

Neutral Citation Number: [2024] EWHC 1398 (Ch)

Case No: CR-2022-003931

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

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 12 June 2024

Before:

INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

IN THE MATTER OF CANDEY LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Between:

MATTHEW NICHOLAS TOM

Petitioner

- and -

- 1. ASHKHAN DARIUS CANDEY**
- 2. NIGEL ALISTAIR MCEWEN**
- 3. ANDREW RICHARD DUNN**
- 4. LUCY MICHELE HANNAH CANDEY**
- 5. CANDEY LIMITED**

Respondents

Ms Chantelle Staynings (instructed by HCR Legal LLP) for the Petitioner.
Mr Alexander Cook KC and Mr Matthew Rogers (instructed by Candey Limited) for the 1st – 4th
Respondents.

Hearing dates: 13 May 2024

This judgment was handed down remotely at 10.30am on 12 June 2024 by circulation to the parties or their representatives by e-mail.

JUDGMENT

ICC JUDGE GREENWOOD:

Introduction

1. This is an application made by the 1st – 4th Respondents by notice dated 24 January 2024 to strike out and/or for summary judgment in respect of the whole or parts of the unfair prejudice petition presented on 28 October 2022 under section 994 of the Companies Act 2006 by the Petitioner, Mr Matthew Tom (“**Mr Tom**”), in respect of the affairs of the 5th Respondent, Candey Ltd (“**Candey**” or “**the Company**”). Not exclusively, but to a substantial extent, the application rests on the effects of the Limitation Act 1980 (“**the 1980 Act**”) and more generally, of delay and the passage of time, in circumstances where Mr Tom resigned as a director of Candey on 15 October 2015, and has not since then participated in the conduct or management of its business.
2. Candey was incorporated on 24 September 2012; it provides legal services and litigation support, including (formerly) through a limited liability partnership, Candey LLP (“**the LLP**”), which was incorporated on 12 March 2009 by the 1st Respondent, Mr Ashkhan Candey (“**Mr Candey**”), a solicitor, and which commenced in business from premises at 7 Stone Buildings, Lincoln’s Inn, in April 2009. Mr Tom is also a solicitor; he and Mr Candey met in about November 2000, shortly after Mr Tom joined Tarlo Lyons Solicitors, where they practised together as colleagues for some years, and became friends. On 1 April 2009, Mr Tom became a member of the LLP, on terms agreed orally on 26 March 2009 with Mr Candey (acting for himself and for the LLP) and at least to some extent recorded in writing (“**the Agreement**”).
3. Between 3 April 2009 (when Mr Candey’s wife, the 4th Respondent, Mrs Lucy Candey (“**Mrs Candey**”) ceased to be a member) and 6 May 2011 (when Mr Andrew Dunn (“**Mr Dunn**”), the 3rd Respondent, also a solicitor, was appointed as a member) the LLP’s only members were Mr Candey, Mr Tom and the 2nd Respondent, Mr Nigel McEwen (“**Mr McEwen**”), formerly the managing partner at Tarlo Lyons.
4. The terms of the Agreement are in dispute, but on Mr Tom’s case, included:
 - 4.1. an express term, which is admitted, that he “*would be paid remuneration of 50% of fees billed by him where the work was introduced by him, and otherwise 40% of fees billed by him, together with a commission of 10% of others’ billing where the client was introduced to them by him*”;

- 4.2. an express term, also admitted, that he would join as an equity partner, with equity starting at 2%, rising by stages (at a rate which is in issue) to 7% after 7 complete years at the firm, with each increase to come from Mr Candey's share; and,
- 4.3. an express term that on his exit from the LLP, "*Mr Candey would procure the receipt by [Mr Tom] ... of a payment from the Firm ... equivalent to the value of his "shares" ...*", independently valued as at the date of his resignation, and subject to Mr Candey's own personal option to acquire Mr Tom's interest for the same sum; whilst Mr Candey's option is admitted, Mr Tom's right to payment on exit is denied;
- 4.4. also in issue are whether or not there were implied terms of good faith, and that Mr Tom would be consulted in respect of significant business decisions and entitled to be involved in the management of the business.
5. Mr Tom's case is that the Agreement was varied in about September 2011, such that (as is admitted) he became entitled immediately to a 4% interest in the LLP and (as is denied) his interest was to increase to 5% from 1 April 2014, 6% from 1 April 2015 and 7% from 1 April 2016, as long as he remained in work at the LLP on those dates; the Respondents' case is that apart from the immediate increase to a 4% interest, the Agreement was not varied.
6. On Candey's incorporation in 2012, each of Messrs Tom, Candey, McEwen and Dunn became a director (as did Mrs Candey) and each became a shareholder, each to an extent intended to reflect his interest at that time in the LLP; 5% of its shares were allotted to Mr Tom. On 1 October 2012, Candey became a corporate member of the LLP.
7. By about October 2014 (albeit there is a dispute about exactly when) the affairs of the LLP and Candey had been restructured ("**the Restructure**") such that, essentially, Candey acquired (or was intended to acquire) the interest of each member in the LLP (at an aggregate price of £11,606,864) and each member, in return, was given by Candey a corresponding and proportionate credit, in a sum recorded in his director's loan account; Mr Tom's account was credited in the sum of £464,274 (albeit again, there is a dispute, which in part reflects the dispute about the alleged 2011 variation, as to whether that sum

was in the correct amount, and indeed, apart from that, more fundamentally, a dispute as to whether Mr Tom in fact sold his interest in the LLP to Candey at all); the LLP's employees became employees of Candey.

8. Also in issue is whether, in October 2013, the Agreement was further varied in respect of Mr Tom's relative shareholding in Candey and its staged increase over time.
9. From about November 2014, Candey became the principal medium through which the business was conducted. Essentially, it is common ground that the Agreement - whatever might originally or by then have been its terms - continued (and/or then came) to bind Mr Tom, Mr Candey, the LLP and Candey itself in respect of Mr Tom's involvement in Candey's business, as it had governed his previous involvement in the LLP's business; in dispute is whether, as alleged by Mr Tom, Candey was, more broadly, a "*quasi-partnership*", and whether in any event its members and directors were bound by obligations of good faith, and subject to equitable constraints on the exercise of their and/or Candey's rights and powers, including on the removal of Mr Tom from office as a director, and on his exclusion from management.
10. Against that background, Mr Tom's case is that in various respects, the affairs of Candey have been conducted in a manner which was and is unfairly prejudicial to his interests as a member, and that in consequence, on 15 October 2015, he resigned as a director. I will expand upon certain aspects of his and the Respondents' pleaded cases below (in particular in relation to the loan account and unpaid commission) but in brief outline, he alleges:
 - 10.1. that increasingly, from about the end of 2012, he was mistreated, excluded from management and put under pressure to agree disadvantageous changes to the Agreement (including in respect of commission) and/or to sell all or part of his shareholding;
 - 10.2. that at a board meeting on 24 September 2015, he was told of a proposed "*amortisation*" exercise, the result of which would have been to reduce dramatically the value of his shares at that time, and which was wrongfully intended to favour Mr Candey and/or Candey in the event of Mr Tom's exit (and their payment for his shares);

- 10.3. that at a further board meeting on 15 October 2015, the other directors voted to approve accounts which, as they knew, inaccurately understated the sum due to Mr Tom in respect of his director's loan account (at £259,454, rather than £332,498, reflecting his claim to a 5% interest in the LLP as at the date of completion of the sale by the LLP's members to Candey in 2014);
- 10.4. that since his resignation in October 2015, in breach of the Agreement:
- 10.4.1. Candey and/or Mr Candey have failed to purchase Mr Tom's shares in Candey, and have instead wrongfully asserted that he was entitled only to a 5.5% holding (contrary to the alleged 2011 and/or 2013 variations) and that in any event, his shares have been (or should be) redeemed at par;
- 10.4.2. that the Company has failed and refused to pay the true, or indeed, any sum outstanding in respect of Mr Tom's director's loan account (in the sum of £332,498) and has instead wrongfully sought to make payment contingent upon Mr Tom's continuing contribution to and involvement in the business;
- 10.4.3. that in addition, again in breach of the Agreement, the Company has failed to pay certain commission due in respect of "*Matter A*", a civil case (said to have settled in about May 2014) conducted by Candey for a client introduced by Mr Tom, and has instead deliberately delayed the progress of the costs assessment in order to put financial pressure on Mr Tom;
- 10.5. that in November 2016, 99,000 new shares were allotted to Candey's other members at par, the effect (and improper purpose) of which was to reduce Mr Tom's shareholding to 0.055% of the Company's issued capital; Mr Tom knew of the proposed allotment, but objected on grounds that by virtue of the Agreement he was entitled to maintain his relative interest in Candey without any need for further payment;

