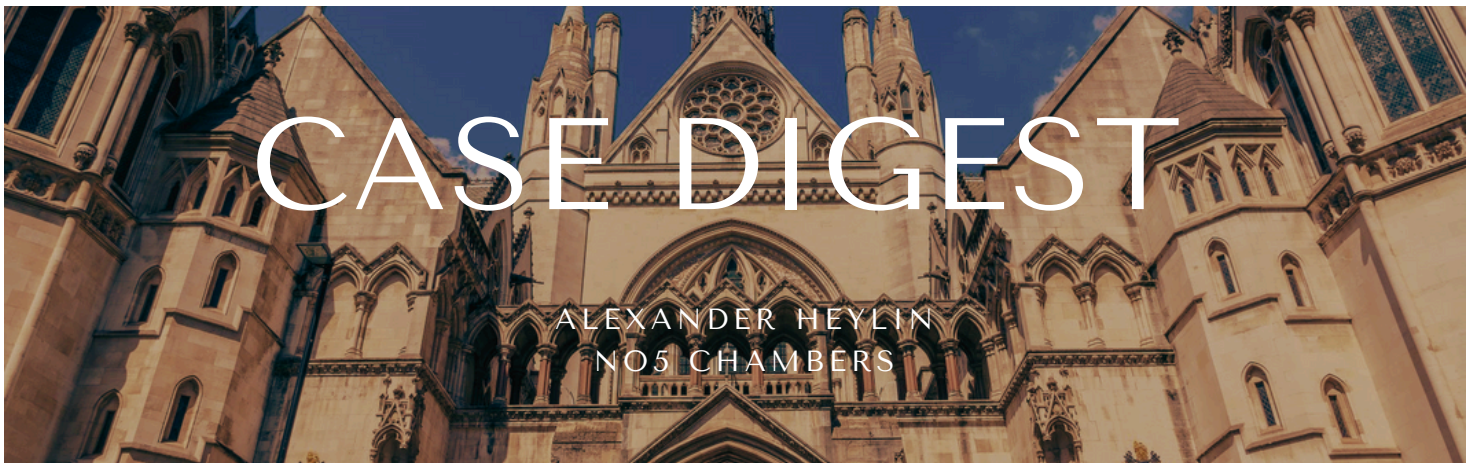

CASE DIGEST

ALEXANDER HEYLIN
NO5 CHAMBERS

SAXON WOODS INVESTMENTS LIMITED V COSTA

[2025] EWCA Civ 708

KEY TAKEAWAYS:

1. The s172 Companies Act 2006 requirement that a director acts in good faith includes a requirement that they act honestly towards the company.
2. Whether or not the Petitioner would have been in a better position, the fact that the First Respondent's conduct deprived the Petitioner of an opportunity was in itself prejudice within s994.
3. A remedy under s996 can not only seek to put right past unfair prejudice but can seek to cure it for the future.
4. The Court of Appeal demonstrated the importance of an approach to the construction of Articles that avoids absurd interpretations (as they did in Syspal Capital LImited v Truman and Another [2025] EWCA Civ 469).

ISSUE

Whether the First Respondent was liable on a petition brought pursuant to section 994 Companies Act 2006.

FACTUAL BACKGROUND

The Company, Spring Media Investments Limited, was the holding company for a group of companies providing creative services to existing brands. The Petitioner, Saxon Woods Investments Limited, was at all material times the holder of 22.33% of the shares in the Company. The First Respondent, Mr Costa, was at all material times the chairman of the Company and, although not himself a shareholder, the holder of a substantial indirect interest in the Company. A shareholders agreement was entered into on 27 February 2013, and novated, amended and restated on 20 May 2016. A board meeting was held on 20 November 2018 at which it was resolved that the Company, led by the First Respondent, would hire an investment bank to commence the exit process, as set out in the shareholders agreement. The Petitioner argued that, thereafter, the First Respondent caused the Company to breach its obligations regarding the provisions for exit in the shareholders agreement as no exit was achieved at all.

SECTION 994 COMPANIES ACT 2006

(1) A member of a company may apply to the court by petition for an order under this Part on the ground -
(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
(b) that an actual or proposed act or omission of the company's affairs (Including an actual or omission on its behalf) is or would be so prejudicial.

(2) The provisions of the Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

THE EXIT PROVISIONS

Article 6.2
Investment Period

The Company and each of the Investors agree to work together in good faith towards an Exit no later than 31 December 2019 (the "Investment Period"). In addition, the Company and each of the Investors agree to give good faith consideration to any opportunities for an Exit during the course of the Investment Period. In the event that an Exit has not occurred upon the expiry of the Investment Period, in addition to any rights provided by Clause 3.5(d) and Article V, the Board of Directors shall engage an investment bank to cause an Exit during [common ground that this should read "after"] the Investment Period at a valuation devised by such investment back and on such terms as shall be consented to by the Board of Directors, which consent shall not be unreasonably withheld.

