Neutral Citation Number: [2022] EWHC 3178 (Ch)

Claim No: CR-2022-001219

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF COINOMI LIMITED (No. 10451885)
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 21/12/2022

Before:
HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

- -

Between:

GIANNIS NTZEGKOUTANIS	**Petitioner**
- and -	
(1) GEORGIOS KIMIONIS	
(2) COINOMI LIMITED	
(3) COINOMI HOLDINGS LIMITED (CYPRUS)	
(4) COINOMI LIMITED (BVI)	**Respondents**

- -
- -

James Mather and **Max Marenbon** (instructed by **Enyo Law LLP**) for the **Petitioner**
Stephen Robins KC (instructed by **DAC Beachcroft LLP**) for the **First, Third and Fourth Respondents**

Hearing date: 23 November 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HH JUDGE KLEIN

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 a.m. on 21 December 2022.

HH Judge Klein:

1. This is the judgment following the hearing of the First Respondent's ("the respondent's") application ("the application"), by notice dated 7 November 2022, for the striking out of, or for reverse summary judgment in respect of, two sub-paragraphs of the Petitioner's ("the petitioner's") unfair prejudice petition ("the petition") under ss.994-996 of the Companies Act 2006 ("CA2006") for relief on the ground that the affairs of the Second Respondent ("Coinomi") have been conducted by the respondent in a manner that is unfairly prejudicial to the petitioner's interests as a member of Coinomi. By the two sub-paragraphs in issue, the petitioner seeks relief against the respondent, and against the Third Respondent ("Cyprus") and the Fourth Respondent ("BVI"), for what the petitioner contends was the respondent's misappropriation of Coinomi's business, which Cyprus and BVI dishonestly assisted, or in respect of which the respondent, Cyprus and BVI knowingly received Coinomi's assets. As presented at the hearing, the respondent seeks to strike out the two sub-paragraphs of the petition on the grounds that the petition discloses no reasonable grounds for seeking the relief pleaded in those two sub-paragraphs (see CPR 3.4(2)(a)) or that, to seek that relief, is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings (see CPR 3.4(2)(b)).

2. The question of principle which I have to determine is whether the petitioner ought to be permitted to proceed to trial on the petition in respect of matters, which could have been litigated against the respondent, Cyprus and BVI by way of a derivative claim, which, the respondent argued, by being pursued by way of an unfair prejudice petition, outflanked the limitations in CA2006 on making derivative claims.

3. The application notice makes clear on its face that the respondent seeks a striking out or reverse summary judgment only to the extent that the two sub-paragraphs in issue relate to him. That is probably because, although his lawyers also act for Cyprus and BVI, the petition has not been served on them and they have not submitted to jurisdiction. (As I shall mention, one of the other applications listed for hearing by me, in which Cyprus and BVI were represented, was an on-notice application by the petitioner for permission to serve the petition on Cyprus and BVI out of the jurisdiction). No particular point was made, though, by counsel at the hearing that, by the application notice, the respondent only seeks relief in relation to him. Nevertheless, any order I make ought to extend only to the respondent, and not to Cyprus or BVI, and counsel will need to consider further what, if any, effect my decision has on the petition against Cyprus and BVI.

Background

4. For the purposes of the application, the dispute between the parties (that is, the petitioner and the respondent) can be derived from their statements of case.

5. The petitioner's case is as follows.

6. Coinomi was incorporated on 28 October 2016, dissolved on 13 October 2020 and restored to the Register by ICC Judge Jones on 23 March 2022. At all times, the petitioner and the respondent were the two equal shareholders in the company, which was in fact a quasi-partnership. The respondent incorporated Cyprus on 12 October

2018 and BVI in December 2018. He is a, or the, ultimate beneficial owner of those companies.

7. From about 2013, the petitioner conceived and developed a computer-based cryptocurrency wallet application which has been "widely acclaimed and recognised as providing a unique and useful service to holders of cryptocurrency". The petitioner needed a partner (a joint venturer) with significant business experience to help market the product. He found the respondent, and they agreed that Coinomi would be incorporated as the vehicle for their joint venture, as, in fact, happened. All the petitioner's intellectual property relating to the product ("the Coinomi product") was transferred to Coinomi.

8. The respondent has been a director of Coinomi since its incorporation. As such, he has owed CA2006 duties (and equivalent common law duties) to the company, as follows:

   i) to exercise his powers only for the purposes for which they were conferred;

   ii) to act in a way that has been considered by him (in good faith) to be most likely to promote Coinomi's success for the benefit of its members as a whole;

   iii) to avoid a situation in which he has, or could have, a direct or indirect interest that conflicts, or possibly might conflict, with Coinomi's interests;

   iv) to declare any interest in any proposed transaction or arrangement with Coinomi;

   (together, the respondent's "director's duties").

9. There are two strands to the respondent's unfairly prejudicial conduct.

10. The first strand, which I will refer to as "the mismanagement allegations", relates to the way in which the respondent managed his relationship with the petitioner.

11. The respondent "engaged in repeated fits of anger and verbal abuse" towards the petitioner and "undermined him", excluding him from a Skype group chat for example. He "procured for himself practical control over [Coinomi's] financial affairs and business and failed to provide the petitioner with any material visibility over these matters or information in respect of them". He also caused filings at Companies House to the effect that the petitioner was no longer a director of Coinomi or a person with significant control of the company.

12. The second strand, which I will refer to as "the misappropriation allegations", relates to the respondent's "misappropriation of [Coinomi's] business and assets and procurement of the company's dissolution".

13. In December 2018, following its incorporation by the respondent, Cyprus applied to register the "Coinomi" trademark with the US Patent and Trademark Office, and the respondent caused the coinomi.com domain name to be transferred to Cyprus. In 2019, the respondent caused the Google Coinomi Listing and the Apple Coinomi Listing to refer to Cyprus, rather than Coinomi, as the developer of the Coinomi product (and, since then, those listings have been further altered to show BVI as the developer of the Coinomi product). The respondent also caused the intellectual property in the Coinomi

product source code to be assigned to Cyprus, and, in 2020, Cyprus applied to the US Patent and Trademarks Office to register Coinomi's logo.

14. In acting in this way, the respondent has been in breach of his director's duties, in particular by procuring or permitting, without the petitioner's knowledge or approval:

    i) the misappropriation, or transfer, of particular assets of Coinomi for no consideration, to Cyprus and/or BVI;

    ii) the misappropriation, or transfer, of effectively the whole of Coinomi's business and assets, for no consideration, to Cyprus and/or BVI;

    iii) the misappropriation, or transfer, of the corporate opportunity associated with the Coinomi product, and/or the joint venture, away from Coinomi, for no consideration, to Cyprus and/or BVI.

15. Furthermore, the respondent has retained, directly or indirectly, Coinomi's cryptocurrency which, in April 2022, may have been worth £3.5 million, and he may have retained further cryptocurrency, with a value of £1.4 million in April 2022, which he (the respondent) claims was stolen in June 2018.

16. Further, in the light of the misappropriation allegations:

> "…Cyprus and…BVI are liable to [Coinomi] as knowing recipients in respect of such of its assets as they received and hold all such assets and their proceeds on constructive trust for Coinomi.
>
> Further or alternatively,…Cyprus and…BVI dishonestly assisted [the respondent's] breaches of fiduciary duty to [Coinomi] and are liable to the company on that basis."

17. As a result of the mismanagement allegations and the misappropriation allegations, the petitioner pleads as follows, in para.32 of the petition:

> "The petitioner therefore prays as follows:
>
> 32.1. for an order that [the respondent] do sell his shares in [Coinomi] to the petitioner, at a valuation reflecting the losses caused to [Coinomi] by his conduct;
>
> 32.2. for an order that the [respondent, Cyprus and BVI], as applicable, do account and/or pay damages to, and/or compensate [Coinomi] in respect of their gains and the company's losses resulting from the conduct complained of in this Petition;
>
> 32.3. for declarations of constructive trust in favour of [Coinomi] in respect of such property in the hands of the [respondent, Cyprus and BVI] as properly belongs to the company;

> 32.4. in the alternative and to the extent necessary, the petitioner seeks authorisation to pursue such litigation on behalf of [Coinomi] as may be necessary to vindicate its interests and obtain compensation and/or other remedies pursuant to the conduct complained of in this petition; and
>
> 32.5. for such other order as the Court thinks just."

18. I need to make two points.

19. First, the two, and the only two, sub-paragraphs of the petition which the respondent applies to have struck out, or in respect of which he seeks reverse summary judgment, are paras.32.2 and 32.3 above. I will refer to the relief sought by para.32.2 of the petition as "the compensation claim" and I will refer to the relief sought by para.32.3 as "the constructive trust claim".

20. Secondly, as counsel for the petitioner, Mr Mather, explained to me at the hearing, and as I read para.32, the relief sought by the petitioner, by paras.32.1-32.3, is cumulative. On a natural reading of those sub-paragraphs, assuming that the petitioner contends that the value of the respondent's shares in Coinomi is nominal (because, on the petitioner's case, the respondent has asset-stripped the company), the petitioner effectively wants (i) to have Coinomi reconstituted as if the misappropriation allegations (assuming they are made out) had never occurred and (ii) to have sole control of the company for a nominal payment for the respondent's shares, even though the petitioner's own case is that they were equal shareholders in the company.

21. Mr Mather explained to me at the hearing that this reading of paras.32.1-32.3 is to mischaracterise what the petitioner wants, because, in fact, he only wants 50% of the value of Coinomi (although, at another point in his oral submissions, Mr Mather explained to me that the petitioner wants to carry on Coinomi's business).