- 10.6. that in these respects, the Respondents acted in breach of their duties as directors (in causing Candey to act as it did) as well as their duties of good faith and the equitable constraints and duties implied by the characterisation of the business as a quasi-partnership.
11. Each of these allegations is denied by the Respondents. Moreover, their case is that in September 2015, if not before, Mr Tom acted in repudiatory breach of the Agreement by (amongst other things) relocating his office to his home in Gloucestershire, and thus “retiring”.
12. Against that background, by his petition, as I have said, presented on 28 October 2022, over 7 years after his resignation, Mr Tom sought, in particular:
- 12.1. an order under section 996 of the 2006 Act, compelling Mr Candey and/or Mr McEwen and/or Mr Dunn and/or Mrs Candey and/or Candey itself to purchase his shareholding in Candey at a fair value to be determined by the court on terms that will remedy the allegedly unfairly prejudicial conduct (including on the assumed basis that Mr Tom holds such percentage shareholding as the court finds he is entitled to) and/or on such other terms or assumptions as the court shall think fit; and,
- 12.2. “*in any event*”, an order under section 996, that Mr Candey and/or Mr McEwen and/or Mr Dunn and/or Mrs Candey and/or Candey itself shall pay Mr Tom “*all sums which are found to be due and owing to him by [Candey] and/or that appropriate adjustments be made to the purchase price of [Mr Tom’s] shareholding to remedy the failure to pay such sums to [Mr Tom]*”.
13. In respect of his claim to payment of any specific sum arising independently of the purchase price to be paid by the Respondents (or some of them) in exchange for his shares, Ms Staynings, who appeared for Mr Tom, explained that Mr Tom’s case is confined to a claim in respect of commission; in particular therefore, there is no discrete claim (whether contractual or otherwise) to payment of the sum credited to his loan account as a result of the Restructure, although the amount of that sum will be relied upon by Mr Tom as being relevant (or potentially so) to the court’s determination of the

fair purchase price to be paid for his shares; in any event, the Respondents' conduct in respect of the loan account is relied upon as comprising unfairly prejudicial conduct.

14. The 1st to 4th Respondents' application was made under CPR rule 3.4(2)(a) and/or (b) and/or CPR Part 24, on various bases. In summary:
 - 14.1. first, that any claim to payment of a specific sum in respect of the loan account and/or of commission in respect of Matter A is barred by the provisions of sections 8 and 9 of the Limitation Act 1980 ("**the 1980 Act**"); and/or,
 - 14.2. second, that where in substance the claims to relief are based on the Agreement and/or the loan account, in respect of which Mr Tom has a parallel cause of action for breach of contract or in debt, albeit now barred by virtue of sections 5 and/or 6 of the 1980 Act, the claims ought to be struck out and/or summary judgment given, because there is no real prospect of the court at trial exercising its remedial discretion under section 996 to grant relief which would undermine the policy of the 1980 Act and allow for a petitioner, in effect, to circumvent its otherwise applicable provisions; those claims are therefore abusive and/or bound to fail; and/or,
 - 14.3. third, whether alone or in combination with the second basis, that Mr Tom has acquiesced in the alleged misconduct and/or deliberately delayed the commencement of proceedings for tactical reasons amounting to an election against the relief sought and/or refused various offers made by Mr Candey to buy his shares, such that the proceedings are abusive and/or in any event realistically bound to fail.
15. In support of the application were the 3rd and 4th witness statements of Mr Candey made on 24 January 2024 and 12 April 2024; in opposition were the witness statements of Mr Tom made on 5 April 2024, and of Mr Adam Finch (a solicitor at HCR Legal LLP, Mr Tom's solicitors) made on 6 February 2024.
16. An 8-day trial of the petition has been listed to begin on or shortly after 1 November 2024. Although they are yet to file or serve witness statements, the parties have exchanged the reports of their expert share valuers dated 25 April 2024, Mr Martin

Chapman, a partner at Crowe UK LLP on behalf of Mr Tom, and Mr Sean Rowbotham, a director of Financial & Strategy Services Ltd on behalf of Respondents (other than Candey). The experts have not yet produced a joint report, but are to do so in due course.

The Relevant Law

Strike Out and Summary Judgment

17. The rules and principles governing the court's powers to strike out a statement of case under CPR rule 3.4(2) or give summary judgment under Part 24 of the CPR were not in dispute.
18. Relevantly, CPR rule 3.4(2) provides that, "*The court may strike out a statement of case if it appears to the court (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings*".
19. For the purposes of a strike out application, the applicant is bound to accept the accuracy of the facts pleaded unless they are self-contradictory or obviously wrong (see the White Book 2024 at 3.4.2). This contrasts with the position on a summary judgment application under CPR r 24.2 where the court may be required, without conducting a "*mini-trial*", to examine the evidence relied upon to prove the claim and consider the evidence that can reasonably be expected to be available at trial.
20. A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence, and the court will not strike out a claim unless it is certain that the claim is bound to fail. In practice therefore, an applicant faces a high bar and relief is normally available only in cases which turn on issues of legal principle which will plainly not be the subject of any disclosure or oral evidence and cross-examination at trial.
21. In a case of alleged abuse of process, the court must first determine whether there is an abuse. If it does so determine, it must then decide whether or not to exercise its discretion to strike out the claim.
22. Applications for summary judgment are governed by CPR Part 24. The circumstances in which the court may grant summary judgment on the whole of a claim or on an issue are

set out in CPR r 24.3: “(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

23. Both parts of this test must be satisfied before the court has any discretion to grant summary judgment. Moreover, the court is not obliged to grant summary judgment on particular issues or sub-issues even if it concludes that the party has no real prospect of succeeding on that issue: it is entitled to hold, as a matter of discretionary case management, that no final determination should be made at an interim stage if there is to be a trial in any event; this was a point emphasised by Ms Staynings: “*where there is to be a trial in any event, and the sub-issue which the Judge has determined on an interim basis is closely related to other factual or legal issues which the trial judge will examine in more detail, it seems to me that it would be generally unwise for the interim hearing Judge to make any binding declarations. What may seem correct on the evidence and argument on an interim application, may turn out to be wrong following the mature reflection available at trial*”: Executive Authority for Air Cargo and Special Flights v Prime Education Ltd [2021] EWHC 206 (QB) at [114].
24. The following principles applicable to applications for summary judgment were formulated by Lewison J (as he then was) 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 at [24]:
 - 24.1. the court must consider whether the claimant has a “*realistic*” as opposed to a “*fanciful*” prospect of success: Swain v Hillman [2001] 1 All E.R. 91;
 - 24.2. a “*realistic*” claim is one that carries some degree of conviction; this means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];
 - 24.3. in reaching its conclusion the court must not conduct a “*mini-trial*”: Swain v Hillman;
 - 24.4. this does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court; in some cases

it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

24.5. however, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550;

24.6. although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment; thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;

24.7. on the other hand 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.

Unfair Prejudice Proceedings

25. There was no debate regarding the law governing unfair prejudice proceedings, but again, for the purposes of the present application the essential principles are uncontroversial.

26. Section 994(1) of the 2006 Act 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.”

27. The court’s powers can only be invoked by a member of the company, and the conduct complained of must be both unfair and prejudicial: the components are distinct. The alleged harm need not be strictly financial or “economic”; the requirement ought not to be too narrowly or technically understood, although prejudice must be real, rather than merely technical or trivial, and must be established objectively, not according to the subjective views of the petitioner. As was said in Re Coroin Ltd [2012] EWHC 2343, by David Richards J (as he then was):

“Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not at law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.”

28. As to the element of unfairness, as was explained by Patten J (as he then was) at [60]-[61], delivering the judgment of the Court of Appeal in Grace v Biagioli & Others [2005] EWCA Civ 1222, one can deduce the following principles from the speech of Lord Hoffmann in O’Neill v Phillips [1999]1 WLR 1092:

“(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;

(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, “consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith”: see p.1099A; the conduct need not therefore be unlawful, but it must be inequitable;

(3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;

(4) To be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s.210 of the Companies Act 1948;

(5) A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity;

(6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for

a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder.”

29. Section 996 of the 2006 Act 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.”*

30. The court’s powers when granting relief are extremely wide and flexible. As was said by Oliver LJ (as he then was) in Re Bird Precision Bellows Ltd [1986] Ch. 658 CA (Civ Div) at 669, in a passage often cited:

“The whole framework of the section, and of such of the authorities as we have seen, which seem to me to support this, is to confer on the court a very wide discretion to do what is considered fair and equitable in all the circumstances of the cases, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company.”

31. Moreover, the court has the power to make any order it thinks fit once unfair prejudice has been established, even if that order has not been sought by the petitioner: Hawkes v Cuddy [2008] B.C.C. 390 (Lewison J as he then was) (appeal dismissed at [2010] B.C.C. 597, [91]). The court’s powers include a power to make an award of compensation, albeit that payment of a sum is not specifically referred to in section 996(2). In many cases, there is much to be said for a “*clean break*” between the parties: see, for example, *per* Warner J in Re Elgindata (No.1) [1991] B.C.L.C. 959, and *per* Lawrence Collins J (as he then was) in Re Clearsprings (Management) Ltd [2003] EWHC 2516 Ch at [29].

Unfair Prejudice Proceedings: Limitation

32. Until 23 February 2024, when the Court of Appeal delivered its judgment in THG plc & others v Zedra Trust Company (Jersey) Ltd [2024] EWCA Civ 158 (after the issue of the Respondents’ application in the present case), it had been “*received wisdom*” that no limitation period was applicable to unfair prejudice petitions (see [20] *per* Lewison LJ). However, as a result of that decision, the position is now as follows.

