Neutral Citation Number: [2023] EWCA Civ 1480

Case No: CA-2023-000044

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
His Honour Judge Klein (sitting as a Judge of the High Court)
[2022] EWHC 3178 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2023

Before:

LORD JUSTICE NEWEY
LORD JUSTICE SNOWDEN
and
LADY JUSTICE WHIPPLE

- -

Between:

GIANNIS NTZEGKOUTANIS	**Petitioner/ Appellant**
- and -	
(1) GEORGIOS KIMIONIS	**Respondent to the Petition and Appeal**
(2) COINOMI LIMITED **(3) COINOMI HOLDINGS LTD (CYPRUS)** **(4) COINOMI LTD (BVI)**	**Respondents to the Petition**

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James Mather (instructed by **Enyo Law LLP**) for the **Appellant**
Stephen Robins KC (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing date: 1 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 12 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal, from a decision of His Honour Judge Klein ("the Judge"), sitting as a Judge of the High Court, raises issues as to when it is legitimate for an unfair prejudice petition brought pursuant to Part 30 of the Companies Act 2006 ("the 2006 Act") to claim relief in favour of the company to which the petition relates.

Basic facts

2. At all times since its incorporation in 2016, Mr Giannis Ntzegkoutanis, who is the appellant, and Mr Georgios Kimionis, who is the respondent to the appeal, have each held half of the issued shares in Coinomi Limited ("the Company"). Mr Ntzegkoutanis and Mr Kimionis also became directors of the Company, and Mr Kimionis remains one. There is a dispute as to whether Mr Ntzegkoutanis is still a director.

3. It is Mr Ntzegkoutanis' case that the Company was formed as the vehicle for a joint venture involving the exploitation of a cryptocurrency "wallet" application (or "app") which he had devised. According to Mr Ntzegkoutanis, he had the idea for the wallet in about late 2013 and subsequently took steps to develop it into a marketable product, which he called "Coinomi". Mr Ntzegkoutanis says that he transferred his intellectual property relating to the app to the Company when that company was established.

4. Mr Ntzegkoutanis maintains that, over time, he was excluded from management of the Company (including by his purported removal as a director) and, further, that Mr Kimionis misappropriated the Company's business and assets. In that regard, it appears to be common ground that:

    i) On 12 October 2018, the third respondent to the petition, Coinomi Holdings Ltd ("Coinomi Cyprus"), was incorporated in Cyprus at Mr Kimionis' instigation;

    ii) On 12 December 2018, Coinomi Cyprus applied to register the "Coinomi" trademark with the U.S. Patent and Trademark Office;

    iii) On 20 December 2018, Mr Kimionis gave instructions for ownership of the "coinomi.com" domain name to be transferred to Coinomi Cyprus;

    iv) In the autumn of 2019, Mr Kimionis gave instructions for the developer of the Coinomi app given in the Google Play Store and the Apple App Store to be changed from the Company to Coinomi Cyprus;

    v) On 25 November 2019, a further company called "Coinomi Ltd" ("Coinomi BVI"), the fourth respondent to the petition, was incorporated in the British Virgin Islands ("the BVI") at Mr Kimionis' instigation as a subsidiary of Coinomi Cyprus;

    vi) By the end of January 2020, Mr Kimionis had procured the transfer of the intellectual property in respect of the source code of the Coinomi app to Coinomi Cyprus. Coinomi Cyprus subsequently licensed Coinomi BVI to use that source code;

vii) On 29 July 2020, Coinomi Cyprus applied to register Coinomi's logo with the U.S. Patent and Trademark Office; and

viii) Mr Kimionis is the ultimate beneficial owner of Coinomi Cyprus and Coinomi BVI.

5. Mr Ntzegkoutanis alleges in paragraph 26 of the petition that Mr Kimionis breached duties that he owed to the Company as a director in procuring or permitting the transfer of the Company's business and assets to Coinomi Cyprus and Coinomi BVI. In paragraph 30, Mr Ntzegkoutanis asserts that as a result of the misappropriations which he contends took place:

> "30.1 Coinomi Cyprus and Coinomi BVI are liable to the Company 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 the Company.
>
> 30.2 Further or alternatively, Coinomi Cyprus and Coinomi BVI dishonestly assisted Kimionis' breaches of fiduciary duty to the Company referred to in paragraph 26 above and are liable to the Company on that basis."

6. The relief sought is specified in paragraph 32 of the petition. That reads:

> "The Petitioner therefore prays as follows:
>
> 32.1 for an order that Kimionis do sell his shares in the Company to the Petitioner, at a valuation reflecting the losses caused to the Company by his conduct;
>
> 32.2 for an order that the First, Third and Fourth Respondents [i.e. Mr Kimionis, Coinomi Cyprus and Coinomi BVI], as applicable, do account and/or pay damages to, and/or compensate the Company 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 the Company in respect of such property in the hands of the First, Third and Fourth Respondents 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 the Company 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."

7. The petition was presented on 22 April 2022. Mr Ntzegkoutanis further issued an application for permission to serve Coinomi Cyprus and Coinomi BVI out of the jurisdiction.

8. On 19 August 2022, Mr Kimionis filed points of defence. These tell a very different story to the petition. According to Mr Kimionis, it was he rather than Mr Ntzegkoutanis who came up with the basis of the Coinomi app; Mr Ntzegkoutanis worked on the Coinomi app as a contractor; Mr Kimionis incorporated a BVI company called Dollzen Limited ("Dollzen") to own and carry on the Coinomi business; the Company was intended to act as Dollzen's agent and provide services to it; Mr Kimionis became increasingly dissatisfied with Mr Ntzegkoutanis' performance and behaviour; in part as a result of Brexit, Mr Kimionis decided that Dollzen's assets should be transferred to a Cypriot company (in the event, Coinomi Cyprus); and the intention was that Mr Ntzegkoutanis should have non-voting shares in Coinomi Cyprus. This is said in paragraph 88 of the points of defence:

> "[T]he Coinomi business never belonged to [the Company]. Rather, it belonged initially to Mr Kimionis personally and subsequently to Dollzen, which retained [the Company] to act as its agent and to perform the various functions identified above. The transfer of Dollzen's assets to Coinomi Cyprus did not involve any misappropriation of [the Company's] property. Rather, it was part of a restructuring of the business which was ultimately beneficially owned by Mr Kimionis. Since Dollzen did not have any creditors or any shareholders other than Mr Kimionis, it was not improper for him to restructure his business by transferring Dollzen's property to Coinomi Cyprus in this way."

