magic's Skeleton Argument at [CORE/116] ("MSkel")) as follows.
26. **As regards the Board Seat Allegation:**

- a. The ICCJ had been wrong to construe the Nomination Agreement as merely entitling Magic to nominate a person to be considered for appointment to the board: the Nomination Agreement in fact conferred on Magic a right to have one board seat occupied by its nominee: ¶19 MSkel [CORE/121]. In reaching her conclusion, the ICCJ had failed to take into account the relevant factual matrix, and in particular the unchallenged evidence that Magic had an obligation (which had been communicated) to have a board seat in order to comply with exchange controls.

- b. Further, the ICCJ judge did not consider the commercial absurdity that of her conclusion that Magic had merely negotiated that it could make a suggestion (something that anyone could do, and which was therefore no right at all): ¶20-1 MSkel [CORE/121].
- c. The ICCJ was wrong to have relied upon the fact that all directors owe the same duties to a company: directors may consistently with their duties have regard to the interests of their appointors and influence over the composition of the board is in itself a valuable right. Prejudice need not be financial. Denial of a right to participate in management is a classic instance of unfair prejudice, as the quasi-partnership cases show: ¶22 MSkel [CORE/122] (and see In Re A. & B.C. Chewing Gum Ltd [1975] 1 W.L.R. 579, cited to Marcus Smith J)
- d. Denial of Magic’s right to appoint was a denial of a significant right which was obviously capable of amounting to unfairly prejudicial conduct, or arguably so (it is of course uncontroversial that denial of a shareholder’s right to participate in management of a company can, and usually does, amount to unfairly prejudicial conduct): ¶¶22-23 MSkel [CORE/122].
- e. The ICCJ was wrong to suggest that such a right must be contained in a SHA or Articles ¶24 MSkel [CORE/123].
- f. The ICCJ was wrong to have concluded (if she had) that Magic’s rights under the Nomination Agreement were superseded by the Deed of Release and New Articles, having regard to the contemporaneous correspondence and particularly oral assurances said by Magic to have been given to it ¶¶25-28 MSkel [CORE/123]. By an additional proposed ground 4A [SUPP/526], Magic sought to argue that the ICCJ erred in striking out the Petition without allowing Magic an opportunity to plead an oral agreement that the Deed of Release and New Articles did not affect Magic’s rights under the Nomination Agreement and Subscription Agreement (Magic provided a draft Reply in this respect [SUPP/344]).

**27. As regards the June 2022 Transaction:**

- a. The June 2022 Transaction was unfairly prejudicial in itself, or arguably so. This was because the share issue was at a substantial undervalue, contrary to the board’s

*prima facie* duty to get full value for an issue of shares; and so amounted to coercion of existing shareholders to introduce further capital for fear of having the value of their shareholdings diluted. The circumstances were thus on all fours with Pettie v Thomson Pettie Tube Products Ltd 2001 S.C. 431, where an issue of shares at an undervalue was found to be unfairly prejudicial conduct, a case which expressly dealt with and rejected the contention that it should not be regarded as so because the petitioning member declined to participate: Pettie at [30] (this ‘*amounts effectively to a course of coercing the provision of further funds under the threat of that minority’s being penalised*’).

- b. Indeed, the evidence relied on by Mr Broadbent expressly acknowledged the element of coercion: ¶¶21 Haslam [SUPP/289-90].
- c. If anything, Magic’s case was stronger than that in Pettie since not only was the result the dilution of its shareholding including in financial value, but as respects Messrs Broadbent and Dixon’s conversion of loans to acquire new shares (at an undervalue) this did not even result in new cash for the company. See ¶¶29-32 MSkel [CORE/125].

**28. As regards the SHA Amendment Allegation:**

- a. Contrary to the ICCJ’s conclusion, the Company breached the Subscription Agreement by the conversion of Mr Broadbent and Dixon’s shareholder loans: on a proper construction conversion was “*payment*” of those loans.
- b. Although the obligation in the Subscription Agreement was an obligation in good faith to incorporate such a restriction in a new SHA, that was breached since the Company destroyed all possibility of it being fulfilled by allowing the conversion.
- c. If the ICCJ held that relevant obligation in the Subscription Agreement was superseded by the New Articles of the Deed of Release, the ICCJ erred. See ¶¶34-36 MSkel [CORE/126] (and as respects the argument that it had been superseded ¶¶25-28 MSkel [CORE/123]).

