IN THE COURT OF APPEAL **Appeal Court Reference 2025-002542**

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

On appeal from: MR JUSTICE MARCUS SMITH [2025] EWHC 1898 (Ch)

B E T W E E N:

MAGIC INVESTMENTS SA

Appellant/Petitioner

- and -

(1) RALPH THIERRY BROADBENT

(2) THE GREATER GOOD FRESH BREWING CO LIMITED

Respondents/Respondents to Petition

SKELETON ARGUMENT OF THE 1ST RESPONDENT TO THE APPEAL

A. INTRODUCTION

1. This is a second appeal by P **[Core 16]** from the Orders of Deputy ICC Judge Agnello KC (the **"ICC Judge"**) dated 19/4/24 **[Core 19]** and 26/4/24 **[Core 20]** by which the ICC Judge struck-out an unfair prejudice petition presented by P on 5/12//22 (the **"Petition"**) **[Core 23]**, ordered reverse summary judgment in favour of the 1st Respondent (**"Mr Broadbent"**) and awarded Mr Broadbent and the 2nd Respondent (the **"Company"**) their costs of the Petition (and other reserved costs) on an indemnity basis.

2. Those orders were confirmed by Marcus Smith J (the **"Judge"**), on appeal, by his order dated 25/7/25 **[Core 7]** and his consequential order dated 24/9/25 **[Core 8]**. A copy of the Judge's judgment (the **"Judgment"**) appears at **[Core 10]**.

3. Permission to appeal was given by order of Miles LJ dated 18/11/25 **[Core 12]** on two issues, 1 and 2, as set out in the Grounds of Appeal **[Core 16]**.

4. Mr Broadbent has filed a Respondent's Notice **[Core 17]** that relies on many of the points made by the ICC Judge in her Judgment of 19/4/24 (the **"Main ICC Judgment"**) **[Core 18]**.

5. In short, Mr Broadbent's position is that the Appeal should be dismissed. The orders made below ought not to be disturbed. The Petition was bound to fail and was rightly struck-out.

B. THE COMPANY

6. The Company is a start-up business that has sought to develop and commercially exploit the market for home-brewed beer and cider using a convenient home-brewing kit.

7. Mr Broadbent is one of the founders of the Company along with a Mr Dixon. At all material times, Mr Broadbent has been one of many dozens of shareholders in the Company. He is identified in the Petition as having been a director of the Company since incorporation and as being a minority shareholder in the Company. Yet P accepts that there were several other directors throughout and many other shareholders.

8. P has been a shareholder in the Company from spring 2021, that shareholding having been purchased by way of an investment under what the Petition defines as the **"Second Subscription Agreement"**. While the Second Subscription Agreement featured heavily below - in relation to an allegation that the Company failed to use reasonable endeavours to amend its constitutional documents and an allegation that founder loans had been repaid - no appeal is pursued by P in respect of those matters.

C. THE PETITION

9. The Petition **[Core 23]** is in very short form. It was drafted and signed by P's then Counsel.

10. Importantly, the Petition relies exclusively on breaches by the Company (¶25 Petition **[Core 23]**). It does not seek to complain about the conduct of Mr Broadbent or claim

that he has, somehow, conducted the Company's affairs. The ICC Judge noted these limitations of the Petition in ¶¶8-9 of the Main ICC Judgment **[Core 18]**. The Petition does not therefore maintain any case under limb s.994(1)(a).

11. While the Petition refers to breaches *"by the Company"*, P identifies no relevant conduct of the Company's affairs, by any organ of the Company. There is no claim of breach of fiduciary duty made against anyone. No decision of shareholders is impugned. In the same vein, the Petition contains no suggestion that equitable constraints exist between any of the shareholders. The only proper conclusions that can be derived from the Petition as to Mr Broadbent, as a person who happens to be a director and shareholder of the Company and in relation to the events referred to in the Petition, are those set out by the ICC Judge in ¶10 of the Main ICC Judgment **[Core 18]**.

12. As emphasised in the Points of Defence **[Core 24]**, beyond such evident limitations, the Petition also ignores key objective facts relevant to this Appeal, such as the adoption of the New Articles/Deed of Release (and the effect of both of these documents), important materials and communications concerning the involvement of Mr Meyer and the absence of an actual *"nomination"* from P of any other person to act as a director.

<u>D. THE ROLE OF THE PETITION IN SECTION 994 PROCEEDINGS</u>

13. A petition must specify both the grounds on which it is presented and the nature of the relief which the petitioner seeks (r.3(2) Companies (Unfair Prejudice Applications) Proceedings Rules 2009; ***Re Pedersen (Thameside) Ltd [2018] BCC 58***, [12], [19]).

14. A petitioner's case is defined (and essentially confined) by the pleaded allegations of unfair prejudice contained in the petition. This is of particular importance in relation to section 994 petitions, since only in this way will the respondents be able properly to meet the case and the Court be able to keep the proceedings within manageable bounds. In addition, here, the Petition was directed to stand as "points of claim" (see *Chief Registrar's Standard Directions Form for Unfair Prejudice Petitions* dated 15/5/2015; Order of Chief ICC Judge Briggs dated 5/12/22 **[Supp 39]**). Mr Broadbent's Points of Defence **[Core 24]** were pleaded responsively to the Petition.

15. In ***Re Lundie Brother Ltd [1965] 1 WLR 1051***, at 1058, Plowman J stated:

> *"It seems to me that it would be wrong for the court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents have been guilty of some oppression or some lack of probity."*

As has been noted above, the Petition does not even begin to impugn the conduct of anyone other than the Company. Had it done so, this would have been a major change in direction for the Petition. Instead, P's case was very narrowly advanced in the Petition.

