Neutral Citation Number: **[2022] EWHC 191 (Ch)**

Case No: CR-2021-001454

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2nd |February 2022

**Before** :

**RICHARD FARNHILL**
**(sitting as a Deputy Judge of the Chancery Division)**

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**IN THE MATTER OF FORE FITNESS INVESTMENTS HOLDINGS LIMITED**

**AND IN THE MATTER OF THE COMPANIES ACT 2006**

**Between :**

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| **IDREES HASHMI** | **Petitioner / Applicant** |
| **- and –** | |
| **(1) PAUL LORIMER-WING** | |
| **(2) FORE FITNESS INVESTMENTS HOLDINGS LIMITED** | **Respondents** |

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Mr Steven Reed (instructed by Joseph Sutton Solicitors) for the Applicant
Mr George Hilton (instructed by Ashtons Legal) for the Respondent

Hearing date: 19 January 2022

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# APPROVED JUDGMENT

**Richard Farnhill (sitting as Deputy High Court Judge for the Chancery Division) :**

## The Application

1. This application arises out of proceedings brought by the Petitioner ("Mr Hashmi") against the First Respondent ("Mr Lorimer-Wing") and the Second Respondent ("the Company") under s. 994 of the Companies Act 2006 in which he seeks an order that Mr Lorimer-Wing purchase his shares in the Company. In the Defence and Counterclaim the Company asserts claims against Mr Hashmi for damages for breach of his duties as a director of the Company, breach of contract and/or pre-contractual misrepresentation and for rescission. Insofar as those claims are not pursued by the Company, Mr Lorimer-Wing seeks a declaration that his interests as a member of the Company have been unfairly prejudiced and permission pursuant to s. 996(2)(c) of the 2006 Act to pursue the Company's counterclaim in the name of the Company.

2. Mr Hashmi seeks the following relief:

   i) That the Company's counterclaim be struck out pursuant to CPR 3.4(2)(b) (as being an abuse of process) and (c) (for being in breach of a court order).

   ii) That Mr Lorimer-Wing's counter-petition be refused permission.

   iii) An injunction restraining Mr Lorimer-Wing from causing or procuring the Company to participate in the petition or incur any costs (including legal costs) in relation to it.

   iv) A mandatory injunction requiring Mr Lorimer-Wing to reimburse the Company for any costs paid by it in relation to the petition and this application.

   v) Directions regarding the service of a Reply by Mr Hashmi.

## Background to the application

3. The Company was incorporated by the First Respondent on 27 February 2019, at which time he was its sole director.

4. Starting from around the time of incorporation, the Petitioner was to develop software for the Company, initially without having a contract in place.

5. The Respondents assert that at some time around November 2019 Mr Hashmi was appointed Chief Technology Officer of the Company and that the Company, or Mr Lorimer-Wing on its behalf, orally agreed to pay Mr Hashmi £5,000 gross per full month of work undertaken by him ("the Oral Agreement"), along with a discretionary bonus arrangement ("the Bonus Agreement"). Although the existence and terms of these agreements may be contested by Mr Hashmi in due course, for the purposes of this application it is the Respondents' assertion that is relevant.

6. The parties agree that by March 2020 Mr Hashmi was already a holder of Ordinary A shares, although there is a dispute about the precise number. On 20 March 2020 Mr Hashmi participated as an investor in a fundraising for the Company, subscribing for 4,639 Ordinary A shares and 1,500 Ordinary B shares. As part of the fundraising all shareholders and investors entered into an investment agreement ("the Investment Agreement") and the Company adopted new articles of association. The interpretation of those articles is at the heart of this application. Mr Hashmi was appointed as a director of the Company, as was Mr James Gilbert. The board of the Company therefore comprised Mr Lorimer-Wing, Mr Hashmi and Mr Gilbert.

7. It is the Respondents' case that at some time in August 2020 the Company entered into two further agreements. The first ("the Consultancy Agreement") provided for payment to Mr Hashmi for work done before the Oral Agreement entered into force; the second ("the Collateral Agreement") provided for the termination of the Consultancy Agreement on the date that the Oral Agreement commenced in November 2019. Again, the existence, terms and effect of these agreements will be a matter for determination in due course; what matters for this application is the assertion itself.