22. The respondent's case is as follows.

23. He, in fact, conceived the Coinomi product and the petitioner was thereafter employed as a software contractor to help develop the product. The business (including all the related assets) has belonged to him (the respondent) and then to his BVI corporate vehicle, Dollzen Ltd ("Dollzen"), and now belongs to Cyprus and BVI. Coinomi has only ever acted as Dollzen's agent.

24. The respondent denies that the mismanagement allegations are true, or, to the extent that they are true (so far as they relate to his control over Coinomi's affairs), that they amount to unfairly prejudicial conduct.

25. So far as the misappropriation allegations are concerned, the respondent denies them, and he pleads that:

> "…the Coinomi business never belonged to Coinomi...Rather, it belonged initially to [the respondent] personally and subsequently to Dollzen, which retained Coinomi to act as its agent…The transfer of Dollzen's assets to…Cyprus did not involve any misappropriation of Coinomi…property. Rather, it

> was part of a restructuring of the business which was ultimately beneficially owned by [the respondent]. Since Dollzen did not have any creditors or any shareholders other than [the respondent], it was not improper for him to restructure his business by transferring Dollzen's property to…Cyprus in this way."

26. At the time when Coinomi was dissolved, it owned minimal cryptocurrency, and the petitioner's share was set off against a debt he owed to the company. Further, although cryptocurrency was stolen in June 2018, most belonged to Dollzen, and the respondent was unable to track down the stolen currency.

27. The respondent therefore disputes the compensation claim and the constructive trust claim (and he denies that the petitioner is entitled to any relief).

28. This is a convenient place to make three further points about the petitioner's case.

29. Mr Mather accepted that parts of the petition (presumably the misappropriation allegations) in respect of which the compensation claim and the constructive trust claim were made could be litigated by way of a derivative claim.

30. Mr Mather also accepted, in response to a question from me, that, if the misappropriation allegations had been pleaded in a derivative claim, the pleading of them would have been different to the way they have been pleaded in the petition.

31. Mr Mather accepted, thirdly, that any valuation for, say, a buy-out order (that is, an order, under s.996(2)(e) CA2006, for the purchase of the shares of any member of Coinomi (in particular, the petitioner) by the other member (in particular, the respondent), or by the company itself), following a decision that the misappropriation allegations are established, but on the footing that those matters had never occurred, may not need to take into account precisely the loss to Coinomi arising from the misappropriation, or the gain made by the respondent, Cyprus or BVI.

32. Finally by way of background, when considering what the petitioner seeks by the petition, or at least by the compensation claim and the constructive trust claim, it may be instructive for me to refer to what the petitioner said, albeit in a different context, in para.63 of his second witness statement made on 7 October 2022:

> "…[The respondent] should be ordered to provide…information for purposes of the location and preservation of assets that are central to these proceedings and so that assessment can be made of whether it is appropriate to seek further relief from the Court. **It cannot be just that I should be required to litigate the issue as to the Company's ownership of those assets to trial** in ignorance of what has become of them, particularly in view of the plainly unmeritorious nature of the case that [the respondent] is pursuing" (emphasis added).

33. As I have mentioned, Mr Mather (together with Mr Marenbon) represented the petitioner. Mr Robins KC represented the respondent. I am grateful to them for all their help.

Unfair prejudice petitions

34. When considering the authorities to which I am about to turn, I have found it helpful to have in mind the statutory basis for unfair prejudice petitions, which I now set out.

35. S.994 CA2006 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."

36. Further, s.996 CA2006 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 - …
>
> (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;…
>
> (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" (emphasis added).

The authorities

37. Mr Robins, in particular, but also Mr Mather, took me to a considerable number of authorities beginning with *Foss v. Harbottle* (1843) 2 Hare 461 (and the principle that a company has its own legal personality and is the proper claimant to sue for wrongs done to it) and *Salomon v. Salomon & Co Ltd* [1897] AC 22 (also on corporate personality), and to authorities from England, Northern Ireland, Scotland, Jersey, the Isle of Man, Malaysia, Hong Kong and the British Virgin Islands. I have considered all those authorities (and all of counsels' submissions). As two recent Court of Appeal authorities demonstrate, Lord Scott has made a significant contribution to the jurisprudence on the question of principle I have to determine, so far as it applies in this jurisdiction, in a concurring judgment in *Re Chime Corpn Ltd* [2004] 3 HKLRD 922 and in a sole judgment of the Privy Council in *Gamlestaden Fastigheter AB v. Baltic Partners Ltd* [2007] BCC 272. In this section of the judgment, I will therefore discuss only two key cases preceding *Chime*, before turning to *Chime* itself, as well as to

Gamlestaden, before then turning to later cases from this jurisdiction and two key cases from other jurisdictions (one from Hong Kong and the other from the British Virgin Islands).

38. I consider, first, *Re Charnley Davies Ltd (No.2)* [1990] BCC 605. In that case, Millett J had to decide whether the administrator of an insolvent company had managed the company in a manner which was unfairly prejudicial to the company, in selling the company's business at a gross undervalue. By the claim, the creditor claimants sought payment of compensation to the company. Millett J identified one of the issues he had to decide (see pp.606-607) as:

> "whether as a matter of law a negligent failure on the part of an administrator to take reasonable steps to obtain a proper price for the company's undertaking can by itself constitute conduct which is "unfairly prejudicial to the interests of (the) creditors" of the company."

39. On that question, Millett J said, at pp.623-626:

> "[Because of the decisions already reached] it [is] unnecessary to decide the remaining question, viz. whether a sale of the company's assets by an administrator at a negligent undervalue is sufficient without more to establish a claim to relief under s.27. But the question has been fully argued, and in deference to the submissions of counsel I will endeavour to answer it. In my judgment, it is not.
>
> Section 27(1) of the Act reads as follows:
>
> > "At any time when an administration order is in force, a creditor or member of the company may apply to the court by petition for an order under this section on the ground –
> >
> > (a) that the company's affairs, business and property are being or have been managed by the administrator in a manner which is unfairly prejudicial to the interests of its creditors or members generally, or of some part of its creditors or members (including at least himself), or
> >
> > (b) that any actual or proposed act or omission of the administrator is or would be so prejudicial."
>
> …I…reject Mr Oliver's submissions, which effectively equated "prejudice" with "detriment" and "unfair" with "tortious", and which ignored the fact that s.27, like s.459 from which it is obviously derived, does not speak of "unfair prejudice" but of management of the company's affairs "in a manner which is unfairly prejudicial to the interests" of creditors or members. It is directed to the manner in which the administrator has managed the company's affairs, not to specific breaches of duty giving rise to financial loss, save in so far as these may be evidence or

instances of the unfairly prejudicial manner in which he has managed its affairs.

…In *Re a Company No.008699 of 1985* (1986) 2 BCC 99,024 Hoffmann J said at p.99,029:

> "The concept of unfairness which was chosen by Parliament as the basis of the jurisdiction under s.459 in my judgment cuts across the distinction between acts which do or do not infringe the rights attached to the shares by the constitution of the company. Mr Potts referred me to the case *of Re Carrington Viyella plc* (1983) 1 BCC 98,951 in which Vinelott J said that (at p.98,959),
>
> > "to bring a petition under s.459 the petitioner must show not simply that his rights as a shareholder have been infringed but that the affairs of the company have been conducted in a way unfairly prejudicial to some part of the members.""

I respectfully agree. An allegation that the acts complained of are unlawful or infringe the petitioner's legal rights is not a necessary averment in a s.27 petition. In my judgment it is not a sufficient averment either. The petitioner must allege and prove that they are evidence or instances of the management of the company's affairs by the administrator in a manner which is unfairly prejudicial to the petitioner's interests. Unlawful conduct may be relied upon for this purpose, and its unlawfulness may have a significant probative value, but it is not the essential factor on which the petitioner's cause of action depends.

Mr Oliver asked: "If misconduct in the management of the company's affairs does not without more constitute unfairly prejudicial management, what extra ingredient is required?" In my judgment the distinction between misconduct and unfairly prejudicial management does not lie in the particular acts or omissions of which complaint is made, **but in the nature of the complaint and the remedy necessary to meet it. It is a matter of perspective**. The metaphor is not a supermarket trolley but a hologram. **If the whole gist of the complaint lies in the unlawfulness of the acts or omissions complained of, so that it may be adequately redressed by the remedy provided by law for the wrong, the complaint is one of misconduct simpliciter**. There is no need to assume the burden of alleging and proving that the acts or omissions complained of evidence or constitute unfairly prejudicial management of the company's affairs. It is otherwise if the unlawfulness of the acts or omissions complained of is not the whole gist of the complaint, so that it would not be adequately redressed by the remedy provided by law for the wrong. In such a case it is necessary to assume that

burden, but it is no longer necessary to establish that the acts or omissions in question were unlawful, and a much wider remedy may be sought.

A good illustration of the distinction is provided by *Re a Company No. 5287/85* (1985) 1 BCC 99,586. In that case the petitioners, who were minority shareholders, alleged that the respondent, who was the majority shareholder, had disposed of the company's assets in breach of his fiduciary duty to the company and in a manner which was unfairly prejudicial to the interests of the petitioner. Hoffmann J refused to strike out the petition, holding that the fact that the petitioners could have brought a derivative action did not prevent them seeking relief under s.459.

