IN THE COURT OF APPEAL **Appeal Court Ref. No. CA-2025-002542**

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 **Respondents**
(2) THE GREATER GOOD FRESH BREWING CO LIMITED **(Respondents)**

SUPPLEMENTAL SKELETON ARGUMENT
(OF THE APPELLANT)

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/215]**.

A. INTRODUCTION

1. This Supplemental Skeleton Argument addresses Mr Broadbent's Respondent's Notice **[CORE/66]** and the arguments in support of that.

2. Magic adopts the same definitions and abbreviations as used in its Appeal Skeleton Argument **[CORE/3]**.

B. MR BROADBENT'S POSITION

3. As Magic reads Mr Broadbent's Appeal Skeleton Argument:

   a. **As regards Magic's June 2022 Transaction Allegation**: Mr Broadbent now accepts that the Judge's reasons for rejecting Magic's argument was wrong in law. He accepts that Pettie v Thomson Pettie Tube Products Ltd 2001 S.C. 431 was correctly decided: **¶31 Broadbent's Appeal Skeleton Argument [CORE/38]**. Instead, via his Respondent's Notice, he seeks (after the event) to raise a procedural complaint that the case is not open to Magic. This is incorrect.

   b. **As regards Magic's Board Seat Allegation**: Mr Broadbent does not seek to support the Judge's view **[J/42(ii)]** that the Company could not confer a right of appointment on Magic by agreement with Magic alone (there is no such contention in **¶¶37-52 Broadbent's Appeal Skeleton Argument [CORE/40])**; rather Mr Broadbent argues that properly construed the agreement **[CORE/218]** did not confer such a right.

4. Beyond that, Mr Broadbent's suggested additional reasons for upholding Marcus Smith J's order annexed to the Respondent's Notice **[CORE/75]** seek to further widen the appeal by resurrecting points argued by Mr Broadbent before the Deputy ICCJ which were rejected by Marcus Smith J and, indeed, to raise points which were not even argued by Mr Broadbent before the Deputy ICCJ or before the Judge (such as his attempted reliance on an offer to purchase Magic's shares: para. 11). This is not permissible.

C. JUNE 2022 TRANSACTION ALLEGATION

5. As noted above, having now accepted that the Judge's reasoning was incorrect, Mr Broadbent now asserts that the Magic's June 2022 Transaction Allegation as put to Marcus Smith J was not open to it. That is wrong.

6. **First**, contrary to what Mr Broadbent now contends, the argument was open to Magic on its pleading:

   a. Magic alleged (**¶25 Petition) [CORE/231]** that the Company's affairs had been conducted in an unfairly prejudicial manner '*by reason of (1) The* Company's *breach of the Second Subscription Agreement;* ***and/or*** *(2) The June Transaction;*

and/or *(3) The Company's breach of the Board Seat Agreement.*'. The Petition thus expressly complained of the June 2022 Transaction as unfairly prejudicial conduct separately and additionally to its complaints as to breach of the Subscription Agreement.

b. Further the petition went on (in **¶26) [CORE/231]** to allege by way of further particularisation that: '*In particular, the effect of the repayment of the Principal Founder Loans is that: (1) The founders of the Company have been enabled to retain their controlling shareholdings in the Company without themselves injecting any new funds and at a price per share (£1.04) which Mr Broadbent expressly recognised was less than market value; (2) The cash inflow to the Company as a result of the June Transaction was not £6 million but approximately £4 million; and (3) The Petitioner's shareholding has been diluted.*'. This positively identified that the share issue had been at an undervalue.

c. Likewise, in **¶19 Petition [CORE/229]** Magic specifically quoted from Mr Broadbent's own email of 17 June 2022 **[SUPP/168]**, in which he had positively asserted that the offering did not reflect '*what the company is worth (indeed the Brewdog HoT place the valuation at £56m)…*'.

7. Thus: (1) the Petition alleged that the June 2022 Transaction was unfairly prejudicial conduct; (2) it identified the undervalue in the offering; and (3) made a further specific complaint that, as respects the founder loans, the Company had not even received cash for the issue of shares at an undervalue to Mr Broadbent and Mr Dixon.