9. Mr Ntzegkoutanis has pointed to various pieces of evidence as support for his version of events. However, Mr James Mather, who appeared for Mr Ntzegkoutanis (as he also did before the Judge), rightly did not suggest that either we or the Judge could or should attempt to determine at this stage which party's case is well-founded. Nor did the Judge do so.

10. The application for permission to serve Coinomi Cyprus and Coinomi BVI out of the jurisdiction was listed to be heard on 23 November 2022 together with an application for an order requiring Mr Kimionis to provide certain information. Shortly before this, on 7 November, Mr Kimionis issued an application for paragraphs 32.2 and 32.3 of the petition to be struck out pursuant to CPR 3.4(2)(a), CPR 3.4(2)(b) and/or the Court's inherent jurisdiction pursuant to CPR 3.4(5). In the event, it was that application which occupied the Court on 23 November. The service out and information applications were adjourned.

11. The Judge handed down his judgment ("the Judgment") on 21 December 2022. He concluded that paragraphs 32.2 and 32.3 of the petition should be struck out as against Mr Kimionis.

12. Mr Ntzegkoutanis now challenges that decision in this Court.

Unfair prejudice petitions

13. Provision for unfair prejudice petitions is nowadays to be found in Part 30 of the 2006 Act, which comprises sections 994-999 and replaced sections 459-461 of the Companies Act 1985 ("the 1985 Act").

14. Section 994 of the 2006 Act allows a member of a company to apply by petition for an order under Part 30 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."

15. Section 996 of the 2006 Act deals with the Court's powers under Part 30. It states:

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

> purchase by the company itself, the reduction of the company's capital accordingly."

The Judgment

16. In paragraph 2 of the Judgment, the Judge identified the "question of principle" which he had to determine as:

> "whether the petitioner ought to be permitted to proceed to trial on the petition in respect of matters, which could have been litigated against [Mr Kimionis], [Coinomi] Cyprus and [Coinomi] BVI by way of a derivative claim, which, [Mr Kimionis] argued, by being pursued by way of an unfair prejudice petition, outflanked the limitations in [the 2006 Act] on making derivative claims".

17. The Judge concluded in paragraph 77 of the Judgment that, subject to some possible qualifications, what he termed "the *Chime* approach" should be adopted in a case such as this one. The Judge derived that approach from the decision of the Hong Kong Court of Final Appeal in *Re Chime Corp Ltd* (2004) 7 HKCFAR 546 ("*Chime*"). As he explained in paragraph 49 of the Judgment, the Judge saw *Chime* as authority for the following principle:

> "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."

18. The Judge expressed the view that "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 [in *Chime*] for such a case to proceed": paragraph 86 of the Judgment. However, the Judge did not consider that he needed to decide whether the *Chime* approach should be qualified as there was "no extra fact, or anything exceptional, in this case" which might make it inappropriate to adopt the *Chime* approach in full: paragraph 88.

19. Considering the *Chime* approach as it applied to the petition, the Judge said in paragraph 89 that he was satisfied that the claims advanced in paragraphs 32.2 and 32.3 of the petition (which he termed respectively "the compensation claim" and "the constructive trust claim") could not be conveniently adjudicated on as part of the

petition. In that connection, the Judge explained that he was 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", adding that such claims "are usually brought by way of derivative claim": paragraph 90. The Judge went on:

> "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 '[the Company's] business and assets' (and, possibly, also 'the corporate opportunity associated with [the Company]') which he says [Mr Kimionis] misappropriated. He would also have to particularise those of [the Company's] assets he contends [Coinomi] Cyprus and [Coinomi] 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 [the Company] arising from any misappropriation the petitioner establishes, or the gain made by [Mr Kimionis], [Coinomi] Cyprus or [Coinomi] 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 [the Company's] loss or the gains of [Mr Kimionis], [Coinomi] Cyprus and [Coinomi] BVI."

20. In paragraph 116 of the Judgment, the Judge explained that he had 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".

That being so, and the Judge being "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", the Judge concluded that "their place in the petition is an abuse of process" and "it is appropriate to strike out those claims against [Mr Kimionis]": paragraph 117. The Judge observed, however, in paragraph 120:

> "Although [Mr Kimionis] 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 [Coinomi] Cyprus and [Coinomi] 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."

21. The Judge had earlier in the Judgment explained that he would not base his decision on an alternative argument that had been advanced by Mr Stephen Robins KC, who had appeared for Mr Kimionis (as he also did before us). Mr Robins had submitted that, now that derivative claims are the subject of a statutory code, claims such as those found in paragraphs 32.2 and 32.3 of the petition can only be advanced in accordance with it. One difficulty which the Judge saw with that contention was that it might be said that "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 [of the 2006 Act], to bring a petition for unfairly prejudicial conduct": see paragraph 67 of the Judgment. The Judge went on to observe that, "[i]n any event", the point had been raised by Mr Robins only in reply with the result that Mr Mather had not been in a position to deal with it. "For this reason alone," the Judge said in paragraph 67, he would not base his decision on the point.

The appeal

22. Mr Ntzegkoutanis appeals on the grounds that the "*Chime* approach" does not form part of English law and that, even supposing that it does, the Judge erred in his application of it. Mr Kimionis both supports the basis on which the Judge concluded that paragraphs 32.2 and 32.3 of the petition should be struck out and, by a respondent's notice, contends in the alternative that those paragraphs fell to be struck out because, having regard to section 260(2) of the 2006 Act, such claims may only be brought either with the permission of the Court under Chapter 1 of Part 11 of the 2006 Act or in pursuance of an order under section 996(2)(c) of the 2006 Act.

23. In his oral submissions, Mr Robins concentrated on the argument advanced in the respondent's notice, and I find it convenient to deal with that before turning to Mr Ntzegkoutanis' grounds of appeal.

The impact of section 260(2) of the 2006 Act

Chapter 1 of Part 11 of the 2006 Act

24. As its heading indicates, Part 11 of the 2006 Act is concerned with "derivative claims and proceedings by members". Chapter 1 of Part 11, comprising sections 260-269, deals with the position in England and Wales or Northern Ireland.

25. Mr Kimionis' respondent's notice is founded on the terms of section 260 of the 2006 Act. That 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).
>
> (3) A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
>
> The cause of action may be against the director or another person (or both) …."