Again, I respectfully agree. The very same facts may well found either a derivative action or a s.459 petition. **But that should not disguise the fact that the nature of the complaint and the appropriate relief is different in the two cases. Had the petitioners' true complaint been of the unlawfulness of the respondent's conduct, so that it would be met by an order for restitution, then a derivative action would have been appropriate and a s.459 petition would not. But that was not the true nature of the petitioners' complaint. They did not rely on the unlawfulness of the respondent's conduct to found their cause of action; and they would not have been content with an order that the respondent make restitution to the company. They relied on the respondent's unlawful conduct as evidence of the manner in which he had conducted the company's affairs for his own benefit and in disregard of their interests as minority shareholders; and they wanted to be bought out. They wanted relief from mismanagement, not a remedy for misconduct.**

When the petitioners launched the present proceedings, they wrongly believed that Mr Richmond was managing the affairs of the company in a manner which disregarded their interests and those of the creditors generally. That was a perfectly proper complaint to bring under s.27. Long before the case came to trial, however, it had become a simple action for professional negligence and nothing more. That, if established, would amount to misconduct; but it would neither constitute nor evidence unfairly prejudicial management. In my judgment it would be a misuse of language to describe an administrator who has managed the company's affairs fairly and impartially and with a proper regard for the interests of all the creditors (and members where necessary), conscientiously endeavouring to do his best for them, but who has through oversight or inadvertence fallen below the standards of a reasonably competent insolvency practitioner in the carrying out of some particular transaction, as

> having managed the affairs of the company in a manner which is unfairly prejudicial to the creditors.
>
> In my judgment, the proper course to follow in the present case was to have the administration order discharged, the company put into compulsory liquidation, a person other than Mr Richmond appointed liquidator, and the claim brought against Mr Richmond by the liquidator under s.212 of the Act…" (emphasis added).

40. I derive the following point of principle from this case. "Misconduct" allegations, such as allegations of breach of duty by a respondent, are suitable for determination as part of an unfair prejudice petition (and similar petitions) to the extent that the allegations are made to establish unfairly prejudicial conduct by the respondent in question. To the extent that such allegations are made as part and parcel of a claim for a direct remedy for them which could be obtained in a derivative claim, such allegations ought to be pursued by way of derivative claim. Further, to determine whether such allegations may be made as part of an unfair prejudice petition, it is necessary to look not just at the allegations themselves but also at the relief sought.

41. The second point I should make about this case relates to Millett J's response to Hoffmann J's decision in *Re a company (No.005287 of 1985)* [1986] 1 WLR 281. As Mr Robins explained, what was before Hoffmann J was an application to strike out an unfair prejudice petition on the ground that the applicant (a respondent to the petition) was no longer a shareholder. Further, as Mr Robins also explained, the principal relief sought by the petition was a buy-out order (see p.282B of the report). I think Mr Robins was right to say that, against that background, Millett J in *Charnley Davies* endorsed Hoffmann J's approach because Millett J took the view that the relief which the petitioner sought in the earlier case (a buy-out order) was a remedy which was quintessentially an unfair prejudice petition remedy and because Millett J also took the view that the "misconduct" allegations were made for the purpose of establishing unfair prejudice as a step to obtaining the buy-out order the petitioner sought. In other words, applying the approach he had advocated in *Charnley Davies* (that is, a focus on the relief sought by an unfair prejudice petition), in that case Millett J took the view that the earlier case fell within the category of cases which ought to proceed as an unfair prejudice petition.

42. I consider *Chime* next.

43. The facts of the case were, as explained in the headnote of the report:

> "W was the widow of H and a director of C, a company. H had been kidnapped and was presumed to be dead. Ps were the administrators of H's estate. C was a company which had been controlled by H. Ps presented an unfair prejudice conduct petition under s.168A (unfair prejudice petition) of the Companies Ordinance (Cap.32) seeking: (i) the setting-aside of the allotment of shares in C made to W after H's abduction; and (ii) the repayment of dividends paid on those shares. Subsequently, Ps sought to amend the petition to allege that W had improperly procured C to advance loans totalling

> approximately $4.5 billion to a company in which she was beneficially interested and to seek repayment of the loan to C. The Court of Appeal allowed the amendment to be made and W appealed to the [Hong Kong] Court of Final Appeal. At issue was whether there was jurisdiction to make on a s.168A petition, an order for the payment of damages or compensation, or for the grant of restitution, to the company itself."

44. In refusing to permit the amendment, the Court explained that there are two types of "jurisdiction"; what Bokhary PJ referred to, at [9], as "jurisdiction in the theoretical sense" ("theoretical jurisdiction") and "jurisdiction in the practical sense" ("practical jurisdiction"). When a court considers whether it has theoretical jurisdiction, it is concerned with whether it is capable of dealing with a case. When a court considers practical jurisdiction, it is concerned with the circumstances in which it is proper for the court to determine a case or make a particular order.

45. Bokhary PJ said:

> "27. …Is there jurisdiction to make, on an unfair prejudice petition presented by a shareholder, an order for the payment of damages or compensation, or for the grant of restitution, to the company itself? I would not say that there is no such jurisdiction in the theoretical sense of the type of case that the court is capable of entertaining. And even in the practical sense of the circumstances in which it is proper for the court to entertain the case or to make a particular order, I stop short of saying that there is absolutely no such jurisdiction. I would not rule out the possibility of circumstances in which it can be seen that such an order could properly be made. **But such circumstances, even if they can arise, would in any case of complexity be rare and exceptional**" (emphasis added)

46. Delivering his concurring judgment (a judgment with which, in turn, the other judges agreed), Lord Scott NPJ formulated the question for the Court thus, at [35]:

> "…The issue in this case is not, I think, whether the court, in exercise of its s.168A jurisdiction, can order a respondent to make a monetary payment, or to make some other form of restitution, to the company, but, rather, whether the court can, on a s.168A petition, deal with and dispose of a cause of action for damages or restitution that is vested in the company and, if it can do so, in what circumstances it should do so."

47. In reaching his decision, Lord Scott acknowledged the breadth of the court's remedial powers under s.996 CA2006 (see [39]), but he too distinguished between a court's theoretical jurisdiction and its practical jurisdiction (see [41]).

48. Having considered *Re Fahey*[1] and *Clark v. Cutland*[2] (two cases Mr Mather referred me to) amongst other cases, Lord Scott explained that, whilst the court did have theoretical jurisdiction to try the issue the petitioners sought to raise by way of amendment, the real issue was whether the court had practical jurisdiction (that is, whether it ought) to do so (see [49]). When concluding that the court did not have (or, perhaps more properly, should not accept) practical jurisdiction, Lord Scott noted that an independent board of directors of the company in that case might have objected to the continuation of an ordinary claim alleging that the widow had acted improperly (see [53]). Lord Scott also pointed out that, as a remedy in the unfair prejudice petition proceedings, the court could permit a derivative claim to be brought, or, if a concurrent derivative claim was brought, could order both the petition and the claim to be tried together (see [61]). Lord Scott continued, at [62]-[63]:

> "As a general rule, in my opinion, the court should not in a s.168A petition make an order for payment to be made by a respondent director to the company unless the order corresponds with the order to which the company would have been entitled had the allegations in question been successfully prosecuted in an action by the company (or in a derivative action in the name of the company). If the order does not so correspond then, either the company will have received less than it is entitled to, in which case it will be entitled to relitigate the issue in an action against the director for the balance, or the company will have received more than it was entitled to, in which case a clear injustice to the director will have been perpetrated. Nor, in my opinion, should the court allow a prayer in the petition for payment by the respondent director of compensation or of restitution to the company to stand unless it is clear at the pleading stage that a determination of the amount, if any, of the director's liability at law to the company can conveniently be dealt with in the hearing of the petition. In any other case, in my opinion, if the allegations against the director are proper to be relied on as evidence of unfairly prejudicial conduct, the appropriate relief to be sought would be an order under s.168A(2)(b) for a derivative action to be brought for the recovery of the sum legally due. It would be proper for the company to express its views as to whether it would be in its interests for such an action to be brought.
>
> Moreover, the use of a s.168A petition in order to circumvent the rule in *Foss v. Harbottle* (1843) 2 Hare 461 in a case where the nature of the complaint is misconduct rather than mismanagement is, in my opinion, an abuse of process. In *Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2)*

[1] *Charnley Davies* was not referred to by the Judge in *Re Fahey*, which, in any event, was a case which was decided before *Chime* where the possibility that a court might need to consider, in the present context, the distinction between its theoretical jurisdiction and its practical jurisdiction (which I discuss below) became evident. Further, *Re Fahey* was a decision which lent heavily on *Re a company (No.005287 of 1985)*.

[2] Mr Mather accepted that, in *Clark*, the court did not actually consider whether there is any limitation on the court's practical jurisdiction in respect of unfair prejudice petitions.

> [1982] 1 Ch 204, a personal action by a shareholder against the allegedly delinquent directors for the diminution in the value of the shareholder's shares attributable, it was said, to the loss that had been caused to the company by the alleged wrongdoing, had been commenced. In the personal action the same allegations were made against the directors as were made in the accompanying derivative action brought by the same shareholder in the name of the company to recover for the company the amount of its loss. The Court of Appeal said this, at pp.223-224:
>
> > "The plaintiffs in this action were never concerned to recover in the personal action. The plaintiffs were only interested in the personal action as a means of circumventing the rule in *Foss v. Harbottle*. The plaintiffs succeeded. A personal action would subvert the rule in *Foss v. Harbottle* and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity."
>
> In *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at p.18, Hoffmann LJ said that:
>
> > "Enabling the court in an appropriate case to outflank the rule in *Foss v. Harbottle* was one of the purposes of [s.994]."
>
> The outflanking would not, in my opinion, be appropriate unless the criterion suggested in para.62 were met."