16. On the importance of the pleaded position in disputes of this type, see comments in ***Re Tecnion Investments Ltd [1985] BCLC 434***, at 441; ***Baker v Potter [2005] BCC 855***, [97]; ***Re Bankside Hotels Ltd [2018] BCC 617***, [21] (and, on appeal, affirming the general approach, David Richards LJ said that: "[i]*t is still the petition that defines what* [Sir Nicholas Warren] *aptly called 'the ambit' of the case. That is not just a question of practice*" (***Re G&G Properties Ltd [2020] Bus LR 762*** [38])). Comments on the function of pleadings in defining a shareholders' dispute in a case such as the present were also made by Crow JA (sitting in the Jersey Court of Appeal) in ***Financial Technology Ventures II (Q), LP v ETFS Capital Ltd [2021] JCA 176***, [303]; it is submitted that these comments also correctly reflect the English law position.

17. As they were bound to do, both the ICC Judge and the Judge were required to keep a careful focus on P's pleaded case in approaching the Strike-Out Application and the appeal therefrom.

E. THE STRIKE-OUT APPLICATION

18. Due to various reasons, including costs' limitations facing Mr Broadbent, the Strike-Out Application **[Supp 44]** was not issued until a few months before trial. Very shortly after its service, factual witness statements were exchanged between the parties (P's statements at **[Supp 46-47]**). In contrast to very many strike-out applications, the determination of the Strike-Out Application was therefore on essentially the same materials as would have been available to the trial judge at the start of trial.

19. The determination of the Strike-Out Application was delayed by a cross-application made by P to strike-out the Strike-Out Application dated 7/3/24. That cross-application failed before ICC Judge Prentis on 13/3/24 **[Supp 53]**. The costs of that cross-application were reserved to the ICC Judge hearing the Strike-Out Application and form part of the costs ultimately ordered by the ICC Judge in favour of Mr Broadbent in her costs order **[Core 20]**.

20. P's written **[Supp 56]** and oral **[Supp 59]** case before the ICC Judge maintained that there were three substantive complaints. Helpfully, in the Main ICC Judgment, the ICC Judge tracked the language of P's complaints as used in the Petition:

    (1) The breach by the Company of failing and refusing to permit P to nominate someone to act as a director of the Company;

    (2) The breach by the Company of the Second Subscription Agreement in failing to use any or any reasonable endeavours in good faith to amend the existing shareholders agreement so as to be provide that the principal founder loans would only be repayable in the event of a *"Qualified Transaction"*; and

    (3) That the *"June Transaction"* (the **"Rights Issue"**) represented a repayment of Principal Founder Loans.

    The ICC Judge dealt with each of these in turn. The decisions reached by the ICC Judge on (2) and (3) are not pursued beyond the Judge although, as explained below, (3) has since been substantively recast. The ICC Judge's reasoning in relation to (1) may be found at ¶¶38 to 45 of the Main ICC Judgment **[Core 18]**.

21. At no time did P suggest before the ICC Judge that it had any case based on the issue of shares at *"an undervalue"* (¶¶45 and 46 P's Skeleton before ICC Judge **[Supp 56]**). Such a point only surfaced in P's *"Grounds of Appeal"* to the Judge. As explained below, it is an attempt to significantly recast complaint (3) above. If it was to be advanced, it should have been argued before the ICC Judge.

22. Before the Judge, P sought to maintain a wholesale attack on the Main ICC Judgment **[Core 18]**. The Strike-Out Application was essentially reargued on each of the three issues identified above and in relation to further findings that the ICC Judge had made against P and justifying the striking-out/reverse summary judgment on the Petition.

23. In addition, before the Judge, P sought to advance a very different case of the issue of shares being at *"an undervalue"*. Written and oral submissions were made on the point **[Supp 68]**. It was more substantively addressed in written submissions filed after the delivery of a draft of the Judgment **[Supp 74-77]** and then, ultimately, in the Judgment itself **[Core 10]**.

F. THE ALLEGED UNDERVALUE COMPLAINT

24. The background to the Rights Issue was a safety recall of the Company's principal product, which not only involved costs in replacing faulty products, but also served to derail the Company's sales. This created a significant cashflow crisis for the Company.

25. Leaving to one side, for the moment, P's now claimed case of the issue of shares at *"an undervalue"*, P has never suggested that there was no need for the Company to have looked to raise money in June 2022 in order to address its funding needs or that it was inappropriate to look to raise the sum involved to meet those needs or that it was inappropriate to do so by way of an issue of new shares.

26. As noted, P did not suggest before the ICC Judge that it had any case concerning an alleged issue of shares at *"an undervalue"*. In adopting that approach, P acted entirely consistently with its prior conduct of the Petition towards trial. P had pleaded no credible case that shares had been issued at *"an undervalue"* - it had neither identified what was the element of alleged *"undervalue"* nor why any such pricing by the Company was (supposedly) wrong. The DRD (Section 1A) directed by the Court identified no such *"issue"* between the parties for disclosure[1] **[Supp 40]**. P's witness evidence for trial **[¶¶53-55, [Supp 46] and ¶¶73-76 [Supp 47]** did not advance any such complaint[2]. P did not rely on any expert evidence (indeed, P had opposed the need for

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1 Although such a claim, had it been advanced, would have been a paradigm example where P might have been expected to want the production of documents in the control or possession of the Company. Yet P did not maintain a claim to disclosure in relation to it.