8. **Second**, and in any case, Magic's argument was advanced and argued at the appeal below without any challenge by Mr Broadbent:

a. The argument was set out in full in Magic's skeleton argument dated 2/9/24 seeking permission to appeal from the Deputy ICC Judge (Magic's Skeleton Argument for the appeal before Marcus Smith J was in materially identical form to that for its permission application, see **[CORE/116, 131]**, including the part relevant to this argument, at **¶¶28-33 MSkel [CORE/124]**:). Trower J granted permission to appeal on 18/10/24 **[SUPP/521]**.

b. The argument was again articulated in Magic's replacement skeleton argument for the appeal in materially identical terms: **¶¶28-33 MSkel [CORE/124]**. As before, this specifically identified that Magic's complaints as to the June 2022 Transaction were separate and additional to its complaints of breach of the Subscription Agreement: **¶33 MSkel [CORE/126]**).

c. Mr Broadbent received Magic's permission Skeleton Argument on or around 2/9/24. He filed his Appeal Skeleton Argument on 25/2/25, more than 6 months later. In that skeleton argument, Mr Broadbent observed **¶¶91-93 B Skel [CORE/158]** that Magic's argument was put differently to how it had been put before the Dep ICCJ but did not contend that it as not open to Magic. Mr Broadbent purported to deal with the argument on its merits.

9. **Third**, at the appeal before the Judge, Magic's argument was developed in full without any challenge by Mr Broadbent to Magic's ability to run such a case. There was a suggestion (**[T/94/22 to 95/7] [SUPP/551])** that Magic's case on appeal was different to that pleaded, but that appears to have related Magic's <u>Board Seat Allegation</u>: **[T/101/20-102/4] [SUPP/553]**. At **[T/100/6 to T/101/9] [SUPP/552]**, there was reference to **¶¶25-26 Petition [CORE/231]** without suggesting that Magic's argument was not open to it: rather it was said that Magic did not have <u>evidence</u> to support the undervalue (a point which was itself incorrect, as discussed later).

10. **Fourth,** in the communications following circulation of the draft judgment, Mr Broadbent accepted that Magic's argument had been free-standing, that it had not been dealt with in the draft judgment and that it should be dealt with.

11. In Mr Broadbent's further submission **[SUPP/581]**, diffuse criticism of the Petition was again made: paras 4-6. Notably, para. 7 paraphrases Magic's case ('*at its highest*'): as being that '*the Company's entry into the "June Transaction", with the alleged consequence in the second half of paragraph 26(1) is said to be "unfairly prejudicial" conduct of the Company's affairs*". That acknowledged that Magic's argument was within its pleaded case. Unsurprisingly, it was not said that the argument that had been advanced was not available to Magic.

12. Mr Broadbent's criticism was rather that Magic did not identify how Mr Broadbent can be said to have so conducted the company's affairs: para. 8. (That is to misread ss.994-

996: Magic has to establish at trial that the affairs of the Company have been conducted in an unfairly prejudicial manner and that Broadbent had a connection to that conduct sufficient to make it just to exercise its discretion to order relief against him: **¶¶16-17, 39-43 M Skel [CORE/120, 128]**; F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2) [2011] EWHC 1731 (Ch) at [1096]).

13. Therefore, Magic's argument is within its pleaded case. Moreover, Mr Broadbent can be seen to have recognised as much, despite his extensive – and excessive – criticisms of the pleading of the Petition. Further, the time for Mr Broadbent to take any such point was in the appeal below: see, by analogy, Hawksworth v Chief Constable of Staffordshire [2012] EWCA Civ 293 at [40-42] (a party cannot complain on appeal that the case was run below was outside the pleadings, if it had not objected below).

14. Yet further, even if there were merit to Mr Broadbent's criticism of the pleading, as the Judge rightly recognised, '*it would be an error to decide this point of appeal on an arid technical ground which (even if correct) can easily be corrected for.*' **[J/34]**. That reflects the ordinary principle that a case should not be struck-out for a deficiency in pleading without affording an opportunity to remedy it.

15. There is no strict rule which prevents a party from meeting a strike-out application or summary judgment by reference to new arguments (if this were such) on appeal (by contrast, for example, with new arguments following trial, where those would have affected the course of the trial): Price v Flitcraft Ltd [2020] EWCA Civ 850 at [14]; Holman Fenwick Willan LLP v Samady [2023] 125 (KB) at [50-51].