**29. As regards the likelihood of relief being obtained against Mr Broadbent at trial:**

There was a real prospect that the Court would order relief against Mr Broadbent. The

ICCJ had not correctly applied the test in F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2) [2011] EWHC 1731 (Ch) at [1096], which simply required Mr Broadbent to be sufficiently involved in the relevant conduct to make it fair to order relief against him, rather than that the conduct was ‘his’, or that he held sufficient shares to control the company. Mr Broadbent was the obvious person to be ordered to purchase Magic’s shares, as having been intimately involved in the relevant conduct and also as having benefited from it. See ¶¶37-43 MSkel [CORE/127].

### **Mr Broadbent’s arguments before Marcus Smith J**

30. Mr Broadbent sought to uphold the ICCJ’s decision for the reasons which she gave. Further, Mr Broadbent filed a Respondent’s Notice dated 15/11/24 [CORE/177] (with a Skeleton Argument in support (“BRespSkel”) [CORE/132]) in which he argued that the ICCJ’s order should be upheld for the additional reasons that the Deed of Release and New Articles (a) satisfied Clause 4.1.4 Subscription Agreement or (b) superseded the Subscription Agreement and the Nomination Agreement (if the ICCJ had not so found).

### **Marcus Smith J’s draft judgment**

31. On 8/7/25, Marcus Smith J’s clerk circulated a draft judgment [SUPP/565]. In that draft, Marcus Smith J rejected Magic’s appeal on all grounds. In relation to the June 2022 Transaction, the Judge concluded that the Deed of Release and adoption of the New Articles amounted to performance of the aspirations articulated in the Subscription Agreement and considered that to be a complete answer to the June 2022 Transaction Allegation ([30-32] of the draft Judgement).
32. Importantly, therefore, the draft judgment did not address at all, the case that had been argued by Magic in its skeleton argument and in its oral submissions; namely that, the Company had offered shares at an undervalue, which was a classic case of unfairly prejudicial conduct.
33. Magic drew the Judge’s attention to this omission (Mr Broadbent agreed that the Judge had omitted to deal with this): see letters Magic 10/7/25 [SUPP/578]; Mr Broadbent 11/7/25 [SUPP/581] (Mr Broadbent criticised aspects the pleading of the Petition but did not suggest that the argument was not open to Magic); Magic 11/7/25 [SUPP/586]; Magic 14/7/25 [SUPP/588]).

## **Marcus Smith J's judgment**

34. On 25/7/25, Marcus Smith J's final judgment was handed down (no further draft was circulated) [CORE/99]. Marcus Smith J principally held as follows.

35. **As regards the Board Seat Allegation:**

- a. The Judge held that it is well arguable that the New Articles / Deed of Release did not supersede the Nomination Agreement: [J/32].
- b. However, the Judge did not accept that Magic had any right under the Nomination Agreement to nominate someone who would be appointed to the Board.
- c. In reaching that view (and although it had not been disputed by Mr Broadbent in his Defence), the Judge queried whether the Nomination Agreement was a contract: [J/38-41]. The Judge further suggested that "*a power to appoint is not generally bilaterally agreed between a company and one shareholder, without the involvement of the other shareholders*" and went on to say that "*It seems to me that the [ICCJ] was right to consider that a right in a single shareholder to appoint a director would have to bind all shareholders, either by way of the articles of association or in a shareholders' agreement. Otherwise there is a questionable preferring of one shareholder (here: Magic) over all the others.*": [J/42(ii)];
- d. Having made those observations, the Judge concluded that the ICCJ was right to read clause 2 of the Nomination Agreement as conferring no more than a right to nominate (i.e. to make a suggestion). Further, the Judge went further and held that the ICCJ should have found that it was no more than a one-off "right" and rejected the suggestion that the Nomination Agreement conferred on Magic a right to a board seat '*in perpetuity*': [J/43] and [J/42].
- e. The Judge held that this is what had happened: Magic had nominated Meyer; the Company was willing to appoint him; Meyer withdrew: [J/42(iv)]. The Judge held that Magic did not nominate anyone else. Whether this was because it was clear that nomination would be refused is an evidential matter on which Judge would not be drawn: '*the Nomination Agreement was at most a one-off ability to nominate with (possibly – and in the circumstances it does not matter) an obligation on the*

*Company to consider that nomination but not guarantee the appointment.’:*  
[J/42(v)].