2 Instead, Mr Da Costa makes an entirely different observation, criticising the issue of the shares at being at a price lower than P had originally invested **[¶75 [Supp 47]**, although that too is not a case contained in the Petition.

any expert evidence at trial on any *"liability issue"*). P's witness evidence in answer to the Strike-Out Application raised no such claim **[Supp 51]**. Entirely consistently with P's presentation to the ICC Judge, P put its whole case in relation to the Rights Issue on the basis of the claim that there was a repayment of the Principal Founder Loans contrary to the Second Subscription Agreement, an argument which was rightly rejected by both the ICC Judge and the Judge (and is not the subject of the Appeal).

27. P has sought before the Judge (and now on this Appeal) to claim that its case was that the shares were issued in the Rights Issue at an *"undervalue"*. Isolating the statements in the Petition that are said to constitute the complaint of an issue of shares at an alleged *"undervalue"* (and leaving to one side statements that are essentially narrative or concern the complaint over repayment (conversion) of the Principal Founder Loans), these are merely the following:

(1) ¶19 of the Petition:

> *"The email* [of 17 June pleaded at ¶18 of the Petition] *went on 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…."*

(2) ¶25 of the Petition (under the side-heading *"Unfair Prejudice"*):

> *"By reason of:*
> …
> *(2) The June Transaction;*
> …
> *The Company's affairs have been conducted in a manner that is unfairly prejudicial to the interests of members generally, alternatively of some part of its members (including the Petitioner)."*

(3) ¶26 of the Petition (also under the side-heading *"Unfair Prejudice"*):

> *"In particular, the effect of the repayment of the Principal Founder Loans is:*
> *(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."*

It is this unprepossessing foundation upon which P seeks to found its case.

28. As the Court will note:

(1) ¶26 makes a general allegation concerning the *"June Transaction"*, i.e. the Rights Issue as a whole, being *"unfairly prejudicial"*. But no earlier paragraph in the Petition advanced any complaint that shares were being issued in the Rights Issue at *"an undervalue"*. ¶19 of the Petition is mere narrative. ¶25 is an entirely general allegation.

(2) ¶26 purports to particularise ¶25. It is this ¶26 that contains, so far as there is anything, the allegation that there was an express recognition by Mr Broadbent that shares were issued at *"less than market value"*. But the opening words of ¶26 (and the particularisation of P's case that it provides) is expressly directed to the feature of the June Transaction/Rights Issue that P took objection to namely: *"the effect of the repayment of the Principal Founder Loans"*. It is not the issue of shares in the Rights Issue per se that P was objecting to, it was the supposed wrongful repayment of the Principal Founder Loans that P claimed produced an improper advantage to Mr Broadbent (and Mr Dixon) (¶¶45 and 46 P's Skeleton before ICC Judge **[Supp 56]]**),

The Petition contains no case that the June Transaction/Rights Issue was wrongful because the terms of the issue of shares in the Rights Issue was at some improper price. When P makes such a suggestion at all it is **only** in relation to the (alleged) repayment of the Principal Founder Loans, an allegation that has it failed upon and that it does not Appeal[3].

29. The Judge labelled P's complaint on this aspect as the *"Pure Dilution Allegation"* (¶32(i) **[Core 10]**). In doing so, the Judge wrongly characterised P's case and his reasoning suggests that he used this new label to encompass the entire Rights Issue/June Transaction, rather than the narrower case that P had actually pleaded. P repeats that error in the Grounds of Appeal **[Core 4]**, relabelling the June Transaction as the *"June 2022 Allegation"*, and thereby seeking to cast the net more widely than P's pleaded case.

[3] Of course, for the reasons given by the ICC Judge and the Judge, the Principal Founder Loans were never *"repaid"* by the June Transaction/Rights Issue. They were converted from loan to equity in a manner that did not offend the Second Subscription Agreement, served to improve the Company's balance sheet and effectively reduced Mr Broadbent and Mr Dixon from the status of creditors in respect of such loans to the status of shareholders.

P's case was not that the Rights Issue was at a price that was less than market value but only that the repayment of the Principal Founders Loans was unfairly prejudicial insofar as they allegedly involved the acquisition of shares by reason of that alleged repayment. The Judge should not have sought to find a case for P that it had not pleaded. His reasoning at ¶¶34 to 37 of the Judgment were on an improperly expansive basis. The Judge's focus (as with P's pleaded case) ought to have been only on the effects of the alleged repayment of the Principal Founder Loans. In contrast, the ICC Judge had, more appropriately, tied her analysis to P's actual pleaded case (¶¶54-63 Main ICC Judgment **[Core 18]**), that also being the very argument that the author of the Petition considered that his drafting actually disclosed (¶¶45 and 46 P's Skeleton before ICC Judge **[Cupp 56]**).

30. As the Judge rightly recorded (¶35, **[Core 10]**), Mr Broadbent rejects the notion that he had *"expressly recognised"* that shares were being issued at *"less than market value"* (or "*an undervalue")*. The Judge's comments in ¶35 Judgment **[Core 10]** are without detracting from that. As to the suggestion P might have such a case:

    (1) The claim that P relies upon in ¶26 of the Petition **[Supp 23]** seeks to equate (i) an indicative offer for the entire issued share capital of the Company that had been made by Brewdog prior to the product recall to (ii) the terms of issue of individual shares in the circumstances of the Rights Issue in 2022. It is a false comparison. Such facts do no basis sustain any inference that Mr Broadbent admitted that shares were being issued at *"less than market value"*. Without being able to finance itself beyond the product recall, the Company would have inevitably faced an insolvent liquidation.

