Neutral Citation Number: [2024] EWCA Civ 158

Case No: CA-2023-000326

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)
Mr Justice Fancourt Vice Chancellor of the County Palatine of Lancaster
[2023] EWHC 65 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2024

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE SNOWDEN

- -

Between :

THG PLC & OTHERS	**Appellants**
- and -	
ZEDRA TRUST COMPANY (JERSEY) LIMITED	**Respondent**

- -
- -

Lance Ashworth KC and Dan McCourt Fritz KC (instructed by **Gowling WLG (UK) LLP**)
for the **Appellants**
Paul Chaisty KC and George McPherson (instructed by **DWF Law LLP**)
for the **Respondent**

Hearing dates : 7-8/02/2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 23/02/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether there is a limitation period applicable to a petition under section 994 of the Companies Act 2006 ("the 2006 Act") alleging that the affairs of a company are being or have been conducted in a manner that is unfairly prejudicial to the petitioner; and if so, what it is. In a judgment dated 18 January 2023, Fancourt J, Vice-Chancellor of the County Palatine, said "no". His judgment is at [2023] EWHC 65 (Ch).

2. Because the question is one of principle, it is unnecessary to set out the alleged facts in any detail. The petition was presented on 7 January 2019. The original Respondents to the petition were THG plc and 14 named individuals who were or had been directors of the company. The number of relevant individual directors has now been reduced to 9. The petition originally made a number of complaints, all of which have been struck out or dismissed. But on an application to re-amend the petition issued on 22 June 2022, and heard on 16 December 2022, the judge allowed Zedra to plead that it had been wrongly excluded from a bonus share issue on 11 July 2016. His judgment was given on 26 January 2023. The re-amended petition, so far as relevant to this appeal, alleges that the directors were in breach of their statutory duty to act lawfully, in good faith for proper purposes and fairly as between different shareholders when exercising the power to allot shares and the power to capitalise profits and appropriate the capitalised profits to shareholders. There is a specific allegation that the directors acted "in bad faith and/or for improper purposes in order to prejudice Zedra's interest as a minority shareholder". The petition goes on to allege that the effect of that exclusion was to dilute Zedra's shareholding. Accordingly, the petition alleges, Zedra lost the right to additional shares which it would have sold. The loss to Zedra is therefore said to be the additional amount which it would have realised on the flotation of THG in September 2020. The principal claim for relief is for an order that the relevant directors pay equitable compensation to Zedra to redress that loss. It was accepted before the judge that that complaint passed the merits threshold for permission to amend. But it was objected that permission should not have been granted because there was an arguable limitation defence. The judge rejected that argument. He held that the question what, if any, relief should be granted lies in the discretion of the court; and that that was a matter to be decided at trial, although considerations of delay in issuing the petition would be relevant. His main reason for doing so was that he considered himself bound by the decision of this court in *Bailey v Cherry Hill Skip Hire Ltd* [2022] EWCA Civ 531, [2023] Bus LR 14. It will be necessary to return to that decision in due course.

3. Although the practice is to refuse permission to amend where there is an arguable limitation defence, we are not asked to decide the appeal on that basis. Rather, we are asked to decide, as a matter of principle, whether any limitation period applies to a petition under section 994; and if so, what that period is.

Unfair prejudice

4. The ability of a member of a company to present a petition alleging unfair prejudice is a creature of statute. A remedy (short of winding up the company) was first introduced by the Companies Act 1948, although at that time the remedy was founded on "oppression". The Companies Act 1980 recast the remedy as one based on unfair prejudice. It has been through several iterations since then and is now contained in the 2006 Act.

5. Section 994 of the 2006 Act relevantly provides:

> "(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."

6. In *O'Neill v Phillips* [1999] 1 WLR 1092 Lord Hoffmann explained the meaning of the statutory expression "unfair prejudice". He pointed out that the concept of fairness is used in a commercial context; and that the terms on which someone agrees to participate in a company is regulated by the company's articles of association and (sometimes) by collateral agreements between shareholders. He also explained that company law had developed seamlessly from the law of partnership, which was treated by equity as a contract of good faith. Thus, he said:

> "The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

7. Although Lord Hoffmann said that equitable considerations might lead to the conclusion that conduct had been unfair, I consider that he was doing no more than interpreting the statutory concept of unfairness. I do not consider that he was suggesting that the ability to present a petition alleging unfair prejudice was itself seeking an equitable remedy or that the procedure would be subjected to the approach of a court of equity.

8. Section 996 provides:

> "(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
>
> (2) Without prejudice to the generality of subsection (1), the court's order may–
>
> (a) regulate the conduct of the company's affairs in the future;
>
> (b) require the company–
>
> (i) to refrain from doing or continuing an act complained of, or
>
> (ii) to do an act that the petitioner has complained it has omitted to do;
>
> (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;
>
> (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;
>
> (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly."

9. An order for the payment of money is not specifically on the menu in section 996 (2), but that section is expressed to be without prejudice to section 996 (1). In a previous round of this litigation in *Re The Hut Group Ltd* [2021] EWCA Civ 904, [2021] 2 BCLC 373 David Richards LJ said at [66]:

> "Zedra's complaint is of conduct by the directors which was unfairly prejudicial to its interests as a member. The relevant conduct took the form of alleged breaches by the directors of their statutory duties. This formulation of unfair prejudice is entirely in line with the approach adopted by this court in *Re Saul D Harrison & Sons Plc* and by the House of Lords in *O'Neill v Phillips*. It is not dependent on showing a fiduciary or statutory duty owed by directors to shareholders personally. Once unfair prejudice is established, the court has the wide powers to grant relief conferred by s.996, as discussed above, and they plainly include the power to order wrongdoing directors to pay compensation to the petitioner."

10. Clearly then, although not specifically mentioned, an award of compensation is one form of relief that the court can grant if it finds a petition to be well-founded.

Stale claims

11. There is a strong public policy against the raising of stale claims. In *Cholmondeley v Clinton* (1820) 2 Jac & W 1, 140 Sir Thomas Plumer MR sitting in the Court of Chancery put it this way:

> "The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility. Interest reipublicae ut sit finis litium, is a favorite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question."

12. In *Board of Trade v Cayzer Irvine & Co* [1927] AC 610, 628 Lord Atkinson said:

> "The whole purpose of this Limitation Act, is to apply to persons having good causes of action which they could, if so disposed, enforce and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of a remedy which they have omitted to use."

13. In *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18, [2003] 1 AC 384 Lord Millett explained at [6]:

> "The underlying policy to which they give effect is that a defendant should be spared the injustice of having to face a stale claim, that is to say one with which he never expected to have to deal: see *Donovan v Gwentoys Ltd* [1990] 1 WLR 472, 479 per Lord Griffiths. As Best CJ observed nearly 200 years ago, long dormant claims have often more of cruelty than of justice in them: see *A'Court v Cross* (1825) 3 Bing 329, 332–333. With the passage of time cases become more difficult to try and the evidence which might have enabled the defendant to rebut the claim may no longer be available. It is in the public interest that a person with a good cause of action should pursue it within a reasonable period."

14. McHugh J said in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 553:

> "A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated."

15. In *Abdulla v Birmingham CC* [2012] UKSC 47, [2012] ICR 1419 (in a dissenting judgment) Lord Sumption said at [41]:

> "Limitation in English law is generally procedural. But it is not a technicality, nor is it necessarily unmeritorious. It has been part of English statute law for nearly four centuries. It has generated analogous non-statutory principles in equity. Some form of limitation is a feature of almost all other systems of law. And it has been accepted in principle in the jurisprudence of both the Court of Justice of the European Union and the European Court of Human Rights. Limitation reflects a fundamental and all but universal legal policy that the litigation of stale claims is potentially a significant injustice. Delay impoverishes the evidence available to determine the claim, prolongs uncertainty, impedes the definitive settlement of the parties' mutual affairs and consumes scarce judicial resources in dealing with claims that should have been brought long ago or not at all."

16. In his article *Section 36 of the Limitation Act 1980* [2023] CLJ 402 Professor Paul Davies argues forcefully that:

> "This public interest applies both at common law and in equity. Any coherent system would not distinguish the limitation period according to whether the remedy was classified as legal or equitable. It is symptomatic of the incoherent development of the statutes concerning limitation that under section 36 equitable remedies are only subject to limitation periods by analogy."

17. It has also been stated that within the bounds of sense and reasonableness the policy of the law should be to advance, rather than retard, the accrual of a cause of action: *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627, 1633 (Lord Nicholls).

18. In addition, since one purpose of a limitation period is to avoid adjudicating on a claim at all if it is statute-barred, it would subvert that purpose if the court could only decide that a claim was barred by delay after a full trial had taken place.

19. There is no such thing as a common law limitation period. In relation to common law claims, limitation periods have been laid down by statute since 1623 (and in the case of land-related claims from even earlier). Currently they are contained in the Limitation Act 1980 ("the 1980 Act"). Where, however, claims are brought for relief in equity which correspond to common law claims, courts of equity have applied common law limitation periods by analogy. It will be necessary to consider this in more detail.

Unfair prejudice petitions

20. Unfair prejudice petitions are not mentioned in the 1980 Act. It is undoubtedly received wisdom that no limitation period applies to them. In *DR Chemicals Ltd*

(1989) 5 BCC it was common ground that the question of the effect of delay in presenting the petition was dependent on the equitable doctrine of laches; and that posed the question whether the delay rendered it inequitable for the petitioner to be allowed to obtain relief. Peter Gibson J approached the question on that basis; and there was no mention of the 1980 Act or limitation periods at all. The petition in that case was presented in July 1986; and the complaint related to an allotment of shares in 1983. Peter Gibson J decided that the delay did not bar the claim. The existence of a limitation period would not therefore have affected the outcome of the claim. In *Re Grandactual Ltd* [2006] BCC 73 Sir Donald Rattee struck out a petition on the ground that it had no real prospect of success. The petitioners in that case had participated in the company's affairs without protest for nine years before presenting the petition. Sir Donald added that he understood:

> "that [s 994] is not subject to any period of limitation, but relief under [s 996] is always within the discretion of the court. I do not consider that the court should countenance such proceedings in the circumstances that I have described nearly ten years after the event."