32.1. Unfair prejudice proceedings commenced by petition under section 994 of the 2006 Act comprise an action “*upon a specialty*” within the scope of section 8 of the 1980 Act; they are therefore subject in principle to a 12-year limitation period from the date on which the petitioner’s cause of action accrued: see [65]-[78].

32.2. Relief sought under section 994 is not “*equitable relief*”; it is relief sought under a statute which the court is empowered to grant because section 996 gives it that power: see [25] and [85] (and Re Edwardian Group Ltd [2018] EWHC 1715 (Ch) at [571] *per* Fancourt J).

- 32.3. It follows that there is no room or need to apply a limitation period “*by analogy*” under section 36 of the 1980 Act (or indeed, otherwise) and that equitable doctrines and defences such as *laches* are not strictly applicable: see [128].
- 32.4. By virtue of section 8(2), the 12-year period prescribed by section 8(1) of the 1980 Act is disapplied if a shorter period of limitation is prescribed by any other provision of the same Act. If a petitioner under section 994 seeks a purely monetary remedy, such as compensation, that claim (or part of the claim) will comprise an action to recover a sum “*by virtue of any enactment*” falling within section 9 of the 1980 Act (the application of which depends on the remedy claimed, rather than the underlying cause of action) and will therefore be subject to a 6-year limitation period from the date on which the cause of action accrued: see [87]-[130].
- 32.5. It follows that different limitation periods will apply to different varieties of relief sought under section 994, as is the case, for example, in respect of section 238 of the Insolvency Act 1986 (see Re Priory Garage (Walthamstow) Ltd [2001] BPIR 144): see [123]. The court should look at the substance or essential nature of the relief sought (not just limited to the words of the pleading) in order to decide which of section 8(1) or section 9 is applicable; this was the “*look and see*” approach referred to by Lord Goddard CJ in West Riding County Council v Huddersfield Corp [1957] 1 QB 540, and by Mr John Randall QC (the Deputy Judge) in Re Priory Garage.
- 32.6. A claimant is in any event entitled to take advantage of a longer limitation period by framing his case appropriately (see [123] and Lord Goff in Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 at 193-194); for example, in the context of professional negligence by claiming in tort rather than contract, and in the context of section 994, by seeking an order to regulate the affairs of the company (governed by section 8(1)) rather than for payment of a compensatory sum (governed by section 9).
- 32.7. A claim under section 994 for an order that the petitioner’s shares be bought by the respondents is not a claim for the recovery of a sum, and therefore does not fall within section 9 of the 1990 Act; in such cases, no debt is due until a

purchase order is made and share certificates are subsequently tendered against the price to be paid; the order is not “*judgment for a sum of money*”: see [124]-125], and [159].

33. In Zedra Trust itself, in consequence of these principles, the petitioner’s application to re-amend its petition to seek monetary compensation was dismissed, because it fell within section 9 of the 1980 Act, and was time barred. As Lewison LJ explained at [2]:

*“... on an application to re-amend the petition issued on 22 June 2022, and heard on 16 December 2022, the judge allowed Zedra to plead that it had been wrongly excluded from a bonus share issue on 11 July 2016. His judgment was given on 26 January 2023. The re-amended petition, so far as relevant to this appeal, alleges that the directors were in breach of their statutory duty to act lawfully, in good faith for proper purposes and fairly as between different shareholders when exercising the power to allot shares and the power to capitalise profits and appropriate the capitalised profits to shareholders. There is a specific allegation that the directors acted “in bad faith and/or for improper purposes in order to prejudice Zedra’s interest as a minority shareholder”. The petition goes on to allege that the effect of that exclusion was to dilute Zedra’s shareholding. Accordingly, the petition alleges, Zedra lost the right to additional shares which it would have sold. The loss to Zedra is therefore said to be the additional amount which it would have realised on the flotation of THG in September 2020. **The principal claim for relief is for an order that the relevant directors pay equitable compensation to Zedra to redress that loss.**”*
(Emphasis added.)

And then at [127] and [129]:

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

128. ...

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

Unfair Prejudice Proceedings: Delay and Acquiescence

34. Apart from issues of strict limitation as such, is the separate discretionary power of the court to dismiss or strike out or give summary judgment in respect of an unfair prejudice petition on grounds of delay or of acquiescence, notwithstanding its commencement at a time within the limitation period. In Zedra Trust, at [126] Lewison LJ said:

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

35. Further, at [160]-[163], Snowden LJ said:

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

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

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

Mr Tom's Loan Account

The Pleaded Cases

36. I have explained that on his case, Mr Tom's loan account at Candey was created as part of the Restructure. Essentially, on the transfer to Candey of their combined shares and interests in the LLP, the members of the LLP were each given (or intended to be given) a debt credit equal to the value at the relevant time of their relative interests in the LLP; the debt was a measure of contributed value.
37. Mr Tom's case is that: (i) the extent and value of his interest in the LLP at the relevant time, and therefore (ii) the amount of the credit to his loan account, as well as (iii) his proportionate shareholding in Candey, ought to be determined in accordance with the disputed terms of the Agreement.

38. There is therefore, as I have outlined, a dispute about each of these elements, including, additionally, whether the relevant time at which to ascertain the value of Mr Tom's transferred interest in the LLP was the date of "*completion*" of the Restructure, or the earlier date, of its agreement (as at "*exchange*").
39. It was common ground that the loan account is not repayable on demand (since otherwise, Candey would have been vulnerable to immediate demands for payment of sums which it could not afford). Instead, in their Defence, the 1st to 4th Respondents pleaded an agreement that (save in respect of Mr McEwen, who was not a fee earner) any sums owed by the Company to its members as a result of its acquisition of their interests in the LLP were to be repaid, "*via each of the members' own skill and labour ... through billing clients and using such monies to repay any director's loans owed to the individual directors*", or to the same effect, "*through profits generated through the continued skill and labour*" of its shareholders. Accordingly, they pleaded that by his alleged repudiatory breach of the Agreement and subsequent resignation, having ceased to be an active participant in the business capable of generating fee income, Mr Tom "*forwent any ability ... to obtain repayment*".
40. In addition, in the event that contrary to their case, there was a debt repayable on demand, the Respondents pleaded: (i) limitation - that by virtue of section 6 of the 1980 Act, demands for immediate payment of the debt having been made more than 6 years before the presentation of the petition, the action for payment was barred; and (ii) alternatively, laches. It is important to note that this was the only respect in which limitation was expressly pleaded in the Respondents' Defence (which as I have said, preceded the decision of the Court of Appeal in Zedra Trust) as a specific defence to a particular claim. Limitation is a defence which must be pleaded specifically: CPR 16 PD, paragraph 11.3, and Ronex Properties Ltd v John Laing Construction Ltd [1983] 1 Q.B. 393, 404, *per* Donaldson LJ.
41. In his Reply, Mr Tom admitted and averred "*only*" that the Company was required to repay the directors' loan accounts arising from the Restructure "*if and when it had funds to do so (having regard to the Company's profits and available funds)*", and pleaded that in fact, including "*for tax reasons*", the loan accounts had previously, from time to time, been repaid in part, instead of directors being paid any profit share. He denied however that payment (or the existence of the debt) was contingent on any continuing or future

participation in the business, or contribution to its profits; payment was not to be “*earned*”; he denied that he was in repudiatory breach of the Agreement, and in any event, pleaded that any repudiation had not been accepted.

42. In addition, amongst other things, Mr Tom pleaded that in any event, the conduct in respect of his loan account was unfairly prejudicial to his interests, to the extent it consisted of: (i) the Respondents having deprived him of a credit for the full amount to which he was entitled as a reflection of his equity entitlement in the LLP at the date of the Restructure, and (ii) the wrongful denial of his entitlement to payment in respect of the account, by wrongfully asserting that any such right or payment was solely contingent on a future and continuing participation in the business. He pleaded that his continuing involvement was untenable because regardless of any terms of repayment, and indeed, regardless of his continuing participation, he was wrongfully deprived of the loan’s full value (or potentially any of its value). Importantly, he pleaded that following his resignation:

“... he was entitled to have the entire shareholding to which he was entitled at the date of his resignation purchased at fair value (either pursuant to the terms of the Agreement or in the form of relief for unfairly prejudicial conduct pursuant to section 996 Companies Act 2006). In those circumstances, the Petitioner does not seek repayment of his loan account in addition to that relief (save that he reserves his right to seek appropriate adjustments to any share valuation and/or appropriate alternative relief at trial, including in the event that the value of his loan account exceeds the fair value of his entire shareholding)”.

43. Before me, Ms Staynings said that (even if some slight amendment or clarification of the Petition or Reply might be required) Mr Tom’s case in respect of the loan account was limited: (i) to reliance upon events and conduct connected with it, including in respect of its amount, terms and existence, to establish or support his allegations of unfairly prejudicial conduct and, (ii) in the event the court finds that the Respondents or some of them are liable under section 994, to reliance upon its existence and amount in the determination by the court of the fair value or price to be paid in exchange for his shares in the Company, on an order under section 996 that his shares be purchased. There is therefore no intended self-standing claim to (re)payment of the sum, whether in contract

or under section 994 or otherwise. As Ms Staynings said, if the claim to a share purchase order fails, Mr Tom accepts that he will not be entitled to any alternative relief in respect of his loan account in the form of an order to make a payment of money.