8. Disagreements started to arise by no later than December 2020 which led, on 2 March 2021, to Mr Lorimer-Wing writing to Mr Hashmi to state that he had been removed as a director of the Company, that he was deemed a Bad Leaver under the Leaver definitions in the articles and, as such, was deemed to have served a transfer notice in relation to his A Ordinary Shares and to have automatically offered all his B Ordinary shares to the Company. The validity of these steps is contested by Mr Hashmi and that dispute forms a central element of his unfair prejudice petition.

9. A TM01 form recording the termination of Mr Hashmi's directorship was filed at Companies House on 19 April 2021. Again, the validity of this form is contested by Mr Hashmi.

10. Mr Gilbert ceased to be a director of the Company on 13 June 2021. Since that time, Mr Lorimer-Wing has acted as the Company's sole director.

11. Mr Hashmi filed his unfair prejudice petition on 10 August 2021. On the same date a Case Management Order was issued by the court in the standard form. This provided, among other things, that:

> "the Respondent(s) (save for the company) file and serve points of defence by **21 September 2021;**
>
> the Petitioner(s) file and serve points of reply (if so advised) by **19 October 2021;**"

12. On 21 September 2021 the Respondents served their Points of Defence and Counterclaim. The Defence is based on the articles of association; the counterclaim references the Oral Agreement and the Consultancy Agreement and Mr Hashmi's statutory duties as a director to promote the success of the Company and to act with reasonable skill and care. However, the particulars of breach are headed "Particulars of Breach of Contract" and, while there is a reference to Mr Hashmi's statutory duties, all of the alleged breaches are contractual in nature. The loss, causation and damage section of the counterclaim refers only to the Oral Agreement and the Consultancy Agreement. The misrepresentation section refers expressly to the

Misrepresentation Act 1967; under sections 2(1) and 2(2) of the 1967 Act, its provisions only apply to parties who have entered into a contract on the basis of the alleged misrepresentation.

## The articles

13. Following the Investment Agreement the Company's articles of association were a mix of the Model Articles and bespoke articles agreed between the parties. As I have noted, this application turns heavily on the proper interpretation of those articles, and specifically on the relationship between three provisions. Articles 7 and 11 derive from the Model Articles:

> "7.—(1) The general rule about decision-making by directors is that any decision of the directors must be either a majority decision at a meeting or a decision taken in accordance with article 8.
>
> (2) If—
>
> (a) the company only has one director, and
>
> (b) no provision of the articles requires it to have more than one director,
>
> the general rule does not apply, and the director may take decisions without regard to any of the provisions of the articles relating to directors' decision-making.
>
> …
>
> 11.—(1) At a directors' meeting, unless a quorum is participating, no proposal is to be voted on, except a proposal to call another meeting.
>
> (2) The quorum for directors' meetings may be fixed from time to time by a decision of the directors, but it must never be less than two, and unless otherwise fixed it is two.

(3) If the total number of directors for the time being is less than the quorum required, the directors must not take any decision other than a decision—

(a) to appoint further directors, or

(b) to call a general meeting so as to enable the shareholders to appoint further directors."

Article 16 is bespoke:

"16.1 The quorum for meetings of the Board shall be two Directors one of whom must be an Investors' Director (if appointed) and one the Executive (if appointed as Director) unless such Investors' Director or Executive is unable to attend a Board meeting and has confirmed in writing (which may be by email) that he is satisfied that the Board meeting in question is quorate without him being present.

16.2 If a quorum is not present within half an hour from the time appointed for a board meeting because the Investors' Director (if appointed) or Executive (if appointed as Director) is not present, the Board meeting shall stand adjourned to the same day in the next week at the same time and place or to such other day and at such time and place as the Directors may determine and if at the adjourned Board meeting a quorum is not present within half an hour from the time appointed therefor because the Investors' Director (if appointed) or Executive (if appointed as Director) is not present, provided there are at least two Directors present then those Directors shall represent a quorum.

16.3 Model Article 11.2 shall be modified accordingly."

## The strike out application

14. Mr Hashmi's case rests on two bases:

i) Properly interpreted, the articles, and in particular Bespoke Article 16.1, require there to be two directors for a board meeting to be quorate

for any purpose other than taking steps to appoint new directors. From 13 June 2021, when Mr Gilbert ceased to be a director, Mr Lorimer-Wing was the only director, such that he had no power to direct the Company to file a counterclaim. As such, the purported authorisation of the counterclaim was ultra vires and a misfeasance on the part of Mr Lorimer-Wing.

ii) In any event, the legal costs principle prohibits the Company from expending its own funds to intervene in what is, on proper analysis, a dispute between shareholders.