21. The question of delay was thus treated as an evaluative judgment for the court, rather than the application of a bright line limitation period. Likewise, in *Re Tobian Properties Ltd* [2012] EWCA Civ 998, [2013] Bus LR 753 this court treated the question of delay as turning on acquiescence rather than the application of a limitation period, although the contrary was not argued.

22. In *Re CF Booth Ltd* [2017] EWHC 457 (Ch) the petitioners sought a buy-out order. Their principal complaint was that the directors had taken excessive remuneration and thus deprived them of dividend income. Mr Mark Anderson QC said at [104]:

> "There is no limitation period under section 994 but the courts will not allow stale claims. If the Company had brought proceedings against the Booth directors to reclaim excessive remuneration, the claim would not have been allowed to go back beyond six years before proceedings were instituted. I therefore think there is force in the argument that I should limit any remedy which I will afford the petitioners by analogy with that limitation period. [Counsel for the petitioners] did not suggest otherwise."

23. In *Re Edwardian Group Ltd* [2018] EWHC 1715 (Ch) it was not suggested that the 1980 Act applied directly to the petition, although it was argued that the equitable defence of laches applied and/or that the 1980 Act should be applied by analogy. There is no authority cited in the judgment relating to those arguments. Fancourt J said at [571]:

> "In my judgment, 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."

24. In *Routledge v Skerritt* [2019] EWHC 573 (Ch), [2019] BCC 812 Ms Tipples QC, sitting as a deputy judge of the High Court, recorded at [19] that the law was not in dispute. She said at [29]:

> "There is no statutory time limit for issuing a petition, neither does the equitable doctrine of laches strictly apply where the relief sought is equitable relief."

25. In *Cherry Hill Skip Hire* this court approved the approach of Fancourt J in *Re Edwardian Group*, although as Mr Ashworth KC pointed out, it was common ground that that was the correct approach. What the court said was that at the interim stage, on an application to strike out or dismiss the petition summarily, the test is whether it is "plain and obvious" that the petitioner would be refused relief at trial.

26. *Cherry Hill Skip Hire* was itself cited with approval (albeit obiter) in *Smith v Royal Bank of Scotland plc* [2023] UKSC 34, [2023] 3 WLR 551. Lord Leggatt (with whom Lords Briggs, Hamblen and Kitchin agreed) said at [58]:

> "There are some types of claim which are not subject to any statutory period of limitation at all. One example is a claim for specific performance, where the only control for delay is the discretion to refuse relief by applying the equitable doctrine of laches: *P & O Nedlloyd BV v Arab Metals Co (No 2)* [2007] 1 WLR 2288. Another example is a petition for relief under sections 994 to 996 of the Companies Act 2006 on the ground of unfair prejudice in the conduct of a company's affairs. Where there has been delay in issuing such a petition, the court's approach is to consider how the delay should affect the exercise of the discretion under section 996 to make such order as the court thinks fit. If, in view of the delay and the reasons for the delay, it is unfair in all the circumstances for the petitioners to obtain the relief they seek, the court will exercise its discretion to refuse it: *In re Cherry Hill Skip Hire Ltd* [2023] Bus LR 14, para 36 (approving *In re Edwardian Group Ltd* [2019] 1 BCLC 171)."

Commentators

27. The current edition of Palmer on Company Law states at para 8.3822:

> "Although there is no formal limitation period for the bringing of an unfair prejudice petition and doctrine of laches does not technically apply to this statutory remedy, a petitioner who delays bringing the petition may be penalised, in an extreme case, by being denied relief … and otherwise in the fashioning of the relief, for example, where the court chooses a date for assessing the value of the company which is unfavourable to the petitioner."

28. The current edition of Buckley on the Companies Acts states in the annotations to section 994 para [31]:

> "Although there is no limitation period and the equitable doctrine of laches does not apply to the statutory remedies available under CA 2006, Pt 30, unjustified delay resulting in prejudice or an irretrievable change of position are likely to be significant factors in the exercise of the court's discretion to grant or refuse a particular remedy, as will be evidence that the petitioner has previously acquiesced in the state of affairs of which complaint is made in the petition. If, in view of the delay and the reasons for it, it is unfair or inappropriate in all the circumstances for the petitioner to obtain relief, the court will exercise its discretion to refuse it. In a case of delay, a petition may be struck out if no reasonable judge, properly applying the law, would say it was fair to grant any relief."

29. Gore Brown on Companies (chapter 19 para [2]) states:

> "While no specific statutory limitation period applies to unfair prejudice petitions, long delays between the conduct in dispute and the unfair prejudice petition being brought will often give rise to the petitioner being said to have acquiesced and the court not hearing the claim because it would be unfair to do so."

30. Mr Robin Hollington KC in his work on Shareholders' Rights (10th ed) agrees. He says at para 7-87:

> "There is no statutory period of limitation applicable to unfair prejudice petitions, but the court will not allow a petition to degenerate into "a raking over of old grievances":…. Where the ground of unfair prejudice relied upon is a wrong which is subject to a statutory period of limitation, such as a breach of a shareholders' agreement or a breach of the duty of care by the directors, then no doubt the lapse of the statutory period of limitation would be a highly material factor in the exercise of the court's discretion. In *Re CF Booth Ltd* [2017] EWHC 457 (Ch), it was held that the minority shareholders could not complain about matters which had occurred more than six years ago by analogy with the general limitation period but they could about matters since then.

> But where no statutory period of limitation applied, delay or acquiescence by the petitioner would remain as relevant as misconduct on the part of the petitioner … in the context of the issues of the unfairness of the treatment of the minority by the majority and the appropriate remedy. The court will take into account the equitable doctrines of acquiescence and laches…."

31. Joffe on Minority Shareholders (6th ed) says at para 6.286:

> "There are no statutory limitation periods applicable to claims under CA 2006 s 994. However, a petitioner with full knowledge of the relevant facts who delays in bringing the petition … runs the risk of being taken to have accepted or acquiesced in the position; and may have difficulty in persuading the court that he is in a position to assert that his interests have been prejudiced."

32. That was also the view taken by the Law Commission in two reports: Shareholder Remedies (LC 246 para 4.16) and Limitation of Actions (LC 270 para 4.211). The only case cited by either report was *DR Chemicals* in which the question was not discussed. It is right to say, however, that in both reports the Law Commission recommended that a limitation period should be introduced.

33. We were not, however, referred to any case in which the question whether a limitation period applied to petitions under section 994 has actually been argued and decided.

34. With the possible exception of *Cherry Hill Skip Hire* (which I consider later) none of the materials to which I have referred bind this court. Nevertheless, the fact is that Mr Ashworth asks us to overturn over 40 years' received wisdom.

What might justify the lack of a limitation period?

35. One possible justification for the lack of a limitation period might be that many petitions rely on a course of conduct as amounting cumulatively to unfair prejudice. In *Re Southern Counties Fresh Foods Ltd* [2008] EWHC 2810 (Ch) Warren J referred to *Grandactual* and said at [72]:

> "The case therefore related only to events long ago. It is not authority for the proposition that conduct in the remote past can never be brought into account in considering allegations of unfair prejudicial conduct on an unfair prejudice petition. In particular, if a course of conduct starting in the remote past has continued to the present time, I see no reason why the entire history of the conduct should not be brought into account in assessing whether the conduct as a whole has been unfairly prejudicial. Of course, the fact that it may have continued without protest for a long period may show that there has been acquiescence and no unfair prejudice; but if the conduct has met with regular objection, or even resignation but with clear non-acceptance, it is not to be rejected *a priori* as incapable of

> being entertained by the court as part of the basis for a petition."

36. The Law Commission considered how such issues might be addressed in their final report on Limitation, when explaining their proposal to include unfair prejudice petitions within the core limitation period of three years. What they concluded at para 4.215 was:

> "Where it is only the cumulative effect of a whole series of incidents which gives rise to the claim for unfair prejudice, the primary limitation period will only start on the date on which the claimant knows (or should know) of the event which gives him or her grounds to bring a claim under section [994]. This may be the last event in the series. Alternatively, there may have been a number of events which were each sufficiently prejudicial to the claimant's interests to ground an application under section [994]. Providing that the claimant brings an application within three years of the date on which he should know of the latest such incident, the claimant will be within the primary limitation period. The claimant would not be able to rely on an earlier event as itself giving rise to unfair prejudice after the primary limitation period had expired. However, he or she will not be debarred from referring to earlier incidents to show why the later event has caused him or her unfair prejudice. There may, for example, be three events, one taking place in 1993, one in 1996 and one in 2000, none of which is sufficient on its own to support a petition under section [994] but whose cumulative effect does give rise to unfair prejudice against the claimant. The claimant knows of each event within days of its taking place. In this case the primary limitation period would not start to run until 2000. If, in contrast, the claimant would have enough to show unfair prejudice on the happening of the first and second event, the primary limitation period would start to run in 1996. If he delays for more than three years he or she will not be able to bring a claim relying on these two events. The third event in 2000, though insufficient by itself to ground a claim, is sufficient to support a fresh petition for unfair prejudice in the light of the earlier events, and the claimant has a fresh right to make such a claim."

37. This seems to me to be the answer to the "cumulative course of conduct" argument. Once conduct (whether individually or cumulatively) amounts to unfair prejudice, there is no particular reason why a petitioner should be in any more favourable position than any other litigant.

38. Another possible justification is that a petitioner may not appreciate that there has been wrongdoing. It might have been concealed from the petitioner either deliberately or in bad faith. But in that event, if there is a limitation period, section 32 of the 1980 Act would postpone the running of time until the claimant has or could with reasonable diligence have discovered the concealment. All that is required is (i) a fact relevant to the claimant's right of action, (ii) the concealment of that fact from the

claimant by the defendant, either by a positive act of concealment or by a withholding of the relevant information, and (iii) an intention on the part of the defendant to conceal the fact or facts in question: *Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2023] 3 WLR 963. The defendant need not be in breach of any duty to disclose in order for time to be extended.

What was the ratio of Cherry Hill Skip Hire?