49. I derive the following point of principle from *Chime*. It is a rare and exceptional case which the court will permit to proceed by way of an unfair prejudice petition when it would otherwise be brought by way of a derivative claim, because to permit the case to proceed by way of an unfair prejudice petition subverts the regime (now the statutory regime) which imposes limitations on making derivative claims. In deciding whether the case before it is exceptional, the court will focus on the relief claimed and ought only to permit the case for that relief to proceed by way of an unfair prejudice petition if, at the earliest stage of the proceedings, the court is satisfied at least that that relief can be conveniently adjudicated on as part of the unfair prejudice petition proceedings. If the court is not so satisfied, to the extent of the relief in issue, the case will be an abuse of process and ought not to be permitted to proceed.

50. As I have said, Lord Scott also delivered the Privy Council's decision in *Gamlestaden*. The background to the case, so far as it is relevant, can be derived from the following extract of the headnote:

> "Gamlestaden brought an application under art.141 of the Companies (Jersey) Law 1991 alleging that Baltic's affairs had been conducted in a manner that was unfairly prejudicial to Gamlestaden's interests. In particular it relied on mismanagement by Baltic's directors in authorising the

> DM112.5 million withdrawal from SPK and their authorising the revaluation of Sprinkenhof made without the required refurbishment. Various other acts of mismanagement by the directors were also relied on by Gamlestaden. The [main] relief sought [was for] an order for damages for breach of duty and alternatively an order authorising Gamlestaden to continue derivative proceedings which had stood adjourned on the basis that the claim could not be brought within any of the exceptions to the rule in *Foss v. Harbottle* (1843) 2 Hare 461..."

The issue, however, for the Privy Council was whether the petition should be struck out because the company was so insolvent that, whatever remedy the petitioner obtained, the company would remain insolvent, so that the proceedings were of no benefit to the petitioner as a member of the company, although they were of benefit to it as a creditor.

51. Lord Scott said, at [27]-[28]:

> "The first question to be addressed…is whether an order for payment of damages to the company whose affairs have allegedly been conducted in an unfairly prejudicial manner can be sought and made in an unfair prejudice application. Another way of putting the question is whether a cause of action allegedly vested in the company can be prosecuted to judgment in an unfair prejudice application. It would, of course, always be essential for the parties allegedly liable on the cause of action to be respondents to the proceedings. But that is not a problem in the present case.
>
> There is nothing in the wide language of art.143(1) to suggest a limitation that would exclude the seeking or making of such an order: the court "may make such order as it thinks fit for giving relief in respect of the matters complained of." The point was raised and considered by the Hong Kong Court of Final Appeal (the CFA) in *Re Chime Corpn Ltd* (2004) 7 HKCFAR 546. **An unfair prejudice application had been made in respect of *Chime* and one of the issues was whether the court had power on such an application to make an order for the payment of damages or compensation to the company**. **The CFA held that the court did have power to make such an order** (see the judgment given by Lord Scott of Foscote at [39]-[49], concurred in by the other members of the court, and the cases there cited). **No reason has been advanced to their Lordships on this appeal why the decision in *Chime* should not be followed. Accordingly, no objection to Gamlestaden's prayer in its art.141 application for an order that the directors pay damages to Baltic for breach of duty can be taken at this strike-out stage**" (emphasis added).

52. I agree with Mr Robins that, because of Lord Scott's reference to his own decision in *Chime*, in this part of the Privy Council's decision Lord Scott was considering the

court's theoretical jurisdiction, and was not considering the court's practical jurisdiction.

53. *Waddington Ltd v. Chan Chun Hoo Thomas* [2009] 2 BCLC 82, another decision of the Hong Kong Court of Final Appeal, was a derivative claim, not an unfair prejudice petition. The form of the proceedings was objected to by the appellant who suggested that an unfair prejudice petition was the right form of proceedings. Lord Millett NPJ rejected that contention, at [77], saying as follows:

> "…Shareholders may bring proceedings under s.168A of the Companies Ordinance if the affairs of a subsidiary are being conducted in a manner which is prejudicial to their interests; and for this purpose the affairs of the subsidiary can also be regarded as the affairs of the parent company: see *Re Citybranch Group Ltd* [2004] EWCA Civ 815, [2004] 4 All ER 735, [2005] 1 WLR 3505. But while there is some overlap between such proceedings and the derivative action they serve essentially different functions. **Unfair prejudice proceedings are concerned to bring mismanagement to an end; derivative actions are concerned to provide a remedy for misconduct**: see *Re Charnley Davies Ltd (No.2)* [1990] BCLC 760; *Re Chime Corpn Ltd* (2004) 7 HKCFAR 546. **While the court may have jurisdiction in the strict sense on a petition under s.168A to order payment of compensation to the company, the derivative action is the proper vehicle for obtaining such relief where the plaintiff's complaint is of misconduct rather than mismanagement**: see *Re Chime Corpn Ltd* (2004) 7 HKCFAR 546 at 571" (emphasis added).

54. It may be that Lord Millett's distinction between cases suitable to proceed by way of an unfair prejudice petition and those suitable to proceed by way of a derivative claim was more "bright line" than Lord Scott's had been in *Chime* (and closer to his own decision in *Charnley Davies*), but to similar effect, in *Apex Global Management v. Fi Call* [2014] BCC 286, Vos J said of *Chime*, at [119]:

> "…The essence of the decision was that, where the central claim was an action by the company to be compensated for a director's breach, a minority shareholder should not use s.994 as a way of circumventing the rule in *Foss v. Harbottle* (1843) 2 Hare 461…"

55. However, Vos J continued, at [125]:

> "In my judgment, these authorities [(that is, the authorities the Judge reviewed, including *Chime*)] all speak with one voice. They show that ss.994-996 provide a wide and flexible remedy where the affairs of a company have been conducted in a manner that is unfairly prejudicial to the interests of some or all of its members. A s.994 petition is appropriate where, for whatever reasons, the trust and confidence of the parties to a quasi-partnership has broken down. Relief can be granted to remedy

> wrongs done to the company, and in such a situation the alleged wrongdoers must be made parties to the petition. Non-members of a company who are alleged to have been responsible for such conduct can be joined as respondents, and, in an appropriate case, such non-members can be made primarily or secondarily liable to buy the petitioners' shares. Artificial limitations should not be introduced to reduce the effective nature of the remedy introduced by ss.994-996."

56. The circumstances of that case were different to those of the present case. In that case, the "third parties" might, in fact, have been responsible for the breakdown of trust and confidence in the quasi-partnership and might, in truth, have been, along with the owner of the petitioner, the quasi-partners. In short, they might have been the cause of the unfairly prejudicial conduct. The same cannot be said, in truth, of Cyprus or BVI, which, on the petitioner's case, are effectively the beneficiaries of the respondent's misconduct.

57. This is a convenient point to deal with an argument Mr Robins made in relation to *Chime*.

58. Mr Robins argued that, had the position in Hong Kong when *Chime* was decided been as it is in this jurisdiction under CA2006, Lord Scott's distinction between those cases in which the court ought to accept practical jurisdiction, and those which it ought not, would have been more bright line, with the distinction being between mismanagement claims (where practical jurisdiction should be accepted) and misconduct claims (when it should not). In support of his argument, he made two points. He said, first, that, when *Chime* was decided, in Hong Kong there was no requirement to obtain the court's permission to continue a derivative claim (as there is under CA2006) and there were no criteria which the court expressly had to take into account by statute in deciding whether to give permission. He said, secondly, that, unlike in Hong Kong when *Chime* was decided, under CA2006 all claims which are derivative claims can only be brought in accordance with ss.260-263 CA2006 (so far as is relevant) or where the court has made an order under s.996(2)(c) CA2006 following the final determination of an unfair prejudice petition (see s.260(2) CA2006).

59. It is helpful to have in mind the relevant sections of CA2006, relating to derivative claims, when considering Mr Robins' argument.

60. S.260 CA2006 provides:

> "(1) This Chapter applies to proceedings in England and Wales or Northern Ireland by a member of a company -
>
> (a) in respect of **a cause of action vested in the company**, and
>
> (b) seeking relief on behalf of the company.
>
> This is referred to in this Chapter as a "derivative claim" .
>
> (2) A derivative claim may only be brought -

(a) **under this Chapter**, or

(b) **in pursuance of an order of the court in proceedings under section 994** (proceedings for protection of members against unfair prejudice)…" (emphasis added).

61. S.261 CA2006 provides:

"(1) A member of a company who brings a derivative claim under this Chapter must apply to the court for permission (in Northern Ireland, leave) to continue it…

(4) [If the permission application proceeds to a hearing then] [o]n hearing the application, the court may -

(a) give permission (or leave) to continue the claim on such terms as it thinks fit,

(b) refuse permission (or leave) and dismiss the claim, or

(c) adjourn the proceedings on the application and give such directions as it thinks fit."

62. S.263 CA2006 provides:

"(1) The following provisions have effect where a member of a company applies for permission (in Northern Ireland, leave) under section 261 or 262.

(2) Permission (or leave) must be refused if the court is satisfied -

(a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or…

(c) where the cause of action arises from an act or omission that has already occurred, that the act or omission -

(i) was authorised by the company before it occurred, or

(ii) has been ratified by the company since it occurred.

(3) In considering whether to give permission (or leave) the court must take into account, in particular -

(a) whether the member is acting in good faith in seeking to continue the claim;

(b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;…

> (d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;
>
> (e) whether the company has decided not to pursue the claim;
>
> (f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.
>
> (4) In considering whether to give permission (or leave) the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter…"

63. I am doubtful that either of Mr Robins' points is sufficiently strong to justify the conclusion that his argument is right and, for that reason, I will proceed, most favourably to the petitioner, on the basis that *Chime* would be decided now as it was in fact decided.

