Neutral Citation Number: [2022] EWCA Civ 531

Case No: CA-2021-001363

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)
HIS HONOUR JUDGE STEPHEN DAVIES
(SITTING AS A JUDGE OF THE HIGH COURT)
CR-2020-MAN-000684

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 27/4/2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ANDREWS
and
LORD JUSTICE SNOWDEN

- -

IN THE MATTER OF CHERRY HILL SKIP HIRE LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Between :

ANDREW RAEBURN BAILEY	**Appellant/Petitioner**
-and -	
(1) CHERRY HILL SKIP HIRE LIMITED	
(2) CHERRY HILL HOLDINGS LIMITED	
(3) CHERRY HILL WASTE LIMITED	
(4) CORAL NORMA BAILEY	
(5) JENNA BAILEY	**Respondents**

- -
- -

Elisabeth Tythcott (instructed on **direct access**) for the **Appellant**
David Gilchrist (instructed by **Tinsdills Solicitors**) for the **4th and 5th Respondents**

Hearing date: 7 April 2022

- -

Approved Judgment

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30 on 27/4/2022

LADY JUSTICE ANDREWS:

INTRODUCTION

1. This appeal concerns the question whether, prior to trial, the Court was wrong to dismiss in its entirety a petition seeking relief under sections 994 to 996 of the Companies Act 2006, on grounds of long delay or acquiescence by the petitioner in the conduct of which he now complains. For simplicity, all references in this judgment to s.994 are to be read as references to its predecessor, s.459 of the Companies Act 1985, where the context so requires.

2. The application for relief in this case originates from a long-standing and bitter family dispute between members of the Bailey family. For ease of reference, and without intending any disrespect, I shall refer to the protagonists by their first names.

3. The company to which the petition relates was Cherry Hill Skip Hire Ltd, which was incorporated on 26 March 1982 ("the Company"). I use the past tense because the Company was dissolved and struck off the register after the petition was issued, though the application for its dissolution pre-dated the petition. The ramifications of this will be addressed later in this judgment.

4. Upon incorporation, 51% of the shares in the Company were allotted to Norma Bailey and 49% to her son Andrew, and both of them became its directors. As its name indicates, the Company carried on a skip hire and waste management business. Fairly quickly there was a major falling out between Andrew and Norma, and by 1985 at the latest, Andrew was excluded from any involvement in the management of the business. He was removed as a director by a resolution passed on 3 September 1999, by which time his daughter Jenna Dudley-Bailey had been appointed as company secretary. She replaced him as a director on 31 December 1999. By then, Andrew and Jenna had also fallen out.

5. Between May 2001 and March 2003, solicitors then instructed by Andrew wrote letters to the Company's solicitors seeking copies of its accounts from 1997 onwards, and other information relating to the Company's affairs, including a full statement of its assets, and asking whether there had been any major disposals of property or assets in the past 5 years. The context for that correspondence, at least initially, appears to have been an exploration of whether the family differences could be resolved by a buy-out of Andrew's minority shareholding. Andrew was complaining, through his solicitors, that he had no accurate idea as to the present position concerning the Company's financial state, nor indeed whether steps had been taken to deliberately devalue his shareholding (though it is clear from the tenor of the correspondence that he suspected that they had).

6. The solicitors indicated that if they did not receive a satisfactory response, proceedings would be taken under s.994, or that Andrew would seek to wind up the company. However when, despite chasing letters, the requested information was not provided, no such proceedings were commenced, and the correspondence petered out.

7. The petition was not issued by Andrew until 1 July 2020 – over 17 years later. By then he was acting in person. It was amended on 20 November 2020 pursuant to case management directions requiring the provision of further particulars of the allegations

made. Both versions contain grounds of Andrew's own composition. We (and the judge below) have proceeded on the working assumption that the amended version is the operative petition. All references to "the petition" in this judgment are to be taken as references to the amended version unless the context otherwise requires.