44. Finally, Mr Tom pleaded that neither the 1980 Act nor laches “*applies to the relief sought pursuant to section 996*” of the 2006 Act.

Limitation

45. In my judgment, for the following reasons, the claim insofar as connected with or arising out of the loan account, is not barred by virtue of any provision of the 1980 Act (or by virtue of the equitable doctrine of laches).
46. First, fundamentally, the point is governed by the decision in Zedra Trust. Mr Tom, in his capacity as a member, is seeking non-monetary relief - a share purchase order - in respect of which, under section 8 of the 1980 Act, the limitation period is 12 years. All of the relevant instances of alleged prejudice in this case - and certainly, all of the relevant events concerning the loan account - took place in less than 12 years before the petition was presented on 28 October 2023. Laches is inapplicable, because the claim is not for equitable relief, or advanced in equity; it is purely statutory.
47. Second, in respect of the loan account, there is no claim to payment of a specific sum as a debt arising under a contract; there is no claim to a contractual remedy at all. Indeed, although Mr Tom has pleaded that the Company was required to repay the directors’ loan accounts arising from the Restructure only “*if and when it had funds to do so (having regard to the Company’s profits and available funds)*”, he has not pleaded when that time or circumstance arose, or said that it has passed, or said that as a result he is entitled to payment; that is simply not his case. His case is that having been unfairly prejudiced, as a member, by the misconduct of the Company’s affairs (including by reference to conduct concerning the loan account, its terms and amount) he is entitled to seek a share purchase order, and that the sum standing to the credit of his account is (or is at least potentially) material to the determination of the purchase price, being itself a measure of that which he contributed to its business on the Restructure.
48. Third, the claim advanced in respect of the loan account is fundamentally different from an alternative claim that might have been advanced in contract:

- 48.1. it is brought against (or includes) different respondents, not said to have been parties to the Agreement and/or loan account;
- 48.2. it requires proof of different elements, and insofar as based on its terms, does not as such require Mr Tom even to prove that the Agreement was contractually binding;
- 48.3. moreover, it relies on different duties, including the 1st to 4th Respondents' duties as directors, said to have been breached, as well as various equitable constraints;
- 48.4. circumstances surrounding the loan are relied upon by Mr Tom in combination with other circumstances to justify the grant of relief;
- 48.5. Mr Tom seeks a remedy which is flexible and discretionary and is therefore unlike contractual damages or an order for payment of a debt, and different from an order for specific performance of a certain, contractually agreed obligation;
- 48.6. moreover, any adjustment to the share price on a purchase order will not necessarily be for the full value of the loan account; any adjustment would reflect an exercise of the court's discretion, and an exercise in valuation. There are many and various possible adjustments, but for example, if a court were to order that in exchange for his shares, and in order, as is common, to effect a clean break between the opposing parties, Mr Tom should be paid a sum by the 1st to 4th Respondents, or one or more of them, adjusted to include an amount in satisfaction of his loan account (and thus on the assumed basis that his loan account is repaid by the Company) that assumption would affect the value of the Company (and thus the total, single amount to be paid in exchange for his shares) but not in precisely the sum of the outstanding account; it would not comprise an order for payment of a sum of money, or a debt;
- 48.7. an example of the court considering a share price determination by reference (in part) to the petitioning members' loss of opportunity to receive dividends (which I understood Ms Staynings to suggest might be analogous to the Company's failure to pay sums in respect of Mr Tom's loan account since his resignation,

whilst nonetheless making payments to the other directors from time to time) is Re McCarthy Surfacing Ltd [2009] BCC 464, at [100] – [102], where the judge said, amongst other things, “*What [counsel for the petitioners] is looking for, therefore, is an order that requires the respondents to purchase Mr Hecquet and Mr Hoare’s shares at a figure which reflects 40% of the dividends which the court considers ought to have been declared on the shares since 1996 on a non-discounted basis, plus a discounted value for the shareholding, computed after deducting from the company’s assets the amount of the notional dividends which the court judges should have been paid*”, and “*The appropriate remedy for that unfair prejudice is that the shares should be bought out by the McCarthy brothers at a value to be fixed by the court, that value to reflect (a) the loss of the chance to receive dividends from the company due to the failure of the board to give proper consideration as to whether dividends should be declared, and (b) the value of Mr Hecquet and Mr Hoare’s shares valued as a minority interest, and after taking account of any compensation payable under (a)*”; the payment contemplated in that case would have been of a purchase price, determined in the circumstances of the case to do justice between the parties, in exchange for shares; it would not have been an order to make payment of a discrete sum as compensation; it would not, it seems to me, have fallen within section 9 of the 1980 Act;

- 48.8. these conclusions are not affected by adopting a “*look and see*” approach to the characterisation of Mr Tom’s claim in this regard. His claim is both literally, and in substance, a claim to non-monetary relief under section 994 of the 2006 Act. The fact that the purchase price might be adjusted by reference in part to the amount of the loan account, which might as a term of the order be treated as thereby satisfied, does not cause me to characterise the whole claim differently (and certainly not at an interim stage of the proceedings): it remains a claim to a share purchase order – an order that Mr Tom’s shares be sold and transferred at a certain price, on certain terms, to one or more of the Respondents.
49. Fourth, it is immaterial that Mr Tom *might* have brought a different action in contract, whether for damages or for payment of a debt or otherwise; the existence of alternative, parallel rights of action (if indeed in this case they exist) is not relevant. Mr Tom was

free to advance his case as he wished, on a basis favourable to himself, including in respect of limitation: see above at paragraph 32.6. I deal further with this point below.

50. Fifth, even if Mr Tom’s claim in respect of the loan account had been for payment of a sum and/or framed in contract (and although, since it was not, the point is somewhat hypothetical) I would not in any event have been persuaded to strike it out or give summary judgment on the basis of limitation.

50.1. First, the Respondents’ only pleaded limitation defence (by reference to section 6 of the 1980 Act, but not section 9) is predicated on the assumption that Mr Tom’s claim was to payment of the loan account, on demand, on a contract. Whilst I acknowledge that Mr Tom in fact demanded immediate repayment of his loan account (for example, by email of 26 October 2015, sent to Mr Candey, and copied to Mr McEwen, Mr Dunn and Mrs Candey) more than 6 years before commencement, his case as subsequently pleaded was that the sum is *not* repayable on demand, and was not even that it was repayable on his departure from the business; it was that it would or could have been repaid only “*if and when [the Company] had funds to do so (having regard to [its] profits and available funds)*”. Ms Staynings described this circumstance as something akin to that which would allow for the declaration of dividends. However, it follows that on neither side has it been pleaded that the Company ever arrived at the point at which, on this (or indeed any other) basis, it became obliged (or even free) to make payment, let alone that its liability arose more than 6 years before the petition. Without that specific allegation, it is not possible to hold that the claim is or would be time barred.

50.2. Furthermore, the pleaded defence was by reference to section 6 of the 1980 Act. It was therefore, as I have said, pleaded as a defence to a claim on a contract of loan. I am in any event doubtful (albeit I do not have to decide) that a claim to payment of a sum made by a petitioner under section 994 could, even in principle, be subject to section 6 of the 1980 Act, rather than section 9. Indeed, Mr Cook’s submissions proceeded on the basis that in respect of the loan, it was (if at all) by virtue of section 9 that the claim was barred, as in Zedra Trust. However, if that is so - if it is section 9 by reference to which this defence is raised - it raises the issue of when the relevant “*cause of action*” arose, being,

presumably (although none of this was pleaded) the cause of action to recover the sum by virtue of section 994 of the 2006 Act (the relevant “*enactment*”) rather than by virtue of the contract. In the present case, one important instance of alleged unfair prejudice was the share dilution in November 2016, which was less than 6 years before the petition was presented. It might be said that this event, either alone or in combination with earlier events, comprised unfair prejudice justifying relief, and that in granting relief the court could in principle make an order for payment of a previously unpaid sum that remained outstanding. For example, a contractual right to payment might arise in year 1 and become time barred in year 6, but be recoverable on a different basis by proceedings commenced under section 994 in year 7, based on prejudicial conduct in year 5. None of this having been pleaded, it would be wrong to speculate as to how the point might unfold.