64. I accept that, in support of his first point (that the permission stage, now required under CA2006, for the continuation of derivative claims would have caused Lord Scott to make a brighter-line distinction between those cases in which the courts ought, and those in which they ought not, to accept practical jurisdiction), Mr Robins can point to the unreported decision of Bannister J, in the Eastern Caribbean Supreme Court, in *Gray v. Leddra*, where the Judge said, of *Chime*, at [8]-[9]:

> "I get very little assistance from this authority. It is unclear whether Hong Kong company law, like BVI company law now, then required the permission of the Court before a derivative claim could be brought. The fact that the point was not mentioned suggests that it did not, but I do not know if in fact that was so. Secondly, and with all appropriate humility, Lord Scott's treatment of conflicting authority is unsatisfactory. He does not convincingly explain, for example, how the decision of Hoffmann J in *In re a Company (No.005287 of 1985)* can sit with the decision of Millett J in *Re Charnley Davies Ltd* and his suggested solution, that if quantum mirrors the company's claim and can conveniently be established at trial, disposes of the difficulty as a matter of pure practicality rather than of principle. The case is not cited in Gore Browne on Companies, presumably because now that United Kingdom company law requires permission before derivative proceedings may be brought, which was not the position at the time when the authorities upon which Mr Cruickshank, who appeared for Mr Gray, relied were decided, it is not considered to be of any relevance.
>
> In my judgment, the position here in the BVI is clear. A derivative action requires permission under section 184C. In considering whether to grant permission, the Court here is

> mandated to take into account a number of important considerations. The Court may not give permission unless it is satisfied that the company itself does not intend to make the claim and that it is in the interests of the company that conduct of the proceedings should not be left to the company or to a majority of its board or of its members. These conditions are of so stringent a nature that in my judgment it is an abuse of the process to attempt to mount a derivative claim without the consent of the Court under section 184C. If that permission is granted, then it seems to me that it is a matter of case management whether the derivative claim is prosecuted as part of unfair prejudice proceedings or is tried together with them or separately, but to attempt to bring such a claim without permission is, in my judgment, an abuse."

65. I put to one side Bannister J's point that *Re a company (No.005287 of 1985)* and *Charnley Davies* do not sit together well, because, as I hope I have shown (or, rather, as Millett J showed), they sit together perfectly well.

66. The difficulty with Mr Robins' first point and Bannister J's analysis may be that, as counsel explained to me, even at common law, if invited to do so the court had to consider, at a preliminary stage, whether a claimant ought to be permitted to continue their derivative claim. For present purposes, as counsel explained to me, the significant change that ss.261, 263 CA2006 brought about was that a requirement for the claimant to apply for the court's permission to continue their claim ("the permission stage") was put on a formalised, and statutory, footing.[3] Lord Scott cannot have not had in mind the common law position when he delivered his judgment in *Chime*. (Indeed, to the contrary, see Lord Scott's point that an independent board of directors of the company in that case might have objected to the continuation of an ordinary claim alleging that the widow had acted improperly. A factor of this sort is a key factor for the court to consider at the permission stage.) (I can add that, since *Leddra*, the Court of Appeal has twice made detailed reference to *Chime*, with approval, or at least without criticism, as I set out below).

67. The difficulty with Mr Robins' second point may be that, because the court has theoretical jurisdiction to entertain, as part of an unfair prejudice petition, a claim which could be pleaded as a derivative claim, it may be said that a petitioner thereby, in a sense, has their own "cause of action" which they can pursue (subject to the court accepting practical jurisdiction). So, to that extent, s.260 CA2006 is not engaged, because the petitioner is not seeking to prosecute a cause of action vested in the company, even though a wholly equivalent claim could be formulated as a derivative claim. To put the same point another way, a petitioner making a claim which could be pleaded as a derivative claim, makes it, in a case such as this, not relying on the company's cause of action but on their statutory right, given by s.994 CA2006, to bring a petition for unfairly prejudicial conduct. Further, Mr Robins' argument is not obviously consistent with David Richards LJ's statement in *Re The Hut Group Ltd*, which I quote below, that as "regards the proper relationship between petitions under s.994 and derivative actions, consideration of the authorities suggests that it is highly

[3] Some support for this may be found in Lewison J's judgment in *Iesini v. Westrip Holdings Ltd* [2010] BCC 420 at [73]-[78].

sensitive to the precise circumstances of the case **and the relief claimed**" (emphasis added). On Mr Robins' argument, a case would either be a derivative claim or it would not, whatever the remedy sought. In any event, Mr Mather pointed out, correctly, that Mr Robins' point was only raised by Mr Robins in reply at the hearing, so that he (Mr Mather) was not in a position to deal with it. For this reason alone, I will not base my decision on Mr Robins' second point.

68. I mentioned two recent Court of Appeal cases in which *Chime* was considered. I need to take them into account, and I turn to them now.

69. The first is *Re The Hut Group Ltd* [2021] BCC 970. At first instance, the judge (HH Judge Eyre QC) rejected the contention that the complaints made by the petitioner, that the company's directors had breached their duties to the company, ought to have been pursued by way of a derivative claim. There was no appeal from that part of the Judge's decision. However, David Richards LJ, in the Court of Appeal, noted that the Judge had said the following on this issue:

> "In my judgement the Petitioner is correct to say that the claim is properly to be seen as one seeking redress for unfair prejudice. The complaint is in respect of the conduct of the affairs of the First Respondent and the effect of that conduct on the Petitioner's interests as a shareholder. The fact that the allegedly wrongful conduct includes breaches of duties which the Second-Fifteenth Respondents owed as directors does not without more mean that the claim is a derivative claim. Instead the nature of the claim must be considered. Subject to consideration of paragraph 4 of the prayer the Petition is not seeking to recover damages for a loss suffered by the First Respondent and there is no suggestion that the First Respondent has suffered loss. It is clear when the body of the Petition is considered that the complaint being made relates to the impact of the alleged actions on the Petitioner as shareholder rather than the impact on the First Respondent. Similarly, when regard is had to the relief being sought the primary relief consists of a number of orders against the First Respondent. Such relief patently is not relief which could have been sought in a derivative claim…"

70. David Richards LJ continued, at [45]:

> "I agree with this analysis of the petition. As regards the proper relationship between petitions under s.994 and derivative actions, consideration of the authorities suggests that it is highly sensitive to the precise circumstances of the case and the relief claimed: see the judgments of Lord Scott in the Court of Final Appeal of Hong Kong in *Re Chime Corpn Ltd*…and in the Privy Council in *Gamlestaden Fastigeheter AB v. Baltic Partners Ltd* [2007] UKPC 26…Whatever that relationship may be, it does not arise in the present case, which does not involve any claim for relief for the benefit of the company, either in substance or even, very largely, in form. The central point in this case is that, while the petition alleges breach by directors of their duties to

> the company, it does not allege that the company, as opposed to Zedra, has suffered any loss."

71. The second is *Taylor Goodchild Ltd v. Taylor* [2021] EWCA Civ 1135, which concerned whether a second claim was permitted when, it was argued, the remedy claimed could have been sought in an earlier unfair prejudice petition, on the basis that the court has wide remedial powers under s.996 CA2006 including by compensating the company. In that case, Newey LJ said:

> "30. In practice, the relief most commonly granted on an unfair prejudice petition is an order for the purchase of the petitioner's shares. Sometimes, though more rarely, the Court will require a respondent to sell his shares to the petitioner, as Barling J did in the present case. It is open to the Court, too, to grant a variety of other remedies, including an order for a respondent to pay compensation to the company or to account to it for profits in respect of a wrong done to the company. In that connection, the Privy Council held in *Gamlestaden Fastigheter AB v. Baltic Partners Ltd* [2007] UKPC 26, [2007] Bus LR 1521 that no objection could be taken at the strike-out stage to a prayer for an order that respondent directors pay damages to the company for breaches of their duties as directors of the company, Lord Scott observing in para.28:
>
> > "There is nothing in the wide language of art.143(1) [which was equivalent to s.996 of the 2006 Act] to suggest a limitation that would exclude the seeking or making of such an order: the court "may make such order as it thinks fit for giving relief in respect of the matters complained of"."
>
> In a similar vein, [see what] Vos J said in *Apex Global Management Ltd v. Fi Call Ltd*…at paragraph 125 [above].
>
> 31. There is more scope for argument, however, as to when it is appropriate for the Court to grant relief in favour of the company in unfair prejudice proceedings. In *Re Chime Corpn Ltd* (2004) 7 HKCFAR 546 ("Chime"), Bokhary PJ, sitting in the Hong Kong Court of Final Appeal, said at para.27 that, while he "would not rule out the possibility of circumstances in which it can be seen that [an order for the payment of damages or compensation, or for the grant of restitution, to the company itself] could properly be made", "such circumstances, even if they can arise, would in any case of complexity be rare and exceptional". "No such circumstances", he said in para.28, had arisen in the case before him, adding:
>
> > "Quite apart from anything else undesirable, pursuing relief in respect of the CAL loans by way of an unfair prejudice petition rather than by way of a derivative action would entail the risk of the respondents or one or more of them facing a

> claim for such relief in a derivative action after the petitioners had failed to obtain the same in the petition."

For his part, Lord Scott NPJ endorsed at para.47 doubts which Millett J had expressed in *Re Charnley Davies Ltd (No.2)* [1990] BCLC 760 as to the "propriety of seeking [an order for payment or restitution to the company] on an unfair prejudice petition if the essence of the complaint was not of mismanagement of the company but of misconduct by the director". [Newey LJ then referred to what Lord Scott said in *Chime* at [62]-[63] above and to what Lord Millett said in *Waddington* (see above)].