16. Mr Broadbent also suggests that Magic had no evidence that the share issue was at an undervalue, which is linked to an observation that no expert valuation evidence had been sought by Magic. However:

    a. The undervalue was the very basis of the offering, as described by Mr Broadbent himself contemporaneously: see **¶47 Magic's Appeal Skeleton [CORE/17]** referring to Mr Broadbent's email 17/6/22 **[SUPP/168]**. This was also specifically recognised the evidence filed by Mr Haslam on behalf of Mr Broadbent: **¶21 Haslam [SUPP/59]**; and see **[T/142/17-143/23] [SUPP/563]**.

b. Whilst Mr Broadbent sought to submit that Magic's reliance on the Brewdog deal was misplaced ('*between an indicative aspiration of value in a much earlier (unconsummated) deal (which, contrary to para 31 of the Skeleton on the Appeal had failed nearly 2 years before)*' **¶93 RSkel [CORE/158])** but that is inconsistent with Mr Broadbent's email of 17/6/22 in which he said that '*the Brewdog HoT place the valuation at £56m'* and that '*Brewdog have sent us their final legally drafted detailed heads of terms which we are reviewing.*' **[SUPP/168]**.

c. **¶30 Broadbent's Appeal Skeleton Argument** again seeks to suggest that the comparison with the Brewdog deal is not apt, but fails to acknowledge that Mr Broadbent's own email 17/6/22 **[SUPP/168]** conveyed that the heads of terms, with the valuation at £56m, remained under consideration. Marcus Smith J rightly proceeded on the assumption that the share offering was at an undervalue: **[J/35]**. This was Mr Broadbent's application for summary determination: it could hardly be said that Magic had no prospect of showing that the share issue was at an undervalue, given both what Mr Broadbent communicated contemporaneously and the evidence of Mr Haslam which he himself adduced.

D. THE BOARD SEAT ALLEGATION

17. Mr Broadbent's Respondent's Notice/Para. 3 repeats an argument which found favour with the Deputy ICCJ - that because the Nomination Agreement uses the word 'nominate' rather than 'appoint', it conferred a mere right to recommend an individual for appointment to the board. That argument is fallacious:

a. The relevant phrase in the Nomination Agreement is '*Magic will be entitled to nominate someone <u>to the board</u>*' (emphasis added) **[CORE/223]**. The provision is clear in its own terms that right is premised on and envisages Magic's nominated person joining the board. The language is perfectly apt to confer a right of appointment: it is materially identical to the language used to confer rights of appointment at Art. 24.1 in the Company's own New Articles **[SUPP/146]** (which were based on Art. 28 of the BVCA Model Articles: see **¶21 ¶MSkel [CORE/121]**; **[T29/5-31/5] [SUPP/535]**; **¶57 Magic's Appeal Skeleton Argument [CORE/20]**).

b. Mr Broadbent's preferred construction – a mere right to nominate someone for consideration for an appointment - is commercially absurd: it confers no right at all. See, the reasoning in The Wellness Group Pte Ltd v Paris Investment Pte Ltd and others [2018] SGCA 47 at [34], particularly.

18. Further, Mr Broadbent's submissions do not deal at all with Magic's evidence that it was know to both parties (and hence part of the factual matrix) that South African exchange controls required Magic to have a board seat: see **¶58 Magic's Appeal Skeleton [CORE/21]**; **¶20 MSkel [CORE/121]**.

19. Para. 4 of the Respondent's Notice contends ignores the point that Mr Broadbent, as CEO, had denied M's entitlement to have its nominee appointed to the board in his email dated 25/10/21 **[SUPP/115]**, a denial maintained in his Points of Defence (at **¶¶13, 64 [CORE/235, 248]**): cf. **¶24 MSkel [CORE/123]**.

