Neutral Citation Number: [2019] EWCA Civ 2046

Case No: A3/2018/2972 and 2973

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMPANIES COURT (ChD)
Sir Nicholas Warren
CR-2013-003502 and 003499 (Nos 1807 and 1805/2013)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2019

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NEWEY

- -

IN THE MATTER OF G&G PROPERTIES LIMITED
and
IN THE MATTER OF THE COMPANIES ACT 2006

Between:

NICHOLAS JOHN CLWYD GRIFFITH	**Appellant**
-and-	
(1) NEIL JOSEPH GOURGEY	
(2) CHARLES DUNCAN GOURGEY	
(3) ROBERT LEWIS and NICHOLAS EDWARD REED (as Joint Trustees of the Estate of Robert John Hodge)	
(4) G&G PROPERTIES LIMITED	**Respondents**

-AND-

IN THE MATTER OF BANKSIDE HOTELS LIMITED
and
IN THE MATTER OF THE COMPANIES ACT 2006

Between:

NICHOLAS JOHN CLWYD GRIFFITH	**Appellant**
- and -	
(1) MAURICE SALEH GOURGEY	**Respondents**
(2) ROBERT LEWIS and NICHOLAS EDWARD REED (as Joint Trustees of the Estate of Robert John	

Hodge)
(3) BANKSIDE HOTELS LIMITED

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Christopher Parker QC and Emily Gailey (instructed by **Blake Morgan LLP**) for the **Appellant**
Daniel Lightman QC, Adil Mohamedbhai and Emma Hargreaves (instructed by **Olephant Solicitors**) for the **Respondents Maurice Gourgey, Neil Joseph Gourgey and Charles Duncan Gourgey**
The other Respondents did not appear and were not represented

Hearing date: 5 November 2019
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Approved Judgment

Lord Justice David Richards :

1. These appeals are brought against orders made by Sir Nicholas Warren, sitting as a High Court judge, in two petitions under section 994 of the Companies Act 2006, alleging unfair prejudice in the conduct of the affairs of two companies, G&G Properties Limited (G&G) and Bankside Hotels Limited (Bankside). It is a remarkable and highly regrettable feature of the appeals that they concern amendments to the pleadings in petitions presented as long ago as March 2013.

2. G&G and Bankside are two of a large number of companies established to carry on hotel and property businesses by Mr Griffith (the appellant and petitioner), Maurice Gourgey (the first respondent in the Bankside petition) and Robert Hodge who was declared bankrupt in 2010. The shares in Bankside were issued to Mr Griffith and Mr Hodge (25 shares each) and to the trustees of a family trust established by Mr Gourgey (50 shares). The shares in G&G were issued to Mr Griffith and Mr Hodge (25 shares each) and to Mr Gourgey's sons, Neil and Charles (the Sons) (25 shares each).

3. The directors of G&G at the material times were Mr Gourgey, the Sons, Mr Griffith until May 2010 and Mr Hodge until his bankruptcy. The directors of Bankside at the material times were Mr Gourgey, his wife, Mr Griffith until May 2010 and Mr Hodge until his bankruptcy.

4. The principal allegation made by Mr Griffith in each petition is that Mr Gourgey has caused G&G, Bankside and its subsidiary Riverbank Hotels Limited to transfer substantial sums to companies in which Mr Gourgey and others connected with him were interested. It is said that the payments were not made in the interests of the companies concerned but were made for the personal benefit of Mr Gourgey and others and without the knowledge and approval of Mr Griffith. Mr Gourgey and the other respondents say that the various companies concerned were run as a corporate group and routinely assisted each other with loans. Mr Griffith had consented to this arrangement, which caused no prejudice to him because the loans were made on commercial terms and, in many cases, to companies in which Mr Griffith was directly or indirectly interested. Other payments were made under arrangements, agreed by Mr Griffith, for management charges. A third petition in relation to Pedersen (Thameside) Limited, based principally on the alleged diversion of a corporate opportunity, was presented at the same time and is being pursued but is not directly relevant to these appeals.