    (2) The requirement in pricing shares in a rights' issue is to obtain a fair (***Pettie*** uses the word *"true"*) value for the newly issued shares. To incentivise take up of the rights, this would inevitably be done at a discount to the pro rata market price for the Company. The extent of that discount is ordinarily a matter for the board of directors, bearing in mind the urgency and need for funds; it is a contextual judgment, not one that involves any set formula or only some maximum level of permissible discount. Such a discount will inevitably mean that an issue is at *"less than market value"* for the entire company. A proposed new issue price for shares is not falsified by simply pointing to two numbers, one an

indicative (but non-binding) offer for all shares in the Company and the other a subsequent discounted price for a share in a rights issue (and each put forward in very different circumstances from the other), and claiming a direct equivalence between them[4].

(3) In any event, unfair prejudice is not established by simply claiming, on a charitable approach to P's pleaded case, that the new issue was at *"less than market value"*; P's case accepts that a discount to market value might be legitimate and, even if P could establish the pleaded case it avers, it simply does not prove that the price of the issue was *"inappropriate"* or "*wrong*". As such, even if P made out its pleaded case in the Petition, it would not substantiate a case of *"unfair prejudice"*.

(4) The contemporaneous correspondence between the Company and P **[Supp 26-37]** does not suggest that P even considered that there might be, or was, any issue of shares at *"an undervalue"*. Instead, what is clear from that correspondence, is that P (wrongly) became fixated on the supposed impropriety of what was done with the Principal Founder Loans and that governed its entire reaction to the Rights Issue (¶2 Respondent's Notice **[Core 17]**). P clearly misunderstood its position in relation to the conversion of the Principal Founder Loans and its errant conclusion on that is why it chose not to participate in the Rights Issue. That too was the conclusion of both the Judge (¶35 Judgment **[Core 10]**) and the ICC Judge (¶57 Main ICC Judgment **[Core 18]**) as to why P suffered dilution in the Rights Issue. It was never that P lacked the funds to participate or that P objected to the terms of the Rights Issue in any other way.

(5) The practical demonstration that the shares were not undervalued is that, even at £1.04 per share, the Rights Issue did not raise the funds that the Company had hoped to raise. Clearly, in the circumstances then facing the Company, members of the Company did not regard the investment as sufficiently attractive even at that price.

(6) No other shareholder in the Company has sought to complain about the issue price of shares under the Rights Issue.

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4 Especially when one such figure is an historic value for the Company's shares as a whole and it is sought to be compared with the price of a new share to be issued to incentivise take up of shares in the Rights Issue (and thereby secure the required funds).

Fairly read, all Mr Broadbent's comment could be taken to reflect was the commercial reality that the Company needed urgent funds to meet its immediate demands but that, it was to be hoped, if that funding was forthcoming and the product recall issues could be overcome, the future value of the Company could rebound to the potential value that the Brewdog indicative offer had suggested[5]. No fair-minded reader could read the email and conclude that Mr Broadbent was suggesting that the cashflow demands in June 2022 could be ignored and that the Company had then a present value of some £56 million irrespective of the changed circumstances caused by the product recall. The points made by Mr Broadbent are not inconsistent, as P seeks to suggest. Mr Broadbent's comment is neither an admission nor a basis for any inference that the shares in the Rights Issue were issued at *"less than market value"*. Without that, P has nothing to begin to support what is, with respect, mere text in a document headed *"petition"*.

31. Mr Broadbent accepts that the Judge's reason for rejecting the Rights Issue complaint (namely that the shares were offered to all shareholders on the same terms) (¶35 Judgment **[Core 10]**) is not a sound basis for rejecting a genuine complaint of the issue of shares at an undervalue - at least on its own. The Judge could have referred to ***Pettie*** but readily distinguished a properly formulated complaint advanced there from the allegations made by P in the Petition, unsupported by any evidence or admission. ***Pettie*** was a case in which an effective challenge had been made to the exercise by the directors of that company of their performance of their duties (in the Petition there is no such complaint). In ***Pettie***, the petitioners had identified the supposed element of *"undervalue"* (which the Petition fails to do) and, indeed, had indicated their dispute as to value before the issue proceeded (which P failed to do, instead, only objecting to the alleged repayment of the Principal Founder Loans).

32. In fairness to Mr Broadbent, the argument put forward by the Judge was not an argument that he had made to the Judge (letter of 11/7/25 **[Cupp 75]**). Instead, Mr Broadbent disputed that P had presented any viable case of an issue at an undervalue.

[5] To be clear, the Brewdog deal has never proceeded further.

P had not done so. What P has since engaged in is an attempt to ignore the limits of its pleaded case.

33. Nevertheless, the Judge was right to reject the alleged undervalue complaint (¶1 Respondent's Notice **[Core 17]**). P had put forward no coherent pleaded case of the issue of shares at an undervalue. P had identified no element of undervalue. Such complaint, as there was, was firmly tied to the repayment of the Principal Founder Loans, rather than available to P just because it had previously referenced the *"June Transaction"* in ¶25(2) of the Petition **[Core 23]**. P had led no evidence, whether factual or expert, to advance such a claim. It did not even question the directors' performance of their duties. Without any of this, the complaint was bound to fail and the Petition would inevitably have been struck-out. That it was not expressly considered and rejected before the ICC Judge was really P's fault; it never suggested that it had (and did not properly have) any such case that was distinct from the alleged repayment over the Principal Founder Loans. The Judge should not have adopted a more expansive (or indulgent) approach to P's case on the appeal before him.