- f. The Judge that the ICCJ’s refusal to allow Magic to plead oral assurances was unimpeachable and the Judge considered that he need not consider that evidence: [J/45].
36. **As regards the SHA Amendment Allegation:** The Judge held that the SHA Amendment Allegation failed because the Deed of Release and New Articles performed the Subscription Agreement: [J/32].
37. **As regards the June 2022 Transaction Allegation:**
- a. The Judge held that, insofar as the June 2022 Transaction relied on a breach of the Subscription Agreement, it failed because the Deed of Release and New Articles performed the Subscription Agreement: [J/32].
- b. The Judge accepted that, in principle, the June 2022 Transaction Allegation was capable of amounting to unfairly prejudicial conduct, notwithstanding Mr Broadbent’s criticism of the Petition (which the Judge would allow to be corrected, if necessary): [J/34].
- c. The Judge proceeded on the basis that the share offering had been at an undervalue *“in the sense that had there been an offering of shares to persons other than existing shareholders, the offer price would have been higher”* (the Judge’s emphasis): [J/35]. However, the Judge held that the fact that the same favourable terms were offered to all shareholders was fatal to Magic’s argument: [J/36].
- d. The Judge further held that the fact Mr Broadbent and Dixon obtained shares by converting their Founder Loans (i.e. without injecting cash into the Company) made no difference to his conclusion: [J/37].
38. Marcus Smith J did not endorse the ICCJ’s finding that even if Magic’s allegations were made out, there was no more than a fanciful prospect of a share purchase order against Mr Broadbent [ICCJ/80-82] [CORE/213]: at [J/34], the Judge indicated that any deficiency in the Petition could be corrected, if needed (in the context of the June 2022 Transaction Allegation). At [J/42(i)], the Judge indicated that a right to appoint a director

was a significant matter and ‘matters’ (in the context of the Board Seat Allegation). Accordingly, the Judge appears to have accepted Magic’s criticism of the ICCJ’s finding.

## **F. THE STATUTORY FRAMEWORK**

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39. By s.994(1) of CA 2006, a member may apply to the court on the ground that a 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). By s.996(1), if the court is satisfied that the petition is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of. A non-exhaustive list of potential forms of relief is set out in s.996(2). The scheme thus separates 2 questions: **(1)** are the requirements of s.994 satisfied such that relief may be granted (*i.e.* for relevant purposes, have the affairs of the Company been conducted in a manner unfairly prejudicial to at least Magic); and **(2)** what relief, if any, should be granted under s.996 (which necessarily entails the question, ‘against whom’)?
40. As to **(1)**: whether conduct is unfairly prejudicial is a highly fact-sensitive, evaluative question, where different judges may reasonably differ: see Re Sprintroom Ltd [2019] EWCA Civ 932.
41. As to **(2)**: relief is discretionary, and may depend on a wide-ranging factual inquiry (Re Bird Precision Bellows Ltd [1986] Ch 658 at 669D-H) and is also highly context dependent and may be affected by the findings on the first question. The Court may have regard to any aspect of the facts; ‘*nothing is off-limits*’, subject to relevance and weight; the Court looks not only to the past but to the future: Ming Siu Hung v JF Ming Inc [2021] UKPC 1 at [14]. Thus, unfair prejudice petitions may be particularly unsuitable for summary determination: see. *Hollington on Shareholder Rights (10<sup>th</sup> Edn)* §9-24 and Khawaja v Stefanova [2024] EWHC 1858 (Ch) at [25-29].

## **G. MAGIC’S GROUNDS OF APPEAL**

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42. Magic appeals the Judge’s determination that the June 2022 Transaction Allegation and the Board Seat Allegation stood no prospect of success. Magic does not appeal the Judge’s determination that the SHA Amendment Allegation stood no prospect of success.