26. Subsequent provisions in Chapter 1 of Part 11 of the 2006 Act deal with applications for permission to continue derivative claims. In particular, section 261(1) stipulates that a member of a company who brings a derivative claim under Chapter 1 must apply to the Court for permission to continue it and section 263 addresses circumstances in which such an application must be refused and matters to be taken into account when considering whether permission should be granted.

27. The explanatory notes to the 2006 Act noted that, at common law, the general principle was that it is for a company itself to bring proceedings where a wrong has been done to it, but that, where there had been a "fraud on the minority", there was scope for a member to bring an action to enforce the company's rights: see paragraph 485. The explanatory notes went on to say that the sections in Chapter 1 of Part 11 of

the 2006 Act did not replace the pre-existing substantive law, but "instead reflect the recommendation of the Law Commission that there should be a 'new derivative procedure with more modern, flexible and accessible criteria for determining whether a shareholder can pursue an action'": paragraph 491. Paragraph 492 of the explanatory notes stated:

> "The sections in Chapter 1 of this Part introduce a two-stage procedure for permission to continue a derivative claim. At the first stage the applicant will be required to make a *prima facie* case for permission to continue a derivative claim and the court will be required to consider the issue on the basis of the evidence filed by the applicant only, without requiring evidence from the defendant. The courts must dismiss the application if the applicant cannot establish a *prima facie* case. At the second stage – but before the substantive action begins – the court may require evidence to be provided by the company. The sections set out a list of the matters which the court must take into account in considering whether to give permission and the circumstances in which the court is bound to refuse permission."

Mr Kimionis' case

28. As Mr Robins explained, the contention advanced in the respondent's notice proceeds as follows.

29. Section 260(2) of the 2006 states in terms that a "derivative claim" may only be brought under Chapter 1 of Part 11 or in pursuance of an order made in proceedings under section 994. The expression "derivative claim" is defined by section 260(1) to refer to:

> "proceedings in England and Wales … 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".

That definition applies as regards the claims made in paragraphs 32.2 and 32.3 of the petition. To that extent, the petition involved proceedings by Mr Ntzegkoutanis as a member of the Company "in respect of a cause of action vested in the company" and "seeking relief on behalf of the company". That, Mr Robins argued, is evident from the terms of the petition. Paragraph 32.2 asks that Mr Kimionis account and/or pay damages "to … *the Company*" and/or "compensate *the Company*" and paragraph 32.3 seeks declarations of constructive trust "in favour of *the Company*" (emphasis added in each case). Moreover, such relief is said to be warranted because of breaches by Mr Kimionis of duties he owed to *the Company* as a director. Parliament can be seen to have had in mind, Mr Robins argued, the grant of relief such as would vindicate a company's cause of action and preclude future proceedings in respect of it. That

would be the case, Mr Robins said, as regards the relief claimed in paragraphs 32.2 and 32.3 of the petition.

30. The upshot, Mr Robins submitted, is that, as matters stand, Mr Ntzegkoutanis is barred from pursuing the relief set out in paragraphs 32.2 and 32.3 of the petition. That follows from the fact that no order sanctioning proceedings for such relief has been made either under Chapter 1 of Part 11 of the 2006 Act or in section 994 proceedings. Mr Robins accepted that, with such sanction, there would be no need for a separate originating process: the relief could be included in a petition complaining of unfair prejudice and would not have to be the subject of a distinct claim form. If, therefore, Mr Ntzegkoutanis had applied for permission to continue the compensation and constructive trust claims in accordance with Chapter 1 of Part 11, it would have been open to the Judge to entertain the application. There being no such application, however, paragraphs 32.2 and 32.3 fell to be struck out.

31. Mr Robins cited in support of his submissions the decision of the Eastern Caribbean Supreme Court in *Gray v Leddra* [2012] ECSCJ No. 171. In that case, an application was made to strike out parts of a claim because, "unless special circumstances obtain, it is wrong in principle to introduce into an unfair prejudice action, which asserts a personal claim by a shareholder, what is in truth an unauthorised derivative claim seeking to assert a right vested in the company in question": see paragraph 6. Acceding to the application, Bannister J said in paragraph 9:

> "In my judgment, the position here in the BVI is clear. A derivative action requires permission under section 184C [of the Business Companies Act 2004]. 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 (emphasis added). 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."

Mr Robins pointed out that Bannister J arrived at this conclusion even though the BVI legislation did not contain a provision corresponding to section 260(2) of the 2006 Act.

Analysis

32. By the time the statutory regime in respect of derivative claims was introduced in the 2006 Act, it was well-recognised that the Court had "a very wide discretion to do what is considered fair and equitable in all the circumstances of the case" (to quote

Oliver LJ in *Re Bird Precision Bellows Ltd* [1986] Ch 658, at 669) in unfair prejudice proceedings. More specifically, there was authority for the proposition that redress benefiting the company could potentially be granted on an unfair prejudice petition. Thus, in *Lowe v Fahey* [1996] 1 BCLC 262, Charles Aldous QC, sitting as a Deputy High Court Judge, declining to strike out such a petition, observed at 268 that "where … the unfairly prejudicial conduct involves the diversion of company funds, a petitioner is entitled as a matter of jurisdiction to seek an order under s 461 [i.e. a predecessor of section 996 of the 2006 Act] for payment to the company itself not only against members, former members or directors allegedly involved in the unlawful diversion, but also against third parties who have knowingly received or improperly assisted in the wrongful diversion". In *Clark v Cutland* [2003] EWCA Civ 810, [2004] 1 WLR 783, His Honour Judge Norris QC (as he then was) had at first instance given judgment against a director in favour of the company in respect of money taken from it without authority in the sum of £1,150,753 in unfair prejudice proceedings: see paragraphs 2 and 3 of Arden LJ's judgment. Far from casting doubt on the legitimacy of that, the Court of Appeal went further, holding that the company was entitled to trace payments into the hands of the trustees of a pension fund to which some of the money had been paid. Moreover, Arden LJ expressed the "provisional view" that, "although the relief sought is claimed under section 461, it is sought for the benefit of the company and … it is, therefore, open to Mr Clark [i.e. the petitioner] to seek an order against the company for payment to him of any costs incurred by him on this appeal": see paragraph 35. In *Chime*, Lord Scott said in paragraph 42:

> "Whether or not a court hearing an 'unfair prejudice' petition has jurisdiction in the strict sense to order a respondent against whom a breach of duty to the company has been established to pay compensation, or to make restitution, to the company, there is no doubt at all that in many cases the jurisdiction to do so has been assumed, that many orders of that sort have been made, and that it is highly convenient that they should have been made."