33. An unfair prejudice petition differs significantly from a conventional civil claim. The Court has a wide discretion as to what, if any, relief it will grant, albeit one that "must … be exercised judicially and on rational principles" (to quote Robert Walker LJ in *Profinance Trust SA v. Gladstone* [2001] EWCA Civ 1031, [2002] 1 WLR 1024, at para.19). Further, in *Re Premier Electronics (GB) Ltd* [2002] 2 BCLC 634, Pumfrey J pointed out that there was no subsisting cause of action between petitioners in unfair prejudice proceedings and the shareholders who were respondents to it and, as a result, held that the Court lacked jurisdiction to make a freezing order against the relevant respondents. An unfair prejudice petition, Pumfrey J noted at 637, is "to be distinguished from, for example, a claim by the company itself in relation to misfeasance by directors".

34. Unfair prejudice petitions are notoriously capable of giving rise to lengthy, complex and expensive litigation. That being so, a "high degree of case management" can, as Arden J said in *Re Tobian Properties Ltd* [2013] Bus LR 753 at para.27, be called for. Sometimes, the Court will direct a split trial with issues as to whether a buyout order should be made being determined at one hearing and quantum deferred to a later one.

35. It is also relevant to refer to part 11 of the 2006 Act, which deals with the circumstances in which a derivative claim can nowadays be brought. A shareholder wishing to seek relief on behalf of the company under part 11 in respect of a cause of action vested in the company must obtain the Court's permission to do so and, when deciding whether to give such permission, the Court is directed to take account of the various matters identified in s.263, including the importance that a person acting in accordance with s.172 would attach to continuing it...

37. …In the present case, Snowden J took the view that Mr Goodchild [(the petitioner)] could both in principle and in practice have sought in the context of his unfair prejudice petition the relief that the Company is now claiming in these proceedings. That the Court would have had jurisdiction to grant such relief under section 996 of the 2006 Act is not in dispute.

However, it is not always abusive to raise later a claim that could have been put forward earlier. Here, **there is no suggestion that a petitioner applying under s.994 of the 2006 Act who alleges that a respondent has breached his duties to the company normally includes in the relief he seeks an order compensating the company for the misconduct**. **More than that, cases such as *Chime* and *Waddington* show that the legitimacy of a shareholder asking for relief in favour of the company by way of unfair prejudice petition rather than derivative claim is very questionable**: for instance, Bokhary PJ spoke in *Chime* of the circumstances in which an order of that kind could properly be made being "rare and exceptional" in any case of complexity if they could arise at all. **The concerns expressed in *Chime* and *Waddington* related in part to the prospect of a wrong to a company being pursued by someone other than the company**. In the present case, pursuit of the WIP and Account of Profits Claims in the unfair prejudice proceedings would not merely have involved their being advanced by a shareholder rather than the company to which the liabilities are said to be owed, but would have required the joinder of an additional party, STL. **Incorporating the WIP and Account of Profits Claims in the unfair prejudice proceedings could also have been expected to complicate and delay the proceedings in other ways**. Snowden J thought that any further disclosure that might have been needed "could easily have been sought", but Mr Goodchild had in fact asked for and obtained an order for specific disclosure and still had only limited information about most of the files Mr Taylor had taken by the time the petition came on for trial. Certainly, **the information available was not such as to allow the WIP and Account of Profits Claims to be quantified**. **Extra complication and delay would have been the more undesirable when** (a) the Company was carrying on a legal practice which needed to be managed and (b) **there might have been little or no scope for the Company to pursue the WIP and Account of Profits Claims if Barling J had accepted Mr Taylor's case that Mr Goodchild had agreed to his setting up STL in the way he did**. It is noteworthy, too, that the skeleton argument which Mr Taylor's then counsel prepared for the first hearing of the unfair prejudice petition, in December 2017, argued that such a petition was "not an appropriate procedure" for pursuing allegations of setting up a business in competition with the Company, "poaching" employees or seeking to divert business from the Company. In all the circumstances, I do not think the fact that Mr Goodchild might have sought to pursue the WIP and Account of Profits Claims in the unfair prejudice petition could on its own possibly have justified a finding that pursuit of the claims in the present proceedings is an abuse of process…

> 47. …while the Court might have had jurisdiction to grant relief under s.996 of the 2006 Act along the lines that the Company now seeks, it is far from obvious that it would have been convenient for the WIP and Account of Profits Claims to be pursued in the unfair prejudice proceedings. Not only could doing so have been expected to delay, complicate and increase the cost of the unfair prejudice proceedings, but the legitimacy of advancing such Company claims would have been questionable…" (emphasis added).

72. To similar effect, Sir Nigel Davis said this:

> "50. In jurisdictional terms I can accept that Mr Goodchild could have sought to introduce into the unfair prejudice proceedings the derivative claims in respect of the WIP and Account of Profits. The real question, as I see it, is whether he should have done, such that his failure to do so renders an abuse of process the subsequent proceedings brought by the Company raising these claims.
>
> 51. The judge seems to have thought that the derivative claims and appropriate remedies could readily have been introduced into and pursued in the unfair prejudice proceedings. But, whilst of course I acknowledge the particular expertise of Snowden J in company law matters, the position with regard to introducing derivative claims into unfair prejudice proceedings is, in general terms, as I see it, potentially quite complex: as the observations in cases such as *Chime Corpn* and *Waddington Ltd* indicate. It is, for the reasons there set out, by no means necessarily straightforward, or even standard, to introduce derivative claims of the present kind into s.994 Petitions. The fact that, as in this case, allegations of breach of fiduciary duty are made as part of the basis for alleging unfairly prejudicial conduct does not necessarily alter that. In fact, as I see it, the approach of the judge in this case could, if accepted, potentially set quite an uncomfortable precedent for other s.994 cases…"

73. Both *Hut Group* and *Taylor Goodchild* are supportive of the court's approach in *Chime* (or, at least, they contain no criticism of the decision). Both too encourage the court to consider, in the present context, the relief the petitioner claims. Further, it may be notable that, in *Taylor Goodchild*, Newey LJ drew attention to the fact that there are limitations on making derivative claims (the permission stage) (just as Lord Scott, in *Chime*, had pointed to the fact that an independent board of directors of the company in that case might have objected to the continuation of an ordinary claim) and to the fact that, in that case at least, the court had to consider whether it would have been convenient to adjudicate on the relief claimed as part of unfair prejudice petition proceedings.

74. Before completing my look at the authorities, I should mention that Mr Mather referred, particularly in his skeleton argument, to *Bhullar v. Bhullar* [2003] 2 BCLC 241. He accepted, though, in his oral submissions, that the Court of Appeal in that case was not

asked to consider whether there might be a distinction between a court's theoretical jurisdiction and its practical jurisdiction in the present context. The case is therefore of no real assistance.

75. Because Mr Mather referred, in his skeleton argument, to Hollington on Shareholders' Remedies (9th ed); para.8-21, I need to consider it here, but I have to contextualise it by also referring to surrounding text. I therefore now set out paras.8-20-8-22:

> "The mere fact that the petitioner may have another remedy, for example, a common-law action for damages based upon the same facts as found the unfair prejudice petition, does not prevent the presentation of the petition: *Re Company (No.00477 of 1986)* (1986) 2 BCC 99171 ChD...Nor is an unfair prejudice petition precluded by the mere fact that a derivative action might lie in respect of the conduct complained of: *Re Company (No.005287 of 1985)* [1986] 1 WLR 281 ChD (Companies Ct)…There is no reason in principle why in appropriate circumstances a derivative claim may not be pursued in parallel with an unfair prejudice petition. In most cases, it will be sufficiently clear at the outset which form of proceedings is the more appropriate and in particular what is the appropriate remedy and in what form of proceeding such a remedy can be granted but it is possible that this may not become clear until trial…
>
> Although the court will not allow unfair prejudice proceedings to be brought where the appropriate proceedings are by way of derivative action.., the court has power under ss.994-996 to make any order that it could have made if the proceedings had instead been brought as a derivative action, including an order for the payment in favour of the company by way of compensation for any loss suffered or by way of an account of profits, and in particular orders against third parties who have been properly joined as parties for this purpose: *Clark v. Cutland* [2004] 1 WLR 783; *Anderson v. Hogg* 2002 SC 190 IH (Ex Div); *Gamlestaden Fastigheter AB v. Baltic Partners Ltd* [2007] Bus LR 1521 at [35]-[36].
>
> It is well established that, where the petitioner's objective is to obtain a share purchase order, the court can order that the petitioner's shares be valued on the basis that any diminution in the value of their shares caused by the unfairly prejudicial conduct is disregarded…Consistently with this principle, it has been considered arguable that, in a case where the claim is based on a wrong to the company, the court has power to order compensation against the wrongdoer directly in favour of the petitioner rather than the company (*Re Brightview Ltd* [2004] BCC 542). Yet the court's power to give relief to the petitioner for a wrong to the company has been doubted and any such power could only be exercised if there was no risk of prejudice to creditors (*Re Chime Corpn Ltd* [2004] HKFCA 8). Lord Scott

> held that such relief could only properly be made in a winding-up of the company, as a proper distribution of the company's profits or as a reduction of capital. Otherwise, the interests of the company's creditors were at risk…"

76. I do not derive any particular assistance from Hollington, because all that the author seeks to do is to summarise what the authorities he cites have decided. He does not seek to make a broader point.

Discussion

77. On the authorities to which I was referred and on the submissions made, I have concluded that, subject to some possible qualification, the approach in *Chime* ("the *Chime* approach") is the approach which should be adopted in a case such as this one, for the following reasons. (Whilst that approach is a practical one, in disagreement with Bannister J in my view it is also a principled one, as I will explain.)