5. The main relief sought by Mr Griffith in the two petitions relevant to this appeal is an order that Mr Gourgey purchase his shares in Bankside and that the Sons purchase his shares in G&G.

6. In their early stages, the conduct of the petitions was marked by commendable speed by all parties. Following service of the petitions in March 2013, Mr Griffith acceded to the respondents' suggestion that there should be combined pleadings in the three petitions. Combined points of claim were served on 24 May 2013, combined points of defence on 2 August 2013 and combined points of reply on 3 September 2013.

7. The state of the pleadings in the G&G case in 2013 is of central importance on the present appeal in that petition and I will return to them when dealing with it.

8. Progress took a backward turn with the failure of the respondents to provide the further information as regards the points of defence requested in September 2013. Notwithstanding a consent order for the provision of the requested information, an unless order and an order made in November 2014 giving relief from sanctions and providing a final chance to provide the full information requested, the respondents failed to do so. By an order made in May 2015, Simon J declared that the points of defence had been struck out. In his judgment ([2015] EWHC 1080 (Ch)), he said that the failures to provide adequate responses went to the heart of the allegations made against the respondents and that a significant number of responses were "not simply insufficient, they are evasive". There had also been "a serious failure" to produce important documents by their due date, for which there was no sufficient explanation.

9. The respondents are not debarred from defending the petitions, but, as the judge said in his first judgment at [144], they "cannot put forward a case which is factually inconsistent with the [points of claim] or put forward any other factual material to support a case that the conduct complained of does not amount to unfairly prejudicial conduct".

10. Further delay was caused by an appeal by the respondents against Simon J's order, which was dismissed in July 2017. A single lord justice gave permission to appeal on the basis of just one point but it transpired, as Longmore LJ noted, that it had already been considered and rejected in an earlier decision in November 2014, from which there had been no appeal: see [2017] EWCA Civ 926 at [17].

11. On 6 April 2018 the Sons issued an application for an order striking out the relief sought against them in the G&G petition, or, alternatively, for an order that Mr Griffith apply within 28 days for permission to amend the petition and the points of claim "so as properly to particularise a claim that [each of the Sons] has or have been concerned in conducting the affairs of [G&G] in an unfairly prejudicial manner".

12. On 13 July 2018, Mr Griffith applied for permission to amend the Bankside petition to plead the uncontested fact that in October 2014 he had acquired an additional 8 shares in Bankside from Mr Hodge's trustees in bankruptcy, thus enabling him to seek a buy-out order against Mr Gourgey in respect of those shares as well as his original holding of 25 shares.

13. These applications were heard with a number of other applications. These included an application by Truchot Trustees Limited (Truchot), the trustee of a family trust set up by Mr Gourgey, to strike out the relief claimed against it in the Bankside petition and the points of claim on the grounds that they disclosed no reasonable grounds for the claim.

14. The applications were heard by Sir Nicholas Warren (the judge) over three days in April 2018. On 9 May 2018, the judge handed down a reserved judgment (the first judgment): see [2018] EWHC 1035 (Ch), [2019] 1 BCLC 434, [2018] BCC 617. He held that, in the absence of suitable amendments, the strike-out applications made by the Sons and Truchot succeeded. He gave Mr Griffith an opportunity to apply for permission to amend the petitions and the points of claim.

15. By applications issued on 13 July 2018, Mr Griffith applied for permission to amend the G&G and Bankside petitions and the points of claim.

16. The judge heard these applications on 30-31 July 2018 and handed down judgment on 25 October 2018 (the second judgment): see [2018] EWHC 2807 (Ch), [2019] 2 BCLC 174. He dismissed the application to amend the Bankside petition and the points of claim in so far as they related to Truchot. Permission to appeal the order as regards Truchot was refused by the judge and by this court. Truchot has therefore ceased to be a respondent against which relief is sought in these proceedings.