## G1. GROUND 1 - THE JUNE 2022 TRANSACTION ALLEGATION

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43. ¶25 Petition [CORE/231] alleged that the affairs of the Company had been conducted in an unfairly prejudicial manner, by reason of the June 2022 Transaction (separately and additionally to any breach of the Subscription Agreement). ¶26 Petition [CORE/231] set out the effects that: (1) Mr Broadbent and Mr Dixon were able to retain their controlling shareholdings; (2) without themselves injecting any new funds; (3) by converting their debts into shares at a price per share of £1.04, which Mr Broadbent expressly recognised was less than market value; and (4) Magic's shareholding was thereby diluted.
44. Magic's arguments were set out in detail in ¶¶29-32 MSkel [CORE/125] and developed orally at [T/62/17-T/74/9] [SUPP/543] and [T/142/17-T/143/23] [SUPP/563] (and prefaced at [T/7/6-24] [SUPP/529]). Mr Broadbent's response is at ¶¶90-93 BSkel [CORE/158] and in oral submissions at [T/100/14]-[T/101/19] [SUPP/552], [T/104/20]-[T/104/25] [SUPP/553].
45. It is submitted that Magic's contentions raised an obviously maintainable case of unfair prejudice:
- a. The Company, through the board, was *prima facie* obliged to get full value for an issue of shares: Lowry v Consolidated African Selection Trust Ltd [1940] AC 648 at 679; Shearer (Inspector of Taxes) v Bercaim Ltd [1980] 3 All ER 295 at 308e-f.
  - b. An offer of shares at an undervalue is inherently prejudicial to members who do not take it up. That prejudice extends beyond the dilution of voting rights to actual financial prejudice, given that the capital inflow is insufficient to prevent a non-participating member's shareholding from being decreased in value: Pettie v Thomson Pettie Tube Products Ltd 2001 S.C. 431 at [20].
  - c. It is no answer that the petitioning member was invited, but declined, to participate in the offering. That argument was specifically addressed and rejected in Pettie at [17], [30] on the basis that such an argument '*amounts effectively to a course of coercing the provision of further funds under the threat of that minority's being penalised*'.

46. The June 2022 Transaction was thus by its very nature, unfairly prejudicial to members, in particular members like Magic who did not want to commit further funds to the Company.
47. Marcus Smith J rightly rejected Mr Broadbent's argument that the offering was not at an undervalue (or not arguably so): **[J/35]** (*'I am also going to proceed on the basis that the offering of additional share was at an "undervalue" in the sense that had there been an offering of shares to persons other than existing shareholders, the offer price would have been higher...'*):
- a. The undervalue had been the basis of Mr Broadbent's own communication to shareholders 17/6/22 **[SUPP/168]**: *'I want to stress that we are not saying that this is what the Company is worth (indeed the Brewdog HoT place the valuation at £56m) - this is a mechanism to encourage as many shareholders as possible to participate in this round.'* (see ¶11 Magic Skel **[CORE/116]**).
  - b. Mr Broadbent had not suggested that this communication misrepresented the position to shareholders - which it would have done if his view was that the Company was then only worth £6m.
  - c. Indeed, it is clear on the documents that the Brewdog deal at or around a £56m valuation was still live at the time of the offering: Mr Broadbent's email 17/6/22 **[SUPP/168]** said *'Brewdog have sent us their final legally drafted detailed heads of terms [see 'the Brewdog HoT place the valuation at £56m' later in the same email] which we are reviewing.'* So, the comparison with the Brewdog deal could not be more apt, and was powerful evidence that the undervalue was very substantial.
  - d. Further the evidence adduced by Mr Broadbent (¶21 Haslam **[SUPP/289]**) was explicit in confirming that the share issue was indeed at an undervalue: *'After much deliberation, the board concluded that the Company should seek funding from existing investors in a funding round which became known as a 'Rights Issue', and that this Rights Issue should be at a discount to what was perceived to be the 'market price' of the Company to provide an incentive to all shareholders to participate in the funding round.'* (emphasis added). This evidence makes no sense if the share issue was at full value.

- e. Further, although Mr Broadbent trailed possible arguments (e.g. ¶¶35-39 **Broadbent 1 [SUPP/311]**) seeking to justify so substantially discounting the shares, it is quite apparent that the offering was not based on any proper valuation of the Company; nor was there any proper consideration of what might be the minimum discount (*i.e.* consistent with the obligation to get ‘full value’) to raise the desired capital. So, Magic undoubtedly had a real prospect of establishing that the share issue was at an undervalue. It is hard to see how Mr Broadbent could succeed in maintaining the contrary in the face of his own email and Mr Haslam’s evidence. The Judge was correct to accept that there was at the least an arguable case that the shares were offered at an undervalue.
48. However, the Judge rejected Magic’s overall contention in the following terms:
- ‘Apart from the question of the Founder Loans, to which I shall return, the fact that the favourable terms for the acquisition of new shares were offered to all shareholders is fatal to Magic’s argument. Magic had exactly the same rights to participate as all the other shareholders, and simply declined to avail itself of the opportunity. It cannot be the case that Magic’s failure to take up the offer is of any weight at all: were material weight to be attached to a failure to take up an offer that could have been accepted on non-discriminatory terms, then that would give every individual shareholder an effective veto. That proposition only has to be stated to be rejected, and I do so reject it.’ [J/35]*
49. This largely mirrored the ICCJ’s reasoning at [ICCJ/57] [CORE/205] ‘*the dilution of the petitioner’s shareholding occurred because it elected not to take up the new shares offer under the terms of the subscription offer*’). That reasoning appears to reflect Mr Broadbent’s contentions at ¶¶46-47 PODs [CORE/246].
50. However, in adopting that analysis, the Judge applied exactly the reasoning which had been explained to be wrong in Pettie at [30]: ‘*Where, as here, the minority contest the allotment of new shares at a significant undervalue, an insistence on the part of the directors and the majority on proceeding with that course rather than, say, offering new shares at a price reasonably reflective of their true value, amounts effectively to a course of coercing the provision of further funds under the threat of that minority’s being penalised by suffering a substantive relative diminution in the capital value of their holdings.*’.

