KINGS CHAMBERS

LIMITATIONS ON THE UNFAIR PREJUDICE REMEDY

1.

1.1. The discretion under s996 Companies Act 2006 ("the Act") has been held to be wide enough to permit a petitioner, having satisfied s994 of the Act, to vindicate claims that the company has (arising out of the established grounds of unfair prejudice) against wrong-doing directors or third parties, provided that they are respondents to the petition, instead of the relief being limited to ordering a derivative claim to be brought by the Company in respect of the conduct complained of.

1.2. See: Gamlestaden Fastigeheter v Baltic Partners Ltd [2007] UKPC 26 at [27] – [28], Sikorski v Sikorski [2012] EWHC 1613 (Ch) at [81] – [85] and Re Fi Call Ltd [2014] BCC 286 at [125].

1.3. See also; the helpful review of the authorities by the Registrar in Wootliff v Rushton-Turner & others [2018] 1 BCLC 48 at [21] – [33].

2. This approach has enabled the Court to, insofar as is possible, impose a "clean break" between "divorcing" shareholders – a sensible objective bearing in mind the cost and time involved in shareholder disputes, the overriding objective and the principle underlying the type of abuse of process explained in Johnson v Gore Wood & Co (No.1) [2002] 2 AC 1 and Aldi Stores Ltd v WSP Group Plc [2008] 1 WLR 748 – i.e. a claimant should be expected to bring all claims against the defendant at the same time unless the court directs to the contrary.

3. Two recent decisions of the Court of Appeal have, without disputing the jurisdiction of the Court referred to in paragraph 1.1 above, questioned the desirability of a petitioner vindicating corporate claims in the context of a petition under s994 of the Act.

4. In Re Hut Group Ltd [2021] EWCA Civ 904:

4.1. At [11] the Court of Appeal stressed that s996 of the Act provides a *"wide and flexible remedy"* but stressed that whether an order should be made under the section and if so, on what terms was left

to the discretion of the Court. At [66] it was stated that this includes the power to order wrongdoing directors to pay compensation to the petitioner.

4.2. At [43] – [45] – the Court of Appeal agreed with the Judge's reasons for finding that the petition was a true petition under s994 of the Act and not (as alleged by the Rs) in substance a derivative claim within the meaning of s260 of the Act. The key point for the CA was that whilst the petition alleged breaches of statutory duty by the directors it did not allege that the Company, as opposed to the petitioner, had suffered any loss. A point returned to at [63].

4.3. Referencing the judgments of Lord Scott in the Court of Final Appeal of Hong Kong in Re Chime Corporation Ltd (2004) 7 HKCFAR 546 and in the Privy Council in Gamelstaden Fastigeheter AB v Baltic Partners Ltd [2007] UKPC 26, the CA stressed that when considering whether or not a petition under s994 is in substance a derivative claim is *"highly sensitive to the precise circumstances of the case and the relief claimed".*

4.4. Unfortunately no guidance is given as to what the considerations should be when considering the *"precise circumstances"* and *"the relief claimed"*.

4.5. At [99], the CA expressed the view that a claim based upon breaches of the shareholders' agreement would be better pursued outside of the petition by way of a Part 7 claim.

5. The approach of the CA in the Hut Group was that ss994-6 are concerned with remedying the position of the unfairly prejudiced shareholder and therefore vindicating claims, founded on the allegations of unfair prejudice, that have caused the petitioner loss and not with claims that have caused the company loss but not a separate loss to the petitioner. The latter cases should be confined to the derivative claim jurisdiction. This approach is difficult to square with the decision of Vos J (as he then was) in Apex at [125] (approved by the CA including Vos LJ now as Master of the Rolls in Hut Group) where he stated: *"Relief can be granted to remedy wrongs done to the company.."*

6. In Taylor Goodchild Limited v Taylor & another [2021] EWCA Civ 1135, the CA also considered the suitability of vindicating corporate claims under s996. This was in circumstances where it was found that the claim was an abuse of process as it could and should have been brought and vindicated in the unfair prejudice proceedings which preceded the same and resulted in the defendant to the claim selling his shares in the claimant company and therefore losing an interest in 50% of the value of the claim now brought. The case considered the competing interests of protecting the processes of the court from being abused by successive litigation (as per Aldi) and the desirability of using s996 as a means of providing a complete and final remedy in relation to the issues in dispute.