17. The judge gave permission for most of the amendments to the G&G petition and the points of claim as regards the claims against the Sons, but on condition that they be allowed to plead full defences to the points of claim as so amended. He also gave permission for amendments to the Bankside petition and the points of claim to plead the fact that Mr Griffith had acquired 8 shares from Mr Hodge's trustees in bankruptcy in October 2014, on condition that Mr Gourgey be permitted to plead a full defence to the points of claim as amended.

18. With permission granted by Floyd LJ, Mr Griffith appeals against the order striking out the relief against the Sons in the G&G petition unless the petition and the points of claim were amended. This therefore requires consideration of the first judgment given by the judge on 9 May 2018 (the first judgment). He also appeals against that part of the order in the Bankside petition by which the judge permitted Mr Gourgey to plead a full defence to the points of claim.

19. I deal first with the appeal as regards the G&G proceedings. The Sons submit, and the judge agreed, that neither the petition nor the points of claim contains a sufficient pleading of unfairly prejudicial conduct on the part of the Sons as to make it arguable that a buy-out order or other relief could properly be made against them.

20. Mr Griffith relies on four grounds of appeal with respect to G&G, which it is convenient to set out:

> "1. Mr Gourgey's entitlement to 50% of the shares in G&G had been placed in the names of his two sons, Neil and Charles Gourgey ("the Sons"). It was alleged that the shares were "his" (i.e. Mr Gourgey's) and this was not disputed in the Points of Defence of Mr Gourgey or the Sons. Consequently the Court should have viewed the relief being claimed against the Sons as the registered holder of the shares in the same way as if the shares had been in the name of Mr Gourgey himself. The Judge erred as a matter of law in not proceeding on that basis but in allowing the Sons to apply to strike out the claim for relief on a basis inconsistent with their Points of Defence.
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> 2. As a director of G&G Mr Gourgey had caused G&G to make payments that benefitted companies of Mr Gourgey in which Mr Griffith did not have an interest in breach of his duties as a director of G&G. The Points of Claim alleged that in doing so he had had the support of his Sons as directors of G&G. Far from denying that they had supported their father, in paragraph 31.2 of the Points of Defence the Sons expressly approved of their father's action irrespective of whether they were in breach of his fiduciary duties as a director: The Judge erred as a matter

> of law in holding that such support by the Sons of their father did not entitle the Petitioner to claim a buy-out order against them.
>
> 3. The Judge erred as a matter of law in holding that as a result of the amendments to the Points of Claim the defendants were entitled to plead not just to the amendments but to the whole of the Points of Claim. There was no rational basis for such a decision and it was contrary to the principle that the permission that follows from an amendment to Particulars of Claim is permission to the defendant to make consequential amendments to his defence.
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> 4. The Judge erred as a matter of law in ruling that an argument of knowledge based on the Sons' position as directors of G&G was not open to the Petitioner on the original Points of Claim."

21. I will deal first with ground 2.

22. The petition, as it stood before the amendments permitted by the judge in October 2018, contained no allegation of support by the Sons for the conduct of Mr Gourgey or of breach of fiduciary duty by the Sons. However, paragraph 36 of the original points of claim pleaded:

> "In breach of *their fiduciary duties* as directors…Mr Gourgey has, without the approval of Mr Griffith, *and with the support of his sons*, caused the following monies to be paid over or lent by G&G…" (emphasis added)

23. There follows a list of nine payments totalling over £2 million made to various companies. By an amendment made in June 2014, reference is made to sums shown as due to G&G in the accounts of another company.

24. It might have been expected that the Sons would request further information of the very exiguous allegation there made against them, either before serving their points of defence or at the same time. Failing the provision of adequate further information, they might have been expected to apply for the claim for relief against them to be struck out.