15. It is sensible to start with the interpretation point. Mr Reed relied on the decision of the Court of Appeal in *Cosmetic Warriors Ltd v Gerrie* [2017] EWCA Civ 324 and in particular the judgment of Henderson LJ at [19] – [23]:

“19. There is no disagreement between the parties about the principles which the court should apply in construing the articles of association of a company. The articles are a statutory contract between the members, and between each member and the company. They must therefore be construed in accordance with the ordinary principles that apply to the interpretation of any written contract. Those principles have been discussed and refined in many cases at the highest level, to which it is unnecessary to make detailed reference.

20. Like the judge, I find it helpful to refer to the approach endorsed by Lord Neuberger PSC in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 , at [15] (omitting citations):

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", … And it does so by focusing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provision of [the contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed

by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

21. More recently, in *Wood v Capita Insurance Services Limited* [2017] UKSC 24, [2017] 2 WLR 1095 , in which judgment was delivered on 29 March 2017, one week after the hearing before us, the Supreme Court has confirmed that the principles of contractual interpretation stated in *Arnold v Britton* did not involve any departure from the guidance previously given by the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900: see the judgment of Lord Hodge JSC (with whom the other members of the court agreed) at [8] to [15].

22. With reference to the "unitary exercise" of interpretation referred to by the Court in both Arnold and Rainy Sky , Lord Hodge said this:

"12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing *In Re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements."

23. As to admissible extrinsic facts of which it is legitimate to take account when construing the articles of the claimant companies, the judge at [26] and [27] noted that Mr Salzedo QC for the defendants accepted that reliance could only be placed on matters which were public knowledge derived from the companies' annual returns. On this footing, regard could be had to the fact that each company is essentially a small company, that it has always had only one class of share, and that there has only ever been a small number of shareholders since its creation. Mr Hollington QC for the companies agreed with this approach, and so do I."

16. On this basis Mr Reed submitted that the wording of Bespoke Article 16 was clear and required two directors. To the extent that there was a conflict with Model Article 7(2) it was resolved by the conflict provision in the articles, under which the Model Articles were disapplied to the extent they conflicted with the Bespoke Articles. There was no dispute that at the time the counterclaim was commenced, and subsequently, there had only been one director, Mr Lorimer-Wing. Commencing the counterclaim was therefore an *ultra vires* act, and as such it should be struck out.

17. Mr Hilton, for the Respondents, not only reached a different conclusion; he adopted a different starting point and a different approach. He started with the Model Articles and the relationship between articles 7(2) and 11(2). These, he submitted, dealt with different situations. Model Article 11(2) did not require a minimum number of directors; rather, it addressed the situation where, as a matter of fact, there were multiple directors. Model Article 7(2) addressed the position where there was only one. Model Article 7(2) disapplied any provision of the articles relating to directors' decision making, such that it prevailed over Model Article 11(2). Although Bespoke Article 16 added elements to Model Article 11(2), on the issue of quorum it was substantively identical, such that the same analysis applied. When Mr Gilbert resigned, the Company had moved from Bespoke Article 16 to Model Article 7(2), and as such Mr Lorimer-Wing had authority to cause the Company to commence the counterclaim.

18. Mr Hilton submitted that any other conclusion would mean that Model Article 11 would require companies to have two directors. S. 154 of the 2006 Act specifically permits companies to have a single director, however, and the Model Articles, which are contained in a statutory instrument, could not abrogate a provision of an Act of Parliament. He further referred to extracts from Practical Law and LexisPSL as evidencing an industry understanding that where a company had a sole director, Model Article 7(2) prevailed over Model Article 11(2) (and so, by analogy, Bespoke Article 16(2)). On Mr Hilton's analysis the conflict provisions in the articles were irrelevant either because the two articles dealt with different situations or because Model Article 7(2), on its terms, was to prevail.

19. I agree with Mr Reed that Bespoke Article 16 requires two directors in order for there to be a quorum, and I do not consider that anything in Model Article 7 alters that conclusion. On the contrary, I consider the two provisions to be consistent with one another.