34. Contrary to the Judge's suggestion (Judgment, ¶34, **[Core 10]**), any amendment to P's case to advance such a claim in a proper fashion would not have been minor in nature. P would have had to amend to plead the alleged *"undervalue"* and what it supposedly was. P's amendments would have had to explain why Mr Broadbent alone would bear culpability for that (or challenge the conduct of the Company's board) and, in any event, why Mr Broadbent alone ought to bear the consequences of the order sought in the Petition. Presumably, as P now seeks to frame it, that amendment would extend to the issue of all shares in the Rights Issue, not merely the pleaded case that was tied to the repayment of the Principal Founder Loans (P's case on Appeal is not clear).

35. Such changes would not be minor matters but would have represented a fundamental change to P's pleaded case shortly before trial. It might well be that, having recognised this in advance of the hearing before the ICC Judge, P accepted that these fundamental issues could not be sorted out before that trial and that trying to suggest such a case, would, at very least (and even assuming permission to amend was given), have come at the obvious risk of the scheduled trial date and/or an increased exposure to adverse

costs. It is clear from the hearing before the ICC Judge (and, indeed, the application to strike-out the Strike-Out Application) that P was intent on, at least, posturing that the trial date should be maintained. In any event, even when repeatedly asked whether P wished to amend the Petition (in any respect), P told the ICC Judge *"no"* (¶¶23, 28 and 83 Main ICC Judgment **[Core 18]**).

36. Even if P had been able to formulate a coherent case as a matter of pleading, it would then be expected to show that such an amendment had some sensible prospect of success before obtaining permission to amend. Yet P had no factual or expert evidence before either the ICC Judge or the Judge that could have established that the Rights Issue was at an *"undervalue"*. P could not rely on any legitimate inference to support its case, for the reasons identified above, and what it has since engaged in is an impermissible attempt to expand its pleaded case. On basic principles, permission to amend to pursue such a speculative case would have inevitably been refused. P's complaint would therefore have stood (and has since fallen) on the repayment of the Principal Founder Loans' claim alone.

G. THE NOMINATION COMPLAINT

37. The Nomination Complaint is hollow. The essence of the pleaded case in the Petition is to be found in ¶¶13-15, 23-24 and 27 of the Petition **[Core 23]**.

38. By letter dated 25/3/21 **[Core 22]**, it was provided as far as relevant, that:

> *"2. [P] will be entitled to nominate someone to the board."*

While styled in the Petition as the *"Board Seat Agreement"* and below as the *"Nomination Agreement"*, as the Judge noted, the letter may be seen as a statement of position and is addressed *"To whom it may concern"* (Judgment, ¶39 **[Core 10]**).

39. In both the company law context and as a matter of ordinary language, a *"nomination"* is different from an *"appointment"* (Main ICC Judgment, ¶23 **[Core 18]**). A nomination is a proposal of a person to occupy a position. An appointment is the culmination of a process that may begin with a *"nomination"* and involves the actual selection of that person and their attainment of that position. Mr Broadbent's approach is entirely consistent with the usual use of these words in ordinary English.

40. Both the ICC Judge and the Judge were entirely right to conclude that *"nominate"* and *"appoint"* were two different concepts and that the letter conferred only a right to *"nominate"* (¶24 Main ICC Judgment **[Core 18]**; ¶42 Judgment **[Core 10]**).

41. Even in its own terms, the Petition draws the same distinction between the term *"nominate"* and *"appoint"*. ¶15(1) of the Petition **[Core 23]** draws a familiar distinction between *"nominate"* and *"appointment"*. So too does ¶23 of the Petition **[Core 23]**, in relation to the role of Mr Meyer. See further the analysis in ¶3 Respondent's Notice **[Core 17]**. Moreover, P's Counsel had accepted that distinction (and that P's right was to *"nominate"* not to *"appoint"*) before the ICC Judge (e.g. p.118 (internal), Main ICC Hearing Transcript **[Supp 59]**).

42. Against that background, P's argument that *"nominate"* means *"appoint"* is unsustainable. P did not suggest that before the ICC Judge; quite the contrary, P's Counsel accepted the distinction. P did not suggest to the ICC Judge that *"nominate"* meant *"appoint"* or that P never accepted such *"so nugatory a right"* as a mere right to *"nominate"* (c.f. Ground 2(b) and (c), Grounds of Appeal **[Core 3]**). The ICC Judge could hardly be faulted for having proceeded on the basis that *"nominate"* did not mean *"appoint"*, when P had accepted that very distinction. Nor could the Judge be so faulted.

43. Instead, the letter of 25/3/21 is to be construed in accordance with its own terms, against documents that existed at the time it was created. If the letter were to be construed against any other document, it should be against the articles of the Company that were in force as at 25/3/21 (the **"Original Articles"**) **[Supp 1]**. Those articles also clearly demonstrate that the two concepts of appointment and nomination should be regarded as distinct. The incorporated provisions of the Model Articles (particularly, Reg 17) deal only with *"appointment"*, which would be effected by either an ordinary resolution of shareholders or by a decision of the directors. *"Nomination"* is a concept that has no place in the Original Articles. In the light of this point too, it was plainly right of the Judge and the ICC Judge to distinguish between the two concepts of *"nomination"* and *"appointment"*.