25. However, the Sons did none of these things. Instead, in August 2013, points of defence were served on behalf of, among others, Mr Gourgey and the Sons. The response to paragraph 36 was contained in paragraphs 53-60. In paragraph 53, it was denied "that there was any breach of fiduciary [duty]…for the reasons set out above". This appears to be a reference to paragraph 31 where it is pleaded that the course of conduct including the impugned payments "reflect the course of action which was agreed and understood between the Three Shareholders [Mr Gourgey, Mr Hodge and Mr Griffith] to represent the best interests and/or "success" of the relevant companies" and to the extent that any conduct would otherwise have constituted a breach of Mr Gourgey's fiduciary duties, it "was authorised and/or ratified by the

Three Shareholders, who between them were or represented all the members of the relevant companies".

26. Paragraphs 54-60 proceed to deal with each payment (other than the tenth added by amendment), in most cases saying that no prejudice was suffered by Mr Griffith because he was a 25% shareholder in the recipient companies.

27. The points of defence do not deny that Mr Gourgey caused the payments to be made nor do they deny that they were made with the support of the Sons. Those pleaded facts were simply not in issue following service of the points of defence.

28. In his first judgment, the judge said of paragraph 36 of the points of claim:

> "107. The obvious difficulty with the pleading in paragraph 36 is that it is not clear that as breach of duty alleged against Neil and Charles [sic] and there is certainly no pleaded basis at all on which the full amount of the relief sought could be claimed against them.
>
> 108. The only lever for relief is the allegation in paragraph 36 that Mr Gourgey acted "with the support of his sons". Mr Lightman describes this, with some justification, as an extraordinary basis for relief let alone an immediate share purchase order against Neil and Charles. This allegation is not without difficulties, including that the G&G petition and the PoC:
>
> a. fail to explain what is meant by the expression "with the support of his sons";
>
> b. fails to specify how, with respect to any of the payments relied on by Mr Griffith either (i) Neil or (ii) Charles is alleged to have given "support" to Mr Gourgey;
>
> c. fail to identify which fiduciary duties either (i) Neil or (ii) Charles is alleged to have breached in relation to any of those payments; and
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> d. fail to explain the relevance of the alleged Understanding to the relief sought against Neil and Charles in the G&G Petition or the allegation that the payments are alleged to have been contrary to its terms, in circumstances where:
>
> i. neither Neil nor Charles is alleged to have been a party to the alleged Understanding or to be or at any time to have been bound by it; and
>
> ii. Mr Gourgey is not, and has never been, a shareholder in G&G, and is not a respondent to the G&G Petition."

29. The judge stated his conclusion at [112]:

> "My conclusion is that the G&G petition cannot stand as against Neil and Charles. The PoC cannot be relied on insofar as the allegations go beyond particularisation of more general allegations in the petition. In particular, Mr Griffith cannot rely on the duties alleged in paragraph 19 of the PoC or the allegation of support of Neil and Charles in paragraph 36."

30. The ratio of the judge's decision would appear to be that no allegation of breach of duty by the Sons is contained in the petition and that cannot be made good by reference to the paragraph 36 of the points of claim. It is, however, fair to say that the judge clearly regarded paragraph 36 as an inadequate pleading and, perhaps, as so inadequate as to be unable to support a claim for relief against the Sons.

31. The Sons would undoubtedly have been entitled to the provision of significant further particulars of the allegations of support and breach of fiduciary duty made in paragraph 36 and might well have been entitled to receive them before serving their points of defence. At the same time, it cannot be doubted that an allegation of breach of fiduciary duty is being made against them, consisting of support for the payments wrongfully procured by Mr Gourgey. It would be a clear breach of duty on their part to support the making of wrongful payments. If the payments were made without the consent of Mr Griffith, such breaches of duty would be well capable of supporting a finding of unfair prejudice, justifying the grant of relief against the Sons.