20. Applying the principles in *Arnold* and *Wood*, the starting point is the language used by the parties. Bespoke Article 16 is clear in requiring two directors in order for there to be a quorum. There was some discussion about the reference to "(if appointed)", but it was accepted by both parties that a Director could be appointed who was neither the Executive nor an Investors' Director. As such, even if the Executive and the Investors Directors were not appointed, there could still be two directors and the quorum requirement could be met.

21. Model Article 7(2) is also clear. It permits for a sole director to manage the company, but only in circumstances where no provision of the articles requires the company to have more than one director. Here, Bespoke Article 16.1 does require there to be multiple directors in order for board meetings to be quorate. Under Model Article 3, the role of the directors is to manage the company. To do this, under Model Article 7(1) they must act either through majority decision at a meeting or by unanimous decision under Model Article 8 (in which case the number of participating directors in the unanimous decision must still have been sufficient to form a quorum at a meeting). A provision in

the articles requiring there to be at least two directors to constitute a quorum logically is a requirement that the company in question have two directors in order to manage its affairs. That is the purpose of the meetings. Bespoke Article 16.1 therefore does require there to be two directors and Model Article 7(2)(a) is, by its own terms, disapplied.

22. That reading is reinforced by Model Article 11(3), which deals with what is to happen if a company does not have sufficient directors to represent a quorum. It empowers the remaining director or directors to take certain limited steps to resolve the ensuing impasse. On the Respondents' case this provision would operate in a very odd manner. Assume, for the sake of argument, that the specified quorum is five directors. If the number of directors drops to between two and four, Model Article 11(3) applies and those directors can only act to restore their number to five. If the number drops further, to one, Model Article 7(2) takes over and the remaining director resumes full powers to run the company. Such an unusual outcome would require clear language to achieve. That language does not exist in the Model Articles, nor does it exist in the articles of the Company.

23. I do not accept Mr Hilton's submission that reading Model Article 11(2) to require a company to have two directors creates a clash between s. 154 and the Model Articles. Although s. 20 provides that the Model Articles are to apply if no other articles are registered, nothing in s. 20 requires a company to adopt them, whether in whole or in part. If a company is to be a single director company s. 154 permits that and s. 20 permits the Model Articles to be amended to achieve that end.

24. Finally, I should address the extracts from Practical Law and LexisPSL. I did not feel either greatly advanced the Respondents' case. LexisPSL acknowledges that there is a debate as to the relationship between Model Articles 7(2) and 11(2). The fact that there is debate shows that there is no industry wide consensus in the Respondents' favour. Although Practical Law was more definitive in saying that Model Article 7(2) should prevail over Model Article 11(2), it also recognised that the Model Articles (notably articles 14 and 15) were not a comfortable fit for single director companies

and would often need to be amended. I agree that amendment is required for the Model Articles to permit for a single director to run a company, but consider that such amendment would need to include the deletion of Model Article 11(2). In this case the parties did not delete it; they reinforced it, in the form of Bespoke Article 16(2).

25. In my view Bespoke Article 16(2) required that at least two directors participate in any decision to commence a counterclaim. At all relevant times Mr Lorimer-Wing was acting as the sole director of the Company. As such he had no power to commence the counterclaim and acted *ultra vires* in purporting to do so. That, in itself, merits striking out the counterclaim.

26. That finding is sufficient to dispose of the strike out application. However, I was addressed at some length on the legal costs principle and given the ease with which the want of authority could in principle be remedied, it is important also to address it.

27. Mr Reed argued that this was an example of a dominant shareholder using the company to fund that shareholder's defence of an unfair prejudice petition. He relied on multiple cases for the proposition that this was not to be permitted, but the key decision was that of Lindsay J in *Re a company No 001126 of 1992* [1993] BCC 325. He placed particular emphasis on the approach set out at 333A-D:

"Firstly, that there may be cases (although it is unlikely nowadays when wide objects clauses are the norm) where a company's active participation in or payment of its own costs in respect of active participation in a sec. 459 petition as to its own affairs is ultra vires in the strict sense.

Secondly, leaving aside that possible class, there is no rule that necessarily and in all cases such active participation and such expenditure is improper.