8. Points of Defence to the original petition were served on behalf of Norma and Jenna, the Fourth and Fifth Respondents, on 9 September 2020. The Points of Defence have not yet been amended to respond to the amended petition because on 10 February 2021, Norma and Jenna issued an application to strike out the petition pursuant to CPR 3.4(2). The application was made on the basis that: (i) there were no reasonable grounds to bring the claim, and (ii) the failure to give proper particulars of the grounds relied upon was likely to obstruct the just disposal of the proceedings. However, the witness statement served by their solicitor in support of that application stated that the main ground of the application to strike out was that:

> "the allegations on which Andrew relies are so stale and he has allowed so many years to pass that his claim for relief is bound to fail."

9. On 17 February 2021, at a costs and case management hearing, HH Judge Hodge QC directed the hearing of two preliminary issues, namely:

> (1) Whether on the facts pleaded in [the Petition] … the Petition, or any parts of the Petition, should be dismissed on the grounds of delay and/or acquiescence; and, if part should be dismissed, which parts;
>
> (2) In respect of any part of the Petition that is not dismissed on the grounds of delay or acquiescence, whether any of those remaining allegations should be struck out for want of particularity and (if so) which parts."

10. The preliminary issues were heard by HH Judge Stephen Davies, sitting as a judge of the High Court, ("the Judge") on 25 March 2021. The individual protagonists were represented at that hearing, as they were before us, by counsel: Ms Elisabeth Tythcott on behalf of Andrew, and Mr David Gilchrist on behalf of Norma and Jenna.

11. At that hearing, the various grounds of Andrew's claim set out in the petition were presented to the Judge as different facets of a continuous course of conduct which began some 37 years previously, and ended only when the Company ceased trading in around March 2019. At the heart of the case as then presented was the complaint that, over a period of many years, Andrew: (a) had been excluded from participation in the running of the Company, and (b) had been denied his rights as a shareholder, including his right to see the Company's accounts and to attend an AGM each year, and the receipt of dividends when the Company was profitable.

12. The Judge delivered an *ex tempore* judgment in which he found that by 2003, at the latest, Andrew knew enough to have been able to take legal proceedings in respect of all the matters of which he now complains, and that the petition should be dismissed on the grounds of delay and acquiescence. He found, at [31] that:

> "no judge properly applying the law to these facts could conclude that it would be right to award any relief in relation to the exclusion."

Whilst acknowledging that the position was less straightforward in regard to the other allegations, he concluded at [38] that:

> "no reasonable judge properly applying the law, who might have every sympathy for Mr Bailey if he proved his case, would say that it could be fair to award him any relief, given that it does raise such ancient issues, and even though those allegations are, as I have said, serious."

In those circumstances, he held that the second preliminary issue did not arise for determination.

13. Andrew appeals against the decision to dismiss the petition in respect of some, but not all, of the grounds. Realistically, he does not appeal against the Judge's decision to dismiss the petition insofar as it is based upon the complaint that he was unfairly excluded from the management of the Company. Nor does he seek to pursue any complaint regarding unfairly prejudicial conduct that allegedly occurred prior to 2001. However, Ms Tythcott submitted that the Judge was wrong in principle to dismiss the petition at this early stage, to the extent that this precluded Andrew's pursuit of complaints of a course of conduct which was unfairly prejudicial to him as a shareholder in and after 2001. She very fairly accepted that at the end of a trial, a judge might decide that the delay in bringing a s.994 petition justified refusing Andrew any relief, but contended that it was wrong for the Judge to have concluded that this outcome was inevitable.

14. Norma and Jenna served a Respondents' Notice in which they sought to uphold the Judge's decision on the further or alternative ground that, insofar as the substance of Andrew's claims is for damages or equitable compensation for breach(es) of fiduciary duty owed by the directors to the Company, any such claims brought by Andrew would have been barred by the rule in *Foss v Harbottle.* Moreover, even if brought by the Company, those claims would have been statute-barred by limitation. The Judge should have dismissed them on the basis that for those reasons, they could not be pursued under the guise of the petition. For reasons that will appear, it has become unnecessary for us to address those arguments.