32. The points made by the judge in sub-paragraphs (a) and (b) of [108] about the lack of details in the allegation of "support" would have been central to any application that the Sons might have made before or at the time of pleading their points of defence. But, having served their points of defence as long ago as August 2013 without making any such application, it is now far too late to strike out the claim for relief on those grounds. Moreover, having served their points of defence without putting the allegation of support in issue, further information could not be sought of it (see CPR 18.1(1)(a)) and any inadequacy in pleading the allegation ceased to be a basis on which the points of claim could be said to be unsustainable. It is also too late to complain of the failure to plead the particular fiduciary duties alleged to have been breached by the Sons, the point made by the judge at sub-paragraph (c) of [108]. In any event, if the facts are established, there will be no doubt as to the duties which were breached. Sub-paragraph (d) refers to the "Understanding" but that forms no part of the case against the Sons, as opposed to Mr Gourgey, as a simple request for clarification would have disclosed, if there was any doubt about it.

33. As to the more general point made by the judge at the start of [108], that the allegation of support was "an extraordinary basis for relief let alone an immediate share purchase order" against the Sons, I am with respect simply unable to understand why that is so. What relief should be granted, if unfairly prejudicial conduct on the part of the Sons is established, is a matter for the trial judge, but a buy-out order against the Sons could well be an appropriate order if they supported Mr Gourgey in making substantial payments in breach of fiduciary duty, depending of course on all the circumstances as they appear to the trial judge.

34. If and insofar as the judge reached his decision to strike out the claim for relief against the Sons on the basis of the inadequacy of the pleadings, I am clear that he was wrong for the reasons I have given.

35. What then of the ground the judge gave in the first judgment at [112], that the claim for relief should be struck out because no allegation of breach of duty was made against the Sons in the petition? Mr Lightman QC, for the respondents to this appeal, referred us to the judgment of Dillon LJ in *Re Tecnion Investments Ltd* [1985] BCLC 434 at 441, and to the numerous judgments at first instance, emphasising the importance of a proper pleading of the petitioner's case in a claim under section 994 or for a winding-up order under the just and equitable ground. I fully endorse that approach. The breadth of the court's jurisdiction in such cases makes this essential, both so that the respondents know the case they have to meet and so that the court can keep the proceedings within manageable bounds.

36. In many of these cases, the only pleading was the petition. It was not generally the practice to have points of claim and points of defence in a contributory's winding-up petition, but they became more common, though not universal, with the introduction of the remedy for unfair prejudice. Provision was made for the court to direct them in paragraph 5 of the Companies (Unfair Prejudice Applications) Proceedings Rules 1986 (SI 1986 No 2000).

37. Where the petition is the only pleading, it follows that the petitioner's case must be fully and properly pleaded in the petition, amplified by further information where appropriate. The rigour of that approach is less important where the court directs points of claim and points of defence. This was recognised by the judge in his first judgment where at [21], having referred to the judgments of Megarry J in *Re Fildes Brothers Ltd* [1970] 1 WLR 592 and of Dillon LJ in *Re Tecnion Investments Ltd*, he said:

> "The force of Megarry J's observations (and their endorsement by Dillon LJ) is, I think, rather less true today in the context of a section 994 petition than it was in 1970. Today, Points of Claim and Points of Defence are the norm. And whilst Points of Claim should still not go outside the ambit of the petition, the detail which Megarry J saw as a requirement of the petition is no longer necessary if it is found in the Points of Claim. It remains the case, however, that it is not the evidence which is of importance in the context under consideration but the petition and the Points of Claim. As HH Judge Pelling QC noted, it is fundamental that "in considering a strike-out application, as when trying a s.994 petition, it is necessary to focus on the allegations that have been pleaded""

38. I agree with this general approach. It is still the petition that defines what the judge aptly called "the ambit" of the case. This is not just a question of practice. Section 996 confers jurisdiction "[i]f the court is satisfied that a petition under this Part is well founded" to make such order as it thinks fit "for giving relief in respect of the matters complained of". While it might be possible to construe "the petition" as referring to the proceedings, rather than to the petition standing alone, the position was clear under the 1986 Rules and remains clear under paragraph 3(2) of the current Rules, the

Companies (Unfair Prejudice Applications) Proceedings Rules 2009 (SI 2009/2469), which provide that "[t]he petition shall specify the grounds on which it is presented and the nature of the relief which is sought by the petitioner". Paragraph 5 repeats the court's power to direct points of claim and points of defence.