Thirdly, that the test of whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole (to borrow from Harman J in *ex parte Johnson*).

Fourthly, that in considering that test the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency. The chorus of disapproval in the cases puts a heavy onus on a company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in the particular case. What will be necessary to discharge that onus will obviously vary greatly from case to case.

Fifthly, if a company seeks approval by the court of such participation or expenditure in advance then, in the absence of the most compelling circumstances proven by cogent evidence, such advance approval is very unlikely."

28. Mr Reed advanced two lines of argument. First, he submitted that the effect of Bespoke Article 16.1 was to render Mr Lormier-Wing's actions in commencing the counterclaim *ultra vires* and so a breach of the first of Lindsay J's heads. Although Lindsay J was obviously more focussed on a breach of the company's objects clause, I agree that the first head applies to any *ultra vires* act. Given my findings on the proper interpretation of the Company's articles, I therefore agree with Mr Reed that the same analysis would also produce the same result of strike out under this approach.

29. Mr Reed's second line was that even if the commencement of the counterclaim were not *ultra vires*, it would still offend the legal costs principle. The "heavy onus" was on the Respondents to overcome a "rebuttable distaste" and show that the counterclaim was "necessary or expedient in the interests of the [Company] as a whole". In fact, the evidence was limited to a sentence in Mr Lorimer-Wing's witness statement to the effect that he had been advised by his lawyers that it was appropriate to bring the counterclaim. This was precisely the type of evidence advanced unsuccessfully before Lindsay J (at 334E).

30. Mr Hilton submitted that the legal costs principle did not arise because this was a claim that it was in the Company's interest to bring. He relied on a number of cases, notably *Incasep Ltd v Jones* [2002] EWCA Civ 961, as

authority for the proposition that counterclaims can fall outside the legal costs principle. He emphasised that this was a strong claim and no substantive defence to it had been advanced.

31. I cannot accept Mr Hilton's approach, either as a matter of principle or on the facts.

32. Although as a starting point there is some attraction to the argument that it will normally be in a company's interests to pursue a valid claim, that is far from conclusive. As the recent decision of *Re Profile Partners Ltd* [2020] EWHC 1473 (Ch) illustrates, the court will be willing to restrain counterclaims in the context of unfair prejudice petitions.

33. It remains for the Company to show why it has elected to pursue its claim in these proceedings. Lindsay J was clear, at 334E, that the onus is to adduce evidence showing "*not merely that the board's decision to participate could have been, but that it was, arrived at by an honest and reasonable board properly looking to what was necessary or expedient in the interests of the company as a whole.*" Mr Lorimer-Wing's evidence says nothing about his actual reasoning in reaching his conclusion; it simply says that his lawyers considered the reasoning to be sound. Like Lindsay J, I consider that to be inadequate.

34. To rely on the statements of case with a view to demonstrating the strength of the case is, at most, to argue what the Company could have concluded; it tells the court nothing about what it did conclude and why. Nor would it be right to draw any conclusion from the fact that Mr Hashmi has not advanced a substantive defence to the counterclaim. He has made clear in this application that he intends to file a Reply, but the form that will take inevitably turns on the outcome of the strike out.

35. Moreover, even were I to attach weight to the statements of case I do not accept that they lead me to the conclusion that it is in the Company's interests that the petition and the counterclaim should be addressed in the same proceedings. As I have noted, the main thrust of the counterclaim arises out of the Oral Agreement and the Consultancy Agreement. In addressing Mr

Hashmi's case that he would have been classed as a Good Leaver but for the wrongful termination of the Consultancy Agreement, paragraph 84(a) of the Defence and Counterclaim describes the argument as "*entirely irrelevant*", going on to note that all Leavers were classed as Bad Leavers under the Company's articles unless they fell within specified classes of Good Leaver. As Mr Hilton noted in his skeleton, the Company is pursuing different causes of action, raising different issues and seeking different relief. At the very least that raises a question about what the connection between the unfair prejudice claim and the Consultancy Agreement is said to be such that it benefits the Company to pursue it in these proceedings. Mr Lorimer-Wing's evidence offers no answer.

36. In the circumstances, I do not consider that the Company has discharged the burden of showing that pursuing the counterclaim in the context of these proceedings was necessary or expedient in the interests of the Company as a whole. For that reason, too, I would strike out the counterclaim.