15. The case has a number of extraordinary features:

    i) As already stated, the Company, which is named as the First Respondent, does not exist. It was struck off the register on 15 October 2020 and dissolved on 27 October that year. No steps have been taken to restore it.

    ii) The named Second Respondent, Cherry Hill Holdings Ltd ("Holdings"), which became the Company's parent company in or around 1989 on the transfer to it of Norma's shares, was also struck off the register on 2 December 2020 and dissolved on 8 December that year. No steps have been taken to restore it.

iii) There is an unresolved personal dispute between Andrew and two of his three children, Jenna and Liam, about whether he made them a gift of his shares in the Company in or around December 2006. The Annual Return filed on 31 December 2007 identifies Jenna and Liam as the holders of 49% of the shares in the Company. Andrew claims in the petition that he discovered this in March 2018. Liam is not a party to these proceedings.

iv) The register of shareholders is missing and therefore it is not known whether the register was altered to remove Andrew's name and substitute Jenna and Liam as members in 2007.

v) No stock transfer forms appear to have been executed. That should have happened, any share certificates should have been handed over, and any stamp duty paid before the transfer was registered.

vi) The beneficial ownership of the shares is very much in dispute.

vii) All the allegations in the amended petition (other than the complaint about the dissolution and striking off of the Company) were between 12 and 37 years old at the time when the petition was issued.

viii) The allegations which Andrew now seeks to pursue were between 12 and 19 years old at that time.

16. The applications made by the Company and Holdings, and authorised by Norma and Jenna as their directors, that they should be struck off and dissolved, were made on 23 January 2020 and published in the Gazette on 4 February 2020. It appears that this is what prompted Andrew to get a friend to write a letter before action on his behalf to Norma and Jenna in March 2020. Indeed, Andrew says in his witness statement: "When I learned that they had applied to strike off the Company I was left with little option but to commence legal proceedings."

THE JURISDICTION TO GRANT RELIEF FOR UNFAIR PREJUDICE

17. S.994(1) provides that:

> "(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 (including an act or omission on its behalf) is or would be so prejudicial."

18. Thus, in order to be able to bring a petition, the petitioner must be a member of a company. If the company of which he was a member no longer exists, he has no standing to bring the petition. Ms Tythcott accepted that if this court were minded to allow the appeal, the petition would have to be stayed pending an application by Andrew to restore the Company to the register. As it appears that the Company was not trading at the time it was dissolved, this will necessitate a court order. When such an application is made for limited purposes, such as the present, the directors would normally be required to give certain undertakings, including an undertaking not to trade. In the event that such undertakings were sought but were not forthcoming, the court hearing the application to restore would have to decide what steps are needed to put it back into existence. This is inevitably going to lead to further delay.

19. If, on the hearing of a petition under s.994, the court is satisfied that the petition is well-founded, it has a wide and flexible power under s.996(1) to "make such order as it thinks fit for giving relief in respect of the matters complained of." The relief available specifically includes an order for the purchase of the shares of any member of the company by other members or by the company itself (s.996(2)(e)). That is the relief which is normally sought in a petition of this nature.

20. However, that relief is not sought by Andrew in the petition as currently formulated, because he says his shares in the Company have been "rendered worthless" by the behaviour of which he complains. He seeks an order that his shares in the Company be "converted" to a 49% shareholding in the Third Respondent, Cherry Hill Waste Ltd, ("CHW") a company belonging to Norma and Jenna, and that *those* shares be bought from him by the Respondents. He also claims various direct payments by way of compensation to him, namely: 49% of moneys that he alleges were unlawfully loaned by the Company to Norma and Holdings, 49% of the profits made by CHW through business allegedly diverted away from the Company to CHW by the directors in breach of fiduciary duty, and 49% of moneys paid by the Company to Rossisle Development Ltd, ("Rossisle") which is not (yet) a party to the proceedings, for "operating costs".