78. I have already noted that both *Hut Group* and *Taylor Goodchild* are supportive of the *Chime* approach, and, noting the points Newey LJ made in *Taylor Goodchild*, it seems to me that the *Chime* approach balances two important factors, which may align or be in opposition depending on the facts of case; namely, (i) that the permission stage is a mandatory stage in derivative claims (other than those sanctioned by way of relief in an unfair prejudice petition (see s.996(2)(c) CA2006)) and (ii) that litigation has to be conducted efficiently.

79. A further point in favour of the *Chime* approach, at least from the petitioner's perspective, is that the approach which would, most likely, otherwise apply is that advocated by Lord Millett in *Waddington* and, before that, in *Charnley Davies*, which makes a brighter line distinction, favouring respondents, between those cases which should proceed by way of an unfair prejudice petition and those which should not.

80. Further, as his judgment in *Chime* makes clear, Lord Scott's view was that a petition should only be permitted to proceed (where the case would otherwise have been brought by way of a derivative claim) where the court is satisfied that to permit the petition to proceed is not an abuse of process. The *Chime* approach gives effect to the fact that, under the Civil Procedure Rules, whether a matter is an abuse of process, and, if it is, what sanction should be imposed, if any, is a question of fact and degree (that is, a question depending on the circumstances of the particular case).

81. As the editors of the 2022 White Book explain, at note 3.4.3:

> "Although the term "abuse of the court's process" is not defined in the rules or practice direction, it has been explained in another context as "using that process for a purpose or in a way significantly different from its ordinary and proper use" (*Attorney General v. Barker* [2000] 1 FLR 759, DC, per Lord Bingham of Cornhill, Lord Chief Justice). The categories of abuse of process are many and are not closed…The court has power to strike out a prima facie valid claim where there is abuse of process. However there has to be an abuse, and striking out has to be supportive of the overriding objective. It does not

> follow from this that in all cases of abuse the correct response is to strike out the claim. In a strike-out application the proportionality of the sanction is very much in issue; see *Walsham Chalet Park Ltd v. Tallington Lakes Ltd* [2014] EWCA Civ 1607. In *Biguzzi v. Rank Leisure plc* [1999] 1 W.L.R. 1926; [1999] 4 All E.R. 934, the Court of Appeal drew attention to several alternatives to a strike out under r.3.4..The striking out of a valid claim should be the last option. If the abuse can be addressed by a less draconian course, it should be…"

82. Indeed, that it depends on the circumstances of the particular case whether an unfair prejudice petition ought to be permitted to proceed (where the case would otherwise have been brought by way of a derivative claim), or it is an abuse of process, may have been in David Richards LJ's mind in *Hut Group* when he said "the proper relationship between petitions under s.994 and derivative actions…is highly sensitive to the precise circumstances of the case and the relief claimed."

83. The *Chime* approach gives effect to the abuse of process principle I have summarised because it is unlikely that there is no abuse of process justifying a striking out where the court has concluded that (i) the relief sought by the petitioner ought to have been claimed by way of a derivative claim and (ii) it is not convenient to adjudicate on that relief in unfair prejudice petition proceedings. On the other hand, it is more likely that, where the relief sought by way of an unfair prejudice petition can be conveniently adjudicated on even though it ought to have been sought by way of a derivative claim, there is no abuse of process or, if there is, that the proportionate response is not to strike out any part of the unfair prejudice petition. Of the approaches advocated, the *Chime* approach is the one which is most sensitive to the particular circumstances of the case the court is considering.

84. I have suggested that there may be some qualification to the *Chime* approach. I have also only said that it is **unlikely** that there is no abuse of process justifying a striking out where the court has concluded that (i) the relief sought by the petitioner ought to have been claimed by way of a derivative claim and (ii) it is not convenient to adjudicate on that relief in petition proceedings. I have made these points for the following reason.

85. Suppose that, by an unfair prejudice petition, a petitioner seeks relief which would otherwise have been sought by way of a derivative claim. Suppose too that the case for that relief is pleaded in the unfair prejudice petition as fully, and in the same way, as it would have been pleaded in a derivative claim. Suppose, thirdly, that, in response to a strike out application by a respondent, the petitioner files all the evidence that they would have filed at the permission stage in support of an application to continue a derivative claim, and that they argue, at the hearing of the strike out application, that they would have been given permission to continue a derivative claim had the relief claimed been sought by that means. Suppose, finally, that the court is satisfied that permission to continue a derivative claim would have been given. In such circumstances, the only practical consequences of the striking out, from the unfair prejudice petition, of the relief are likely to be that (i) the petitioner would have to issue a derivative claim and pay the issue fee and (ii) there would be a delay in case managing the unfair prejudice petition so that it might be case managed with the derivative claim. If, in this scenario, the court was not satisfied that the contentious relief could be adjudicated on conveniently in the petition proceedings, one can legitimately ask

nevertheless: what real purpose would be served by striking out that relief on the ground that it cannot be adjudicated on conveniently? (As an aside, the possibility that a petitioner might effectively seek permission, in unfair prejudice petition proceedings, to continue what would otherwise have been a derivative claim may have been something contemplated by Bannister J in *Leddra*.)

86. In short, it may be that, at the margins at least, the *Chime* approach ought to be qualified to accommodate the exceptional case which otherwise ought to be permitted to proceed even though it does not meet Lord Scott's requirements for such a case to proceed. It may also be possible for such a qualification to be made. After all, as I have said, the jurisdiction to strike out on the ground of abuse of process involves questions of fact and degree and depends on the particular circumstances of the case, and so it can easily accommodate the exceptional case.

87. It is possible, of course, that the qualification I have postulated would not actually be a qualification of the *Chime* approach, because Bokhary PJ spoke of the rare and exceptional case which ought to be permitted to proceed, so acknowledging some flexibility in the approach, and because Lord Scott began his analysis in [62] with the phrase: "as a general rule".

88. In any event, I do not need to decide, nor would it be appropriate for me to decide, if the *Chime* approach should be qualified as I have suggested it might, because this point was not something counsel addressed me on at the hearing and because there is no extra fact, or anything exceptional, in this case which might cause me not to adopt the *Chime* approach in full. Although Mr Mather suggested, in passing, that, if permission had been sought in a derivative claim for the compensation claim and constructive trust claim to continue, it would undoubtedly have been given, the parties did not make any submissions on the question of permission and little, if any, of the evidence addressed the issues which a claimant has to address at the permission stage.

89. Considering then the *Chime* approach as it applies to the petition, for the reasons I am about to give I am not satisfied that the compensation claim or the constructive trust claim can be conveniently adjudicated on as part of the petition. Rather, I am satisfied that they cannot be.

90. Before I give my reasons for this conclusion, I need to point out that I am satisfied that, but for the petition, the compensation claim and the constructive trust claim (supported by the misappropriation allegations) would have been pursued by way of a derivative claim. They are claims which are usually brought by way of a derivative claim, as Mr Mather partially accepted.

91. Turning then to my reasons, I am satisfied that, as Mr Mather also partially accepted, if the misappropriation allegations had been pleaded in a derivative claim, they would have been more fully pleaded than they are now, and that, in order for a court to determine liability in respect of the compensation claim and the constructive trust claim, the misappropriation allegations would need to be more fully pleaded. The petitioner would have to particularise "Coinomi's business and assets" (and, possibly, also "the corporate opportunity associated with Coinomi") which he says the respondent misappropriated. He would also have to particularise those of Coinomi's assets he contends Cyprus and BVI received. Unless the court made findings about the misappropriation and/or the receipt of particular assets, it would be difficult, at least, to

quantify the compensation claim or grant specific declarations as part of the constructive trust claim.

92. Further, as Mr Mather also accepted, correctly in my view, any valuation for, say, a buy-out order may not need to take into account precisely the loss to Coinomi arising from any misappropriation the petitioner establishes, or the gain made by the respondent, Cyprus or BVI. On the other hand, if the compensation claim is permitted to proceed to trial and liability is established, it is much more likely that the court would have to undertake a complex quantification exercise to determine Coinomi's loss or the gains of the respondent, Cyprus and BVI.

How should I proceed?

93. I have already explained that the respondent seeks to strike out the compensation claim and the constructive trust claim on the ground that they are an abuse of process. I have also summarised the test the court should adopt when deciding whether a matter is an abuse of process and, if so, how it should respond.

94. The respondent also seeks to strike out those claims (particularly under CPR 3.4.(2)(a)) on the ground that the petition discloses no reasonable grounds for making them.

95. As the editors of the 2022 White Book explain, at note 3.4.2:

> "…Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (*Harris v. Bolt Burdon* [2000] CP Rep. 70; [2000] CPLR 9)… An application to strike out should not be granted unless the court is certain that the claim is bound to fail (*Hughes v. Colin Richards & Co* [2004] EWCA Civ 266; [2004] PNLR 35, CA (relevant area of law subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts))…"

96. Further, Mr Mather drew to my attention that, in *Libyan Investment Authority v. King* [2021] 1 WLR 2659, Arnold LJ said, at [96]:

> "…as can be seen from para 1.7 of CPR PD 3A…, "bound to fail" in rule 3.4(2)(a) means bound to fail "because of a point of law" even if it has a real prospect of success on the facts."

97. I would prefer not to determine the application on this ground for the following reasons.

98. In the light of what I have said, I am satisfied that the court does have theoretical jurisdiction to determine the compensation claim and the constructive trust claim (with the issue being whether the court should accept practical jurisdiction to determine those claims), and Mr Robins accepted that it might be argued that, for this reason, the claims are not liable to being struck out on this ground.

99. Further, this point (that, where the court has theoretical jurisdiction, CPR 3.4(2)(a) is not satisfied) may have been what was in Lord Scott's mind when he expressed himself as he did in [27]-[28] in *Gamlestaden*. As [4] of the Privy Council's decision makes clear, the strike out application in that case had been made "on the ground that [the unfair prejudice petition] was bound to fail in law" (although it may be noted that Lord Scott continued, in [4], by pointing out that the applicant argued that the petition in that case was an abuse of process).