51. The Judge did so without any reference to Pettie (nor the wider principle that a company is *prima facie* obliged to get full value for an issue of shares). This occurred even though:
- a. The point had been explicitly addressed in ¶30 BSkel [CORE/125];
  - b. The Judge had been taken to Pettie in oral submissions at [T/68/7-T/72/4] [SUPP/544] (including having had [30] of Pettie read to him [T/71/24]-[T/72/14] [SUPP/545]);
  - c. After the Judge’s draft judgment had omitted to deal with this argument at all, the Judge was twice referred back Magic’s written and oral submissions on this point in letters 11/7/25 [SUPP/586] and 14/7/25 [SUPP/588], the latter of which repeated the point in terms again referring to the relevant reasoning in Pettie.
52. Moreover, Mr Broadbent had not himself sought to dispute either the wider principle that a company is *prima facie* obliged to get full value for an issue of shares or the correctness of the decision in Pettie. Moreover, in this case, the evidence adduced on behalf of Mr Broadbent had positively acknowledged the element of coercion inherent in the offering: ¶21 Haslam [SUPP/289] said *‘the board concluded that the Company should seek funding from existing investors... at a discount to what was perceived to be the “market price” of the Company to provide an incentive to all shareholders to participate... it balanced a commercial opportunity... and the needs of the Company... with the threat of dilution for investors who chose not to invest in the Rights Issue... My own experience (and that of other board members...) was that the balance of ‘carrot and stick’ could be very effective in closing a funding round.’*: Mr Haslam – describing the thinking of the board – advanced as a virtue the vice which makes such an offering unfair: viz. using the *‘threat of dilution’* (Mr Haslam’s *‘stick’*) as a means of coercing existing shareholders to introduce more capital.
53. The Judge’s reasoning is wrong and the reasoning in Pettie is correct. When the Judge says *‘that would give every individual shareholder an effective veto’* that ignores the principle that the Company is *prima facie* obliged to get full value (as identified in Pettie at [30] the company’s proper course is to ensure that the offer is *‘at a price reasonably reflective of their true value’*). The corollary of the Judge’s suggestion is that a shareholder faced with such an offering at an undervalue is obliged – in order to avoid dilution, including of the financial value of its existing shares - to take up the offering by

putting in more capital. In short, the Judge’s reasoning positively condones the element of coercion rightly identified as being improper in Pettie.

54. The Judge’s further reasoning as respects the conversion of the shareholder loans shows, Magic submits, that he did not grasp the point that the Company was obliged to get full value for an issue of shares. As explained in Pettie at [31], referring to Shearer (Inspector of Taxes) v Bercairn Ltd (see ¶30 MSkel [CORE/125]), there are circumstances where a modest (e.g. 10%) discount to the market value of shares *might* be justifiable in order to ensure an adequate take-up of a rights issue. For example, if the Company was in pressing need of working capital, a modestly discounted issue might be appropriate. But no such justification could apply to the conversion of shareholder loans which were not due for repayment: the conversion brought no cash into the Company.