21. There are obvious problems with such relief, and, at the hearing of the appeal, Ms Tythcott frankly and fairly accepted that if the appeal were allowed, the petition would need to be radically overhauled. She stated that in place of all the relief currently sought, Andrew would have to seek an order for his minority shareholding to be bought out, on valuation assumptions which would notionally build in the value of any moneys, assets or profits that were found to have been wrongfully extracted or diverted from the Company during the period complained of.

22. Given Ms Tythcott's confirmation that Andrew was no longer seeking any direct payment to him of moneys which would be due to the Company in restitution, damages, or equitable compensation for misfeasance by the directors, the points made in the Respondents' Notice, and points made by Mr Gilchrist in his skeleton argument about reflective loss, no longer arose. In fairness to the Respondents, it should be made clear that the proposed change of position with regard to relief was indicated for the first time in Ms Tythcott's oral submissions at the hearing of the appeal.

23. S.994 can only be invoked in respect of the way in which the *company's* affairs are or have been conducted, or in respect of an actual or proposed act or omission *of the company*, which is not only prejudicial to the petitioning shareholder but *unfairly*

prejudicial. It therefore does not cover personal disputes between shareholders, though such disputes are often at the heart of proceedings such as these.

24. The statutory jurisdiction encompasses two broad categories of complaint. The first is a complaint of mismanagement of the company, which can include failures to comply with the company's constitution, and behaviour which would amount to a breach of fiduciary duty or some other actionable wrong (such as the diversion or misuse of company funds or property) to the benefit of the majority at the expense of the minority. The second is a complaint that the majority shareholders have been running the company in a manner which, though otherwise perfectly lawful, is contrary to an underlying agreement or understanding with the minority. In the latter scenario, as David Richards J put it in *Re Coroin Ltd (No.2)* [2012] EWHC 2342 (Ch), [2013] 2 BCLC 583 at [635]:

> "Equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the shareholders which makes it unjust or inequitable to insist on legal rights or to exercise them in a particular way."

This aspect of the jurisdiction is most often relied on in cases of so-called "quasi-partnerships," where there is an underlying relationship of trust and confidence between the members.

25. At the time when the matter came before the Judge, the complaints made by Andrew in the petition fell into both these categories; but in consequence of the narrowing of the grounds of complaint upon appeal, we are only concerned with the first category.

THE SURVIVING COMPLAINTS

26. The petition currently runs to 24 paragraphs. Some of the allegations - for example those in paras 3 and 8 - concern matters that cannot possibly be described as conduct of the affairs of the Company. Others are very difficult to understand, not least because they consist of allegations of wrongdoing of a general nature which lack specificity. As the Judge rightly observed at [35]:

> "It is also clear that the current case as pleaded by Mr Bailey would have to be significantly made more detailed as a proper vehicle for this case to proceed to trial because the existing allegations are made at far too high a level of abstraction to enable the Respondents to deal with them as they need to."

27. The Grounds of Appeal identify three broad "substantive matters" of which complaint is made in the petition besides the exclusion of Andrew from management of the Company, namely:

i) The removal of the goodwill and assets of the business of the Company during a course of conduct in and after 2001;

ii) The "fraudulent" substitution of apparent shareholders (Jenna and Liam) in place of Andrew in respect of his 49% holding in

the Company, including the submission of a "fraudulent" Annual Return to Companies House;

iii) The "fraudulent" dissolution of the Company under a purported but unlawful application to strike off pursuant to s.1003 of the Companies Act 2006 without notice to, or knowledge or participation of Andrew as 49% shareholder.