33. There is, nonetheless, nothing in the explanatory notes to the 2006 Act to indicate that the introduction of the provisions relating to derivative actions was intended to bear on unfair prejudice petitions. Nor is any such indication to be found in the Law Commission report on "Shareholder Remedies" (Law Com No 246, Cm 3769), which, as the explanatory notes stated, was the inspiration for Part 11 of the 2006 Act. The Law Commission recommended that a "new derivative procedure should replace the common law derivative action entirely", but it did not say that this would or should affect unfair prejudice proceedings. In fact, the Law Commission explained that it had decided that it would not be appropriate "to require all claims which can be brought by or on behalf of the company" to be brought by way of "derivative action" and, to the contrary, considered that "a claimant should have the right to choose whether to bring a derivative action or proceedings under s 459 [i.e. a predecessor of section 994 of the 2006 Act], or cumulative claims under both": see footnote 27 to paragraph 6.12. In paragraph 6.11, the Law Commission had said, "Whilst we noted the tendency of applicants to bring section 459 proceedings in respect of matters which could have given rise to a derivative action, we do not consider that the two should be entirely assimilated".

34. It is significant, too, that Part 30 of the 2006 Act made no mention of Part 11 or any requirement to obtain permission to seek any relief in unfair prejudice proceedings. Had Parliament envisaged that Part 11 of the Bill which became the 2006 Act could impinge on Part 30 of that same Bill, it might have been expected to include in Part 30 at least a cross-reference to Part 11, but it did not do so. Further, the explanatory notes to the 2006 Act say simply, "Sections 994-998 restate sections 459, 460 and 461 of the 1985 Act, which provide a remedy where a company's affairs are being conducted in a manner which is unfairly prejudicial to the interests of its members", making no reference to Part 11. The reality, I think, is that it cannot have been anticipated that the statutory regulation of derivative claims introduced by Part 11 would affect unfair prejudice proceedings under Part 30.

35. Mr Mather argued that the wording of Part 11 of the 2006 Act is to the same effect, so that section 260(2) does not bite on Mr Ntzegkoutanis' petition. He submitted that the present proceedings:

    i) are not "in respect of a cause of action vested in the company" within the meaning of section 260(1)(a) but are rather in respect of the cause of action vested in Mr Ntzegkoutanis as a shareholder by virtue of Part 30; and

    ii) are not "seeking relief on behalf of the company" within the meaning of section 260(1)(b) but are rather brought by Mr Ntzegkoutanis on his own behalf, to obtain relief for his own benefit.

36. I am not myself persuaded by the first of these points. While the meaning to be attributed to the expression "in respect of" will be affected by the context in which they occur (see *Mirchandani v Somaia* [2020] EWCA Civ 1260, [2021] 1 Cr App R 7, at paragraph 75), it has been said to have "the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer": see *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWHC 9 (Ch), [2007] 1 WLR 2489, per Lightman J at paragraph 27, quoting Mann CJ in *Trustees Executors and Agency Co Ltd v Reilly* [1941] VLR 110, at 111. I also think it is clear that paragraphs 32.2 and 32.3 of the petition ask for orders to be made on the strength of "causes of action" that, on Mr Ntzegkoutanis' case, are "vested" in the Company. The petition asks for money to be paid to the Company, and declarations of constructive trust "in favour of the Company", on the basis that the Company is entitled to that relief as a result of alleged breaches of duty by Mr Kimionis. That being so, it seems to me that, read naturally, the words "seeking relief" "in respect of a cause of action vested in the company" (as they appear in section 260(1)) cover paragraphs 32.2 and 32.3 of the petition.

37. I also agree with Mr Robins that it can be no answer to his contentions that the petition seeks other relief which, on any view, would not be "in respect of a cause of action vested in the company" within the meaning of section 260(1) of the 2006 Act. Section 260 must be capable of applying where proceedings "[seek] relief on behalf of the company" "in respect of a cause of action vested in the company" but also ask for something else. Section 260 does not state that it is limited to proceedings which are exclusively, or even primarily, for relief such as is described in section 260(1)(a) and (b), and it would make no sense for the statutory code that has been introduced for derivative claims to be so confined.

38. However, I find Mr Mather's contention that Mr Ntzegkoutanis is not seeking relief "on behalf of the company" within the meaning of section 260(1)(b) of the 2006 Act compelling. True it is that Mr Ntzegkoutanis is seeking relief which, if granted, will benefit the Company, but he is asking for it in his own right rather than on behalf of the Company. He is exercising his personal entitlement, as a member of the Company, to apply to the Court on unfair prejudice grounds pursuant to section 994 of the 2006 Act. One of the remedies that can be granted where such a petition is held to be well-founded is an order "authoris[ing] civil proceedings to be brought in the name and on behalf of the company": see section 996(2)(c). Proceedings issued in pursuance of such an order would be a "derivative claim" within the meaning of section 260(1), but the present proceedings are not of that kind. Mr Ntzegkoutanis has no authority to bring proceedings on the Company's behalf, and he does not do so.

39. That conclusion seems to me to accord with the language of section 260 of the 2006 Act, but it is reinforced by the matters mentioned in paragraphs 32-34 above. As Lord Nicholls noted in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, at 397, statutory interpretation is "an exercise which requires the court to identify the meaning borne by the words in question *in the particular context*" (emphasis added). Provisions elsewhere in the statute may provide relevant context, as may explanatory notes and Law Commission reports: see *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, at paragraphs 29 and 30.

40. It follows that, in my view, section 260 of the 2006 Act does not extend to paragraphs 32.2 and 32.3 of the petition and they do not therefore fall to be struck out on that basis. The argument advanced in the respondent's notice thus fails.

The "*Chime* approach" and its application

Authorities

41. *Chime*, from which the Judge derived "the *Chime* approach", involved an unfair prejudice petition presented under section 168A of the Companies Ordinance (Cap.32). The question before the Hong Kong Court of Final Appeal was whether the petitioners should be allowed to amend the petition to introduce claims that a respondent had procured the company to make improper loans and, as a result, that there should be an order for repayment or compensation to be paid to the company. As was noted at paragraph 8 by Bokhary PJ, with whom Chan and Ribeiro PJJ and Mortimer NPJ agreed, the case raised the issue "whether there is 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".