20. As to para. 5 of the Respondent's Notice (where Mr Broadbent argues that the New Articles **[SUPP/120]** and Deed of Release **[SUPP/100]** superseded the Nomination Agreement **[CORE/223]):**

a. For all that he criticises Magic's pleading, the argument he wishes to advance was not itself properly pleaded: **¶33 PODs [CORE/242].** Mr Broadband pleaded that Magic '*implicitly accepted*' that the Board Seat Agreement '*fell away'* but ultimately relied upon a different case that there had been implied rescission of the agreement. That case was only identified and advanced by Mr Broadbent during reply submissions before the Deputy ICCJ: see Magic's submissions before Marcus Smith J at **[T/41/18 to 47/11]**, **[T/139/20 to 141/19] [SUPP/538, 562]**.

b. Under such doctrine, the burden was on Mr Broadbent to show (to the summary judgment standard) that the Deed of Release and/or New Articles were fundamentally inconsistent with the Nomination Agreement continuing in place: Frangou v Frangos [2023] EWCA Civ 1320 at [96-99]. However, the Deed of Release did not purport to affect the Nomination Agreement. That the Deed of Release did not do so is itself powerful evidence that the parties did not intend to affect the Nomination Agreement. The Nomination Agreement sat alongside the New Articles just as it had alongside the previous Articles. The contemporaneous correspondence further strongly suggests that the parties did not intend to affect the

Nomination Agreement by the Deed of Release and New Articles: see (1) Mr Broadbent's email of 25/10/21 **[SUPP/115]**; (2) Mr Da Costa's email of 26/10/21 **[SUPP/116]**; **¶¶67-68 Da Costa 1 [SUPP/280]**; Magic's submissions at **[T/52/22 to 55/19] [SUPP/540]**.

c. The Judge was accordingly correct to find that it was well arguable that the Nomination Agreement survived the Deed of Release and New Articles **[J/32(ii)]**. Certainly, Mr Broadbent has not demonstrated that there is no prospect of Magic establishing at trial that the Nomination Agreement must have been impliedly rescinded.

21. As to paragraphs 6 and 7 of the Respondent's Notice: the denial of a right to a board seat is both unfair and substantially prejudicial. Prejudice need not be financial (Re Coroin Ltd [2012] EWHC 2343 at [630-631]) and the right to a board seat is a significant right. As the quasi-partnership cases show, the denial of a right to participate in management habitually leads to a share-purchase order. See **¶¶22-23 MSkel [CORE/122]** and in Re A. & B. C. Chewing Gum Ltd [1975] 1 W.L.R. 579 at 591C-592B; Metson v Metson [2022] EWHC 1988 (Ch) at [339]; and **[J/42]** '*The right to appoint a director is a significant right… a power to appoint matters.*'. It would also be open to the Court to grant other relief: e.g. so as to give effect to Magic's right.

22. As to paragraph 8: the importance of a right to appoint is not diminished by the point that all directors are subject to the same duties, for the same reasons as referred to in the paragraph above, noting further that subject to those duties, directors are entitled to take into account the interests of their nominee: see again **¶¶22-23 MSkel [CORE/122];** Hawkes v Cuddy [2009] EWCA Civ 291 at [33]; F&C Alternative Investments at [224-254].

E. RESPONDENT NOTICE PARAS 9-12

23. As to para. 9-10: Magic has identified the relief which it seeks: viz. a share purchase order against Mr Broadbent (Prayer (1) to the Petition **[CORE/232])**. Mr Broadbent is the obvious person to be ordered to purchase Magic's shares: for the reasons set out at **¶¶63-70 of Magic's Appeal Skeleton Argument [CORE/22]**. Additionally, whilst that is the relief which Magic primarily seeks, the Court is not precluded from ordering other relief e.g. a share purchase order by the Company or some lesser relief. It is no requirement that

Mr Broadbent control the company in order for relief to be ordered against him: F&C Alternative Investments (Holdings) at [1096].

24. As to para. 11: as recorded at **[ICCJ/64] [CORE/207]**, Mr Broadbent did not before the Deputy ICCJ rely on his offer of 31/7/23 **[SUPP/236]** as a basis for striking-out the Petition. Mr Broadbent did not rely on the offer 31/7/23 in the appeal to Marcus Smith J either: Mr Broadbent's Respondent's Notice below **[CORE/177]** made no reference to the offer. Mr Broadbent was right not to pursue any such argument and he should not be permitted to do so now having elected not to pursue it at first instance or on appeal.

25. The offer afforded no basis for disposing of the Petition on a summary basis (see O'Neill v Phillips [1999] 1 WLR 1092 at 1106D-E). It was made long after the Petition had been presented (5/12/22) and Mr Broadbent's Points of Defence (27/2/23) denying unfair prejudice; and after the first CCMC (5/5/23). Further, Mr Broadbent's offer made no offer as to Magic's costs and it did not account for the prejudice suffered by Magic by the dilution.

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14 April 2026