28. Although strictly speaking it was outside the scope of the preliminary issues as formulated, with Ms Tythcott's assistance we went through each of the grounds to ascertain those allegations which Andrew still wishes to pursue in a reformulated petition. She accepted that paras 2-5 and 8-10 inclusive were no longer being pursued, and that if any part of para 1 were to be pleaded by way of background, it would be confined to the assertion that Norma acted as a *de facto* director. Likewise, the fact that Jenna was appointed as Company Secretary on 30 June 1999 and as a Director on 31 December 1999 would need to be pleaded somewhere (currently these matters are in para 22), but since it can no longer be alleged that Andrew was unlawfully excluded from participation in management, it would no longer be alleged that this was done without authority. Various other paragraphs set out the duties of the directors and might more sensibly be re-cast in a way which identified, in respect of each of the surviving complaints, why they were said to be in breach of fiduciary or statutory duty at the relevant times.

29. The remaining paragraphs would require substantial modification to reflect the narrowing of the period of complaint and the refining of the complaints, in particular, the realistic acceptance by Ms Tythcott that (at least pending disclosure) there is no basis for pleading fraud or dishonesty, but merely breaches of fiduciary duty.

30. In essence the surviving complaints appear to be:

i) that, between 2001 and 2008, the Company made loans to Norma at a time when it was not operating profitably (para 6);

ii) that no AGM has been held since 2001 or that if it has, Andrew was not notified of it and allowed to participate in it (para 7);

iii) that between 2001 and 2008 payments were made to Rossisle, a company of which Norma and Jenna were directors and shareholders, in respect of "operating costs", to which Rossisle was not entitled (para 11);

iv) that Norma and Jenna's interest in Rossisle was not disclosed and that the transactions with Rossisle were tainted by a conflict of interests (para 11);

v) that in each trading year from 2001 onwards Andrew has been denied access to the Company's annual accounts, directors' report and auditor's report (para 12);

vi) that in 2007 the Company filed an Annual Return wrongly naming Jenna and Liam as the holders of Andrew's shares and/or that the register of members was wrongfully altered to remove Andrew as a shareholder (paras 13 and 14);

vii) that from 2001 onwards, business and assets were diverted from the Company to CHW, and the Company was deliberately run down (para 16);

viii) that Norma and Jenna, having created the situation where the Company could no longer trade, and stripped it of its assets, applied to have the Company and Holdings struck off and dissolved without prior notice to Andrew as minority shareholder (para 24).

31. In my view, the final allegation adds nothing of substance to the general complaint that the Company's business and assets were syphoned off between 2001 and 2008 for the benefit of Norma and Jenna or other companies they owned, thereby diminishing the value of Andrew's shareholding. In any event the remedy for wrongful dissolution lies in having the Company (and, if need be, Holdings) restored to the register.

32. It is said in para 3.1 of the Appellant's Notice and para 10.1 of the Appellant's skeleton argument that Andrew only became aware of "the removal of the business from the Company" and the purported conversion of his shareholding in 2018. Thus, on his case, the delay in bringing proceedings in respect of those matters was only in the order of 2 years, even though the events upon which the extant complaints are based allegedly occurred between 12 and 19 years before the petition was issued.

33. A dispute between individuals about ownership of shares is not a dispute about conduct by the Company in which the shares are held, and therefore is not, in and of itself, a proper basis for a s.994 petition. The answer to the question of who has owned those shares since December 2006 will depend on whether (a) Andrew made a gift of them to Jenna and Liam, and (b) if he did, but then failed to act upon his promise by executing the requisite stock transfer forms, whether he was precluded from going back on that promise.

34. On the other hand, the complaints made by Andrew about the behaviour of the directors from 2001 onwards are premised upon his continuing ownership of the shares; and procuring that someone else's name or names be substituted for that of the true owner on the register of members (or in other information filed at Companies House) *would* be an act attributable to the Company and thus a proper ground of complaint in a s.994 petition. The issue about the alleged gift will have to be resolved in these proceedings, and, as Ms Tythcott acknowledged, Liam must be joined in order for that to happen.