37. Mr Reed pursued a third line of attack, this time based on CPR 3.4(2)(c) and the directions order. That order provides for "the Respondent(s) (save for the company) [to] file and serve points of defence". Mr Reed's submission was that this precluded the Company from serving points of defence, such that the counterclaim, being part of the defence, was also precluded.

38. It is fair to say that submission was not strongly advanced at the hearing. Mr Hilton pointed out that strikeout is a draconian remedy and that in this case a less severe, and more appropriate, response would simply be to vary the directions order. I agree that would have been the appropriate course had the question turned on this ground alone.

**The counter-petition**

39. Mr Lorimer-Wing's counter petition seeks authority under s. 996(2) of the 2006 Act to pursue the Company's counterclaim in the Company's name in the event that the Company does not pursue that claim itself.

40. The immediate and overwhelming difficulty with the counter petition is that, as Mr Reed rightly points out, relief can only be granted under s.996 if the petition asserting unfair prejudice is well founded. What will prevent the Company from pursuing the counterclaim in these proceedings is this court's order striking it out. That could never be a basis for establishing unfair prejudice.

41. Accordingly, I agree that the counter-petition has no basis in law and that permission to pursue it should be refused.

**The negative injunction**

42. The argument for the negative injunction restraining the Company from further participation in the petition has a similar basis to the strike out: if pursuing the counterclaim was, as I have found, *ultra vires* and not necessary or expedient in the interests of the Company as a whole, the same ought to be true of continued active involvement in the petition.

43. Although that works as a starting point, however, the injunction is obviously forward looking and that gives rise to issues that do not arise with the strike out:

    i) The defect in board composition is one that can, at least in principle, readily be remedied, in which case future involvement of the Company in the petition may not then be *ultra vires*.

    ii) Similarly, if the decision of the board were properly reasoned and that reasoning was evidenced, there is no blanket rule of principle precluding the Company from being involved in these proceedings.

    iii) The preclusion is, in any event, on active participation. No authority was advanced for an argument that all participation is precluded and some costs – for example, in monitoring the claim, giving disclosure and taking advice on the judgment – will obviously be in the Company’s interests.

iv) Because the injunction is sought on an interim basis it may later be discharged. As such, the party seeking the interim injunction is expected to offer an unlimited cross-undertaking in damages. "*The default position is that an applicant for an interim injunction is required to give an unlimited cross-undertaking in damages. That is regarded as the price for interfering with the defendant's freedom before he has been found liable for anything.*" (*JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139 *per* Lewison LJ at [68]. The cross-undertaking must be supported by evidence of means (see, in particular, *Staines v Walsh* [2003] EWHC 1486 *per* Laddie J at [35]).

44. Mr Hilton objected to the injunction sought, both on the ground that it was too broad and because the evidence of means said to support the cross-undertaking was inadequate, being limited to a single sentence in the witness statement of Mr Sutton, Mr Hashmi's solicitor: "*I am advised by the Petitioner that he would have the means to satisfy any cross-undertaking in damages.*" Ashtons Legal, on behalf of the Respondents, raised the point as to the lack of evidence as to means in a letter to Mr Sutton of 5 January 2022. No further evidence was provided, however.

45. Mr Reed acknowledged that the proposed injunction was broad but invited me to reduce its scope if I thought that was appropriate. He also acknowledged that the evidence as to means was very limited but submitted that this was a factor that ought to be considered in assessing whether the grant of the injunction was just and convenient, rather than to act as an absolute bar on the granting of relief.

46. I cannot accept that approach. Even assuming that the terms of the injunction could properly be narrowed by the court, it is not the case that the cross-undertaking is an optional extra or part of the balance of convenience test. As PD 25A paragraph 5.1 makes clear, an order for an injunction "*must contain*" the cross-undertaking. Laddie J in *Staines* used the same mandatory language in respect of the supporting evidence. To treat the two in the same way seems

to me wholly logical, because without the supporting evidence the court is unable to assess whether an effective cross-undertaking has been given.

47. In this case that evidence is effectively non-existent. There is no evidence of Mr Hashmi's assets, liabilities or means, simply a second hand assertion of opinion. That robs the cross-undertaking of much of its utility. The fact that the point was squarely put to Mr Hashmi well in advance of the hearing and no response was provided simply heightens the concern. No satisfactory explanation has been offered that might allay that concern.