51. Although not points regarding limitation as such, it is convenient to deal here with two further arguments raised by the Respondents.
52. First, given the nature of the claim made, it is irrelevant (even if correct, which I do not accept to have been established) that as Mr Cook argued, the loan repayment term pleaded by Mr Tom (that the debt be paid by the Company only “*if and when it had funds to do so (having regard to the Company’s profits and available funds)*”) is too uncertain to be enforceable in contract.
 - 52.1. The claim is not to (re)payment of the loan whether on the terms of the Agreement and/or otherwise, whether in contract or at all: it is not said that payment has fallen due (because the Company has or has had sufficient funds) and that the term should therefore be enforced. Moreover, for the purposes of section 994, the relevant test is one of “*unfairness*”, which is broader than (or in any event, different from) the test in contract; the rules that require certainty of contractual terms are not necessarily applicable.
 - 52.2. I would not in any event have been persuaded to strike out the claim or give summary judgment on the basis of contractual uncertainty. In this respect, Mr Cook relied on the decision of the Court of Appeal in Gadhok v Shamji [2003] EWCA 1928, in which the Court of Appeal refused an appeal against an order

striking out a claim on the basis of limitation advanced on grounds that the judge had been wrong to conclude that the sum claimed had become repayable more than 6 years before proceedings began (see [15], [18] and [33]). The details of the case are unimportant, but in addition to the basis of dismissal, Arden LJ (as she then was) expressed some doubt (contrary to the view of the judge) as to whether, in any event, the alleged agreement (which had, over time, been advanced by the claimant in seven different versions) was sufficiently certain to be enforceable, being that the defendant would, “ ... *pay off the debt when either he or Gomba had the money ...*”: see [36], echoed briefly by Lord Justice Simon Brown at [42]. In doing so, Arden LJ distinguished the decision of Atkinson J in Ledingham v Bermeijo Estancia Ltd [1947] 1 All ER 749, in which a waiver “*until such time as the company is in the position to pay the interest*” was held, in the circumstances of the case, to have a meaning that was “*quite clear*”, being that it was until the company could pay interest out of income, which the court could determine on evidence. Additionally, Mr Cook referred to Dynamic Window Systems Pty Ltd v Robinson [2016] VSC 152, an Australian case in which an application to set aside a statutory demand (in the context of a proposed winding-up petition) under section 459G of the Corporations Act 2001 as being subject to a genuine dispute was dismissed, including because the repayment term alleged (that “*the loan ... will be repaid as soon as practible (sic)*”) was too uncertain to be enforced (see [26]) meaning that the loan was repayable immediately.

- 52.3. Had Mr Tom advanced an alternative case for payment on the terms pleaded (“*if and when it had funds to do so (having regard to the Company’s profits and available funds)*”) I would not have struck it out as too uncertain at this stage because: (i) I do not consider the term to be so obviously vague as to be incapable of contractual force; as Ms Staynings said, it is in terms not dissimilar to the expression governing a company’s profits available for distribution set out at section 830 of the 2006 Act; moreover, it is not wholly different from the Respondents’ own pleaded alternative version, that the Company “*could only pay those with equity holdings in the LLP through profits generated through the continued skill and labour of the shareholders in the Company*”; (ii) in this case, the issue is fact and context sensitive (as illustrated by the decision in

Ledingham); it is one in respect of which the parties' witness evidence would be relevant, and the court would wish to consider all the circumstances and documents; previous decisions are merely illustrative of general principles; in the present case, the parties are yet to exchange witness statements; the issue is not suitable for summary determination.

53. The second further point argued by Mr Cook was that in any event, Mr Tom has no real prospect of establishing the alleged loan repayment term pleaded because it conflicts starkly with that which he stated in pre-action (and earlier) correspondence. For example, in his letter to Mr Candey dated 10 October 2016, he said, "*It remains my position that no terms were agreed as to when my loan would be repayable and that the legal effect of that is that it was repayable immediately*", repeating the assertion made in his "*pre-action letter*" dated 5 August 2016 (that "*No terms were ever agreed as to when my loan was repayable. The absence of such agreed terms rendered my loan immediately repayable upon creation of the loan, without any requirement for formal demand, as is well established at common law ...*"). In the circumstances, Mr Cook described Mr Tom's subsequently pleaded case as disingenuous.
54. Aside from the fact that in any event, Mr Tom makes no claim to payment of the loan account, I would decline to give summary judgment on this issue on the suggested basis:
 - 54.1. this is matter pre-eminently unsuitable for summary determination; it is for cross-examination on evidence contained in statements yet to be served; it is, in my view, impossible to conclude that merely because in 2015/2016 Mr Tom claimed in correspondence an immediate right to payment by the Company on one basis, he now has no prospect of establishing a different term in the context of these formal proceedings; no doubt he will be cross-examined, and no doubt, to the extent relevant, the judge at trial will take account of any inconsistencies between his case and his previous words and statements, and any explanations of those inconsistencies that he might wish to give; it is not uncommon for a party's case to change or develop in the period before commencement, or even subsequently; it is not necessarily a hallmark of weakness, or worse;
 - 54.2. indeed, the Respondents' own case in this regard appears also to have changed; in his email of 16 September 2016, copied to Mr McEwen, Mr Dunn and Mrs

Candey, Mr Candey said: “5. *To the extent that you are able to establish the existence of a loan account it is expressly denied that such loan would be payable on demand. To do so would have the effect of immediately making CANDEY Limited insolvent, in breach of SRA regulations. It is the unanimous view of myself, Nigel and Andrew that this was not the intention of the parties.* 6. *To the extent that you are able to establish the existence of a loan account, drawdown of such loan account was conditional on cash being banked by CANDEY Limited in respect of billed services relating to your personal services in a sum of at least double the sum you would drawdown, and/or in a sum on the introduction of new business to yourself and others.*” The Respondents’ pleaded case makes no reference to the alleged condition regarding the amount or particular source of “banked cash”.

Limitation “by analogy”

55. Relatedly, although not strictly an argument of limitation, Mr Cook argued that because Mr Tom’s underlying right to payment of the loan account is contractual (and because a contractual claim is time barred) the court should strike out or give summary judgment in respect of any claim to a remedy under section 996 which would be substantially the same, because it can be sufficiently sure that even if Mr Tom were otherwise to be successful at trial, it would not grant such a remedy in the exercise of its remedial discretion.
56. In this regard, Mr Cook relied on a number of authorities, but in particular, Re CF Booth Ltd [2017] EWHC 457, in which a claim was brought under section 994 of the 2006 Act. The petitioners complained (see the summary at [5]) that the affairs of the company had been conducted to their unfair prejudice because certain directors had taken excessive remuneration whilst causing the company to pursue a policy of not paying dividends. The prejudice alleged was the non-receipt of dividend income and the negative impact on the capital value of the petitioners’ shares resulting from unfair remuneration and dividend policies. The petitioners claimed that the refusal to recommend dividends had been deliberately intended to devalue the minority shareholdings with a view to acquiring them cheaply. The prejudice complained of was “*said to have started thirty years ago*” (see [6]).

57. The judge (Mr Mark Anderson QC, sitting as a Deputy High Court Judge) found, as alleged, that the directors' remuneration was excessive, and that the related dividend policy was unfair, not for the benefit of the company's members as a whole; he held that the directors had acted in breach of their duties, and he held that the appropriate remedy was that the petitioners' shares should be purchased at a price which he fixed. In that context (the petition having been presented in July 2015) he said:

57.1. first, at [104] (and as was at that time assumed to be correct), that there "*is no limitation period under section 994 but the courts will not allow stale claims. If the Company had brought proceedings against the Booth directors to reclaim excessive remuneration, the claim would not have been allowed to go back beyond six years before proceedings were instituted. I therefore think there is force in the point that I should limit any remedy which I will afford the petitioners by analogy with that limitation period.* [Counsel for the petitioners] *did not suggest otherwise.*" (Emphasis added.)

57.2. and then, at [127], "*In my judgment it would be just and equitable between these parties, when valuing the petitioners' shares, that the balance sheet be adjusted to add back the excessive remuneration taken by the Booth directors in the six years to 31st July 2015. I limit the remedy to those six years because I think that any right to a remedy beyond that period is stale.*"

58. The decision in CF Booth was referred to in Zedra Trust, at [22] (where the comments in [104] of CF Booth were set out), and within an extract from Hollington on Shareholders' Rights (10th edition) at para 7-87, set out at [30], as follows:

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

complain about matters which had occurred more than six years ago by analogy with the general limitation period but they could about matters since then.

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

59. In Zedra Trust, at [30], Lewison LJ described that passage as being an expression of agreement with the commentary in Palmer on Company Law (at 8.3822) and in Buckley on the Companies Acts (in the annotations to section 994) to the effect that there was no limitation period in respect of claims under section 994 but that matters of acquiescence and/or delay (combined with consequent prejudice and/or irreversible change of position) may cause a court to decline relief or fashion it to account for delays and the passage of time (as in CF Booth) or even to strike out a petition at an interim stage, “*if no reasonable judge, properly applying the law, would say it was fair to grant any relief*” (Buckley).
60. As to the decision in CF Booth:
 - 60.1. First, it was decided before Zedra Trust, at a time when it was commonly said and assumed that no limitation period applied to claims under section 994; in stating and proceeding on that assumption, it proceeded conventionally (and was, certainly in part, referred to in Zedra Trust as an illustration of that “*received wisdom*”, that the impact of delay was “*treated as an evaluative judgment for the court, rather than the application of a bright line limitation period*” – see Zedra Trust at [20] and [21]). Cases decided before Zedra Trust must be considered with a least some degree of caution, because courts were understandably reaching (in the absence of a relevant limitation period) for some principled means of fairly balancing the rights of parties affected by the passage of time.
 - 60.2. Second, since Zedra Trust, there is no need or room for an argument that a claim under section 994 is limitation barred by reference to a limitation period applied

“*by analogy*”; claims under section 994 are (at least) subject to section 8 and/or section 9 of the 1980 Act.