39. The petition must therefore specify the grounds, but that does not mean that they need to be fully particularised. That is the function of the points of claim, unless the petition is to stand as the points of claim. The modern practice is for the court, shortly after presentation of a petition, to issue directions in standard form, which include a direction for the petition to stand as points of claim and for the service of points of defence. The court may vary the direction on the application of a party and, in some cases, there are still separate points of claim.

40. In the present case, there can be no doubt that the allegation against the Sons in paragraph 36 of the points of claim should have been included in the petition. It is a ground, indeed in my view for reasons which follow the only ground, for relief against the Sons. Rather than striking out the case against the Sons on this ground, as the judge did, this omission should be cured by an amendment to the petition so that it conforms to the points of claim. There is no injustice to the Sons in taking this course and, when asked, Mr Lightman was unable to point to any injustice. The Sons have known of the case pleaded against them in paragraph 36 of the points of claim since May 2013, and they pleaded to it in August 2013.

41. It follows that, in my judgment, the judge was wrong to strike out the claim for relief against the Sons. I would therefore allow the appeal on ground 2. On that basis, ground 3 falls away, because Mr Parker QC, appearing for Mr Griffith, made clear that, if we allowed the appeal on ground 2, he would no longer rely on the amendments made pursuant to the application issued in July 2018, save to the extent of repeating in the petition the allegation made in paragraph 36 of the points of claim.

42. Ground 4 is closely connected to ground 2, and Mr Parker did not in his oral submissions place weight on it as a freestanding ground of appeal. No allegation of knowledge on the part of the Sons of Mr Gourgey's conduct, beyond paragraph 36 of the points of claim, is made in the petition or the points of claim. Mr Parker was right in his skeleton argument to say that directors may be liable in respect of the acts of a fellow director without actual knowledge of those acts where, if the directors had performed their duties as directors, they would have known of them: see *Lexi Holdings Ltd v Luqman* [2009] EWCA Civ 117, [2009] 1 BCLC 1. However, he was wrong to submit that it is enough to plead the fact that they were directors, leaving it to the respondents to raise as a defence that they had performed their duties as directors. The onus of proving a breach of duty lies on the party alleging it.

43. I turn to ground 1 of the grounds of appeal. Mr Parker submitted that the claim against the Sons was sustainable on the basis stated in ground 1 as an independent ground for relief. This was to be approached as if there were no sustainable pleading of breach of duty against the Sons.

44. The G&G petition states in paragraph 3 that at all material times 25 shares have been held "in the name of" each of the sons and Mr Hodge and that 25 shares have been held "by" Mr Griffith. Despite this slight difference in describing the shareholdings, Mr Parker did not suggest that it was significant. It is not Mr Griffith's case that the

sons held their shares in G&G as nominees for Mr Gourgey. There is no further pleading in the G&G petition relating to the Sons. There is a pleading in paragraph 9 that *Bankside* was a collaboration between Mr Gourgey, Mr Hodge and Mr Griffith, with all profits to be taken "in proportion to the parties' shareholdings, i.e. the Petitioner 25%, Mr Hodge 25% and Mr Gourgey 50%", thus treating Truchot's shareholding as if it were Mr Gourgey's. There is no similar pleading as regards G&G and the Sons' shareholdings in the G&G petition. The petition cannot therefore sustain the case stated in ground 1.

45. The position is no better in the points of claim. Paragraph 11 repeats the shareholdings in G&G in the same terms as paragraph 3 of the petition, but it contains nothing further to support the case stated in ground 1.

46. Mr Parker sought to make good the absence of any pleading of this case by reference to paragraphs 5 of the points of defence. So far as relevant, it stated:

> "5. Mr Gourgey, Mr Griffith and Mr Hodge ("the Three Shareholders") (or in some cases their families and/or family trusts associated with them) were members of or beneficially interested in large number of companies, including various companies referred to in the Petitions. In the majority of cases, the interest of Mr Gourgey was equal to that of the combined interests of Mr Hodge and Mr Griffith. This was the case in relation to the following companies:
>
> 5.1. Bankside, as to which paragraphs 1 and 2 are admitted.
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> 5.2. Riverbank, which was a wholly owned subsidiary of Bankside, as to which paragraphs 6 to 9 are admitted, save for paragraph 8(2).
>
> 5.3. G&G, as to which paragraphs 10 to 12 are admitted."