48. Put simply, therefore, Mr Hashmi appears deliberately to have chosen not to comply with one of the requirements for the relief that he seeks in the face of a direct request that he do so. He can have no complaint when that failure to satisfy an element of his application – the price of his injunction – means that injunctive relief is refused.

49. Even were this an issue for the balance of convenience I would have refused to grant the injunction.

50. There is a serious issue to be tried. It is clear from the witness statement of Mr Frape, the partner at Ashtons Legal with carriage of this matter on behalf of the Respondents, that at least some of the Company's funds have been used in actively participating in these proceedings. I have found that to be *ultra vires* and that there was no proper evidence of how it was in the best interests of the Company as a whole. Of course, that expenditure was made at a time when Mr Lorimer-Wing, acting on legal advice, believed both that he had the power as a sole director to commence the counterclaim and that it was in the Company's interests to do so. Those beliefs are likely to change in light of this judgment. In the circumstances, therefore, the risk is not so clear cut as Mr Reed suggested, but it is in my view sufficient to surmount the hurdle of a serious issue.

51. I do not accept, however, that damages, or in this case the remedy of a share buyout, would leave Mr Hashmi unprotected. His claim is made against Mr Lorimer-Wing, so does not depend on the Company's financial standing, and is calculated on the basis of certain assumptions in place as at a date to be

properly selected, which may be before any expenditure was incurred by the Company. In the circumstances, I see no basis to depart from the approach in *Pringle v Callard* [2007] EWCA Civ 1075.

52. As to the balance of convenience, Mr Reed referred me to the decision of Trower J in *Koza Ltd v Koza Altin Işletmeleri AS* [2021] EWHC 786 (Ch), in particular to paragraph [77]. Trower J there referred to *National Commercial Bank Jamaica v Olint Corporation* [2009] UKPC 16. In that latter decision Lord Hoffmann listed at [18] a series of factors to consider in assessing the balance of convenience. These include the likelihood of prejudice and the likelihood of a party being able to satisfy any award of damages ultimately made against it.

53. As I note above, I consider that the likelihood of prejudice has been significantly reduced. Although Mr Lorimer-Wing acted *ultra vires* and was not able to evidence that his actions were in the best interests of the Company, his evidence, which has not been questioned and which I have no reason to doubt, is that he took those steps on the basis of legal advice. That legal advice will presumably change in light of this judgment. The strike out has remedied the historic breach; if Mr Lorimer-Wing continues to act on legal advice, the risk of future breaches is greatly reduced. Balanced against that, Mr Hashmi has, in the face of a clear requirement in the CPR and a clear complaint from the Respondents, failed to give evidence of his means to pay an award of damages against him. That is a significant concern in assessing his ability to satisfy and award of damages. In the circumstances I consider that the balance of convenience would also lie against granting the injunction.

**The mandatory injunction**

54. Mr Hashmi also seeks a mandatory injunction requiring Mr Lorimer-Wing to repay the legal expenses incurred by the Company so far.

55. I found it hard to ascertain the basis for this claim. It was plain from the reference to injunctive relief that this was not simply a costs application, and in any event an order for costs would be highly unlikely to produce full reimbursement, even if made on the indemnity basis.

56. If the claim was based on a breach of duty causing a loss it would most obviously be a claim of the Company. However, it was plainly not being brought by the Company, since the application was Mr Hashmi's and the Company opposed it. It was unclear what breach Mr Hashmi might be asserting or what loss, other than reflective loss, he might have suffered from the Company's expenditure.

57. The argument was not advanced in detail in Mr Reed's skeleton, and ultimately was not pursued with any vigour at the hearing. In my view that was right. Although I do not rule out the possibility that these costs could be recovered by the Company in due course, there was no legal basis for Mr Hashmi to seek a mandatory injunction in respect of them at this stage.

**Service of the Reply**

58. This was not addressed in submissions and is something that can most sensibly be addressed in light of what I have said above.

**Conclusion**

59. For the reasons given above:

    i) The counterclaim is struck out.

    ii) Permission for the counter-petition is refused.

    iii) Both the negative and mandatory injunctions are refused.

    iv) I make no order at this stage regarding the service of the Reply.