42. After an extensive review of the authorities, Bokhary PJ concluded in paragraph 27:

> "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."

Bokhary PJ said in paragraph 28 that no such circumstances had arisen in the case before the Court, 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."

43. For his part, Lord Scott NPJ, with whom Chan and Ribeiro LJJ and Mortimer NPJ also agreed, endorsed at paragraph 47 doubts which Millett J had expressed in *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 ("*Charnley Davies*") 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". Likewise, Lord Scott observed in paragraph 63 that "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".

44. Later in his judgment, Lord Scott said:

> "61. Although … the court has jurisdiction, in the strict sense, to make the orders sought (other than the order against CAL which is not a party to the petition) it would not, in my opinion, be proper for the court on this petition to entertain what would, in effect, be Chime's action against the directors for their breach of duty in causing the loan to be made. If there is misconduct it can be established in a derivative action. If the court, on hearing the petition, thinks that a derivative action prosecuting this alleged misconduct should be brought, it can make an order to that effect under s.168(2)(b). It could also, if persuaded it were a convenient course to adopt, order that the petition and the derivative action be tried together.
>
> 62. As a general rule, in my opinion, the court should not in a s.168A [i.e. unfair prejudice] 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."

45. Lord Millett NPJ made remarks to similar effect in *Waddington Ltd v Thomas* [2008] HKCFA 63, [2009] 2 BCLC 82 ("*Waddington*"), another decision of the Hong Kong Court of Final Appeal. He said in paragraph 77:

> "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 Corp 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 Corp Ltd* at p.571."

46. Comparable views have been expressed in other cases from common law jurisdictions. In *Re Shun Tak Holdings Ltd* [2009] 5 HKLRD 743, Kwan J, sitting in the Hong Kong Court of First Instance, struck out an unfair prejudice petition as an abuse of process in circumstances in which the petitioners had "offered no or no valid reason why the safeguard of a filter should be bypassed" and it was "difficult to see what positive benefit they could gain by pursuing the complaints in a s 168A petition other than avoiding the filtering process [i.e. that provided by the need to obtain leave to bring a derivative action]": see paragraph 68. In *Prestigic (Wisley) Nominees Ltd Co v JTC Management Ltd* [2012] JRC097 ("*Prestigic*"), the Jersey Royal Court struck out unfair prejudice proceedings as an abuse of process, having concluded that the complaint was "one of misconduct *simpliciter*" (paragraph 51) and that it had to "distinguish between relief for mismanagement of the affairs of the Company and relief for misconduct and that it is only actions in relation to the former that fall properly within the ambit of the unfair prejudice provisions" (paragraph 43). In *Ho*

Yew Kong v Sakae Holdings Ltd [2018] SGCA 33, the Singapore Court of Appeal, affirming a view it had previously expressed in *Ng Kek Wee v Sim City Technology Ltd* [2014] SGCA 47, said at paragraph 93 that unfair prejudice petitions "should not be used to vindicate wrongs which are in substance wrongs committed against a company and which are thus corporate rather than personal in nature".

47. Lord Scott himself cited *Chime* in *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26, [2007] Bus LR 1521 ("*Baltic Partners*"). Giving the judgment of the Privy Council, he said:

> "27. The first question to be addressed, therefore, 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.
>
> 28. There is nothing in the wide language of article 143(1) [which corresponded to section 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'. The point was raised and considered by the Hong Kong Court of Final Appeal (the CFA) in *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 paras 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 the *Chime* case should not be followed. Accordingly, no objection to Gamlestaden's prayer in its article 141 application for an order that the directors pay damages to Baltic for breach of duty can be taken at this strike-out stage."

48. The Judge considered that, in this passage, Lord Scott was referring to the Court's "theoretical" jurisdiction rather than its "practical" jurisdiction: see paragraph 52 of the Judgment. I agree. There is no indication that he was intending to retreat from views he had expressed in *Chime* as to when it is "proper" for the Court to entertain

unfair prejudice proceedings seeking relief in favour of the company. *Baltic Partners* thus provides further confirmation that the Court has *power* to order a respondent to pay compensation to the company, but I do not think it is of any real help on the question of when it is *appropriate* for such relief to be claimed by way of unfair prejudice petition.

49. *Chime* has also been cited in a number of cases in this jurisdiction, notably *Apex Global Management Ltd v Fi Call Ltd* [2013] EWHC 1652 (Ch), [2014] BCC 286 ("*Fi Call*"), *Re Hut Group Ltd* [2020] EWHC 5 (Ch), [2020] BCC 443 and, on appeal, [2021] EWCA Civ 904, [2021] BCC 970 ("*Hut Group*") and *Taylor Goodchild Ltd v Taylor* [2021] EWCA Civ 1135, [2022] BCC 1155 ("*Taylor Goodchild*"). In *Fi Call*, Vos J took the "essence of the decision" in *Chime* to be 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" (paragraph 119), going on to say in paragraph 125:

> "In my judgment, these authorities 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."

50. In *Hut Group*, His Honour Judge Eyre QC (as he then was) at first instance said this in paragraph 55 about paragraph 62 of Lord Scott's judgment in *Chime* (quoted in paragraph 44 above):

> "In my judgement Lord Scott in that passage is not to be seen as laying down preconditions which must necessarily be fulfilled before the court can ever permit a claim seeking such relief to be brought. Rather he was giving guidance, albeit potent guidance, as to the circumstances in which it was likely to be or not to be appropriate for the court to permit such a claim to be made. That interpretation follows from Lord Scott's acceptance that the court had power to grant such relief and his indication that the question was the propriety of the inclusion of the claim in the particular case. Moreover, it is of note that Lord Scott expressly stated that he was setting out his assessment of what was appropriate 'as a general rule' rather than setting out preconditions for the exercise of the jurisdiction. The distinction is a narrow one because at the lowest the passage provides powerful guidance as to when it

> will be appropriate for the court to permit such a claim. It follows that it will rarely be appropriate for the court to permit a claim of this kind in circumstances where the two elements identified by Lord Scott are not present. However, I do not understand Lord Scott to have been saying that such a course could never be appropriate."