47. The judge well summarised at [109] what appears to be the case being advanced:

> "Mr Parker accepts that Mr Gourgey is the real villain, to use his words. But what he says is that, although he is unable to assert that Neil and Charles are lead players in the breaches of duty, they cannot be immune from a buy-out order if they are nominated to hold the shares. I imagine that what Mr Parker is getting at here is that Mr Gourgey placed shares in the names of his sons. Mr Parker submits that it is not possible to get out of section 994 by putting the shares in a family member: Neil and Charles cannot rely on the fact that the wrongdoing was that of their father to avoid the strictures of section 994. The submission here is similar to the one made in relation to Truchot. But as with Truchot, something more has to be shown than the mere fact of ownership by a family member, even if the shares were given to his sons by Mr Gourgey."

48. I agree with the judge's rejection of this part of Mr Griffith's case, for the reasons he gave. It is not alleged in the petition or the points of claim that the Sons held their shares for Mr Gourgey or that he directed the Sons in the exercise of their rights as shareholders or their duties as directors. Unless Mr Griffith alleges some connection between the Sons and the alleged wrongdoing of Mr Gourgey, there is no basis on which the court could grant relief in the form of a buy-out order against them. Contrary to Mr Parker's submission, he gains no support from the use of the defined term "the Three Shareholders" in paragraph 5 of the points of defence, which is immediately followed by "or in some cases their families and/or family trusts associated with them".

49. Mr Parker submitted that he could also rely on paragraph 31.2 of the points of defence which pleads that, to the extent that any conduct of Mr Gourgey would otherwise have constituted a breach of his fiduciary duties, "it was authorised and/or ratified by the Three Shareholders, who between them were *or represented* all the members of the relevant companies". As regards G&G, what is here being alleged is that Mr Gourgey represented the Sons as members of G&G for the purpose of approving his actions as a director. In other words, it is said that he was their agent for this purpose. Whether this could form a sustainable basis for relief against the Sons could well depend on questions such as whether they knew or could reasonably have foreseen that Mr Gourgey would commit breaches of duty.

50. None of this, however, is pleaded as part of Mr Griffith's case, either in the petition or in the points of claim. Mr Parker cited the decision of this court in *Thevarajah v Riordan* [2015] EWCA Civ 41, [2015] CP Rep 19 in support of his submission that he was entitled to rely on the points of defence, even though they had been struck out. Nothing in the judgments in that case suggests that it is open to a petitioner to rely on matters pleaded in points of defence to provide grounds for relief which are not to be found in the petition at all. Further, the paragraphs in the points of defence on which Mr Parker relies would require very substantial re-casting before they could stand as coherent grounds for relief.

51. I therefore reject ground 1.

52. Turning now to the appeal in the Bankside petition, this is, as I have earlier explained, limited to the condition imposed by the judge that Mr Gourgey be entitled to plead a full defence to the points of claim as amended in accordance with the judge's order.

53. Although the amendment was restricted to pleading the acquisition by Mr Griffith of an additional 8 shares, so allowing him to seek a buy-out order for his entire holding of 33 shares, the condition permitted Mr Gourgey to plead a defence to the entire points of claim, including all the allegations originally made in them, notwithstanding that his points of defence had been struck out in the circumstances described earlier in this judgment.