## **G2. GROUND 2 - THE BOARD SEAT ALLEGATION**

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55. The Nomination Agreement [CORE/223] provided “2. [Magic] will be entitled to nominate someone to the board.”. Magic contends that this entitled Magic to have its nominee appointed as a director (*i.e.* to have one board seat occupied by whomever Magic nominated from time-to-time).
56. By contrast, the Judge construed the right as an entitlement merely to express a view as to who might be appointed: “...*The Judge* [sc. the ICCJ] *read clause 2 as conferring no more than a right to nominate. In short, the Judge correctly assessed the “rights” conferred by the Nomination Agreement as minimal, and as not amounting to a right to appoint. ...*” [J/42]. He held that “*“the Nomination Agreement simply recorded a right that Magic would have had in any event”* [J/42(iii)] and see [J/43]. This reflected the ICCJ having drawn a semantic distinction between ‘*nominate*’ and ‘*appoint*’ and having concluded that the Nomination Agreement only conferred a right to nominate someone rather than a right to have its nominee appointed [ICCJ/22-24] [CORE/195] see [ICCJ/43] [CORE/201].
57. Magic argued before the Judge that the ICCJ’s conclusion was wrong for the reasons set out particularly at ¶¶19-21 Magic Skel [CORE/194]. For Magic to negotiate such a nugatory right made no sense and was commercially absurd. The ICCJ failed to take into account the factual matrix. The conclusion drawn from the semantic distinction was fallacious: the language of the Nomination Agreement was materially identical to the

language used to confer rights of appointment in Art. 28(1) BVCA Model Articles [SUPP/504], adopted by the Company in Article 24.1 New Articles (*‘each Investor... shall be entitled to nominate one person to act as a Director’*) [SUPP/146]: i.e. perfectly apt to confer a right of appointment.

58. A key aspect of Magic’s argument before the Judge was that the ICCJ had ignored highly relevant parts of the factual matrix: this right was agreed against the background, known to the Company, that Magic required this provision because South African exchange control required it to have a board seat: see ¶¶20-23, 26-27, 32, 37, 45-50 **Lazarus 1** [SUPP/261]; ¶¶13-15, 34-35, 38, 40, 42-43, 45, 53-54, 57-63, 66-71 **Da Costa 1** [SUPP/273]: see **MSkel ¶20** [CORE/121] and [T/16/11] to [T/27/7] [SUPP/531] of Magic’s oral submissions, where the Judge was taken to that evidence. The Judge’s judgment fails to deal with those submissions and evidence at all.
59. The Judge’s reasoning on this point begins by querying whether the Nomination Agreement was a contract at all [J/38-41]. That did not reflect the submissions made by either side before him or indeed Mr Broadbent’s Defence, in respect of which he was seeking summary judgment. Rather, on the pleadings, it was common ground that the Nomination Agreement was a contract: ¶¶13-14, 24 **Petition** [CORE/228, 231]; ¶¶13-14, 20-21, 24, 26, 33 **PODs** [CORE/235, 238, 242] (Mr Broadbent’s argument being rather as to the nature of the right conferred and, by its Respondent’s Notice [CORE/177], that the Nomination Agreement had been superseded). Yet further, Mr Broadbent’s Respondent’s Notice [CORE/177] was premised on the Nomination Agreement being a contract: Mr Broadbent’s argument was that there had been an implied rescission of it, a submission advanced by reference to *Chitty on Contracts* para. 26-030: ¶¶10-13 **BRespSkel** [CORE/135]. Likewise, Mr Broadbent’s oral submissions were also premised on construing the Nomination Agreement as a contract: e.g. [T/117/8]-[T/119/7] [SUPP/557], [T/124/3]-[T/124/10] [SUPP/558]. Although the Judge stopped short of holding that the Nomination Agreement was not a contract, it seems clear from [J/41] that his further reasoning was infected by a point which reflected neither side’s case.
60. The key consideration, however, which led to the Judge’s conclusion that the Nomination Agreement did no more than confirm a ‘right’ which Magic already had, was the Judge’s reasoning that] “*was right to consider that a right in a single shareholder to appoint a*

director would have to bind all shareholders, either by way of the articles of association or in a shareholders' agreement. Otherwise there is a questionable preferring of one shareholder (here: Magic) over all the others." [J/42(ii)]. This referred to [ICCJ/23] [CORE/195] where the ICCJ said "In any event, such an entitlement to appoint would, in my judgment, have to be contained in the articles of association or possibly be contained in a shareholders agreement whereby the shareholders agree that such an appointment is to be made.". At ¶24 MSkel [CORE/123], Magic submitted that this was unsupported by any reasoning and wrong. Mr Broadbent did not contend – either before the ICCJ or before the Judge – that there was anything which precluded the Company from agreeing with Magic to confer a right of appointment on Magic, in the absence of agreement of all the other shareholders. In particular, Mr Broadbent did not attempt to defend the ICCJ's reasoning at [ICCJ/23] [CORE/195] or gainsay Magic's submission ¶24 MSkel [CORE/123] (Mr Broadbent's written response to the Board Seat Allegation is at ¶¶37-46, ¶¶64-72 BSkel [CORE/146, 153]).