Earlier in his judgment, in paragraph 46, Judge Eyre QC had said:

> "The purpose of s.994 is to provide redress in cases where the affairs of a company have been conducted in a way which is unfairly prejudicial to the interests of a shareholder as shareholder. It is concerned to address mismanagement of the affairs of the company rather than to provide redress for misconduct which has harmed the company. However, the mismanagement of the affairs of a company can take the form of a breach of duty by those in control of a company and the same acts can be both mismanagement which is unfairly prejudicial to a minority shareholder and misconduct in breach of a director's duties and causing harm to the company. The question of whether a claim is properly to be seen as appropriately brought by way of a s.994 petition or as being in reality a derivative claim is a matter of analysis of the true nature of the particular claim. In that analysis particular regard is to be had to the relief sought and even more to the nature of the complaint. The court has to consider whether the complaint is in reality in respect of the harm caused to the relevant company by the misconduct (in which case there should be a derivative claim) or in respect of the impact on a petitioner's position and rights as a minority shareholder (in which case s.994 proceedings are appropriate)."

51. On appeal, David Richards LJ, with whom Sir Geoffrey Vos MR and Coulson LJ agreed, quoted paragraph 56 of Judge Eyre QC's judgment (in which Judge Eyre QC had applied the principles he had set out in paragraph 55) and continued in paragraph 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 Corp Ltd* (2004) 7 H.K.C.F.A.R. 546 and in the Privy Council in *Gamlestaden Fastigeheter AB v Baltic Partners Ltd* [2007] UKPC 26; [2007] B.C.C. 272. 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 [the petitioner], has suffered any loss."

52. The question in *Taylor Goodchild* was in a sense the converse of that in the present case: not, as here, whether it is *open* to a petitioner in unfair prejudice proceedings to seek relief in favour of the company but whether it was *incumbent* on a petitioner to do so, with the result that the company could not later pursue the claim. In the course of my judgment, I noted that "[i]t is open to the Court … to grant a variety of … 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" (paragraph 30), but that there was "more scope for argument … as to when it is appropriate for the Court to grant relief in favour of the company in unfair prejudice proceedings" (paragraph 31). On the facts, I took the view that, while the Court might have had jurisdiction to grant relief under section 996 of the 2006 Act along the lines that the company now sought, it did not follow that the claim *should* have been asserted in the unfair prejudice proceedings or that the company's claim was abusive. Sir Nigel Davis, agreeing, encapsulated the issue in this way in paragraph 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."

53. The mismanagement/misconduct distinction which can be seen in the passages I have quoted from *Chime*, *Waddington*, *Prestigic* and Judge Eyre QC's judgment in *Hut Group* can be traced back to *Charnley Davies*. That case involved a petition under section 27 of the Insolvency Act 1986 alleging that the administrator of a company had managed its affairs in an unfairly prejudicial manner. Millett J said this at 624-625:

> "An allegation that the acts complained of are unlawful or infringe the petitioner's legal rights is not a necessary averment in a sec. 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 sec. 459.
>
> Again, I respectfully agree. The very same facts may well found either a derivative action or a sec. 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 sec. 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."

54. In *Re a Company (No. 005287 of 1985)* [1986] 1 WLR 281, to which Millett J referred in *Charnley Davies*, the petitioners alleged that "H" had conducted the company's affairs in an unfairly prejudicial manner, including by acting in breach of duty and without authority, but H was said to have transferred his shares and so

ceased to be a shareholder. Hoffmann J nonetheless declined to strike H out as a respondent to the petition. He said this at 284:

> "It is accepted that on the facts alleged in the petition, the truth of which, of course, remains to be tried, the petitioners would be able to mount a derivative shareholders' action of the kind exemplified by *Wallersteiner v. Moir* [1974] 1 W.L.R. 991 against H. in order to require him to account for such of the company's assets as he may have disposed of without authority. But it is said that such an action should be commenced separately by writ and that it would not be proper to seek the equivalent relief within a petition under section 459.
>
> Looking at the matter from a practical point of view that does not seem to me to be very convenient. It would mean separate proceedings having to be commenced by writ and separate pleadings delivered in respect of matters which would very substantially overlap, if not duplicate, the issues canvassed in the petition and affidavits under section 459. It would then be necessary for both sets of proceedings to be heard together. I would be reluctant to come to the conclusion that this form of duplication was necessary unless it was clear that the jurisdiction under sections 459 and 461 did not permit the whole matter to be dealt with upon the petition. It seems to me that although it is true that section 462(2) shows that the normal order under section 461 will be an order against the company or another member, there is no reason why the words of section 461(1) should not be given their full effect and allow the court to give relief in respect of a complaint that the company's affairs have been conducted in a manner unfairly prejudicial to the interests of members, even when this would involve giving relief against a respondent who is no longer a member. For that reason, I am not willing to strike out H. as a party to the petition."

Conclusions on the legal principles

55. My own view is that the relevant legal principles can be summarised as follows as a matter of the law of England and Wales:

i) The Court has power to grant relief in favour of the company on an unfair prejudice petition. The Hong Kong Court of Final Appeal said as much in *Chime*, and in *Baltic Partners* the Privy Council confirmed that "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". *Fi Call*, *Hut Group* and *Taylor Goodchild* are to similar effect;

ii) At least generally, the Court should not in unfair prejudice proceedings make an order for relief in favour of the company unless the order corresponds with an order to which the company would have been entitled had the relevant

allegation been successfully prosecuted in an action by the company (or in a derivative action in the name of the company) (to adapt slightly a point which Lord Scott made in *Chime*);

iii) It can potentially be an abuse of process for a petitioner to claim relief in favour of the company by way of unfair prejudice petition. I cannot envisage any circumstances in which a petition claiming only such relief would be proper. The right course in such a case would surely be for the petitioner to issue a claim form and seek permission to proceed with it pursuant to Part 11 of the 2006 Act. A petition could also be struck out as an abuse of process if, although it included a claim for relief which was available only in unfair prejudice proceedings (such as an order for the purchase of shares), it could be discerned that the petitioner was not genuinely interested in obtaining such relief and was, instead, trying to bypass the filter for which Part 11 of the 2006 Act provides;