Article 6.3
Exit Progress

If an Exit is proposed in accordance with the terms of this Agreement, each of the Investors shall: (i) give such co-operation and assistance as is reasonably required in connection with the proposed Exit, which shall include co-operation and assistance in the preparation of any information memorandum/"teaser" and the giving of presentations to potential purchasers, investors, financiers and their advisers, as well as assisting on any due diligence exercise conducted in relation to an Exit; and (ii) procure (Insofar as it lawfully can) that such Exit is achieved in accordance with such proposal."

FIRST INSTANCE

[2024] EWHC 387 (Ch) and [2024] EWHC 1056 (Ch)
Mr Simon Gleeson (sitting as a Deputy High Court Judge)

FINDINGS OF FACT

Found that the Company, as a result of Mr Costa's conduct, failed to work in good faith towards an Exit by 31 December 2019 (the "Investment Period") and failed to give good faith consideration to opportunities for an Exit by that time.

The judge found that Mr Costa regarded himself as "the Company", and his "primary focus at all times appears to have been to ensure that no director or shareholder…had any knowledge of or involvement in the Exit process" (at 163).
Mr Costa gave assurances to the other directors that he was doing everything in accordance with the investment bank's advice, but no bard member knew exactly what the investment bank had actually been instructed to do (at 163).

The judge also found that "Mr Costa had formed the view that he did not want to sell the Company until he was confident that he could get a good price for it, and that he did not expect this to happen until 2020 at the earliest" (at 164 to 166).

Ultimately, the judge found that "Mr Costa therefore cannot rely on the argument that it was the board who had caused the Company to breach its obligations, since the Board's decisions in the matter were the result of the fact that he had misled it" (at 202).

CONCLUSIONS ON ISSUES RAISED BY THE PETITION

The judge found that the Company breached Article 6.2, by not working in good faith towards an Exit by the end of 2019 and by failing to give good faith consideration to offers received, and that this breach was the result of Mr Costa's conduct.
However, the judge rejected the Petitioner's contention that Mr Costa had acted in breach of his duties as a director under s172(1) and s174 of the Companies Act 2006.

He concluded that the Company's affairs had been conducted in a manner that was unfairly prejudicial to the Petitioner, and that the Petitioner was, conditionally at least, entitled to an order that its shares be purchased by Mr Costa.
The condition to the purchase order was that a final offer for the shares in the Company would have been received from a third party by the end of 2019 in an amount that was greater than US$75 million, net of debt. The judge directed a second trial, at which it would be determined whether such an offer would have been received.

THE APPEAL

[2025] EWCA Civ 708

Lord Justice Edis, Lord Justice Snowden and Lord Justice Zacaroli

Issue 1: Obligation to Work Together in Good Faith Towards an Exit

Regarding the construction of the first sentence of Article 6.2, their Lordships found that the phrase "no later than 31 December 2019" most obviously governed the words "an Exit" which immediately preceded it.

Their Lordships held that it would be absurd to interpret the words "agreed to work together in good faith" as governed by the phrase "no later than 31 December 2019" as such a reading would mean that the parties could comply simply by beginning to work together on 31 December 2019.

As accepted by the First Respondent, given that their Lordships found that the judge's construction of the first sentence of Article 6.2 was correct, the appeal against the judge's finding that it was breached by the Company was dismissed.

Issue 2: Obligation to Give Good Faith Consideration to any Opportunities for an Exit

Their Lordships upheld the judge's finding that the Company failed to give good faith consideration to an opportunity for an Exit.

Despite the First Respondent arguing that the judge's approach mistakenly relied on the Company's subjective view of the offer at the time, given that no actual offer was ever received (as opposed to expressions of interest) and the Company never engaged with those expressions of interest, it is not known what form any offer might have taken. Therefore, their Lordships found that the failure to engage with the expressions of interest was a clear breach of the obligation.

Issue 3: Unfairly Prejudicial Conduct by Reason of Causing the Company to Breach its Obligations Under Article 6.2

The point of dispute between the parties in respect of this issue was whether the fact that the Petitioner's rights as a member were prejudiced by the loss of opportunity amounted to unfair prejudice within s994 if the Petitioner would have been in no better position because no Exit would in any event have been achieved.

Their Lordships concluded that the First Respondent's conduct in causing the Company to breach its Article 6.2 obligations was unfairly prejudicial to the Petitioner as, whether or not an Exit would otherwise have been achieved, it deprived the Petitioner of the opportunity to achieve one.

Issue 4: Breach of Fiduciary Duty

Their Lordships held that the judge's approach to s172 Companies Act 2006, requiring a director to act in what he considers in good faith would be most likely to promote the success of the company, was not right as his approach deprived the phrase "in good faith" of all meaning.

The requirement that a director acts in good faith includes a requirement that they act honestly towards the company. As the judge found the First Respondent deliberately misled and concealed information from the Board, he was behaving dishonestly in the way explained in Ivey v Genting Casinos [2017] UKSC 67.

As a result, their Lordships allowed the appeal against the judge's decision.

Issue 5: The Appropriate Remedy Under Section 996

Section 996 gives the court a wide discretion to give relief in respect of the unfair prejudice established.

Their Lordships found that this was a clear case for a buy-out order and made an unconditional order that the First Respondent buy the Petitioner's shares in the Company on a non-discounted basis as a pro rata proportion of the open market value of the Company as at 31 December 2019.