35. Given that the Judge was dealing with preliminary issues, it must be assumed that any factual disputes would be resolved in favour of the petitioner at trial. Therefore for present purposes it is to be assumed that Andrew remains entitled to his 49% shareholding, and that, if and when the Company is restored to the register, he has the status to bring the petition. It must also be assumed, therefore, that he would establish

at trial that the purported transfer of ownership to Jenna and Liam did not happen, and was officially documented by the Company (at least in the Annual Return for 2007) without his knowledge. As the Judge found at [19], there is no evidence that Andrew was aware of what was in the information filed at Companies House at that time.

THE CORRECT APPROACH TO DELAY IN THIS CONTEXT

36. There is no statutory period of limitation applicable to unfair prejudice petitions. It was common ground before us that where there has been delay in the issue of a petition under s.994, the correct approach is that which was adopted by Fancourt J in *Re Edwardian Group Ltd, Estera Trust (Jersey) Ltd and another v Singh and others* [2018] EWHC 1715 (Ch), [2019] 1 BCLC 171 at [571]:

> " … the right approach is to consider how the delay in question should affect the exercise of the court's discretion under section 996 to make such order as it thinks fit. There is no statutory time limit for issuing a petition, nor does the equitable doctrine of laches strictly apply where the relief sought is not equitable relief. However, unjustified delay resulting in prejudice or an irretrievable change of position (the essential ingredients of a defence of laches) are likely to be significant factors in the exercise of the court's discretion to grant or refuse a particular remedy. So too is any evidence that the Petitioners have previously acquiesced in the state of affairs of which they now complain, which is the basis of a number of the authorities to which I was referred. *If, in view of the delay and the reasons for the delay, it is unfair or inappropriate in all the circumstances for the Petitioners to obtain the relief that they seek, the Court will exercise its discretion to refuse it."* [Emphasis added].

To similar effect, Peter Gibson J held in *Re DR Chemicals* (1989) 5 BCC 39 that the test was whether the delay "renders it inequitable for [the Petitioner] to be allowed to obtain relief."

37. In *Re Edwardian Group Ltd*, Fancourt J was dealing with the delay in the context of a judgment following the hearing of the substantive petition, not by way of a preliminary application to strike out. Despite this, and despite the fact that cases of this nature invariably turn on their own facts, the decision provides a useful illustration of the factors to be taken into account when determining the just and equitable result in a case of serious and culpable delay. Although there was no allegation of expropriation, the conduct complained of in that case does bear some resemblance to Andrew's complaints in the present case.

38. The petition in that case was issued in November 2015. The petitioners, H, who was a minority shareholder, and Estera, which held shares in the company in trust for H, were seeking to be bought out by the respondents. H's complaints included a claim that his brother, J, who was the managing director, had acted in breach of fiduciary duty and put himself in a conflict of interest by diverting corporate investment opportunities from the company to himself in 1983 and 1991-1994, by investing in two companies, E and W, and making a substantial profit from those ventures without disclosing this to the board until 2008, and even then not making full and frank disclosure. That claim was found to be proved at trial, as was a claim that more recently, in a period after 2011, J had caused

the distribution of substantial profits to himself in guise of remuneration, instead of declaring dividends.

39. Fancourt J found that H's suspicions about J's interests in W had been aroused in 2005 and that this made him suspicious about the relationship between J and E, though there was nothing concrete for him to have relied on in that regard until 2008. By October 2008, however, H did have sufficient information to allege that J had breached his duty to the company in respect of his dealings with both E and W. Funding would have been available to bring a claim for unfair prejudice in 2011, but the deliberate choice was taken to use it to finance another piece of family litigation, which took up almost 4 years, during which time H and Estera remained shareholders of the company under the management of J and without any representation on the board.