44. In the event, the only person that P ever *"nominated"* to be a director was a Mr Christopher Meyer. Mr Meyer did attend several board meetings of the Company (where he was recorded as attending as a "director" - **[Supp 5-7]**). However, by an email timed at 16:32 on 11/7/21 **[Supp 9]**, Mr Meyer declined to act (or act further - it matters naught[6]) as a director of the Company. P accepts that it knew Mr Meyer's position from that time [¶7 RRFI **[Core 25]**. P also accepts that it did not thereafter nominate anyone to act as a director of the Company.

45. P's pleaded complaint is that the Company supposedly *"failed and refused to permit the Petitioner to nominate any other individual to act as a director of the Company"* (Petition, ¶24 **[Core 23]**). But *"nomination"* was always a matter for P alone and P accepted that it had never looked to nominate anyone else. That is not a basis for claiming *"unfair prejudice"* (¶4 Respondent's Notice **[Core 5]**).

46. The ICC Judge carefully analysed the complaint made and the allegation of prejudice contained in ¶27 Petition **[Core 23] (**¶¶38-45, Main ICC Judgment **[Core 18]**). There was no reasonable prospect of the complaint succeeding at trial.

47. P's actual complaint also needs to be viewed in the context of the actual communications between the parties at the time. These are contained in **[Supp 10-14]**. The final email from P (Mr Lazarus) on the point, timed at 3:06 on 19/10/21 **[Supp 14]** did not suggest that any intractable position had been reached by reason of Mr Broadbent having questioned whether P had a right to make a second nomination. It states **[Supp 14]**:

> *"Hi Ralph*
> *When we invested at the time it was a clear request and agreement that we would have the seat at the time occupied by Chris.*
> …
> *Happy to chat to Hugh but in view of the fact you are redefining the board I think I should speak* [to] *the New Board once this process is complete.*

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[6] P claims that Mr Meyer was never actually appointed. Mr Broadbent claims that he was and acted as such but, ultimately, declined to act further because of his other commitments. It has not been necessary for the Courts below to resolve such an issue - and it will not be necessary for the Court of Appeal to do so either. It is enough that P accepted that it *"nominated"* Mr Meyer and that it knew that he later said (to put it neutrally) that he was unable to act as such.

Regards,
David Lazarus"

This is how P left matters. P simply agreed that they would raise them with the new board in the future. It never did so.

48. In any event, so far as Mr Broadbent questioned whether P had any right to effect a second nomination, he was entitled to do so. The Judge himself concluded that the right to nominate was a *"one off"* (¶¶42-43 Judgment **[Core 10]**). It can hardly be unfairly prejudicial for Mr Broadbent to have posed that same question in correspondence of P. But, again, that is to address a case that P has not pleaded. As the email from Mr Lazarus shows, in the end, P was content to leave matters for future discussion. Moreover, P did not nominate anyone else to act as a director

49. P's actual pleaded case of consequent *"prejudice"* underscores the trivial nature of the complaint (see ***Re Saul D Harrison [1995] 1 BCLC 14***, at page 18, per Hoffmann LJ). P claims that, by reason of the alleged breach of the breach of the letter of 25/3/21, P was *"deprived of the opportunity to have an individual appointed to the board who would be likely to have particular regard to the interests of the shareholders of the Company in general (including those of the [P]), as opposed to merely those of its founders"* (Petition, ¶27 **[Core 23]**). The Petition contains no complaint that, if P had *"nominated"* a director, the board would have taken any different decision or that P would have had any greater influence or missed out on information that it might have had.

50. As a matter of substance, it is entirely clear from the way that Mr Lazarus had left matters that P was not prejudiced at all. P had clearly (and freely) accepted the good sense in waiting until a new board had been formed but then did nothing about it. P's *"complaint"* is a matter of obvious triviality, which has no proper place being brought under s994 CA 2006 (see ***Re Saul D Harrison [1995] 1 BCLC 14***, *op cit*), (¶6 Respondent's Notice **[Core 5]**).

51. Moreover, all such arguments over the effect of the letter of 25/3/21 ignore the fact that, from start November 2021, the effect of the adoption of the New Articles was to overtake any prior arrangements and to provide a uniform arrangement for the

appointment of directors by all members of the Company (¶5 Respondent's Notice **[Core 5]**). As the ICC Judge and Judge (rightly) found, the New Articles provided a uniform basis for the appointment (and removal) of directors that overtook the letter of 25/3/21. Under the New Articles - as it had been under the letter of 25/3/21 - P was entirely able to *"nominate"* anyone for consideration as a director. See ¶63 Main ICC Judgment **[Core 18]**; ¶44 Judgment **[Core 10]**.

52. In all the circumstances, P's complaint is fanciful. Leaving to one side Mr Meyer, even if *"nominate"* had the meaning sought to be attributed to it by P and allowed more than one nomination, P never *"nominated"* anyone. Instead, as P itself left matters in correspondence, it was content just to pick things up in the future, although P never actually did so. It is not unfair for the Company to have assumed P would do what it said it would do in its email of 19/10/21 **[Supp 14]**. Such basic facts cannot be transformed into an effective claim of *"unfair prejudice"* or one that would ever justify any relief (or any relief against Mr Broadbent).