- 60.3. But in any event, third, the judge in CF Booth, in the course of a case in which the court had been invited to peer back at “*events of the distant past*” (see [6]) referred to a limitation period only in the context of determining what would be “*just and equitable between [the] parties, when valuing the petitioners' shares*” (the emphasis is mine) as part of the court’s approach to the fashioning of a fair remedy, on the facts of that particular case, in the exercise of its broad discretion (albeit a discretion exercised in the context of limitation as at that time differently understood). I note that counsel for the petitioners in CF Booth did not argue against that approach.
- 60.4. Since Zedra Trust, whilst the court cannot (if and when applicable) undermine the effect of section 8(1) of the 1980 Act on an action brought under section 994, there might nonetheless be cases in which, at trial, as an aspect of determining a fair remedy (in particular perhaps, in respect of valuation) a court would take into account, as a factor, the existence of some other limitation period: for example, if valuing a company by reference to its assets, one of which is said to be a right or claim which is, at the valuation date, wholly or partly limitation barred (as in CF Booth, where the remuneration notionally added back to the company’s assets was limited to that which the company would not have been time barred from claiming as at the valuation date). The approach taken in CF Booth, if so understood, is not, I think, inconsistent with Zedra Trust, or otherwise (in light of that decision) necessarily unprincipled; it concerned a different issue.
61. In Sumitomo Mitsui Trust UK Ltd v Spectrum Galaxy Ltd (Claim No. BVIHC (COM) 2018/0172) in which judgment was delivered on 14 April 2021, Jack, J. [Ag.], sitting in the Commercial Court of the British Virgin Islands, dismissed a petition under the BVI equivalent of section 994 in its entirety (at trial) because the underlying breaches of contract on which the unfair prejudice claim was founded were statute-barred, and “*overall the delay ... [was] excessive*”, such that in the court’s discretion, relief was refused: see [83] in particular. In the context of the present case, I derived no real assistance from this decision, which was decided before Zedra Trust; it is not possible to

know how the case would have been pleaded, argued or decided had it been heard subsequently; I note for example, that proceedings began less than 12 years after the breaches of contract (see [36] and [83]). Arguably, the decision is inconsistent with Zedra Trust, or at least inharmonious. In any event, it appears (from the judgment at least) that the main relief sought by the claimant was the rescission of certain contracts under which it made investments (see [17] and [82]) and that the claim to rescission was itself barred by delay (see [59]-[62]). In the present case, Mr Tom's claims in respect of the loan account, and the relief he seeks, are not the same as those he might have advanced in contract.

62. As a self-standing ground on which to strike out or give summary judgment in respect of Mr Tom's loan account claims, I also reject this additional argument.
63. First, as I have said, Mr Tom's claim and the relief sought is not the same or substantially the same as his (suggested) claim in contract. The whole premise of the argument is not correct.
64. Second, in respect of the loan account, the case differs from CF Booth. In that case, the value of the company (and thus the value of the petitioner's shares and of his remedy) was limited by reference to the limits of the company's freedom to seek recovery from overpaid directors, whereas in the present case, it was argued that the petitioner's claim against the Company's other members should be struck out because it replicates an alternative (but limitation barred) claim which the petitioner himself might have pursued against the Company (and/or to some extent, one of its members). There is no justification for that approach, which derives no support from the decision in CF Booth, and which is inconsistent with Zedra Trust.
65. Third, in any event, the court's remedial discretion under section 996 is wide and flexible, and it would be bold (and I would decline) at this interim stage to hold that there is no realistic prospect of the court granting the remedy sought by Mr Tom, by reference to his loan account, because of the possibility of some alternative cause of action which would have been subject to limitation, had it been pursued (even if that fact might be treated as "*a highly material factor*" - see Hollington - in the exercise of the court's discretion under section 996).

Abuse of Process: the Existence of a “Parallel Action”

66. In this regard, the Respondents’ argument was closely related to those considered above. Again, it was said that Mr Tom’s claims are based on contractual entitlements, including his claim to a greater shareholding and a buy-out, which had they been brought by ordinary action, would have been time barred. It was said therefore to be an abuse of process to maintain those causes of action by petition, thus deliberately avoiding the effect of the 1980 Act; the court ought not to sanction a blatant circumvention of the limitation rules.

67. In Hunter v Chief Constable of the West Midlands Police [1982] AC 529 HL at 536C, Lord Diplock referred to:

".. the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied...It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

68. The power is thus said to arise out of the court’s inherent jurisdiction to safeguard its authority and processes from being undermined by disruptive, oppressive or otherwise inappropriate use of its procedures. Determining whether proceedings are an abuse of process is not an exercise of discretion; it is an exercise of judgment. However, deciding upon the appropriate remedy, if any, does involve an exercise of discretion.

69. I reject this argument for the following reasons.

69.1. First, it is based on a premise that I have rejected: the claim made by Mr Tom under section 994 is substantially different from that which he might (arguably) have brought in contract, as is the remedy (as, almost inevitably, are the prospects of success) as I explained above at paragraph 48.

- 69.2. In any event, had he claimed specific performance (as would have been necessary, for example, had he wished to seek the sale of his shares) his claim would not have been subject to a shorter, 6-year, limitation period (see section 36 of the 1980 Act). In any event, specific performance would not have given Mr Tom the relief which he seeks; it would not have entitled the court to make an order against all of the respondents or to make any adjustments in relation to the purchase order (for example, in respect of valuation date or other adjustments, such as in respect of his loan account); it would not have allowed for the court to compensate Mr Tom in respect of the alleged improper dilution of his shareholding (to 0.055%) on 2 November 2016.
- 69.3. Second, subject to the court's powers to prevent the abuse of its processes, litigants, acting within the rules, are autonomous: they are free to frame their cases as they wish. Notwithstanding the possible existence of a related parallel claim in contract, Mr Tom's use of section 994 does not, in my judgment, comprise the use of that process in a manner which is manifestly unfair to the Respondents, or which is such as to bring the administration of justice into disrepute among right-thinking people. Apart from anything, it cannot be "*contrary to the policy of the 1980 Act*" (as was suggested) to bring an action within the limits of a period imposed by the Act itself. It cannot be (and was not) suggested that Mr Tom does not genuinely wish for or seek the remedy which by his petition he has claimed. He has therefore invoked the court's powers for the purpose for which they were created.

Unpaid Commission

The Parties' Pleaded Cases

70. As explained, it is not in dispute that Mr Tom was entitled, under the Agreement, to payment of "*commission*" equal to 10% of others' billing where the client was introduced by him (paragraph 20.1 of the Petition and paragraph 30.1 of the Respondents' Defence). At paragraph 50 of the Petition, it was pleaded, in respect of "*Matter A*", referred to above, that following a settlement in May 2014, Mr Tom "*became entitled to 10% of the fees of approximately £500,000 that had been incurred [sic] by the Firm*" but that subsequently, "*Mr Candey took no steps to progress a bill of costs ... which was a*

necessary starting point to recover the fees due and the payment of the Petitioner's commission".

71. The failure to pay commission and/or the failure to progress the determination of the amount of costs (and therefore commission) payable are relied upon as comprising unfairly prejudicial conduct (in addition to other conduct in respect of the commission agreement, in particular, attempting to change its terms). Furthermore, as relief - unlike in respect of the loan account - Mr Tom claims payment of the specific sum of any commission found to be due in respect of Matter A (and/or, as in respect of the loan account, an appropriate adjustment to the share price). On the principles described above, that part of the claim is, it was accepted, subject in principle to section 9 of the 1980 Act; it is a claim to payment of a sum by virtue of an enactment, and in substance, is a claim pursuant to the terms of a contract.

72. The pleaded Defence in respect of commission comprises a denial "*that any such fees were incurred in May 2014*"; a denial that there was deliberate delay in pursuit of the costs assessment, which was "*not straightforward*" and which had not been completed by the time of Mr Tom's resignation in October 2015; and ultimately, a statement that although admittedly no commission has been paid, "*The Petitioner is not entitled to any commission following his repudiatory breach of the [Agreement] and departure from the Firm.*" In this respect, the Defence does not raise or refer specifically to limitation or the 1980 Act, whether to section 9 or otherwise; neither does it say when, according to the Respondents, the commission payment (which appears otherwise to be admitted) fell due. Given that section 6 was specifically pleaded in opposition to the loan account claim, that omission was not necessarily either insignificant or accidental.

Limitation

73. I can deal shortly with the Respondents' argument that Mr Tom's claim to payment of commission should be struck out or summary judgment given on grounds of limitation. I reject it because a limitation defence is not pleaded, as it ought to be, and because (if and insofar as it matters) this is not a case in which it is otherwise obvious that a limitation defence (which Mr Cook suggested could be inserted as a simple matter of amendment) would succeed (rendering the claim patently abusive, and the whole business of an amendment no more than a pointless formality).