39. The company in that case was incorporated in 1982, and Andrew Bailey ("Andrew") was appointed as a director. He also held 49 per cent of the shares in the company. By 1985 he had been excluded from management; and he was removed as a director in 1999. Following correspondence between lawyers, Andrew threated to wind up the company; but that correspondence petered out in 2003. It was not until 2020 that he issued his petition under section 994. The petition was a home-made petition. Before the judge the grounds of Andrew's claim were presented as a continuous course of conduct which ended only in 2019. The judge decided that, by 2003 at the latest, Andrew knew enough to have been able to take legal action; and that the petition ought to be dismissed on the grounds of delay and acquiescence. On appeal to this court Andrew restricted his claim to events that occurred after 2001. The complaints, therefore, spanned a period which began some 19 years before the petition was presented.

40. Andrews LJ (with whom Snowden LJ and I agreed) described the surviving complaints at [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:
>
> (1) 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 section 1003 of the Companies Act 2006 without notice to, or knowledge or participation of Andrew as 49% shareholder."

41. She identified the essence of the complaints at [31]: namely that between 2001 and 2008 the company's assets were syphoned off for the benefit of other shareholders or their companies, thereby diminishing the value of Andrew's shareholding. It was asserted that Andrew only became aware of this in 2018. The relief sought in the petition was (or would after amendment be) an order requiring Andrew's shares to be bought out on certain valuation assumptions.

42. At [36] Andrews LJ said:

> "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 section 994, the correct approach is that which was adopted by Fancourt J in *In re Edwardian Group Ltd* … para 571."

43. She then quoted the passage I have set out at [23], including Fancourt J's statement that 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." She referred also to *DR Chemicals*, although in that case Peter Gibson J did approach the question of delay as a question of laches.

44. Andrews LJ then analysed the facts of *Re Edwardian Group* in some detail. She concluded:

> "[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."

45. In *R (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955 this court considered the way in which a proposition of law could become part of the ratio of a decision. Buxton LJ said:

> "[21] There may be a number of ways in which propositions that have not been the subject of argument become part of the ratio of a case, in the sense adopted in paragraph 16 above of being treated by the court as a necessary step in reaching its conclusion, and that process may again differ according to whether the court in question is performing an appellate role.
>
> [22] First, a proposition may be the subject of agreement or concession between the parties; the court in acting on it may or may not specifically reserve the issue of whether it is lending its own authority to the correctness of the proposition."

46. In *Cherry Hill* the proposition was one that was agreed between the parties; and the court acted on it in the sense of considering the facts on that basis. I am inclined to agree with the judge in the present case that this is part of the ratio of *Cherry Hill Skip Hire* and that, if there had been a statutory limitation period in play it is hard to see how the appeal could have been allowed. But, for reasons which I explain in the next section of this judgment, whether it was part of the ratio or not does not ultimately matter.

Is Cherry Hill Skip Hire binding?

47. In *Joscelyne v Nissen* [1970] 2 QB 86 the court said at 99:

> "The court is not omniscient in the law, nor are counsel, however eminent. We work under great pressure from the lists, and whilst not always ready to accept a concession on a point of law from the Bar it is not infrequent to do so, and moreover on a point essential to the decision of the appeal, without further investigation. We are attracted by a suggestion that the conceded point of law should be open to argument in another case, provided it is made plain that that should not be made the basis for the further suggestion that where an argument, though put forward, had been only weakly or inexpertly put forward, the point of law should similarly be open: for much uncertainty could thus be undesirably introduced."

48. The same approach must, in my judgment, apply where a proposition of law was common ground.

49. In *Re Hetherington* [1990] Ch 1, 10 Sir Nicolas Browne-Wilkinson V-C said:

> "In my judgment the authorities therefore clearly establish that even where a decision of a point of law in a particular sense was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense."

50. Whether a subsequent court is bound by a decision of a previous court on a point that was assumed to be correct, but which was not argued, was discussed again in *Kadhim.* The main question was whether the court was bound by an earlier decision of the court on the interpretation of a regulation in the Housing Benefits (General) Regulations 1987. At [21] and [22] Buxton LJ explained that there were several ways in which a proposition of law could become part of the ratio of a case in the sense that it was a necessary step in the court's reasoning. One such way was by agreement or concession. The important point to note is that Buxton LJ's subsequent discussion of the authorities is in the context that the proposition of law in question *is* part of the ratio of the earlier case. After a review of the authorities, Buxton LJ said at [33]:

> "We therefore conclude, not without some hesitation, that there is a principle stated in general terms that a subsequent court is not bound by a proposition of law assumed by an earlier court

> that was not the subject of argument before or consideration by that court. Since there is no direct Court of Appeal authority to that general effect we should indicate why we think the principle to be justified."

51. He then went on to give his reasons for that conclusion. Buxton LJ went on to say at [38]:

> "Like all exceptions to, and modifications of, the strict rule of precedent, this rule must only be applied in the most obvious of cases, and limited with great care. The basis of it is that the proposition in question must have been assumed, and not have been the subject of decision. That condition will almost always only be fulfilled when the point has not been expressly raised before the court and there has been no argument upon it…. And there may of course be cases, perhaps many cases, where a point has not been the subject of argument, but scrutiny of the judgment indicates that the court's acceptance of the point went beyond mere assumption. Very little is likely to be required to draw that latter conclusion: because a later court will start from the position, encouraged by judicial comity, that its predecessor did indeed address all the matters essential for its decision."

52. He concluded that in the earlier case the point in issue was not raised. The court simply assumed an interpretation of the relevant regulation that that assumption "was not the subject of argument or consideration". The court in *Kadhim* was not, therefore, bound.

53. Of course, in almost any case in which the court assumes a proposition of law to be correct, or accepts a concession, or proceeds on the basis that a particular proposition of law is correct, it will analyse the facts in the light of that proposition. But that, in my view, does not necessarily amount to the court's acceptance of the correctness of the point or go beyond mere assumption.

54. In *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2019] EWCA Civ 1361, [2020] Ch 365 what was in issue were the principles applicable to rectification of a contract. They had been discussed (obiter) by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101; and then applied by this court in *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333. Giving the first judgment in that case Etherton LJ said at [78]:

> "Although the observations of Lord Hoffmann in the *Chartbrook* case [2009] AC 1101 about rectification (quoted in para 54 above) were not essential for the decision in that case, they were delivered after full argument, were approved by the other members of the Appellate Committee, and set out established principles rather than seeking to change them. Both parties before us have rightly proceeded on the basis that they correctly state the existing law."

55. Toulson LJ however, was much more doubtful whether the obiter discussion in *Chartbrook* was right. He said at [157]:

> "There is, with respect, a question mark whether the principle adopted in this part of the decision was right, and there is an associated question whether this court ought to follow it in any event."

56. Having referred to some academic criticism of *Chartbrook* he said at [176]:

> "Notwithstanding the immense respect due to Lord Hoffmann and other members of the House of Lords, I have difficulty in accepting it as a general principle that a mistake by both parties as to whether a written contract conformed with a prior non-binding agreement, objectively construed, gives rise to a claim for rectification."

57. He concluded:

> "[179] Despite my concern about the correctness of the principle of the decision in the *Chartbrook* case [2009] AC 1101 on the rectification issue, this court ought in my view to follow it in the present case for a combination of reasons.
>
> [180] First, although the decision on the point was obiter, it was the considered unanimous opinion of the House of Lords on a point which had been argued. It would be a bold course for this court not to follow it.
>
> [181] Secondly, we did not ourselves hear argument on this point. There was argument about whether the fact that both parties were mistaken, albeit for different reasons, in believing that the transfer contract conformed with the prior commercial agreement embodied in Version 1 and the valuation was sufficient for rectification, but there was no argument about the correctness of the reasoning in the *Chartbrook* case."

58. Lord Neuberger MR said at [196]:

> "However, like both Toulson and Etherton LJJ, I think that it is right to proceed on the basis of Lord Hoffmann's analysis on this appeal, even if it could otherwise be appropriate for this court to depart from that analysis (as to which I express no view). It would be wrong to depart from the analysis on this appeal for two reasons. First, any qualification of, or variation to, that analysis which has been raised in any article to which we have been referred would not affect the outcome of this appeal; secondly, the appeal was argued, and the case below was argued and decided, on the basis of Lord Hoffmann's analysis."

59. That, then, was a case in which all three members of the court were aware of criticism of Lord Hoffmann's analysis, which, because it was obiter, did not in any event bind the court. Yet all three members of the court made the deliberate choice that the court should follow that analysis; and Etherton LJ seems to me to have gone as far as to say that it was correct. They then analysed the facts of the case in detail on the basis that the law was as stated by Lord Hoffmann.

60. It was *Daventry* that this court refused to follow in *FSHC Group Holdings* on the ground that the point had not been argued. What the court said about stare decisis (referring to *Kadhim* among other cases) at [136] was:

> "Subsequent authorities have clearly established that the suggestion which attracted the Court of Appeal in *Joscelyne v Nissen* [1970] 2 QB 86 is a correct approach and that a court is not bound by a proposition of law which was not the subject of argument because it was not disputed in an earlier case (even if that proposition formed part of the ratio decidendi of the case)."

61. Ultimately, it held that Lord Hoffmann had been wrong.

Does Cherry Hill Skip Hire go beyond assumption?

62. I do not think that Andrews LJ's factual analysis went beyond looking at the facts on the basis of the common ground. I do not regard her judgment as being in some way a free-standing decision on the point. It is perfectly true that she said that the approach in *Re Edwardian Group* was correct. But that, too, was on the basis of the common ground. At best, therefore, what the court did in *Cherry Hill Skip Hire* was to decide the case in accordance with received wisdom, without questioning whether that received wisdom was correct.

63. Mr Chaisty KC relied heavily on Lord Leggatt's observations in *Smith*. But those observations were plainly obiter both because it was common ground that there was an applicable limitation period in that case; and also because *Smith* was concerned with a wholly different statute passed for consumer protection. So we are not bound by those observations either.

64. In my judgment, therefore, we are not bound by *Cherry Hill Skip Hire* and must consider the question afresh.

Is a petition under section 994 within the scope of the Limitation Act 1980 at all?

65. The 1980 Act imposes limitation periods in respect of different types of "action." Some of those actions are defined by reference to the underlying cause of action; while others are defined by reference to the remedy sought. Section 38 (1) defines "action" so as to include "any proceedings in a court of law".