61. Ultimately, the Judge's reasoning was unsupported by authority, just as the ICCJ's had been. The Judge's further reasoning that "Otherwise there is a questionable preferring of one shareholder (here: Magic) over all the others" [J/42(ii)], does not show that the Company could not reach such an enforceable agreement, rather at most suggests a reason why the Company should not do so: e.g. that the board might be criticised for having caused the Company for having entered into such an agreement.
62. There is nothing which precludes a Company from conferring a right of appointment on one person by agreement with that person. The Judge's construction of the Nomination Agreement was wrong because of that incorrect conclusion. Additionally, the Judge passed over all Magic's points to why the Nomination Agreement did indeed confer a right of appointment on Magic.

## **H. RELIEF**

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63. As Magic reads Marcus Smith J's judgment, he did not endorse, and accepted Magic's criticisms of, the ICCJ's conclusion that there was no prospect of Magic being entitled to relief under s. 996 (or specifically a share purchase order against Broadbent), if it succeeded in establishing its June 2022 Allegation (see [J/34]) or its Board Seat Allegation (see [J/42(i)]). The ICCJ's conclusion was wrong for the reasons which Magic

argued before the Judge, which are set out below (see ¶¶37-43 MSkel [CORE/127] and Magic's oral submissions at [T/84/17]-[T/90/11] [SUPP/548]).

64. The Petition sought an order that Mr Broadbent purchase Magic's shares as the primary relief. Mr Broadbent is a member, with a substantial holding, thus squarely within the express terms of s.996(2)(e). Mr Broadbent is by far the most obvious member to be required to purchase Magic's shares: see below.
65. Although the ICCJ omitted this when describing the prayer [ICCJ/8] [CORE/190], the Petition also properly included a conventional prayer for further or alternative relief as the Court thinks fit (see the form required by the Companies (Unfair Prejudice Applications) Proceedings Rules 1986 (SI 1986/2000), reg. 3(1) and the schedule). If, in all the circumstances, the Court thought it just to make a share purchase order, but not against Mr Broadbent, the order might be made against the Company. Alternatively, the Court might order some lesser form of relief (*e.g.* to afford Magic its board seat and/or to reverse the effect of the conversion of Mr Broadbent's loan into shares). Such alternative relief may be ordered even if not requested by the Petitioner: Re Macom GmbH (UK) Ltd [2021] EWHC 1661 (Ch) at [50-57].
66. Mr Broadbent had not contended in his Points of Defence [CORE/233] that it was inappropriate to seek relief against him on the basis that he lacked responsibility for unfairly prejudicial conduct pleaded by Magic, still less did he argue that anyone else bore responsibility. No such contention was relied upon in the Summary Disposal Application or identified in the list of issues agreed for the hearing [SUPP/338]. Rather, the point appears to have been raised by the ICCJ.
67. At [ICCJ/9] [CORE/190], the ICCJ suggested that '*the petition was completely silent in relation to any actions by [Mr Broadbent] and its [sic] involvement in the unfairly prejudicial conduct as pleaded*'. This was an ungenerous characterisation of the **Petition** [CORE/224], which made concise reference to Mr Broadbent's role, alleging: that (1) Mr Broadbent and Mr Dixon were the founders and directors since incorporation (¶2); (2) Mr Broadbent held 2.22m shares at the date of the Petition (¶4); (3) Mr Broadbent was CEO and one of two directors when Magic subscribed (¶5); (4) the shareholder loans addressed in the Subscription Agreement were those of Mr Broadbent and Mr Dixon (¶7); (5) M's concern was that the founders (Mr Broadbent and Mr Dixon) should have '*skin*

*in the game*' (¶8); (6) the Subscription Agreements made provision as to Mr Broadbent and Mr Dixon's shareholder loans (¶9-10) (which the evidence showed were signed by Mr Broadbent for the Company); (7) the Nomination Agreement reflected an agreement made by Mr Broadbent for the Company (¶13); (8) the breach of the Subscription Agreement was the failure to implement the restrictions on the Founder Loans (¶16); (9) Mr Broadbent undertook the communications to shareholders re the share offering (and the Brewdog deal) leading to the June 2022 Transaction (¶¶17-19); (11) Magic asked Mr Broadbent for the Company's undertaking not to complete it, but this was not given (¶21); (12) the loans which were converted were those of Mr Broadbent and Mr Dixon; and (13) the effect of the conversion was that Mr Broadbent and Mr Dixon obtained shares issued at less than market value, without providing cash (¶26). Given Mr Broadbent's central involvement, it was more than fanciful (indeed likely) that relief would be ordered against Mr Broadbent if Magic's contentions were established.