- 73.1. First, it appeared to be common ground that completion of the costs assessment is or was a pre-condition of payment. However, it was neither agreed nor clear (or even pleaded) when that event took place, although it was apparently after 15 October 2015 (when Mr Tom resigned) a date about 7 years before proceedings commenced on 28 October 2022.
- 73.2. Second, Ms Staynings said that if limitation were to be pleaded, Mr Tom would - if necessary - rely on section 32 of the 1980 Act, based on the Respondents' "*deliberate concealment*" of relevant facts, in respect of which she referred to the explanation at [108] – [109] of Canada Square Operations Ltd v Potter [2023] UKSC 41: "*What is required is (1) a fact relevant to the claimant's right of action, (2) the concealment of that fact from her by the defendant, either by a positive act of concealment or by a withholding of the relevant information, and (3) an intention on the part of the defendant to conceal the fact or facts in question.*"
- 73.3. In that regard, Ms Staynings referred to the Respondents' alleged (but disputed) failures to give timely disclosure of documents relevant to the date of receipt of fees by the Company, including their failure to disclose, before 27 December 2023, relevant ledgers (not produced in evidence) showing when certain sums were billed, and also (apparently due to a "*technical hiccup*") to disclose before 28 March 2024 certain costs orders relevant to Matter A. I am not willing to speculate whether: (i) *prima facie*, the limitation period in respect of the commission claim has expired, and if so when; and (ii) if so, whether reliance on section 32 might be justified. In the present circumstances, the matter is not suitable for determination in this summary fashion.
- 73.4. I also reject Mr Cook's argument (by reference to The Mihalis Angelos [1970] 2 WLR 907) that Mr Tom could in any event have sued in September 2015, in reliance on an anticipatory breach. First, again, the point was not pleaded. Second, in any event, it was not evidenced or obvious that as at (about) the point of Mr Tom's departure from the business, the Company or the Respondents had repudiated contractual liability in respect of a future obligation to pay commission when it fell due, such that Mr Tom was then immediately entitled to relief.

- 73.5. Third, the Respondents' limitation argument was based on the application of section 9 of the 1980 Act. I note, without speculating or deciding, that had section 9 been pleaded (rather than section 5) it would at least have raised the issue of when, for that purpose, Mr Tom's cause of action accrued, and "by virtue of [sections 994 – 996 of the 2006 Act]" the sum claimed became recoverable.
- 73.6. Fourth, in any event, Mr Tom's allegations about commission are part of his case in respect of unfairly prejudicial conduct, and part of his case about the appropriate, fair price to be paid for his shares. Given that they will therefore be ventilated and decided at trial in any event, there is (on the basis referred to at paragraph 23 above) further reason not to determine the issues at an interim stage.
- 73.7. Finally, in substance for the same reasons, I would reject any arguments based on the grounds explained above at paragraph 55 in relation to the loan account – given that it is not possible to conclude that the underlying limitation period has expired, there is no room for a conclusion that the court would be bound to reject the claim, in the exercise of its discretion under section 996.

Delay, Acquiescence, Election and Abuse of Process

74. On various further grounds, to be taken alone or together, the Respondents argued that the whole petition should be struck out.

Delay, Acquiescence and Election

75. It was not suggested by Mr Cook that Mr Tom's delay in the commencement of proceedings under section 994, was or could be, without more, enough to justify the court striking it out. As stated by Snowden LJ in Zedra Trust at [160]: "... *it is generally thought to be impossible for a court to strike out or summarily dismiss a claim on the basis of inordinate delay if it is brought within an applicable statutory limitation period: see Birkett v James [1978] AC 297 at 320.*" Neither side sought to contradict that proposition; the mere passage of time (within the limitation period) is therefore not (or at least, was not said to be) decisive. Moreover, as I have said, the equitable doctrine of laches is not strictly applicable.

76. Instead, Mr Cook submitted that even where the limitation period has not expired, judges should, in appropriate cases, strike out or summarily dismiss “*allegations of historical misconduct if it can clearly be seen, at an interim stage, that no reasonable judge could consider that such matters would justify the exercise of discretion to grant the relief sought at trial*”. I agree with that submission, which reflects the words and judgment of Snowden LJ in Zedra Trust at [162]; but it is a high hurdle.
77. As I have said, the remedial discretion under section 996 is broad, and in general terms confers “... *a very wide discretion to do what is considered fair and equitable in all the circumstances of the case, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders ...*”; it plainly contemplates, for example, the possibility that notwithstanding proof of historic unfairly prejudicial conduct, it might be appropriate to refuse a (or any) remedy, because that outcome is “*fair and equitable in all the circumstances*”. If that is so, and if the court can safely reach that conclusion at an interim stage, it can exercise its powers to strike out or give summary judgment. The point turns on the court’s assessment of the impact of the passage of time, and of acts or changed circumstances in the meantime, on the petitioner’s ultimate prospects of achieving substantive success at trial; although the passage of time is material, it is not an issue of procedure or limitation; it is an example of the court’s power to strike out proceedings that are in substance bound to fail.
78. Relatedly, Mr Cook submitted that significant delays between the allegedly unfairly prejudicial conduct and the unfair prejudice petition may allow for or support an allegation or inference that the petitioner has acquiesced in the conduct complained of (and that it is therefore no longer open to him to complain of unfair prejudice) particularly where the petitioner - notwithstanding his knowledge of the allegedly unfairly prejudicial acts - has sought “*deliberately and tactically*” to delay presenting the petition; where such tactical delay was to seek to take advantage of a perceived or anticipated rise in the value of his shareholding, the petitioner may be taken to have made an election and denied relief. I accept those (essentially uncontroversial) principles which do not imply the passage of any particular period of time, and as to which there was no real dispute between the parties: see for example, *per* Fancourt J in Re Edwardian Group Ltd [2019] 1 BCLC 171, at [571] and [598]. In that case, in refusing to deny relief, Fancourt J said, at [605]:

“...HS and Estera did not deliberately delay their proceedings in order to take advantage of the rising fortunes of the Company. **They did not elect to remain shareholders and benefit from that status.** The reason for the delay in issuing proceedings was (for whatever misguided or ill-advised reason) to allow the BM Singh proceedings to be brought first. **While that can rightly be criticised as a tactical decision made in order to try to obtain the best chance of obtaining relief against JS, it was not a tactical decision to try to benefit from remaining a shareholder notwithstanding a claim to be bought out. It is in that type of case that a minority shareholder is taken to have made an election and is denied relief.** Moreover, although the Company’s financial position has undoubtedly improved since 2009, that was for particular reasons relating to the revaluation of its properties that I have already explained, rather than because of any change of direction of the Company’s business since 2009. I do not consider it at all likely that HS or Estera had such increases in mind at the end of 2009 as a reason for delay. As from the end of 2012, the increase in the Company’s value has been much more modest.” (Emphasis added.)

79. Similarly, in Re Cherry Hill Skip Hire Ltd [2022] EWCA Civ 531, at [41], Andrews LJ said:

“The delay in issuing the claim for unfair prejudice in *In re Edwardian Group Ltd* was held to be both deliberate and tactically motivated. However, although the financial position of the company had strengthened during the period of delay, **it was not a tactical decision to try to benefit from the rise in value of the shares by remaining a shareholder notwithstanding knowledge of the grounds for making a claim to be bought out.** Fancourt J rightly observed that in that type of case, a minority shareholder is taken to have made an election and will be denied relief. The position of H and Estera was essentially the same throughout the delay. The behaviour of J and the company had been seriously prejudicial and unfair. Finally, the respondents could be adequately protected or compensated in other ways for the effect of culpable delay by valuing the petitioners’ shares at an earlier date, and, where appropriate, making them account for dividends received during the period of such delay.” (Emphasis added.)

80. In the present case, “pre-action” correspondence commenced in 2015. Very soon, Mr Tom indicated that he was ready to issue proceedings.
- 80.1. On 26 October 2015 (almost immediately after his resignation from the business), Mr Tom asked the Respondents to “...*kindly confirm your proposals within 7 days for repayment of my outstanding director's loan*”.
- 80.2. On 17 November 2015, Mr Candey (on behalf of the Respondents) wrote to Mr Tom and disputed his claim in its entirety, including his alleged right to the sale of his alleged shares and repayment of his loan account.
- 80.3. On 5 August 2016, Mr Tom sent the Respondents a formal Letter of Claim. In relation to the loan account, he said: “*I claim immediate repayment by [the Company] of the full amount of my loan to [the Company] arising from the sale of my entire interest in [the LLP] to [the Company] on 23 June 2014, plus interest calculated from 16 October 2015 onwards*”.
- 80.4. On 25 August 2016, Mr Tom told the Respondents by email that he intended “*in any event to be ready to issue court proceedings by the end of September [2016] ...*” and that he was “*already in a position to pursue an unfair prejudice petition...*”. On various occasions subsequently, he repeated his intention to issue proceedings imminently, as described by Mr Candey in his 3rd witness statement.
- 80.5. On various occasions, Mr Candey invited the Petitioner to bring proceedings. For example, by letter of 9 October 2017, he said, “*You have been litigating with us by correspondence for some 3 years. There is a limit to the extent that anyone is required to respond to pre-action correspondence. We are not prepared to engage with you any further, and if you therefore think that you have any claims then they must be brought within the discipline of Court proceedings*”.
- 80.6. Following that letter of 9 October 2017, there was no correspondence for over three years. Then, on 28 May 2021, on behalf of Mr Tom, his solicitors, HCR, sent another letter before action to the Respondents. Mr Candey replied on the same day, stating, amongst other things: “*In respect of the balance of your*

correspondence your client is asserting and relying on a factual matrix of many years ago. He threatened previously to sue me in 2015. He has now waited some 6 years and is no doubt only taking action because he is rightly concerned about limitation”.