66. A petition initiating proceedings in court falls squarely within this definition. In *Re Karnos Property Co Ltd* (1989) 5 BCC 14 Mervyn Davies J held that the definition applied to a winding up petition; and in that respect I consider that he was correct. In *Ridgeway Motors (Isleworth) Ltd v Alts Ltd* [2005] EWCA Civ 92, [2005] 1 WLR 2871 at [29] Mummery LJ accepted the argument that a winding up petition is, in a

general sense, a "proceeding in a court of law"; but he went on to hold that, for other reasons, the limitation period in section 24 (1) of the 1980 Act (which concerns actions upon a judgment) did not apply. *Karnos* was cited in skeleton arguments in *Ridgeway* but not referred to in the judgment.

67. In principle, therefore, it is possible for a petition presented under section 994 to fall within the scope of the 1980 Act.

Does section 8 of the Limitation Act apply?

68. Section 8 provides:

> "(1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.
>
> (2) Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act."

69. *Collin v Duke of Westminster* [1985] QB 581 concerned a claim to enfranchise a leasehold house. The lessee served notice claiming that right; but took no further action for many years. The landlords argued that the effect of the notice was to bring into existence a simple contract for sale and purchase of the freehold; and that after six years any claim reliant on that contract was statute barred. This court rejected that argument. Oliver LJ said at 601:

> "The obvious and most common case of an action upon a specialty is an action based on a contract under seal, but it is clear that "specialty" was not originally confined to such contracts but extended also to obligations imposed by statute."

70. He added at 602:

> "Broadly, the test is whether any cause of action exists apart from the statute…It seems to me to be quite clear that in the instant case any cause of action which the applicant has derived from the statute and from the statute alone. Apart from the statutory provisions he could have no claim and it is only by virtue of the statute and the regulations made thereunder that there can be ascertained the amount of the price to be paid under the statutory contract the terms of which can be gathered only from the sections of the Act and the Schedules. Subject, therefore, to one question, namely whether the word "specialty" as used in the Limitation Act 1939 and the Act of 1980 has assumed a more limited meaning than it originally bore, I have no doubt at all that the applicant's claim is a claim on a specialty."

71. Having considered previous authority he concluded that the word had not assumed a more limited meaning.

72. A member of a company has no right to petition for relief for unfair prejudice apart from section 994. The right to go to court is not one created either by the common law or by equity. That is illustrated by the instant case in which Zedra's petition is based upon breach of statutory duties (which codify earlier fiduciary duties) which are owed by the directors to the company rather than to Zedra itself. It follows, in my judgment, that in principle a petition seeking relief under section 994 is subject to the limitation period laid down in section 8.

73. Mr Chaisty argued that a petitioner had no cause of action under section 994 until the court had decided that the petition was well-founded. Then, and only then, could the court exercise its powers under section 996. Whether the petition was well-founded could not be determined until trial, which explained why the court had no power to make an order for an interim payment: *Re a company (No 004175 of 1986)* [1987] BCLC 574. Time could not therefore start to run until the court had decided that the petition was well-founded. I do not accept this argument. Entitlement to relief in almost any form of civil litigation depends on satisfying a court that the claim is a valid one (i.e. that it is well-founded). If time did not begin to run until the court had reached that decision, no limitation period would ever be effective. Nor do I consider that the decision of the Supreme Court in *Smith* provides a true analogy. As Lord Leggatt was at pains to point out, where a relationship of debtor-creditor was still in existence the statutory question for the court is whether the relationship "is unfair". The court must consider the whole relationship and not merely the source of unfairness. The deliberate use of the present tense requires the court to assess fairness at the time when a determination of fairness is made. He said at [44]:

> "Any entitlement to a remedial order arises from a set of facts which is complete only at the time when the order is made. In the judgment of the Court of Appeal, at para 54, Birss LJ expressed the point clearly when he said that:
>
> "crucially the fact that a relationship was unfair yesterday is not same fact as the relationship being unfair today. The facts necessary to make a claim for the unfairness on that given date cannot be said to have occurred until that given date."

74. Once the relationship ends, the position is different, as Lord Leggatt explained at [45]:

> "Once the credit relationship ends, the position changes. A determination that the relationship was unfair to the debtor on the date when it ended can be made on that date or any later date. All the facts relevant to the determination are fixed when the relationships ends and nothing that occurs subsequently can affect the assessment of fairness. It can therefore be said that a cause of action has accrued so that the period of limitation starts to run."

75. Thus, once the relationship has ended, the consumer does have an accrued cause of action, even though the court has not yet decided whether the relationship was unfair.

76. Lord Leggatt continued:

> "[46] The reason why in this case the completed cause of action argument may seem appealing at first blush is that the facts resemble quite closely facts which could give rise to a cause of action founded on contract or tort of a type which lawyers are used to analysing in a way that is similar to the approach for which the bank contends. If, when offering PPI cover to a customer, the bank had owed a duty under a statute or at common law to disclose to the customer the existence and amount of commission that it stood to receive, a cause of action based on breach of such a duty would accrue on proof that: (i) the customer entered into a PPI contract and made payments of premium under the contract; (ii) the bank did not disclose before the contract was made or while it remained in force the commission payable out of the PPI premium payments; and (iii) had such disclosure been made, the customer would not have entered into the PPI contract (or would have terminated it immediately if the contract had already been concluded) and therefore would not have made any subsequent payments of premium. In such a case the cause of action would be complete, and the limitation period would therefore begin to run, at the time when the payments were made.
>
> [47] To draw an analogy with a claim of this type, however, is misleading because a claim for relief under section 140B of the 1974 Act is not based on any breach of a legal duty and cannot be analysed in the same way. While the relationship between the creditor and the debtor arising out of the credit agreement is continuing, there is no set of material facts which as a matter of law constitute necessary and sufficient elements of the cause of action such that, if those facts are established, the claimant has an accrued entitlement to a remedy under section 140B."

77. Here, by contrast section 994 is capable of applying where the affairs of the company "are being or *have been* conducted" in a manner that is unfairly prejudicial. Where the petition alleges that the affairs of a company *have been* conducted in a way that is unfairly prejudicial (as in this case) I see no obstacle to holding that the cause of action is complete once the conduct complained of has taken place. There is no further fact that needs to be established.

78. In its ordinary sense a "cause of action" is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person: *Letang v Cooper* [1965] 1 QB 232, 242. But I do not consider that too much weight can be placed on the word "entitles". Even an action seeking a discretionary remedy can properly be described as founded on a cause of action. There are many cases in which the outcome of a claim will depend upon an evaluative judgment by the court. *Smith* itself is one such example. The court will always be called upon to decide whether a debtor-creditor relationship is unfair. Yet once the debtor-creditor relationship has ended, the debtor has a cause of action which has accrued, and to which a limitation period applies. The key question is not whether the claimant has an absolute entitlement to the relief claimed, but whether further facts need to be found.

79. Mr Ashworth argued, in the alternative, that if section 8 did not apply directly, then it applied by analogy. It is one of the limitation periods specified in section 36 of the 1980 Act which do not apply:

> "… to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940."

80. Mr Frederick Gye, who ran the Italian Opera at Covent Garden, was no stranger to the Victorian courts. *Knox v Gye* (1871-2) LR 5 HL 656 was a claim for an account against him by the personal representative of his deceased partner. The bill seeking the account was filed in the Court of Chancery in April 1861. In 1854 the deceased partner had been ordered to join his regiment in the Crimea and he died in December 1854, whereupon the partnership was dissolved. The appeal to the House of Lords was heard by Lord Hatherley LC (who, as Wood V-C, had been the judge at first instance); Lord Chelmsford (who had reversed him) and Lords Westbury and Colonsay, who were new to the case. Lord Westbury gave the leading speech. He first said that a claim for an account at common law would have been statute barred. He then said at 673-5:

> "That a Court of Equity will not, after the lapse of six years without acknowledgment, decree an account between a surviving partner and the estate of a deceased partner has been long settled by various decisions. The rule, of course, must be the same where the parties are reversed, and the representative of the deceased partner is the Plaintiff. The general principle was laid down as early as the case of *Lockey v Lockey*, where it was held that where a Court of Equity assumes a concurrent jurisdiction with Courts of Law no account will be given after the legal limit of six years, if the statute be pleaded. If it could be doubted whether the executor of a deceased partner can, at Common Law, have an action of account against the surviving partner, the result will still be the same, because a Court of Equity, in affording such a remedy and giving such an account, would act by analogy to the Statute of Limitations. For where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a Court of Equity acts by analogy to the Statute of Limitations, the meaning being, that where the suit in Equity corresponds with an action at Law which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule of procedure. But if any proceeding in Equity be included within the words of the statute, there a Court of Equity, like a Court of Law, acts in obedience to the statute. I have no doubt,

> therefore, of the Statute of Limitations being a bar to the whole of the relief sought by the Appellant as executor of Thistlethwayte.
>
> Your Lordships will no doubt recollect that in the observations I have made with regard to the adoption of the statute by a Court of Equity, I refer to those well-known expressions of Lord Redesdale, in which he distinguishes between the cases where a Court of Equity acts in analogy to the statute, and where it acts in obedience to the statute. Where a Court of Equity frames its remedy upon the basis of the Common Law, and supplements the Common Law by extending the remedy to parties who cannot have an action at Common Law, there the Court of Equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords."

81. It is, in my view, clear from this passage that equity acts by analogy with the Limitation Act where (and only where) the Act imposes a limitation period on the equivalent common law claim. It does not give a court of equity a free hand in imposing a judge-made limitation period. That is, in part, why equity developed the principles of laches and acquiescence.

82. We were referred to a further trilogy of cases in this court discussing the circumstances in which equity will apply a limitation period by analogy. They were *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112; *P & O Nedlloyd BV v Arab Metals Co Ltd (The UB Tiger)* [2006] EWCA Civ 1717, [2007] 1 WLR 2288 and *The Claimants in the Royal Mail Group Litigation v The Royal Mail Group Ltd* [2021] EWCA Civ 1173.

