

The Court of Appeal's Treatment of Delay in Connection with an Unfair Prejudice Petition

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INTRODUCTION

In *Re Cherry Hill Skip Hire Limited* [2022] EWCA Civ 531, the Court of Appeal reversed a decision to dismiss an unfair prejudice petition on grounds of acquiescence or a delay—of some 17 years. The judgment demonstrates the factors to which a court will have regard in considering whether an application under s 994 Companies Act 2006 (or its predecessor s 459 of the Companies Act 1985) for unfair prejudice may proceed, even after a lengthy delay.

In the absence of a statutory limitation period and the inapplicability of the doctrine of laches in relation to unfair prejudice petitions, the Court instead stayed proceedings to allow the Petitioner to replead and otherwise seek the restoration of the company. Since filing the Petition, the company had been struck off the register such that the Petitioner lacked standing to maintain the Petition unless the company was restored by court order. At the same time, the Court strongly encouraged the parties to mediate the dispute.

THE FACTS

The company to which the Petition related was incorporated in 1982. It was a family-owned company in which the mother owned 51% of the shares and her son (the Petitioner), the remainder. It was alleged that differences in the family resulted in the Petitioner's effective exclusion from management of the company in 1985, including that in 1999 his daughter had replaced him as a director. From 2001 to 2003, the Petitioner took steps through his solicitors to gain accounts and other company information (including threatening an unfair prejudice petition), but without success. Amongst other things, the Petitioner alleged that there had been various irregularities in the management of the company such that his shares were rendered worthless. The company stopped trading in 2019 and in January 2020, an application was made to strike off and dissolve the company. This prompted the Petitioner to issue a Petition (in July 2020), but the company was struck off and dissolved in October 2020 before the

determination of his Petition. At first instance, the Court dismissed the Petition on the grounds of delay and acquiescence following the hearing of a preliminary issues application. The Petitioner appealed.

THE JUDGMENT

The Court of Appeal reiterated that s 994 concerns two types of complaints. First, where a company is mismanaged, which may include breaches of its constitution or a breach of fiduciary duty or some other wrong (such as diversion or misuse of company funds)—that can be the subject of a legal action. Second, where the majority shareholders conduct themselves in a manner that, whilst lawful, is in breach of an agreement or understanding with the minority shareholders—*e.g.*, *Re Coroin Ltd (No 2)* [2012] EWHC 2342 (Ch). The provision does not extend to general shareholders' disputes (about which most of the unamended Petition concerned). During the Court of Appeal proceedings, the issues considerably narrowed such that the Petitioner's case was confined to the first of the two types of complaint.

In dealing with the uncontested issue that there had been a delay in filing the Petition, the Court of Appeal drew on *Re Edwardian Group Ltd, Estera Trust (Jersey) Ltd and another v Singh and others* [2018] EWHC 1715 (Ch), which concerned a lengthy delay prior to issuing a Petition. In particular the Court emphasised Fancourt J's reasoning that "*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*". The crux of the analysis must focus on the degree to which the unjustified delay results in prejudice. If the prejudice is significant, or in the form of irremediable change of position, then these will be significant factors in favour of refusing relief.

Lady Justice Andrews, with whom the other Lord Justices agreed in all respects, said that when a court decides whether a petitioner has acquiesced, and therefore lost the right to petition under s 994, there is a distinction to be drawn between a shareholder:

- who knows that they are being excluded and their rights denied, but who fails to act; and
- a passive shareholder who after failing to act, then discovers (years later) that money was diverted from the company for the benefit of its directors, and indeed that their own shareholding was expropriated.

Lady Justice Andrews commented that "[T]he 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.” Furthermore, (metaphorically) sitting on their hands does not imply that a shareholder acquiesced in mismanagement where such mismanagement may have been going on or where it might occur in the future. Although the Court recognised the danger of evidence being compromised with the delay in making the claim, it considered that evidence of more recent events (on the facts of this case) could in principle be adequate—depending on their presentation at trial—to warrant reconsideration. Accordingly, in this case, it was wrong for the Petition to be dismissed at a preliminary stage.

Nevertheless, given that the Petition required substantial amendments, and the need for the company to be restored in order for the Petitioner to have standing, the Court of Appeal stayed proceedings to allow these to occur. In doing so, the Court strongly encouraged the parties to mediate the dispute given the time and costs involved in resolving the dispute through litigation.

GOING FORWARD

- In deciding whether a delay in bringing an unfair prejudice petition will cause it to fail, a potential petitioner should consider whether such delay resulted in a change of position, as well as whether the potential petitioner may be deemed to have acquiesced to the mismanagement of the company.
- In assessing the viability of a claim, it should be remembered that unfair prejudice is intended to redress harms to the company, not to individual shareholders.
- It appears that a court will consider the facts broadly and whether, on the merits, it would be unfair or inappropriate in all the circumstances to grant relief.

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