68. The ICCJ seemingly regarded it as necessary for relief to be granted against Mr Broadbent that he went beyond his role as a director, or that he had a controlling shareholding. In particular, the ICCJ relied on the absence of '*wrongdoing to be attributed to Mr Broadbent*' and '*identified and pleaded unfairly prejudicial conduct against Mr Broadbent*' [ICCJ/80] and [ICCJ/81] [CORE/213]. In so doing, the ICCJ applied the wrong approach. As set out in F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2) [2011] EWHC 1731 (Ch) at [1096], '*the test is whether the defendant ... is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime ..., to grant a remedy against that defendant in relation to that conduct. The standard of justice to be applied reflects the requirements of fair commercial dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court's assessment whether what was done involved unfairness in which the relevant defendant was sufficiently implicated to warrant relief being granted against him.*'. This is a far more flexible and open-textured test, which respects the scheme and context of the statutory remedy.
69. The full extent of Mr Broadbent's role and influence on the matters complained of and whether, as a matter of discretion, relief should be granted against Mr Broadbent or otherwise, are, *par excellence*, matters for trial. Even on the papers, the following bears

emphasis. (1) Mr Broadbent, for the Company, had negotiated the terms of Magic's subscription: ¶¶14-15 Broadbent 1 [SUPP/307]. (2) The key relevant provision in the Subscription Agreement [CORE/219] related to Mr Broadbent's own Founder Loan (and that of Mr Dixon, Mr Broadbent's being the larger). Mr Broadbent had discussed and agreed this provision, including for Mr Dixon: ¶¶14-15 Broadbent 1 [SUPP/307]. Here, Mr Broadbent had necessarily been acting both as/for the Company and personally as lender (and indirectly for Dixon). (3) Mr Broadbent, himself, agreed, for the Company, Magic's right to nominate a person to the board and confirmed this by the letter 25/3/21 ([CORE/223]; and see ¶¶13-14 Petition [CORE/228]; ¶13 Broadbent 1 [SUPP/307]). (4) Mr Broadbent then denied Magic's entitlement to a board seat: his email 25/10/21 [SUPP/115], himself coming up with the argument that Magic's right was of one-off nomination. In the proceedings, Mr Broadbent maintains the denial of Magic's entitlement to a board seat. (5) On Magic's evidence, in connection with the Deed of Release, Mr Broadbent confirmed, that none of Magic's rights would be 'watered down' ¶¶49-50 Lazarus 1 [SUPP/266], ¶¶67, 69 Da Costa 1 [SUPP/280]. (6) Mr Broadbent instigated, or at least was a prime-mover behind, the scheme of the June 2022 Transaction: ¶35 Broadbent 1 [SUPP/311]; ¶¶31-34 Dixon 1 [SUPP/301]; ¶21 Haslam 1 [SUPP/289] ('My recollection is that the initial suggestion for a Rights Issue came from Ralph Broadbent...') and he benefited from it. (7) through the June 2022 Transaction, Mr Broadbent (wrongly) acquired at an undervalue an additional 1.11m shares, through conversion of his Founder Loan: it could hardly be disproportionate to require him to purchase Magic's shareholding of 103,000 shares (¶4 Petition [CORE/225]).

70. The ICCJ was wrong that there was a requirement to plead and show 'wrongdoing' 'attributable' to Mr Broadbent. On the correct test, Magic had to establish at trial that the Company's affairs had been conducted in an unfairly prejudicial manner (by any person(s)) and that Mr Broadbent had a connection to that conduct sufficient to make it just to exercise the discretion to order relief against him. For the purposes of the application, Mr Broadbent had to show that the prospects of any relief against him were fanciful. But, Mr Broadbent was intimately involved in the relevant conduct, not least because he was a director (and CEO), quite apart from being a major shareholder. At the very lowest, Mr Broadbent condoned the relevant conduct, which of itself gives rise to a more than fanciful prospect of relief against him. In truth, Mr Broadbent's role went far beyond this: aside from being the main active player, Mr Broadbent benefited from the

prejudice to Magic: he acquired shares – far more than Magic’s entire holding - at an undervalue, by converting his loan (which was not or should not have been due for repayment).

**J. CONCLUSION**

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71. Magic respectfully asks the Court to allow the appeal, such that the orders below are set aside and Mr Broadbent’s application for summary disposal dismissed (and the costs below reversed): see section 9 Appeal Notice [**CORE/56**].

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19 December 2025

(Re-referenced 26 March 2025)