83. The first of these was a claim for equitable compensation for breach of fiduciary duty arising out of a pool agreement for which the defendant acted as underwriting agent. This court held that sections 2 (claims in tort) and 5 (claims in contract) applied by analogy. The second was a claim for specific performance of a contract of carriage. This court held that the remedy claimed was so different from the common law remedy of damages that no limitation period could be applied by analogy. The third was a claim for an injunction compelling the defendant to perform an alleged statutory duty which, in turn was founded on a claim in tort. This court held (with some unease) that it was bound by *The UB Tiger* to hold that an injunction was so different from the common law remedy of damages that the limitation period under section 2 could not be applied by analogy.

84. What is common to all three cases that we were shown on this question, is that in each of them there was a potential analogy in a limitation period for common law claims.

85. The question, then, is whether Zedra is claiming equitable relief; and, if so, whether it is the kind of relief that is similar to the relief that could be awarded by a court of common law. In my judgment, Zedra is not claiming equitable relief. It is claiming relief which the court is empowered to grant because (and only because) section 996 gives it that power. In that respect I agree with what Fancourt J held in *Edwardian*. There is, I consider, no common law equivalent cause of action which would enable

the analogy to be applied. But because of my conclusion that section 8 applies to this statutory claim, the question of analogy is academic.

86. Section 8 is disapplied if a shorter limitation period is prescribed by the 1980 Act. I turn, therefore, to consider that question.

Does section 9 of the Limitation Act apply?

87. Section 9 provides:

> "An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."

88. The scope of this section seems to depend on what remedy is claimed, rather than the underlying cause of action. In *West Riding County Council v Huddersfield Corporation* [1957] 1 QB 540 boundaries between the two authorities were altered. Section 151 of the Local Government Act 1933 provided for agreements to be made between the authorities concerned, and for arbitration in default of agreement. Section 151 (2) provided:

> "The agreement may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any functions, and for payment by either party to the agreement in respect of property, debts, functions, and liabilities so transferred or retained, or of such joint user, and in respect of the remuneration or compensation payable to any officer or person, and that either by way of a capital sum or of a terminable annuity for a period not exceeding that allowed by the Minister."

89. In default of agreement the adjustment was to be referred to arbitration. It will be noted that section 151 (2) envisaged a number of different matters in respect of which an agreement could be made: they included for example the retention of property or the joint use of property, although it is true that it also referred to the transfer of debts.

90. Orders adjusting the boundaries were made in 1937 and 1938. In 1953 the county council made a claim against the corporation for two liquidated sums. The report does not reveal how those sums were made up. The corporation did not agree those claims; and the question was whether they were statute barred. Lord Goddard CJ held that they were. He said at 544:

> "I have no doubt that there are matters which may not involve the payment of money. It may be that some functions can be transferred without having to make financial provision with regard to them; but it is quite obvious to me from the whole of the section, including the following subsections, that the statute clearly is contemplating that in most cases at any rate there will be payments of money."

91. He quoted from the Limitation Act 1939:

> "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say: - . . . (d) actions to recover any sum recoverable by virtue of any enactment . . ."

92. He then said at 546:

> "In my opinion this is a money claim and the arbitration is one to recover a sum recoverable by virtue of an enactment. Section 151 of the Local Government Act provides for this adjustment. If the local authority which loses part of its area to another corporation or body can show that it has suffered financial loss within the meaning of that section, a loss which has to be adjusted, then it has a claim for the money. It seems to me that that is the scheme of the Act. I think that the arbitration which was held here was an arbitration consequent upon the West Riding County Council's claim that it ought to be paid money in respect of the transfer of part of its area to another body. That transfer, however, took place more than six years ago."

93. The claim was simply an action to recover a sum of money by virtue of the provisions of section 151 of the Local Government Act, 1933. It was therefore statute barred.

94. *Central Electricity Board v Halifax Corporation* [1963] AC 785 ("*CEGB*") concerned the aftermath of the nationalisation of electricity. The Electricity Act 1947 transferred the assets and liabilities of electricity undertakings to electricity boards which were set up to carry on the nationalised industry. The combined effect of sections 14 (1) and 15 (1) of the Act was that "property held or used by the local authority wholly or mainly in their capacity as authorised undertakers, and rights, liabilities and obligations acquired or incurred by the local authority in the said capacity" should "on the vesting date vest by virtue of this Act and without further assurance in such electricity board or boards as may be specified in the following provisions of this section or determined thereunder." In general, the assets and liabilities vested in the appropriate area board, but under proviso (iii) to section 14 (2) all investments and cash vested in the central authority. Halifax Corporation had a bank balance of some £34,500 derived from its activities as an electricity undertaker. The CEGB claimed to be entitled to that sum. The House of Lords held that the claim was barred by section 2 (1) (d) of the Limitation Act 1939. Lord Reid set out the CEGB's argument which proceeded in four steps. He dealt with the fourth step as follows:

> "Fourthly, section does not apply because this action is not to recover a sum recoverable by virtue of any enactment - that is where, in my view, the argument fails. If the words of section 2 (1) (d) are given their ordinary meaning I have no doubt that they cover this case. The sum sued for is only recoverable because it vested in the appellants' predecessors "by virtue of this Act and without further assurance" (see section 14 (1)), and this is an action to recover it. I doubt whether the words of section 2 (1) (d) are capable in any context of bearing a

> meaning which would not cover this case, but I must try to explain the meaning which counsel for the appellants persuasively pressed upon us."

95. He then rejected a distinction which had been drawn in earlier cases between bringing an action on a statute and suing in respect of a cause of action given by a statute; or between an action on a statute and an action given by a statute. Lord Reid said:

> "But this distinction seems to me so difficult that it does not surprise me that Parliament should abolish it, and the words of section 2 (1) (d) are so clear that I do not think it possible to force on them the interpretation which the appellants put forward."

96. Lord Morris of Borth-y-Gest said in his concurring speech:

> "Though in decided cases there has been recognition of a difference between an action which is given by a statute and an action on a statute, the wording introduced by section 2 (1) (d) of the Limitation Act, 1939, namely, "actions to recover any sum recoverable by virtue of any enactment," seems to me to be wording which precisely covers the present action."

97. Also agreeing, Lord Guest said:

> "By section 2 (1) (d) of the Act, actions to recover any sum recoverable by virtue of any enactment are time-barred six years from the date on which the cause of action accrued. I may say at once that I am in agreement with your Lordships that the period applicable is six years and not 12 years as provided in section 2 (3) of the Act. The appellants' action was for the sum of £34,500 alleged to be due to them from the respondents under the Electricity Acts, 1947 and 1957. The basis of the claim was that the sum of £34,500 was held immediately prior to vesting by the respondents wholly or mainly in their capacity as electricity undertakers and accordingly vested in the appellants' predecessors in terms of the Electricity Act, 1947."

98. Accordingly, the cause of action asserted by the CEGB was a cause of action given by statute and since the claim was a claim to recover money, the claim was statute barred.

99. *Re Farmizer (Products) Ltd* [1977] 1 BCLC 589 was a claim brought under the wrongful trading provisions of section 214 of the Insolvency Act 1986. The relief available under that section was set out as follows:

> "the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper."

100. The liquidators claimed a declaration that the directors knew or ought to have concluded that there was no reasonable prospect that the company would avoid an insolvent liquidation, and that they should make a monetary contribution to the company's assets. The company went into liquidation in October 1987; and the liquidators made their application in April 1992. In 1995 the directors applied for the claim to be struck out for want of prosecution. It was common ground that the application should not be struck out unless the limitation period had expired. Blackburne J held that section 9 applied to the claim; and that time began to run when the company went into liquidation. This court upheld that decision. One of the arguments advanced by the liquidators was that liability derived not from section 214, but from the exercise by the court of its own discretion, which affected both liability and quantum. Peter Gibson LJ rejected that argument. He held that the only relief available under section 214 related to a liability to pay money; and the fact that the court was exercising a discretion did not affect that. As he put it at 599:

> "If one asks, 'By virtue of what is the sum of £1.25m recoverable?', the answer would surely be: 'By virtue of s 214'. It is of course only capable of being recovered if the court chooses to make the declaration after the statutory conditions are shown to be satisfied, but I have no difficulty in holding that s 9 of the 1980 Act applies to such a case. Mr Oliver accepted that the recoverable sum under the section could be damages."

101. He added that he accepted the directors' second argument that:

> "… that even if the contribution, liability for which the court can declare under s 214, could be other than in a sum of money, nevertheless the claim made by the liquidators against Mr and Mrs Gadd comes within s. 9(1). The decision in the *West Riding* case supports the view that when the statutory provision relied on for the recovery of a sum enables the court to make an order either to give monetary relief or relief in some other non-monetary form, one should look to what was actually being claimed in the proceedings."

102. If that approach is applied to petitions under section 994, it would appear to follow that different limitation periods would apply to different petitioners, depending on what relief they sought. If, for example, the petitioner sought an order regulating the affairs of the company in the future, that would not be a monetary remedy. But if, as in this case, the petitioner's surviving claim was merely a claim for compensation, then section 9 would apply.

103. In *Rowan Companies Inc v Eggink Offshore Transport Consultants VOF* [1999] 2 Lloyd's Rep 443 the question was whether individual partners could be joined to a claim against a Dutch partnership. Their liability was alleged to arise under article 18 of the Dutch Commercial Code which provided that partners were jointly and severally bound in respect of the obligations of the partnership. David Steel J held that the cause of action against the individual partners derived from the Code and hence was an action on a specialty. He then considered the scope of section 9. He said:

> "As a matter of first impression:
>
> (1) The word 'sum' in its ordinary and natural meaning means any sum of money.
>
> (2) There is no express restriction of the scope of the section to claims for liquidated sums of money, i.e. debts.
>
> (3) *The relevant distinction would seem to be between claims under an enactment for non-monetary relief and those claims under an enactment for monetary relief whether in a form of debt, damages, compensation or otherwise*.
>
> This first impression is fortified, in my judgment, by the authorities.
>
> … It is clear that actions on a [specialty] are not confined to claims for liquidated sums: *Pratt v Cook Son & Co (St Paul's) Ltd* [1940] AC 437 (quantum meruit*), Leivers v Barber Walker & Co* [1943] KB 385 (workmen's compensation), *Aiken v Stewart Wrightson Members Agency Ltd (The Pulbrook Syndicates)* [1995] 1 WLR 1281 (damages). …The scheme of the Act is to impose a six-year limitation period on claims for money under an enactment thus constituting an exception to the general rule as regards [specialties]: *West Riding County Council v Huddersfield Corp* [1957] 1 QB 540, *Central Electricity Board v Halifax Corp* [1963] AC 785, *Re Farmizer (Products) Ltd* [1997] BCC 655." (Emphasis added)

104. That is also the conclusion that Mr John Randall QC reached in *Re Priory Garage (Walthamstow) Ltd* [2001] BPIR 144, after an extensive review of authority. The claim itself was a claim under section 238 of the Insolvency Act 1986 to set aside transactions made by a company prior to its insolvency. Section 239 (3) provided:

> "Subject as follows, the court shall, on such an application, make such orders as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction."