iv) Where, on the other hand, an unfair prejudice petition seeks both relief in favour of the company and relief that would not be available in a pure derivative claim, and the petitioner appears to be genuinely interested in obtaining the latter, I do not think that it would ordinarily be appropriate to strike out either the petition or any part of the relief sought. It is not difficult to conceive of a situation in which it would make sense for a petitioner to include in an unfair prejudice petition a claim for, say, an order for a respondent to buy or sell shares *and* an order for a payment to be made to the company on the basis of a breach of duty by a respondent. In such a case, it would "not seem … to be very convenient" "from a practical point of view" (to echo Hoffmann J in *Re a Company (No. 005287 of 1985*) to insist that the claim for relief in favour of the company be the subject of a separate claim form. Even supposing that, on the particular facts, it would make more sense for the order in favour of the company to be pursued in a distinct derivative claim, it seems to me that it would rarely be right to deem the petition or any relief sought in it to be abusive if all the heads of relief were being pursued otherwise than to evade the requirements of Part 11 of the 2006 Act. As Judge Eyre QC remarked in *Hut Group*, "the same acts can be both mismanagement which is unfairly prejudicial to a minority shareholder and misconduct in breach of a director's duties and causing harm to the company". If a petitioner considers, for example, that such facts could warrant a share purchase order or, failing that, at least the grant of relief in favour of the company, I should not have thought that it would be improper to claim both in an unfair prejudice petition. As Vos J said in *Fi Call*, sections 994-996 of the 2006 Act "provide a wide and flexible remedy" and "[a]rtificial limitations should not be introduced to reduce the effective nature of the remedy introduced by ss.994-996";

v) Where in unfair prejudice proceedings a petitioner asks for relief in favour of the company as well as relief that could only be granted on an unfair prejudice basis, case management issues should be addressed. The best course may be for all the issues to be dealt with at the same time, in a single hearing. Sometimes, however, it could be desirable for matters relating to a claim for relief in favour of the company to be deferred either entirely or in part. It might, for example, be advantageous to determine at the main hearing whether

a respondent was *liable* to the company for a breach of duty but to defer any issue as to *quantum*. I do not myself share the view that a Court should not "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" (to quote Lord Scott in *Chime*, at paragraph 62). To my mind, the mere fact that it might not be "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" would not render a claim for compensation to be paid to the company in respect of such a liability abusive, but would rather call for case management;

vi) I do not, with respect, consider that what the Judge called "the *Chime* approach" represents the law in this jurisdiction. In particular, I do not think that it is only a "rare and exceptional case" that 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", nor that the Court "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".

56. It follows that, in my view, the Judge approached the application for paragraphs 32.2 and 32.3 of the petition to be struck out on a mistaken basis.

The present case

57. The skeleton argument prepared on Mr Ntzegkoutanis' behalf by Mr Mather explains that the "primary relief sought is a composite remedy whereby [Mr Ntzegkoutanis] seeks the reconstitution of the assets misappropriated and/or damages to the Company for the loss caused by the misappropriations, together with an order that [Mr Kimionis] sell his shares in the Company to [Mr Ntzegkoutanis], so permitting him to resume the business associated with the product which he had developed and, in any event, enabling him to vindicate his economic interest in the business and assets of the Joint Venture". If that is Mr Ntzegkoutanis' aim, it makes obvious sense for the petition to claim the relief in favour of the Company sought in paragraphs 32.2 and 32.3 of the petition in addition to an order requiring Mr Kimionis to sell his shares to Mr Ntzegkoutanis. In fact, supposing that Mr Kimionis were ordered to sell his shares, it would be very difficult to determine how much Mr Ntzegkoutanis should pay for them without knowing whether the compensation and constructive trust claims were well-founded and, if they were, their value. It is Mr Kimionis' position, of course, that both claims are without foundation. On that basis, his shares in the Company are presumably worth very little. He would not want to be ordered to sell his shares to Mr Ntzegkoutanis at a price calculated on that footing only to find that he then had to face proceedings by the Company asserting the compensation and constructive trust claims.

58. There is, at any rate, no reason to believe that Mr Ntzegkoutanis is not genuinely interested in obtaining an order allowing him to buy Mr Kimionis' shares and is, instead, trying to bypass the filter for which Part 11 of the 2006 Act provides. Nor did

Mr Robins suggest that there is. That being so, I do not consider that paragraphs 32.2 and 32.3 are abusive or should be struck out.

Conclusion

59. I would allow the appeal and dismiss the application for paragraphs 32.2 and 32.3 of the petition to be struck out.

Lord Justice Snowden:

60. I agree with Lord Justice Newey that the appeal should be allowed. Subject to one point, I also agree with the reasons that he gives.

61. Lord Justice Newey has indicated in [36] above that he is not persuaded by Mr Ntzegkoutanis' argument that his petition under section 994 is not "proceedings … in respect of a cause of action vested in the company" within the meaning of section 260(1)(a) of the Companies Act 2006. For my part, and for the reasons that follow, I consider that Mr Ntzegkoutanis is correct on this point, and this is an additional reason for rejecting Mr. Kimionis' respondent's notice.

62. Part 11 of the 2006 Act is a statutory codification of a long-standing common law procedure for the bringing of "derivative actions" by members of a company. At common law, as explained by the Court of Appeal in Prudential Assurance v Newman Industries (No.2) [1982] Ch 204 at 210D-G, such actions operated as an exception to the "proper plaintiff" rule,

> "A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in Foss v. Harbottle (1843) 2 Hare 461 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence….
>
> The classic definition of the rule in Foss v. Harbottle is stated in the judgment of Jenkins LJ in Edwards v. Halliwell [1950] 2 All E.R. 1064 as follows … (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation…."

63. In Prudential, the Court of Appeal went on to explain that there was an exception to the proper plaintiff rule which was known as the "fraud on the minority" exception. This applied where a particular type of wrong had been done to the company (which included fraud and breaches of fiduciary duty, but not mere negligence), but the wrongdoers were in control and could thus prevent the company from suing to obtain redress. In such a case, in order to avoid the injustice of the wrong to the company going unremedied, a shareholder could be authorised by the court to act as a representative of the company to pursue the company's cause of action on behalf of the company. This was clearly explained by Lord Denning MR in Wallersteiner v

Moir (No.2) [1975] QB 373 at 390-391, and by Briggs J in Universal Project Management Services Ltd v Fort Gilkicker Ltd [2013] Ch 551 at [16]-[20].