40. Despite the fact that H and Estera could have issued the petition in 2011, Fancourt J concluded at [609] that it would be disproportionate to deny them a remedy for the unfair prejudice which they had proved, and that their conduct in delaying the issue of the petition did not make it inequitable for them to be granted one, given the nature of the wrongdoing and the consequences of refusing a remedy. In reaching that conclusion, he weighed the reasons for and seriousness of the delay against the nature of the unfairly prejudicial conduct, and the consequences for the petitioners of refusing relief against that background. He found that there was unlikely to have been substantial prejudice to the respondents, because even if the petition had been issued timeously in 2011, the events complained of in 1983 and 1991-1994 would still have been historic and beyond the limits of good recall. Nor was there any acquiescence in the conduct complained of, because H had intimated in 2009 that legal proceedings were being prepared, and continued to complain about J's failure in 2008 to come clean about his interests in E and W, which were only fully revealed after the service of a draft petition.

41. The delay in issuing the claim for unfair prejudice in *Re Edwardian Group Ltd* was held to be both deliberate and tactically motivated. However, although the financial position of the company had strengthened during the period of delay, it was not a tactical decision to try to benefit from the rise in value of the shares by remaining a shareholder notwithstanding knowledge of the grounds for making a claim to be bought out. Fancourt J rightly observed that in that type of case, a minority shareholder is taken to have made an election and will be denied relief. The position of H and Estera was essentially the same throughout the delay. The behaviour of J and the company had been seriously prejudicial and unfair. Finally, the respondents could be adequately protected or compensated in other ways for the effect of culpable delay by valuing the petitioners' shares at an earlier date, and, where appropriate, making them account for dividends received during the period of such delay.

42. In the present case, the Judge did not have the advantage that Fancourt J had of seeing and hearing the witnesses at the substantive hearing of the petition. He was therefore constrained to approach the matter by considering whether, even if Andrew made good his allegations at trial, it was plain and obvious that the delay in itself would render it inequitable for him to obtain relief.

43. I have considerable sympathy with the Judge, not least because the way in which the case was presented to him was very different from the more restricted and focussed way in which it was presented to us. Ms Tythcott candidly told us that she did not press the Judge in respect of post-2001 events, and Mr Gilchrist confirmed that the arguments before the Judge drew no line between matters occurring before and after

2001. Moreover, the Judge was not faced with a petition seeking to be bought out at an appropriate value; the fact that Andrew was claiming direct payments by way of equitable compensation would inevitably have influenced the Judge's evaluation of the prospects of obtaining relief at trial. His approach at [37] is one that I could easily foresee a trial judge taking, especially if the focus of complaint had remained Andrew's exclusion from management in 1985 and his removal as a director in 1999, and all that flowed from that. However, that is not necessarily the only approach that would be taken to the petition in its putative restructured form.

44. Mr Gilchrist contended, as he did in the court below, that all the matters relied on by Andrew were just different facets of a single complaint of exclusion from the Company, and that it was not possible to compartmentalise them in the manner sought by Ms Tythcott. As Mr Gilchrist pointed out, in 2001 Andrew suspected that assets or moneys were being diverted from the Company, thereby prejudicing the value of his minority shareholding. He nevertheless chose not to pursue the matters raised by his solicitors in correspondence, even though the directors failed to provide him with copies of the accounts to which he was (rightly) advised he was legally entitled. By the autumn of 2003, at the latest, he knew he could bring a petition complaining of unfair prejudice, and he chose not to do so. Mr Gilchrist submitted that it would be wrong in principle to sever the later events and treat them as giving rise to independent causes of action.

45. That argument plainly carried a great deal of weight with the Judge. I find this understandable so far as events prior to 2003 are concerned; but it is self-evident that Andrew could not have complained in 2003 about the ostensible expropriation of his shares in 2007, which is something he cannot have foreseen. Moreover, even if there had been an established pattern of money being paid to Rossisle or business being diverted to CHW prior to 2003, it does not *necessarily* follow that Andrew would be shut out from complaining about further instances of similar behaviour in later years just because he suspected it was going on, failed to press for the accounts to which he was then undoubtedly entitled, and failed to obtain them from Companies House when they were not forthcoming despite repeated requests and threats of litigation.