105. The range of orders that a court may make are amplified by section 241 (1):

> "Without prejudice to the generality of sections 238(3) and 239(3), an order under either of those sections with respect to a transaction or preference entered into or given by a company may (subject to the next subsection) —
>
> (a) require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the company,

> (b) require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred,
>
> (c) release or discharge (in whole or in part) any security given by the company,
>
> (d) require any person to pay, in respect of benefits received by him from the company, such sums to the office-holder as the court may direct,
>
> (e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction, or by the giving of the preference, to be under such new or revived obligations to that person as the court thinks appropriate,
>
> (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for the security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction or by the giving of the preference, and
>
> (g) provide for the extent to which any person whose property is vested by the order in the company, or on whom obligations are imposed by the order, is to be able to prove in the winding up of the company for debts or other liabilities which arose from, or were released or discharged (in whole or in part) under or by, the transaction or the giving of the preference."

106. Mr Randall QC summarised his conclusions at [160] in terms that bear extensive quotation:

> "(1) An application to the court under s 238 to 241 IA86 to set aside one or more transactions is an action on a [specialty] within s 8(1) Limitation Act 1980 and hence prima facie subject to a twelve year limitation period. The case of *Re Farmizer Products* is clearly distinguishable because the words of s 214 are different and because the claim there was a claim for monetary compensation, not a claim to set aside a transaction….
>
> (2) There may however be examples of applications under ss 238 to 241 which are taken outside the scope of s 8(1) of the Limitation Act by the combined operation of ss 9(1) and 8(2) of that Act with the effect that the limitation period is reduced from 12 years to 6.
>
> (3) An application under ss 238 to 241 will come into the latter category if it can fairly be said that the substance or the

> essential nature of the application is "to recover a sum recoverable by virtue of" those sections. The applicant accepts that some cases under ss 238 and 239 will be caught by s 9(1). Which category will prove to be the more frequent has been the subject of extended debate, and I do not propose to offer any prediction of my own. One example of a case caught by ss 9(1) and 8(2) might be where the transaction to be set aside is a simple payment of a sum of money. Another might be where the only substantive relief available to the applicant is an order for the payment of money, such as where s 241(2) precludes the setting aside of the transaction.
>
> (4) Where there is doubt as to whether a claim falls into the first (that is, 12 year) category, or the second (that is, 6 year) category, the "look and see" approach adopted by Lord Goddard CJ in the *West Riding* case and approved by Peter Gibson LJ in the *Farmizer Products* case at 599F should be applied, and the court should look to see what the substance or essential nature of the relief truly sought by the applicant in the particular case before it is. The court is not limited just to the words of the pleading. The court may look at the substance behind the pleading. However, provided the pleaded claim to set aside is a bona fide claim, which is neither a sham nor bound to fail, the applicant is entitled to pursue it, and it cannot be without significance that the first example of the types of relief which may be granted to implement ss 238(3) and 239(3) given in s 241(1), which is ultimately a list of examples, is that set out at subsection (a), which I have already quoted earlier in this judgment."

107. On the facts he held that as the principal head of relief claimed was the setting aside of certain transfers of leases, the claim as a whole was a claim on a specialty and thus subject to a 12-year limitation period.

108. A similar question arose in *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542, [2007] 1 WLR 2404 in relation to individual insolvency. That case concerned an application under section 423 of the Insolvency Act 1986. That section is part of a suite of provisions dealing with transactions at an undervalue. The trustee in bankruptcy in that case applied to set aside an accumulation and maintenance settlement established by the bankrupt; charges securing loans made by the settlement trustees to the bankrupt; and the assignment of a loan account assigned to the trustees as further security. The settlement trustees contended that the claim was statute barred. The powers given to the court are set out in section 423 (2):

> "Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for- (a) restoring the position to what it would have been if the transaction had not been entered into, and (b) protecting the interests of persons who are victims of the transaction."

109. The range of orders that a court may make are amplified by section 425 (1):

> "Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows)-(a) require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made; (b) require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of money so transferred; (c) release or discharge (in whole or in part) any security given by the debtor; (d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct; (e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the court thinks appropriate; (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction."

110. Arden LJ discussed the question of limitation at some length. At [115] she said:

> "While the relief sought in respect of the later charges and the assignment is clearly not to recover a sum of money (though it may lead to a consequential order for the payment of money), the order sought in respect of the gift into settlement may be such an order. In those circumstances, section 9(1) of the 1980 Act may apply: see section 9(1) and section 8(2), at para 108 above. However that may be, I do not see how it can be said that, in that case, the 1980 Act provides no limitation period. Of course, the court has jurisdiction to make some form of order other than the payment of money, but it is established by earlier decisions of this court that where statute enables the court to give relief in monetary or non-monetary form the court should look to see what is actually claimed: see *West Riding County Council v Huddersfield Corpn* [1957] 1 QB 540 and *In re Farmizer (Products) Ltd* [1997] 1 BCLC 589."

111. At [116] she added:

> "In so far as the relief sought is not "to recover any sum recoverable by virtue of" an enactment, within section 9 of the 1980 Act, I agree with the judge that this is an action for a specialty."

112. Sir Martin Nourse, however, did not find it necessary to consider section 9; and Waller LJ agreed with him. Sir Martin said at [144]:

> "The second question is whether the claims of the trustee in bankruptcy fall within section 8(1) or section 9(1) of the Limitation Act 1980. My own view, like that of Judge Weeks QC [2005] BPIR 842, 915–916, is that, since the main claim was in origin and substance a claim to set aside the settlement, the action as a whole was "an action upon a specialty" within section 8(1). But because the action was commenced on 4 December 2002, more than 12 years after the settlement was made on 10 March 1989 and less than six years after the bankruptcy order was made on 28 January 1999, the question whether the applicable period of limitation was 12 years under section 8(1) or six years under section 9(1) is academic."

113. Mr Chaisty pressed us with the decision of Mann J in *The Claimants in the Royal Mail Group Litigation v Royal Mail Group Ltd* [2020] EWHC 97 (Ch). Mann J considered a number of preliminary issues, only some of which were live on the appeal. The relevant claim for present purposes (which was not the subject of the appeal) was a claim by certain VAT registered traders for damages against Royal Mail for not providing VAT invoices. Mann J held that the claimants had no viable claim. But one of the agreed issues was whether a limitation period applied to that claim and, if so, what it was. One of the candidates was section 9. Mann J decided to deal with that issue; but since it did not arise on his view of the legal basis for the claim, what he said was obiter. The relevant part of his judgment is as follows:

> "[190] Mr Herberg's first candidate is section 9 ("An action to recover any sum recoverable by virtue of any enactment …") to which a 6 year period applies. He submitted that the claims for breach of statutory duty were claims to recover a sum recoverable by virtue of an enactment, namely the VAT Regulations.
>
> [191] The trouble with this argument is that the Regulations say nothing about money, or recovery of money. On the hypothesis of this part of this judgment they impose an obligation without saying more about its effect. The cases cited to me were where the statute in question specified not only the cause of action but also specified a remedy, and that remedy was money or an equivalent. Thus in *Re Farmizer Products Ltd; Moore and another v Gadd and another* [1997] BCLC 589 a claim under section 214 of the Insolvency Act 1986 (summary remedy against directors and officers of a company for defaults) was held to fall within section 9 because the section provided for a "contribution" to be made and that meant money. In *Rahman v Sterling Credit Ltd* [2001] 1 WLR 496 the court held that a claim to re-open a transaction under the Consumer Credit Act 1974 was an action on a specialty but a claim for repayment of moneys, which was a remedy specifically provided for under the Act, was thought by Mummery LJ to be a claim to which section 9 applied, though it was not necessary for him actually to decide the point.

> [192] In my view the facts and decisions in these cases confirm what one gets from the wording of section 9 itself. To fall within that section there has to be a claim prescribed by statute, and the statute has to prescribe a form of monetary payment (or an equivalent) payable in respect of that claim. The present case does not fall within that description. On the assumption that the Regulations give rise to a civil claim, they provide an obligation (to provide an invoice) but say nothing about any civil remedy for a disappointed customer, whether monetary or otherwise. (There are, of course, remedies or sanctions available to HMRC, but they do not provide for sums to be payable to the disappointed customer.) The claimants claim damages, but that is not a prescribed remedy under the section. It is a remedy provided for in the general law. So the damages are not "[a sum] recoverable under a statute". This conclusion is consistent with the decision of HHJ Toulmin QC in *R v Secretary of State for Transport Ex parte Factortame Ltd (No 7)* [2001] 1 WLR 942 at para 163:
>
> "I therefore construe the words "any sums recoverable by virtue of any enactment" in section 9 of the 1980 Act as referring to cases where those sums which are recoverable by the claimant are specified in or directly ascertainable from the enactment. This is to be contrasted with damages recoverable under section 2 of the 1980 Act which are compensatory damages assessed under common law principles and which cannot therefore be directly ascertained from the statute.""

114. In fact, Mann J decided that the claim was properly characterised as a claim in tort, with the consequence that a 6-year limitation period did apply. So, in that respect, what he said about section 9 was doubly obiter. But as I read this part of his judgment, it rests on the point that the regulations in issue said nothing about a remedy and that the claimed remedy was a "remedy provided in the general law". That was also the distinction drawn by Judge Toulmin in *Factortame*. That cannot be said of the remedy claimed in this case, which is a remedy which the court is empowered to give only by statute. Nor is it clear whether Mann J was referred to as much authority as we were.