64. The essential feature of such derivative actions at common law was that the cause of action being pursued was that of the company, and the shareholder acted as a representative plaintiff on its behalf. This was different in principle to a petition under section 459 of the 1985 Act in which a shareholder was asserting a personal right to apply to court for relief on the basis that his interests as a member had been unfairly prejudiced. A breach of duty by a director to a company would be sufficient to vest a cause of action in the company, but would not be sufficient to enable a shareholder to obtain relief under section 459. The petitioner under section 459 would additionally have to show that the breach of duty was "unfairly prejudicial" to his interests as a member. This might not be the case, for example, if the breach, though prejudicial, was not *unfair* because of the petitioner's own misconduct: see e.g. Re London School of Electronics [1985] BCLC 273 at 279e-f.

65. This distinction was made explicit by the Law Commission in paragraph 6.11 of its 1997 report on Shareholder Remedies (Law Com 246),

> "Whilst we noted the tendency of applicants to bring section 459 proceedings in respect of matters which could have given rise to a derivative action, we do not consider that the two should be entirely assimilated. They are different in principle - one gives rise to a personal right which the shareholder can enforce, the other relates to the company's cause of action - and although they may cover some of the same ground, this will not always be the case."

66. Against this background, it was very clear that the Law Commission intended that the new statutory procedure that it proposed for derivative actions should only apply to representative proceedings by a member seeking to enforce the company's cause of action, and should not affect the ability of a shareholder to bring a personal claim under the unfair prejudice regime.

67. The Law Commission adhered to that distinction in Appendix A to its report when suggesting wording for a draft Bill to insert new sections into the Companies Act 1985. Those new sections defined a derivative action to which the new regime should apply as,

> "an action by a member of a company where the cause of action is vested in the company and relief is sought on its behalf."

68. The Law Commission also provided draft Explanatory Notes to accompany this draft Bill, which said, in relation to the definition,

> "There are three elements to this: the action is brought by a member of the company; the cause of action is vested in the company; and relief is sought on the company's behalf."

69. As eventually enacted in 2006, section 260(1) split the Law Commission's proposed composite definition into two sub-subsections (a) and (b), and introduced the words "in respect of" instead of "where". However, I do not consider that this was anything other than a stylistic change by the drafters of the 2006 Act, who took a very different approach to drafting than their predecessors in 1985.

70. There is nothing in the legislative history of the 2006 Act to suggest that Parliament intended, by the change of wording, to make any substantive change to the essential nature of the derivative action which the Law Commission had identified in 1997. Quite the reverse. The Explanatory Notes to Part 11 stated that the intention was to reflect the recommendations of the Law Commission, and paragraph 494 of the Explanatory Notes in relation to section 260(1) described the effect of that section in exactly the same words that had been proposed by the Law Commission in relation to its draft Bill in 1997, stating,

> "[Section 260(1)] defines what is meant by a derivative claim. There are three elements to this: the action is brought by a member of the company; the cause of action is vested in the company; and relief is sought on the company's behalf."

71. Nor is there anything in the structure of the 2006 Act to suggest that the codification of derivative claims was intended to affect the conduct of unfair prejudice petitions. Although the 2006 Act was a comprehensive re-write of the companies legislation, the two regimes appear entirely separately in Parts 30 and 11 of the Act.

72. The only cross-reference between the two regimes is in section 260(2)(b) which envisages a derivative claim being brought pursuant to an order being made under section 996. But this contemplates a shareholder being authorised by the court to bring a claim on behalf of the company *after* his unfair prejudice petition has succeeded; it does not suggest that a derivative claim as defined in section 260(1) could form a part of a contemporaneous unfair prejudice petition. And for obvious reasons, CPR 19.14(1)(b) provides that the CPR regime for the grant of permission to pursue a derivative claim does not apply to a claim which has already been authorised to be brought by the court under section 996.

73. The Companies (Unfair Prejudice Applications) Proceedings Rules 2009 (SI 2009/2469) also do not cross-refer in any way to derivative claims, or even hint at the possibility that any part of an unfair prejudice petition under Part 30 might have to be the subject of the separate permission regime in Part 11 of the 2006 Act or the CPR. Indeed, even a cursory examination of the detail of the procedure for derivative claims under CPR 19.14-19.15 (included under the general heading of "Representative Parties"), and the 2009 Rules, reveals that the two are not compatible.

74. The result is that I consider that Mr Ntzegkoutanis's petition does not fall within section 260(1)(a) any more than it falls within section 260(1)(b). I agree with Lord Justice Newey's observation, in [38] above, that Mr Ntzegkoutanis is not asking for relief on behalf of the Company under section 260(1)(b) because he is exercising his personal entitlement, as a member of the Company, to apply to the court on unfair prejudice grounds pursuant to section 994 of the 2006 Act. For the same reason, I think Mr Ntzegkoutanis's proceedings are brought pursuant to his personal right to apply to the court under section 994. They are not proceedings brought by him in a

representative capacity to enforce the Company's cause of action, which is what section 260(1)(a) is intended to catch.

75. For these reasons, in addition to those given by Lord Justice Newey, I agree that the appeal should be allowed.

Lady Justice Whipple:

76. I agree that this appeal must be allowed for the reasons given by Lord Justice Newey. I note the one point of difference between Lord Justice Newey and Lord Justice Snowden, which turns on the meaning and application of s 260(1)(a) of the 2006 Act. In my view, paragraphs 32.2 and 32.3 of the Petition do advance claims which are "in respect of cause[s] of action vested in the company", within the meaning of s 260(1)(a). That is to apply the ordinary words of the statute, read in context, to the facts. I can readily accept Lord Justice Snowden's view that the purpose of Chapter 11 of the 2006 Act, which includes s 260(1), was to codify the long-standing common law procedure for derivative actions and that no interference with the procedure for unfair prejudice actions was intended. But the two types of actions always had the potential to "cover the same ground", as the Law Commission recognised at paragraph 6.11 of its 1997 report (see [65] above). I think this case illustrates that sort of overlap. I see nothing in the purpose or history of these provisions to suggest a meaning other than the ordinary, natural meaning of the words at s 260(1)(a). I therefore agree with Lord Justice Newey that the condition at s 260(1)(a) is met on the present facts (see [36] above).

77. However, that conclusion does not affect the outcome of this appeal. Nor does it validate the respondent's notice which fails on the alternative and agreed basis that paragraphs 32.2 and 32.3 of the Petition do not seek relief *on behalf of the company*, rather they advance a claim for relief on Mr Ntzegkoutanis' own account (see [38] above). That means that the condition in s 260(1)(b) is not met, and in consequence, the statutory procedure for derivative claims contained in Part 11 of the 2006 Act is not engaged.