H. THE DISPROPORTIONATE REMEDY SOUGHT AGAINST MR BROADBENT

53. As noted, P's complaints are all framed as allegations that the Company was in breach in some respect. Nevertheless, the relief sought is directed only against Mr Broadbent and not any other director or shareholder or even against the Company itself. In relation to each of the matters complained about in the Petition, Mr Broadbent is, at most, recorded as being involved in the general narrative but he is not alleged to have been acting on behalf of the Company in relation to any alleged *"breach"*, let alone to have been *"conducting the* [C]*ompany's affairs"* in such a way. See Main ICC Judgment, ¶¶79 to 81 **[Core 18]**.

54. ¶69 of P's Skeleton on the Appeal identifies a variety of reasons why P contends that Mr Broadbent could be made the subject of an order under section 996 CA 2006. Of course, this supposes a sustainable case of unfair prejudice was made out. Nevertheless, dealing with these reasons in turn:

    (1) Mr Broadbent had negotiated the terms of P's subscription [But so what? No complaint was made by P over those negotiations.]

(2) Mr Broadbent had negotiated and agreed terms on his own behalf and on behalf of Mr Dixon in relation to the Founder Loans in the Second Subscription Agreement [But, so what? No complaint is made over these negotiations. Moreover, the Second Subscription Agreement had fallen away with the adoption of the New Articles and that decision is not appealed by P.]

(3) Mr Broadbent had signed the letter of 25/3/21 [Again, so what? He had done so on behalf of the Company. His signature to the letter is not said to be wrongful.]

(4) Mr Broadbent had *"denied"* P's entitlement to a board seat claiming it had only a *'one-off'* right [This is not P's pleaded case and is irrelevant. In any event, it ignores the subsequent correspondence that shows that P agreed to park the issue for future discussion. In any event, it was hardly *"unfair"* for Mr Broadbent previously to question whether P had more than a *'one-off'* right that a High Court Judge has determined that P did not have.]

(5) On P's evidence, Mr Broadbent had confirmed that none of P's rights would be *'watered down'* [But this too was not P's pleaded case and it was a case that P confirmed, by its Counsel, it was not making before the ICC Judge as some form of misrepresentation complaint or collateral contract [p.162 Main ICC Hearing Transcript **[Supp 59]**). It was rightly disregarded by the ICC Judge as an entirely unpleaded complaint.]

(6) Mr Broadbent acquired shares through the June 2022 Transaction and it would not be disproportionate to require him to purchase P's shareholding [But it was not only Mr Broadbent but many other shareholders who acquired shares in the Rights Issue and helping to overcome the severe financial problems caused by the product recall The material question for the Court was would it be it *"just"* and *"proportionate"* to make a buyout order against Mr Broadbent because of what could be established against him by reason of the case pleaded in the Petition, and not just because Mr Broadbent had a particular economic interest in the Company.]

There is no suggestion (nor could there be) that Mr Broadbent was able to - or ever did - dictate the conduct of the affairs of the Company, either in his own right or in combination with others. P's position in trying to target Mr Broadbent as the subject of an order for relief is simply hopeless.

51, While section 994 CA 2006 imposes no limits on the classes of potential respondents, there are still controls over who should be made a respondent:

(1) Persons who might be appropriately joined as substantive parties include a person who:

> *"is so connected to the unfairly prejudicial conduct that it would be just, in the context of the statutory regime contained in section 994 to 996, to grant a remedy against [him, her, it] in relation to that conduct"* under the flexible regime of ss994 and 996

See ***Gamlestaden Fastigheter AB v Baltic Partners Ltd [2008] 1 BCLC 468***, [26]-[28].

(2) As Vos J said in ***Apex Global Management Ltd v Fi Call Ltd [2014] BCC 286***, [125]:

> *"Sections 994-6 provide a wide and flexible remedy where the affairs of a company have been conducted in a manner that is unfairly prejudicial to the interests of some or all of its members…Relief can be granted to remedy wrongs done to the company, and in such a situation the alleged wrongdoers must be made parties to the petition. Non-members of a company who are alleged to have been responsible for such conduct can be joined as respondents, and, in an appropriate case, such non-members can be made primarily or secondarily liable to buy the petitioners' shares. Artificial limitations should not be introduced to reduce the effective nature of the remedy introduced by ss 994–996."*

(Quite so, but there the two respondents, each of whom had challenged their naming as a respondent to the petition, were neither shareholders nor de jure directors of the relevant company. However, one was alleged to be a shadow or de facto director of the company, and the other the ultimate puppet-master. They were held to be appropriate respondents to the proceedings. From the very allegations made in that petition, there were effective allegations that they had conducted the relevant company's affairs).

55. Such quotations give emphasis to the fact that the joinder of a respondent to a petition should involve proper consideration over whether or not there is any realistic prospect that the trial Court will grant the remedy sought against such person. Section 992(2) CA 2006 is in permissive terms; the Court must consider it *"just"* to ever make such an order against a respondent.