115. *Smith v Royal Bank of Scotland* (which I have already mentioned) concerned claims under section 140A of the Consumer Credit Act 1974. The underlying allegation was that a debtor-creditor relationship was unfair, because the creditor had not disclosed that it was receiving commission under a PPI insurance policy. Each of the consumers claimed repayment of premiums paid. It was, however, common ground that section 9 of the 1980 Act applied; and the real debate was when the limitation period started to run. The substantive decision does not, therefore, help with the present case. But in the course of his judgment Lord Leggatt referred to *Rahman v Sterling Credit Ltd* [2001] 1 WLR 496 (to which Mann J had also referred). That was a claim to re-open an extortionate credit bargain under section 139 of the Consumer Credit Act 1974. The powers of the court were contained in section 139 (2) which provided:

> "(2) In reopening the agreement, the court may, for the purpose of relieving the debtor or a surety from payment of any sum in excess of that fairly due and reasonable, by order—
>
> (a) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons,
>
> (b) set aside the whole or part of any obligation imposed on the debtor or a surety by the credit bargain or any related agreement,
>
> (c) require the creditor to repay the whole or part of any sum paid under the credit bargain or any related agreement by the debtor or a surety, whether paid to the creditor or any other person,
>
> (d) direct the return to the surety of any property provided for the purposes of the security, or
>
> (e) alter the terms of the credit agreement or any security instrument."

116. In the course of his judgment, Mummery LJ said:

> "It follows that, in so far as Mr Rahman seeks, whether by counterclaim or by separate action, to make a claim to reopen the loan agreement under section 139, that claim is not barred by limitation: that cause of action arose in 1989, less than 12 years ago. If he is successful in his claim the court may make an order relieving him in whole or in part from the obligation to make future payments. That in turn would make it necessary for the court to reconsider whether it was appropriate to leave the 1990 possession order in place.
>
> If, however, Mr Rahman were to claim repayment of sums of money already paid by him under the credit bargain, an objection could be raised that section 9 applies. The limitation period would be six years. Mr McDonnell stated that the counterclaim would be amended to exclude any claims for repayment of moneys."

117. Thus, the same section created different limitation periods, depending on the relief claimed. Commenting on that case in *Smith*, Lord Leggatt said at [48]:

> "Case law established that the period of limitation for a such a claim depended on the nature of the relief sought. Insofar as the debtor was seeking relief from indebtedness incurred under the credit agreement, the claim was "an action upon a specialty", for which section 8 of the Limitation Act 1980 prescribes a limitation period of 12 years. Insofar as the debtor was seeking repayment of payments already made under the credit

> agreement, the claim fell within section 9 which, as already noted, prescribes a limitation period of six years."

118. That seems to me to be at least implicit approval of what Mr Randall QC called the "look and see" approach. I note also, that in *Smith* both *Farmizer Products* and *Hill v Spread Trustee* were cited, although not referred to in the judgments, and thus not subjected to any adverse comment.

119. Mr Chaisty challenged this analysis. First, he argued that *Farmizer Products* did not apply because the court in that case was concerned with the narrower wording of section 214 of the Insolvency Act 1986. By contrast, in the case of a petition under section 994 of the 2006 Act the court has the widest possible discretion. Unlike section 214, section 996 (which gives examples of the remedies the court may give) says nothing about compensation. Second, he argued that cases such as *West Riding* were confined to cases where the statute under consideration specifically contemplates the recovery of money; and the claim is for a specified sum rather than unliquidated compensation. Mr Chaisty submitted that section 9 is confined to statutes which (a) expressly mention the recovery of money, (b) create the right to recover that money and (c) impose a duty on the defendant to pay that money.

120. Third, he argued that a decision that a limitation period applied to unfair prejudice petitions would send shock waves through the world of company law; and would lead to widespread undesirable consequences. To borrow Lord Reed's allusion in *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 at [43] "like the Fat Boy in *The Pickwick Papers*, counsel sought to make our flesh creep." In my view the suggested fears are overstated. In many cases the allegation supporting a claim of unfair prejudice will be a continuing course of conduct. As regards such cases, the existence of a limitation period (at least in principle) is unlikely to present a problem. If, unusually, the only relief sought is the payment of money for compensation arising in consequence of a single past event, I cannot see why the claimant should not be required to start his claim timeously. Fourth, he argued that to apply a 6-year limitation period to some claims under section 994 but not to others would create arbitrary distinctions as between different claims under the same statutory provision. Fifth, he argued, where a petition claimed a number of different remedies, some pecuniary and others not, it would be unworkable to allow some claims to go forward and for others not to.

121. It is true that section 214 is narrower in its scope than section 996. But in *Farmizer Products* Peter Gibson LJ said in terms that if the statutory provision relied on enables the court either to give monetary relief or relief in some non-monetary form, one should look to what is actually being claimed. So, too did David Steel J in *Rowan*, Mr Randall in *Priory Garage*, Arden LJ in *Hill* and Mummery LJ in *Rahman*. That was also the view of the Law Commission in their consultation paper on Limitation of Actions (Law Comm Consultation Paper 151) where they said at paragraph 7.15:

> "Whether an action is governed by section 8 or section 9 is determined by the nature of the relief sought."

122. The statutory provision in *West Riding* went beyond the mere payment of money; and Lord Goddard expressly recognised that some adjustments could be made which did not involve the payment of money. His decision rested on the fact that the actual

claim was a money claim. I do not therefore accept the first two of Mr Chaisty's objections. As the *CEGB* case shows, section 9 is to be read in a straightforward manner. There is no justification for confining it to a statute which specifically provides for the payment of money and which gives the claimant an absolute entitlement to it.

123. The fourth and fifth objections do have more force. But in *Hill v Spread Trustee* all three members of the court were sanguine about that prospect (although for different reasons). In *Rahman* Mummery LJ was explicit that different heads of relief claimed under the same statutory provision attracted different limitation periods. David Steel J took the same view in *Rowan Companies*. The critical distinction was between claims under an enactment for non-monetary relief and those claims under an enactment for monetary relief. In *The UB Tiger* the court specifically contemplated that a limitation period might apply (either directly or by analogy) to one head of relief claimed, but not to another. Likewise, in a case of professional malpractice the same facts may give rise to concurrent claims in contract and tort; each with its own limitation period, rules about remoteness of damage, and measure of damages. In such cases it is for the claimant to choose how to frame his case. As Lord Goff said in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 193-4:

> "My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."

124. One remedy which was discussed in argument was the normal form of relief in section 994 petitions which required (usually) the majority shareholders to buy the shareholding of the petitioner, sometimes on the basis of valuation assumptions imposed by the court. I do not consider that such a claim would be a claim for the recovery of money. As Scott J explained in *Re a company (No 004175 of 1986)* [1987] BCLC 574 when refusing an application for an interim payment:

> "Counsel for the petitioner submits that an order at trial under s 461(2)(d) will represent, for the purposes of these rules, "judgment against the [respondents] for a substantial sum of money". I disagree. An order under s 461(2)(d) requiring the purchase by the respondents of the petitioner's shares will be an order for the purchase of shares. It will entitle the petitioner to money when but not until he tenders the share certificates against the purchase money. There is at the moment no debt owing by the respondents to the petitioner. There will be no debt owing by the respondents to the petitioner until, first, an

> order for purchase is made at trial; and second, there is tender of the requisite share certificates against the purchase price required to be paid."

125. In this respect a buy-out order is analogous to an order for specific performance of a contract. The vendor who obtains such an order does not have a money judgment; nor indeed any entitlement to money unless and until he executes a transfer in exchange for the purchase price. In the same vein, as Arden LJ said in *Hill*, a claim to set aside a settlement is clearly not a claim to recover a sum of money (though it may lead to a consequential order for the payment of money). Nor do I see any great hardship in requiring a petition seeking such an order to be brought within 12 years of the events giving rise to the unfairness alleged.

126. What is, perhaps, more troubling is if a 12-year limitation period applies to claims for non-monetary relief, whether the court can dismiss a claim brought within the limitation period on the ground of delay. If and to the extent that a limitation period applies to a claim, the claimant has, at least in principle, the full statutory period within which to bring his claim. It would thus normally be inappropriate to strike out the claim merely because of delay. It may that on particular facts it could be seen that the claimant had acquiesced in the state of affairs of which he complains, with the consequence that the court's discretion would not be exercised in his favour even if he were to prove all his allegations. In such a case it would, I think, be possible for the court to give summary judgment in the defendant's favour. Although this question was mentioned in oral argument, it was not the subject of any developed submissions. I therefore prefer to leave that question to a case in which it matters.

127. If I pose an adapted version of Peter Gibson LJ's question in *Farmizer Products*, I ask "By virtue of what is the claimed compensation recoverable?", the answer must surely be: "By virtue of sections 994 and 996."

128. The limitation period in section 9 is also disapplied by section 36 where the claim is for equitable relief, unless equity would have applied a limitation period by analogy. Again, the award of compensation under section 996 is not, in my opinion, "equitable relief".

129. Where, therefore, as in this case (a) the right to go to court is purely statutory and (b) the only relief sought is the payment of money (whether liquidated or unliquidated), I would hold that the action falls within section 9 of the Limitation Act 1980, with the consequence that it cannot be brought more than six years after the matters complained of.

130. It follows, in my judgment that the matters that Zedra seeks to raise by amendment are statute barred; and the amendment should not have been allowed.

Does section 21 (3) of the Limitation Act 1980 apply?

131. In THG's skeleton argument it was argued that section 21 (3) of the 1980 Act applies to the claim. Although Mr Ashworth did not abandon that argument, he touched on it only briefly in oral submissions. I should therefore deal with it.

132. Section 21 (3) provides:

> "Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued."

133. Section 38 provides that "trust" and "trustee" have the same meanings as in the Trustee Act 1925. Section 68 (17) of the latter Act provides that "trust" and "trustee" extend to implied and constructive trusts.