7. At [30], the CA again endorsed the principles referred to in paragraph 1 above (again approving [125] of Apex) but concentrated on considering the question as to when it would be appropriate for the Court to grant relief in favour of the company in unfair prejudice proceedings (see [31] – [35] and [37]) and concluded that it should only be where the vindication of the claim and the consequential remedy is straight-forward and there would be no need to go beyond the issues to be considered on the petition (i.e. the tests of unfairness and prejudice) – for example – if a respondent would seek to raise arguments of limitation or to rely upon s1157 of the Act . Sikorski is an example of such a claim. The concern of the CA was that otherwise there was a risk of adding to the length and complexity of petitions and a circumvention of the protections imposed by Part XI of the Act for the bringing of derivative claims.

8.

8.1. What however Taylor Goodchild does show is that, if the petition does raise allegations of unfairly prejudicial conduct that also give rise to claims by the company against the respondents then, if such claims are not going to be vindicated in the petition and potentially pursued post-petition this does need to be spelt out to the Court and the other parties as early as possible so that there is no

risk of such a claim in the future being challenged as an abuse of process. There needs to be certainty either way.

8.2. The claim in Taylor Goodchild was allowed to proceed due to the unusual circumstances surrounding the determination of the petition and the late concession by the company that it would limit the claim to 50% of its value so as not to prejudice the defendant (i.e. if the claim had been vindicated in the petition then he would have had a 50% interest in the value of the same).

9. Moving forward:

9.1. The approach in Hut Group is of parties and the Courts needing to get back to the purpose behind ss994-6 of the Act – i.e. remedying unfair prejudice in the conduct of the company's affairs by reference to the position of the shareholder and concentrating on the key disputes between the parties that will impact on the determination of the petition.

9.2. A shareholder who wishes to vindicate corporate claims on behalf of the company needs to have recourse to the statutory derivative claim scheme in Part XI of the Act.

9.3. Whilst s996 of the Act is in the widest possible terms and does permit the Court to make an order requiring a respondent to remedy a wrong done to the company, it will only be appropriate in straight-forward cases such as Sikorski or where the determination of the corporate claim will not materially add anything to the issues to be determined on the petition or the costs of or time taken to determine the same.

9.4. Save in cases such as Sikorski, the primary relief sought on a petition will be solely personal to the petitioner as shareholder. The best example of this is a share purchase order;

9.5. If a petition is seeking relief in respect of wrongs done to the company, then, consideration needs to be given as to, whether or not, it is in substance a derivative claim and therefore should proceed under Part XI of the Act as opposed to a petition under s994 of the Act.

9.6. If a share purchase order is sought, then (on the basis that the petitioner is the selling party) any valuation should be on the basis that the unfair prejudice found in the case had not occurred. This is not vindicating a corporate claim against any respondent but ensuring that the petitioner is not prejudiced by the conduct complained of in the petition;

9.7. If the petitioner is seeking an order that the respondent sells their shares then ordinarily the company will be valued as is so, subject to minority discount, the petitioner pays no more than the shares are actually worth.

10.

10.1. In the circumstances of paragraph 9.7 above, those acting for the respondent will need to ensure that their client was protected from the petitioner acquiring 100% of the company on the basis of such a valuation and then bringing a corporate claim against it based on the complaints made in the petition – as per the position in Taylor Goodchild.

10.2. In a settlement agreement this would be achieved by an appropriate release and satisfaction clause binding the petitioner and the company with a consequential covenant on their part not to sue in respect of the matters complained of.

10.3. If the Court proceeded to determine the matter however the position is far from clear as to what the Court could do to protect the position of the respondent. The starting point would be there having been compliance with the approach advocated in paragraph 8.1 above such that the Court and the parties would have certainty as to, whether or not, there would be a corporate claim.

10.4.

10.4.1. If there was to be a corporate claim, then the Court would have to ensure that this potential claim was valued when valuing the company for the purposes of fixing the price to be paid for the respondent's shares such that the respondent is not prejudiced if the claim is subsequently brought against him after he has ceased to be a shareholder.

10.4.2. If the above was not possible then the Court could (as part of the wide discretion it has under s996) make a direction (analogous with that offered to and accepted by the CA in Taylor Goodchild) that the company should not be permitted to proceed with a claim against the respondent in respect of the matters complained of unless that claim was limited to recovering a % of the value of the claim such % to be the petitioner's shares in the company at the date of the petition.

10.4.3. In reality, the latter is likely to be the easiest position to achieve, the former being fraught with difficulty as it would be difficult to take account of the costs that would be incurred by the company in bringing and enforcing the claim or to factor in risks that would impact on the success of the claim and the enforcement of any judgment.

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