54. The judge gave his reasons for this condition in his second judgment at [60]:

> The amendment, if it is made, does open up a further issue which is the extent that the respondents are then able to plead a defence. Although no actual amendment is required to the prayer for relief, the actual result of the introduction of

> paragraph 3B is to expose the respondents to more extended relief than that to which they would have been exposed under the existing pleading (ignoring the sweeping-up provision of a claim to such other order as the court thinks fit). In my view, the respondents ought to be able to raise any defence to that additional relief sought which they have and should not be prevented from relying on the facts and matters pleaded in the Points of Defence which have been struck out. But once the respondents are permitted to raise defences to the Bankside petition in relation to the 8 shares, it is inevitable that those defences can be reintroduced in relation to the 25 shares. The court cannot possibly reach a conclusion after trial that it is satisfied that there has been unfairly prejudicial conduct in relation to the 25 shares but not in relation to the 8 shares: if the defence and evidence in relation to the 8 shares results in Mr Griffith being unable to satisfy the court that there has been unfairly prejudicial conduct, then he is not entitled to any relief, even in relation to the 25 shares. Mr Griffith must therefore elect whether to amend and thus to allow the respondents to run their defences in full or not to amend and proceed on the basis that the Points of Defence have been struck out. I accordingly make it a condition of permission to make this amendment that the respondents should be permitted to plead in full to the PoC."

55. As Mr Parker submitted, the underlying reasoning of the judge appears to be that the case for relief in respect of the 8 additional shares is different from the case as regards the original 25 shares. With respect to the judge, this is a misconception. The case made by Mr Griffith is precisely the same in respect of both parcels of shares. He does not seek to plead any grounds for relief that have not already been pleaded and to which Mr Gourgey responded in the points of defence since struck out. If those points of defence had not been struck out, there would be no cause for amending them as regards the case made against Mr Gourgey. Equally, there is no reason for now permitting Mr Gourgey to plead to those grounds, and so by-pass the order striking out the points of defence. As Newey LJ observed in the course of argument, the judge's order sets at nought the strike-out order, which was affirmed by this court. If Mr Griffith had sought to amend the points of claim by pleading additional allegations against Mr Gourgey, it would clearly have been right to permit him to plead to the new allegations, but there would be no reason to give a wider permission.

56. Mr Lightman submitted that, unless Mr Gourgey were permitted to plead a defence, he would or might be deprived of two specific arguments in opposition to any buy-out order extending to the 8 additional shares. The two arguments, noted by the judge in his second judgment at [57] and [59], are, first, that a buy-out order should not extend to shares acquired at a time when the petitioner knew of the conduct alleged to be unfairly prejudicial (see *Bermuda Cablevision Ltd v Colica Trust Ltd* [1998] AC 198 at 212 per Lord Steyn) and, second, that Mr Griffith is not entitled to a buy-out order in respect of shares bought from a shareholder (in fact, his trustees in bankruptcy) who had consented to the conduct alleged to be unfairly prejudicial. Without expressing any views as to their merits on the facts of this case, I agree that Mr

Gourgey should be able to run those arguments and to plead such facts and matters as may be necessary to enable him to do so. Permission to plead a defence should be limited accordingly.

57. In conclusion, for the reasons given in this judgment, I would allow the appeal in the G&G petition on ground 2 and also allow the appeal in the Bankside petition.

Newey LJ:

58. I agree.

The Master of the Rolls:

59. I also agree.

60. The remarkable delay in bringing these petitions to a full and final hearing is a matter of considerable concern. They were issued as long ago as March 2013. It is extraordinary that, even after the combined points of defence were held by Simon J in May 2015 to have been struck out since 22 April 2014 for failure to comply with an order of Simon Monty QC, and an appeal from Simon J's order was dismissed by the Court of Appeal in July 2017, the parties are still engaged in interlocutory skirmishes over their respective pleadings. In retrospect, the proceedings might well have benefited from, and would still benefit from, having an assigned judge. The court must now further the overriding objective, and in particular deploy its power in CPR 1.4(2)(g) to control the progress of the proceedings, by ensuring that the proceedings come on for hearing without further delay and dealing firmly with any application by any party which might frustrate that end. The parties themselves must co-operate with the court and with each other to achieve the speedy resolution of this dispute or face stringent orders against them, including as to costs.