100. Finally, I would prefer not to determine the application on this ground because I did not receive comprehensive submissions about the circumstances when CPR 3.4(2)(a) is satisfied.

101. As I have also explained, the respondent seeks reverse summary judgment.

102. I remind myself of the familiar principle applicable to summary judgment applications, which the editors of the 2022 White Book note thus at note 24.2.3:

> "The following principles applicable to applications for summary judgment were formulated by Lewison J in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v. Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301 at [24]:…
>
> …it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, **if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it**. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v. TTE Training Ltd* [2007] EWCA Civ 725" (emphasis added).

103. Mr Mather argued as follows (see para.32 of his skeleton argument):

> "Where the success of an application under CPR 3.4 or 24.2 depends on the resolution of a controversial, complex, difficult or developing area of the law, the proceedings should be allowed

> to go to trial. As Lord Collins of Mapesbury held in *Altimo Holdings and Investment Ltd and others v. Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at 1825F-H: "it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts…It was no part of the court's function "to decide difficult questions of law which call for detailed argument and mature consideration"."

104. On the authorities as they stand, I am doubtful that whether or not the compensation claim and the constructive trust claim ought to be pursued by way of the petition or by way of a derivative claim is controversial or a developing area. Further, whilst I accept that the determination of that issue is fact-dependant, I am doubtful that the determination is fact-sensitive in the sense Lord Collins may have had in mind. The determination of the issue does not depend on whether misappropriation allegations are, or are not, made out at trial. Rather, the issue is fundamentally one of law; namely, in what circumstances ought a claim made in an unfair prejudice petition actually be pursued only by way of a derivative claim. The determination of that issue does not depend on whether or not the facts which are the basis for the petition are established at trial.

105. In any event, Lord Collins acknowledged that he was only speaking about what is "normally" appropriate.

106. If it is the case that a claim made in an unfair prejudice petition ought actually to be pursued by way of a derivative claim, it is in the interests of the parties to know that at an early stage in the proceedings, rather than only at trial when so much time and cost will already have been incurred in litigating the underlying claim.

107. Further, as Mr Mather fairly acknowledged, if that matter is left for determination until trial, there is a possibility that the trial judge might say that, however inappropriate it might be for a petitioner to pursue a claim, it is too late for a respondent to object because all the time and costs in dealing with that claim have been incurred. So, if, in every case, the matter is to be left for determination until trial, and if, at every trial, the trial judge decides that it is too late to deal with the matter, one might ask, rhetorically: when will the issue ever become a non-controversial one, assuming that it is not at the moment?

108. I have heard detailed argument from counsel. Save in one respect, as I have already indicated, Mr Mather did not suggest that his submissions might have been any different if the issue was determined at a later stage in the proceedings. As I have said, at least in one sense, the determination of the issue is not fact-sensitive. I am satisfied that the petitioner has had sufficient opportunity to file evidence in response to the application. No-one suggested that the petitioner might have wanted to file further evidence. I am also satisfied that the petitioner has had a sufficient opportunity to make submissions. Further, as I have said, it is in the interests of the parties (or, as I understood Mr Mather to accept, logical at least) that I determine the issue now, before any unnecessary time is wasted or costs are incurred. In these circumstances, I am (and have been) satisfied

that this is one of those cases where I should grasp the nettle and determine the issue, as I have done.

109. The application notice is procedurally defective in a number of ways in relation to the reverse summary judgment application; in particular, because, contrary to CPR PD 24; para.2(3)(a), it does not "identify concisely any point of law…on which the applicant relies", in circumstances where what I have to determine is a point of law, rather than whether, on the facts, the petitioner has a sufficient prospect of success. Mr Mather fairly accepted that the fact that the application notice is procedurally defective should be no bar to me granting reverse summary judgment if it is otherwise appropriate to do so (although this is a point to which I will return).

110. He did, however, make a broader complaint that the application was made very late, some months after the petitioner's principal applications, which were due to be heard by me, had been made and listed for hearing and only shortly before the hearing, in circumstances where, because the application was made late, the proceedings have been disrupted; in particular, because, through lack of court time, and because the outcome of the application affects, or may affect, the outcome of the petitioner's applications, I had to adjourn the hearing of the petitioner's applications (i) by notice sealed on 22 April 2022, for "information about the location of relevant property or assets[, or about] relevant property or assets which may be the subject of an application for a freezing injunction" and for permission to serve the petition and other litigation documents on Cyprus and BVI out of the jurisdiction and (ii) by notice sealed on 19 October 2022, for an extension of time for serving the petition on Cyprus and BVI.

111. Mr Mather suggested that, in effect as a sanction, I should either dismiss the application in any event or adjourn it generally with liberty to restore.

112. At the beginning of the hearing, I indicated to Mr Mather that I was sympathetic to the complaint that the application was made late and had disrupted the proceedings (but I was not sympathetic to Mr Mather's further complaint, made during the course of the hearing, that the application had been made late for the purpose of disrupting the proceedings). I also indicated to Mr Mather that I would consider sympathetically any adjournment application he made, although I did draw to his attention that, if I did adjourn the hearing of the application, I might also be compelled to adjourn the hearing of the petitioner's applications because, as I have mentioned, the outcome of the application is capable of affecting the outcome of the petitioner's applications. On instructions, Mr Mather elected not to apply for an adjournment.

113. Because Mr Mather elected not to apply for an adjournment, in circumstances where I heard detailed argument, where the application is not fact-sensitive (at least in one sense), where, save in the one respect I have indicated, there was no indication that Mr Mather's submissions might have changed if the application had been made earlier and where I have otherwise decided that it is most appropriate to determine the issue now rather than later, there is no merit in imposing the sanction of dismissal, in this case at least, on the respondent for his delay in making the application. A dismissal would have the effect of allowing the petitioner to continue claims which are otherwise at risk of being struck out or the subject of reverse summary judgment. Further, if all I did was to dismiss the reverse summary judgment application, it may be that the same matters I have determined could be re-litigated before the trial judge for whatever that is worth.

114. Nor is there any merit in adjourning the application generally with liberty to restore. It is very possible that the respondent would apply to restore the application immediately after I made the adjournment decision. If Mr Mather intended that the adjournment I should grant should be a simple adjournment, on any restoration another judge would have to hear and consider the same arguments I have heard and considered. If Mr Mather intended that the adjournment should be on the basis that the application is part-heard, even if the practical difficulties of re-listing a hearing before me could be overcome, what would be the point of that? Save in the one respect I have indicated, Mr Mather did not suggest that there were any further submissions he might want to make or any further evidence that I might need to consider. Suppose too if the application was not restored until, say, trial. As I have noted, Mr Mather accepted that the trial judge might say that, however inappropriate it might be for the petitioner to pursue the compensation claim and the constructive trust claim by way of the petition, it is too late for the respondent to object. In that scenario, any adjournment would be equivalent to the dismissal of the application.

115. In short, neither a dismissal of the application nor its adjournment, in each case as a sanction, would be just. Nor would either course otherwise further the overriding objective.

Disposal

116. I have decided that (i) but for the petition, the compensation claim and the constructive trust claim would have been pursued by way of a derivative claim, (ii) I am not able to decide that, if a derivative claim had been made, at the permission stage the court would have permitted the claim to proceed, (iii) the compensation claim and the constructive trust claims cannot be conveniently tried as part of the petition proceedings and (iv) the *Chime* approach ought to apply in this case.

117. In such circumstances, as Lord Scott explained, and because I am satisfied that, if those claims proceed by way of the petition, the court's process would be used for a purpose or in a way significantly different from its ordinary and proper use, their place in the petition is an abuse of process. Further, in such circumstances, it is appropriate to strike out those claims against the respondent. No lesser outcome is proportionate. Indeed, it is difficult to conceive of a lesser outcome which recognises the abuse of process.

118. In such circumstances it might also be appropriate to grant reverse summary judgment in the alternative, but, on reflection, I have decided not to do so. I do not need to do so and, even though Mr Mather accepted that the fact that the application notice is procedurally defective should be no bar to reverse summary judgment, because the respondent did not identify the point of law he has asked me to determine there is a danger that, if I simply granted judgment, that might place an unintended obstacle in the way of the petitioner pursuing the compensation claim and the constructive trust claim by way of a derivative claim.

119. The result must therefore be that paras.32.2 and 32.3 of the petition are struck out as against the respondent.

120. Although the respondent has succeeded on the application, it may turn out that the result is unsatisfactory for him. The petitioner may now begin a derivative claim against the respondent, Cyprus and BVI, making the misappropriation allegations, and the

compensation claim and the constructive trust claim. If he does so, it may be that the case management of the petition will be delayed as a result, and it may turn out that the compensation claim and the constructive trust claim are tried at the same time as the petition.

121. The parties could have agreed: (i) to proceed as if the compensation claim and the constructive trust claim had been made by way of a derivative claim, (ii) that, for those claims to continue to be litigated, the petitioner had to satisfy the court that, had they been brought by way of a derivative claim, permission would have been given at the permission stage, (iii) that any security for costs application in relation to the compensation claim and the constructive trust claim should be approached as if those claims had been made by way of a derivative claim and (v) that the petitioner should fully plead those claims as if they had been made by way of a derivative claim. The court might have been able to endorse such an agreement. If that had happened, any practical disadvantages of this decision for both parties would have been avoided. As it is, the parties have reached no such agreement, and I must make the orders I have indicated.

122. I will hear further from counsel about how effect is to be given to my decision and on all costs and consequential matters.