134. This court considered the application of section 21 of the 1980 Act to directors of a company in *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162. In effect, a director of the company diverted a business opportunity from the company by buying for himself land with development potential. Although the company approved his purchase, it was not informed that the land had development potential. The company brought proceedings to set aside the transaction. Chadwick LJ gave the only reasoned judgment. At [25] he said:

> "I start with four propositions which may be regarded as beyond argument: (i) that a company incorporated under the Companies Acts is not trustee of its own property; it is both legal and beneficial owner of that property; (ii) that the property of a company so incorporated cannot lawfully be disposed of other than in accordance with the provisions of its memorandum and articles of association; (iii) that the powers to dispose of the company's property, conferred upon the directors by the articles of association, must be exercised by the directors for the purposes, and in the interests, of the company; and (iv) that, in that sense, the directors owe fiduciary duties to the company in relation to those powers and a breach of those duties is treated as a breach of trust."

135. He went on to consider how section 21 applied to the director of a company. At [39] he said:

> "In the context of a claim against a director who, in breach of trust – that is to say, through an abuse of the trust and confidence reposed in him as a director – has taken a transfer of the company's property to himself, "the beneficiary", for the purposes of s 21(1)(b) of the Act is the company, "the trustee" is the director and "the trust property" is the property which has been transferred from the company to the director. That must follow from the proposition that a director is, in those circumstances, to be treated as a trustee within the first of Millett LJ's categories. I go on, therefore, to consider whether the present action is "an action ... to recover ... trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his use"."

136. The Supreme Court confirmed this analysis in *Burnden Holdings (UK) Ltd v Fielding* [2018] UKSC 14, [2018] AC 857. Lord Briggs said at [11]:

> "It is common ground (and clear beyond argument) that, as directors of an English company who are assumed to have participated in a misappropriation of an asset of the company, the defendants are to be regarded for all purposes connected with section 21 as trustees. This is because they are entrusted with the stewardship of the company's property and owe fiduciary duties to the company in respect of that stewardship… By the same token, the company is the beneficiary of the trust for all purposes connected with section 21."

137. The important point for present purposes is that the beneficiary is the company, and not its shareholders. That is consistent with the general principle that the directors of a company owe fiduciary duties to the company and not to individual shareholders. In *Bath v Standard Land Co Ltd* [1911] 1 Ch 618, 627 Sir Herbert Cozens Hardy MR put it this way:

> "I base my decision upon the broad principle that directors stand in a fiduciary position only to the company, not to creditors of the company, not even to individual shareholders of the company, still less to strangers dealing with the company."

138. Section 21 (3) applies to an action by a beneficiary. But Zedra, as a shareholder in THG, is not a beneficiary vis-à-vis the directors of THG. Only THG is a beneficiary. It follows, in my judgment, that Zedra's claim does not fall within section 21 (3).

Does section 21 (3) apply by analogy?

139. Section 36 of the Limitation Act 1980 provides:

> "(1) The following time limits under this Act, that is to say—
>
> (a) the time limit under section 2 for actions founded on tort;
>
> (aa) the time limit under section 4A for actions for libel or slander, or for slander of title, slander of goods or other malicious falsehood;
>
> (b) the time limit under section 5 for actions founded on simple contract;
>
> (c) the time limit under section 7 for actions to enforce awards where the submission is not by an instrument under seal;
>
> (d) the time limit under section 8 for actions on a specialty;
>
> (e) the time limit under section 9 for actions to recover a sum recoverable by virtue of any enactment; and

> (f) the time limit under section 24 for actions to enforce a judgment;
>
> shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940.
>
> (2) Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise."

140. Henderson LJ explained in *HMRC v IGE USA Investments Ltd* [2011] EWCA Civ 534, [2021] Ch 423 at [83]:

> "… the judge's approach seems to me to rest on a misunderstanding of how section 36(1) of LA 1980 is intended to work. The analogy espoused by the judge is with a cause of action (rescission at common law) for which no limitation period exists under the 1980 Act, whereas the question posed by section 36(1) is whether one of the specified time limits under the 1980 Act may be applied by analogy. To be relevant, therefore, an analogy must be with one of the statutory time limits, in the present case the time limit under section 2 for actions founded on tort."

141. In the light of that, I do not consider that it is possible to apply section 21 by analogy, because it is not one of the limitation periods identified in section 36.

What procedure governs amendments to a petition?

142. Mr McCourt Fritz KC argued this part of the appeal. Section 35 (1) of the 1980 Act provides:

> "(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—
>
> (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
>
> (b) in the case of any other new claim, on the same date as the original action."

143. Section 35 (3) provides:

> "Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any

> action after the expiry of any time limit under this Act which would affect a new action to enforce that claim."

144. Section 35 goes on to provide:

> "(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
>
> (5) The conditions referred to in subsection (4) above are the following—
>
> (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action…"

145. "Rules of court" are defined in Schedule 1 to the Interpretation Act 1978. The expression means:

> "… in relation to any court … rules made by the authority having power to make rules or orders regulating the practice and procedure of that court…"

146. Most civil litigation is governed by the Civil Procedure Rules. CPR Part 17 deals with amendments. Rule 17.4 (1) applies where a party applies to amend "their statement of case" after the expiry of a limitation period. Rule 17.4 (2) permits the court to allow an amendment but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim. Rule 2.3 defines "statement of case" as:

> "… a claim form, particulars of claim where these are included in a claim form, defence, counterclaim or other additional claim, or reply to defence."

147. The application to amend was made by application notice dated 22 June 2022, specifically asking for permission to amend pursuant to CPR rule 17.1 (2) (b). However, the judge took the view that a petition was not within the definition of "statement of case" in the CPR with the consequence that he had no power to refuse to permit the amendment.

148. I do not follow this. There is a statutory prohibition on permitting new claims to be raised, unless permitted by rules of court. If rules of court permitting such amendments do not apply to petitions, then the statutory prohibition prevails. If, on the other hand, they do apply to petitions especially in cases where (as here) the petition has been ordered to stand as points of claim, then no amendment may be allowed unless it comes within the terms of rule 17.4 (2). The proposed amendment clearly does not fall within rule 17.4 (2).

149. In his skeleton argument Mr Chaisty relied on The Companies (Unfair Prejudice Applications) Proceedings Rules 2009. These rules were made in exercise of powers under section 411 of the Insolvency Act 1986, extended to unfair prejudice petitions by section 997 of the 2006 Act. Section 411 of the 1986 Act gives the Lord Chancellor power (with the concurrence of the Lord Chief Justice or his delegate) to make rules affecting court procedure.

150. Mr Chaisty argued in his written argument that the 2009 Rules are not "rules of court". I disagree. Section 997 constitutes the Lord Chancellor as the authority having power to make rules affecting court procedure relating to unfair prejudice petitions. It follows that the 2009 Regulations are "rules of court" as defined by the Interpretation Act 1978. But if Mr Chaisty's argument is correct, then section 35 (3) of the 1980 Act absolutely prohibits a new claim from being made in the course of any action. The only escape from section 35 (3) (except in personal injury cases) is through rules of court. If, on the other hand, they are rules of court (as I consider they are) and purport to give the court an unfettered right to allow an amendment to a petition to include a new claim that would otherwise be time barred, then they would appear to be ultra vires as contravening section 35 (4) and (5) of the 1980 Act. In fact, however, rule 2 (2) provides that:

> "Except so far as inconsistent with the Act and these Rules, the Civil Procedure Rules 1998 apply to proceedings under Part 30 of the Act with any necessary modifications."

151. If the judge was correct to say that a petition is not a "statement of case" as defined in the CPR, it is in my judgment a necessary modification to the CPR in the case of an unfair prejudice petition to widen the definition of "statement of case" so as to include a petition. Such a modification falls within rule 2 (2) of the 2009 Rules. That has the consequence that CPR rule 17.4 applies.

152. I should in fairness to Mr Chaisty say that he did not really seek to support the judge's reasoning in the course of his oral submissions.

153. Accordingly, I consider that the judge was wrong to say that he had no power to refuse the amendment even if it was statute barred.

Result

154. I would allow the appeal.

Lord Justice Arnold:

155. I agree.

Lord Justice Snowden:

156. I also agree that the appeal should be allowed for the reasons given by Lewison LJ.

157. The received wisdom for over 40 years has been that unfair prejudice petitions are not subject to any periods of limitation. That was the assumption made, without the matter being argued, in *Cherry Hill*. However, as Lewison LJ has clearly explained,

when that assumption is challenged, it can be seen that there is nothing to support it. Specifically, there is nothing in *DR Chemicals* that bears upon the point.

158. It is understandable why respondents to petitions under section 994 and its predecessors may have been motivated to argue for a regime under which the court has a discretion to refuse relief on the bases identified by Fancourt J in *Edwardian Group*, rather than to suggest that there was a 12 year limitation period under section 8 of the Limitation Act 1980. Such a long statutory limitation period would not serve to defeat many complaints.

159. It is also very rare for petitions under section 994 to seek the payment of compensation to petitioners rather than, say, an order for the purchase of shares at a value adjusted to reflect the financial effect upon the company of the alleged misconduct of the respondents. So, it is understandable that the issue of whether section 9 of the Limitation Act 1980 imposes a 6 year limitation period in unfair prejudice cases has not been addressed in any reported case before now.

160. The issue that has given me significant pause for thought is the one identified by Lewison LJ in paragraph [126] above, namely that it is generally thought to be impossible for a court to strike out or summarily dismiss a claim on the basis of inordinate delay if it is brought within an applicable statutory limitation period: see *Birkett v James* [1978] AC 297 at 320.

161. It is notorious that many petitions under section 994 can, if unchecked, lead to disproportionately lengthy and expensive trials. Such petitions require robust case management if they are to comply with the overriding objective. Accordingly, the policy of the courts since the relatively early days of the unfair prejudice jurisdiction has been to discourage litigants from dredging up old grievances and to encourage them to focus on a limited number of specific, current complaints. That approach was reflected in the Law Commission's suggestion that a relatively short limitation period of three years should be introduced in relation to section 994 petitions.

162. I would not wish this decision to be seen as reversing that trend or providing any encouragement to petitioners to advance stale complaints under section 994. Judges should not be discouraged, in appropriate cases, from striking out or summarily dismissing allegations of historical misconduct if it can clearly be seen, at an interim stage, that even though the petition was presented within the applicable limitation period, no reasonable judge could consider that such matters would justify the exercise of discretion to grant the relief sought at trial. However, as Lewison LJ has indicated, the precise implications of our decision in this respect will need to be worked out in a future case in which it matters.