46. It seems to me that, where delay is concerned, there is a distinction to be drawn between a shareholder who knows he has been excluded from active involvement in the company's affairs and fails to complain about *that* for many years, and a passive shareholder who knows he is not getting the company's accounts or an invitation to the AGM and is not receiving dividends and does nothing about any of those matters, but then discovers years later that money or corporate opportunities have been diverted from the company for the benefit of its directors, and moreover, that his shareholding was apparently expropriated in 2007. The distinction lies in the fact that in the absence of evidence to the contrary, a shareholder is entitled to assume that the company is being managed properly by its directors in accordance with their fiduciary and statutory duties, and that its constitution has been followed.

47. Andrew may well have chosen to "sit on his hands", as Mr Gilchrist put it, but it does not follow that he was thereby acquiescing in any mismanagement that may have been going on or might occur in the future. Still less would it follow that the directors or majority shareholder would simply be entitled to expropriate Andrew's shares in the Company, or to treat him as having ceased to be a shareholder after a long period of inaction on his part.

48. Whilst there may come a time when even misfeasant directors are entitled to say that it is too late to complain about past wrongdoing, I consider that if the petition were reformulated along the lines indicated by Ms Tythcott, one could not properly form the view that it was plain and obvious that, even if all Andrew's complaints were proved at trial, a judge would refuse to grant him equitable relief because of the delay. That might still happen, indeed, I consider that there is a significant risk that it would, but much would depend on the way in which the evidence pans out at trial; it is by no means a foregone conclusion.

49. The Judge felt able to infer that the Respondents would face serious evidential prejudice even though, as he said, he did not have a full picture as to what documentation of a contemporaneous nature is now available. Again, I can understand why he took that view in respect of a complaint hinging on exclusion from involvement in the Company's affairs over many years, going back to the mid-1980s. Matters are less clear-cut in respect of more recent events, particularly those post-dating the alleged expropriation of Andrew's shares. It is a little difficult to see how, having made the findings he did in para [19] of his judgment, the Judge could have decided that the complaint about that alleged expropriation could not be pursued because of delay. In fairness to him, however, it is not immediately apparent from the petition that the pleaded complaint in that regard concerns behaviour attributable to the Company.

50. As matters currently stand, the court does not know what documents are and are not still available; that may only become clear when disclosure is complete. The filed accounts for the relevant period should still be available, and that includes accounts filed by other companies such as Rossisle (if Rossisle is joined as a defendant) and CHW. One would have expected a responsible solicitor receiving the correspondence from Andrew's solicitors back in 2001 to have advised their clients to hold on to important documents. At some later juncture, the clients might have assumed or been advised that because no proceedings were forthcoming as threatened, they could destroy the documents (subject to their obligations to HMRC to hold onto them for a particular period), but there is simply no evidence of that.

51. On posing the question, as the Judge did at [38], whether no reasonable judge properly applying the law would say that it was fair to award Andrew any relief, I find myself driven to a different answer from the one he gave. That, however, assumes the radical overhaul of the petition that Ms Tythcott acknowledged was needed, and the restoration of the Company to the register; and it also assumes that the petition as reformulated can be sufficiently particularised to survive the second preliminary issue, which the Judge found it unnecessary to decide.

CONCLUSION

52. I would allow this appeal and stay the proceedings pending the necessary steps being taken to restore the Company to the register. This will provide an opportunity for the petition to be re-amended to put it into proper order. It should also afford an opportunity for the parties to take stock of the situation and see whether it might be possible to reach settlement without the need to resort to the expending of further resources on restoring defunct companies, adding further parties and, as the Judge put it: "staggering on towards a hugely expensive and time-consuming trial." This is the

sort of case which, to my mind, cries out for mediation; the parties would be well-advised to give this serious consideration.

LORD JUSTICE SNOWDEN:

53. I agree.

LORD JUSTICE LEWISON:

54. I also agree.