56. The question of whether a remedy might then be *"just"*, involves consideration of whether such a remedy would be *"proportionate"*:

(1) See ***Re JE Cade & Son Ltd [1992] BCLC 213*** per Warner J at 223b-c:

> *"I turn to the prayer for relief in the petition. There can be no doubt, and indeed it was common ground between counsel, that the relief prayed for in a petition under ss 459 and 461 must be appropriate to the unfairly prejudicial conduct of which the petitioner complains."*

(2) HHJ Pelling QC in ***Re Pedersen (Thameside) Ltd [2017] EWHC 3406 (Ch)***, [12]:

> *"…the scope of the remedies that a court can provide under s.996 is very wide as the express terms of the section make clear. However, the relief sought must be proportionate to the unfairly prejudicial conduct of which the petitioner complains - see by way of example* ***Re JE Cade & Son Ltd [1992] BCLC 213*** *per Warner J at 223C. It is for the petitioner to specify the relief that he, she or it seeks and in my judgment in an appropriate case a respondent is entitled to seek to strike out the relief claimed as being excessive, providing that the respondent can show that the likelihood of a trial judge exercising his discretion to grant the relief claimed is so remote that the case can be described as perfectly hopeless."*

57. Where the petitioner has joined a respondent against whom its claim is hopeless, the Court may deal with it on a strike-out application: see ***Re Baltic Real Estate (No 1) [1993] BCLC 498***; ***Re Little Olympian Each-Ways Ltd [1994] 2 BCLC 420***, 429-429g; ***Re Little Olympian Each-Ways (No 3) [1995] 1 BCLC 636***, 666f; ***Holman v Adams Securities Ltd [2010] EWHC 2421 (Ch)***, [80]; ***Re Pedersen (Thameside) Ltd [2018] BCC 58***, [12], [19]; ***Re Bankside Hotels Ltd [2018] BCC 420***, 429f-429g.

58. Here, the requested buyout order, directed solely against Mr Broadbent, is a very significant form of relief. Such an order would represent a considerable financial imposition upon him, especially at the sort of valuation contended for by P. Such a buyout order is not a minor or insignificant obligation and, if Mr Broadbent could not comply with it, he would face the threat of bankruptcy proceedings to enforce such an order.

59. Given the allegations advanced by P, this was never *"an appropriate case"* or one where it would be *"just"* for P to seek such an order against Mr Broadbent or for the trial Court to make such an order against Mr Broadbent (¶10 Respondent's Notice **[Core**

5]). Mr Broadbent perfectly properly denied that P had any case for relief against him (¶67 Points of Defence **[Core 24]**); Mr Broadbent was not required to itemise that it was inappropriate to seek relief against him alone or that an order might be made against someone else (cf. ¶66 P's Skeleton on the Appeal) **[Core 2]**).

60. In that context, the words *"Further or other relief"* in the prayer to the Petition **[Core 23]** do not represent some 'catch-all' that allows P to maintain a petition on the basis that some other form of relief might conceptually be available to it, or against the Company, even if it failed in securing a buy-out order (¶9 Respondent's Notice **[Core 5]**) (cf. ¶65 P's Skeleton on the Appeal) **[Core 1]**). Such points ignore observations such as those in ¶56 above. ***Re Macom GmBH (UK) Ltd [2021] EWHC 1661 (Ch)*** is very much a case on its own facts; it does not represent a departure from the need for a petitioner to identified the nature of the relief that they seek or the need and ability of a court hearing a strike-out application to assess whether that the relief sought is a realistic possibility.

61. As stated, there is no wrongdoing alleged against Mr Broadbent in the Petition at all. The complaints that P actually makes are each that *"the Company failed"* to do something. Mr Broadbent is not said to have breached the Company's articles or any other agreement at all. Mr Broadbent is not said to have breached any duty as a director, whether fiduciary or otherwise. There is simply no *"conduct of the [C]ompany's affairs"* complained about, let alone any resulting from Mr Broadbent's behaviour. As far as can be seen, he has been joined simply to provide an inappropriate target for P's preferred form of relief and to place commercial pressure upon Mr Broadbent to accede to its demanded price for its shares (effectively at the value when P originally invested and prior to the product recall) P's Non-binding estimate of value, **[Supp 41]**).

62. The ICC Judge rightly concluded that, on the Petition and evidence, the remedy sought by P was manifestly disproportionate and would not be *"just"* *(*¶¶68-81 Main ICC Judgment **[Core 18]***)*, such that there was no realistic prospect of any trial Court ever making the remedy sought by P. The Judge could (and should) have upheld the ICC Judge on this additional basis.

I. THE OFFER

63. In the light of the relative success of the parties - and what P has inevitably failed upon and what, at most, it has the mere hope that it might succeed upon on Appeal, Mr Broadbent's offer of 31/7/23 **[Supp 43]** can be readily seen to have provided an entirely fair offer for the disposal of the Petition. P had rejected that offer for reasons that were spurious (see ¶¶36 to 49 of **[Supp 45]**), yet it, more than adequately, addressed such claims, especially in the light of the House of Lords' decision in ***O'Neill v Phillips [1999] 1 WLR 1092***. (¶11 Respondent's Notice **[Core 5]**).

64. Irrespective of its relevance to the Appeal, Mr Broadbent will rely on his offer of 31/7/23 on the issue of costs.

J. COSTS

65. The ICC Judge delivered a careful judgment on costs, following full argument between the parties **[Core 9]**. The ICC Judge's order on costs covered three sets of costs:
    (1) The costs of the Petition (including costs of the Company in relation to provision of disclosure);
    (2) The costs of the Strike-Out Application; and
    (3) The costs of P's application to strike-out the Strike-Out Application.

66. P stated that it was not pursuing its appeal to the Judge on costs following its failure on the substantive issues (letter of 4/8/25 **[Supp 78]**).

K. CONCLUSIONS

67. The appeal should be dismissed. The Petition was a poorly drafted document and was bound to fail. Whatever case P might have advanced, it is not a case that was fairly advanced in the Petition (or through to the intended trial) and was simply not supported by the evidence before the ICC Judge and Judge.

NIGEL DOUGHERTY
OLIVIA TOLSON
(Counsel for Mr Broadbent and the Company)
Erskine Chambers
25 March 2026