- 80.7. This led to further rounds of letters exchanged between Mr Candey and Mr Tom’s solicitors, the last of which was on 13 July 2021. Again, there was a period of silence until 28 October 2022, when the petition was issued.
81. Accordingly, said Mr Cook, Mr Tom was well aware of the principal facts and of his alleged right to claim, from the moment of his resignation; even if it was the case that certain financial or other information has since been disclosed to him, his understanding and knowledge had not changed materially between the date of his departure and the date of commencement, some 7 years later. Indeed, in his 1st witness statement, Mr Tom said (in order to support the point that the Respondents were not prejudiced by any delay) that he has “*not advanced any claim that is materially different to those I set out in our correspondence following my departure from the firm or introduce new factual allegations...*”. As a result of the delay, said Mr Cook, if the petition is not struck out, the Respondents will suffer prejudice, being made to respond to historic allegations, for example, in respect of the terms of the Agreement made orally in 2009.
82. The Respondents’ case was that there was no good reason for this period of delay, and that Mr Tom’s “*true reason*” was tactical, seeking to benefit in particular from a higher valuation of his shareholding as the Company paid down the other directors’ loans over time, and thus became more valuable, and in the meantime, tracking the share value by reference to its filed accounts, which by the end of March 2021, showed net assets of £3,796,191. In his 1st witness statement, Mr Tom said that “*It took a very long time for me to carry out my own research and to feel comfortable that I had found sufficient information to ensure such proceedings were worthwhile pursuing, and thereafter to instruct solicitors and prepare my petition.*” (Emphasis added.)
83. By reference to this evidence, Mr Candey said, in his 4th statement, that “*the Petitioner: (i) knew the significance of the directors’ loans and of their likely repayment over time; (ii) did not want a buy-out as of 15 October 2015, or thereafter, unless the financials showed a good enough valuation to make it worth his while; and (iii) chose to pursue his*

claim after seeing, many years down the line, that CANDEY's value would produce a higher value of his alleged shares. In the absence of any other good reason for his delay (which I refer to below), it is very clear from the Petitioner's own evidence that his delay was deliberate and tactically motivated."

84. I reject the argument that the petition should be struck out or summary judgment given on the basis that Mr Tom acquiesced in the alleged unfairly prejudicial conduct, for the following reasons.
85. First, it is not alleged that he acquiesced in all of the conduct in respect of which he complains, for example, the November 2016 share dilution, which is a significant allegation.
86. Second, in support of the submission, the Respondents relied on very little material; the allegation was advanced on a narrow basis. In particular, it was said that in relation to his allegation of exclusion from participation in management, Mr Tom was aware of the allegedly unfair conduct as and when it occurred, and has not referred to any occasion on which he was denied an opportunity to participate in the conduct of business. Reference was also made to the Board Meeting on 24 September 2015, at which he said that he "*didn't need a buy out now*", in response to Mr Dunn's suggestion that he was trying to engineer a buy-out of his shares.
87. As to those words, Mr Tom explained in his witness statement:

"Prior to the board meeting on 24 September 2015, I had only a vague understanding of what amortisation meant. I did not believe that this kind of 'writing down' exercise had any substantive impact on the underlying value of a business. Before the meeting, no accountants' advice had been shown to me and none of the Respondents discussed it with me. The only explanation I received was at the board meeting itself.

*Given this limited understanding, I was surprised at the suggestion that the amortisation exercise would actually reduce the value of the firm and R1 was suddenly keen to have the firm independently valued so a buyout of my shares could be agreed. Accordingly, my comment that I "*didn't need a buy out now*"*

was directed at the position I presumed RI was proposing to take on valuation of my shares in light of the amortisation exercise. I was also seeking to respond directly to an allegation that my having moved to Gloucestershire had been a plan to force a buyout, notwithstanding that I had confirmed my intention to stay.”

88. Fundamentally therefore, the allegation of acquiescence is not, for the purposes of this application, sufficiently supported by the evidence. More generally, it raises an issue of fact which cannot realistically be determined on a summary basis before even the exchange of trial witness statements. It is a matter for oral evidence and cross-examination, as well as requiring a proper analysis of all the contemporaneous documentation (rather than a single isolated document) relevant to whether Mr Tom knew of the extent to which he was excluded and/or acquiesced in the relevant acts.
89. For example, in his witness statement, Mr Tom said that there were certain instances of exclusion of which he was not aware. Moreover, he said that he had “*real trepidation about rocking the boat*” and “*decided instead that a more effective approach would be to take positive initiatives and seek to change [Mr Candey’s] mind about the situation*”. As Warren J said in Re Southern Counties Fresh Foods Ltd [2008] EWHC 2810 (Ch) at [72]: “... *if a course of conduct starting in the remote past has continued to the present time, I see no reason why the entire history of the conduct should not be brought into account in assessing whether the conduct as a whole has been unfairly prejudicial. Of course, the fact that it may have continued without protest for a long period may show that there has been acquiescence and no unfair prejudice; but if the conduct has met with regular objection, or even resignation but with clear non-acceptance, it is not to be rejected a priori as incapable of being entertained by the court as part of the basis for a petition*”.
90. The real nature of Mr Tom’s reaction to the alleged events, and of his knowledge, cannot fairly or safely be dealt with at this stage. I bear in mind the principles set out above at paragraph 24.
91. For the following reasons, I also reject the related argument that Mr Tom’s delay in the commencement of proceedings was deliberate and tactical, such that he should be found,

at least at this interim stage, to have elected against the pursuit of an action under section 994.

92. First, any delay must now be assessed (and the reasonableness of any suggested inferences based on delay must be considered) in the context of the decision in Zedra Trust. Mr Tom has acted within the relevant limitation periods (or at least, cannot presently be said not to have done).
93. Second, Mr Tom complains of matters that are continuing, and began less than 6 years before the petition was presented, for example, the share dilution in November 2016.
94. Third, until about November 2016, the parties were engaged in negotiations.
95. Fourth, whilst true that Mr Tom has said that he was concerned about the Company's value, and whether it was sufficient to justify (undoubtedly expensive) proceedings in which the principal remedy sought would be the purchase of his shares, I do not infer from that evidence (at this stage, untested) that he elected to remain a shareholder (let alone a shareholder with a much diluted shareholding) in order to benefit from a rise in the value of his shares notwithstanding his knowledge of grounds for making a claim to be bought out; he did not "*elect*" against the pursuit of the remedy now sought. On the contrary, his conduct was in principle rational and understandable, and related to the commercial justification for commencing proceedings; the distinction is between, on the one hand, a decision to remain as a shareholder and accept the benefits and risks of doing so, and on the other, a decision not to commence expensive litigation without some reasonable prospect of net benefit; in any event, Mr Tom continued (there is no evidence to the contrary) to consider the possibility of proceedings until the point of final decision in October 2022 when he presented his petition (within the limitation period).
96. Fifth, in any event, the court can fix the terms of any remedy to meet any possible unfairness to the Respondents, for example, by ordering the Company to be valued at an earlier date.
97. Finally, Mr Tom's evidence is that he was delayed by matters outside his control, including the Covid Pandemic, and undertaking research and obtaining solicitors' and counsels' advice. He also said that he considered (and was caused to pause by) Mr

Candey's "*huge appetite for using litigation and costs threats to intimidate others for his own advantage*" and the clear inequality of arms between the parties. These are, in principle, reasonable matters to take into account; they contradict the suggestion of an election to remain as a member, with all the risks and benefits of taking that course; again, in any event, they would need to be interrogated at trial.

98. These matters are thus in issue. The Reply stated, at paragraph 62, "... *it is expressly denied that the Petitioner has been guilty of any inexcusable delay. To the extent necessary (and without waiving any privilege in the same) the Petitioner will rely, among other matters and without limitation, upon the extensive attempts at settlement and negotiation that were made prior to issue of the Petition. Further and in any event, even on the Respondents' own case, the latest allegations in the Petition relate to a period of less than six years prior to the issue of the Petition. In the premises, it is also denied that there has been any detriment to the Respondents.*" They are matters for trial.

Abuse of Process: Mr Candey's Offers

99. Where a respondent has made an offer to buy the petitioner's shares at a fair value, he may, in certain circumstances, apply to strike out a petition as an abuse of process.
100. As was explained by Lord Hoffmann in O'Neill v Phillips [1999] 1 WLR 1092, parties should be encouraged, where at all possible, "*to avoid the expense of money and spirit inevitably involved in such litigation by making an offer to purchase at an early stage*": page 1106H. His proposal was for the majority to make an offer to buy the petitioner's shares which was plainly reasonable, so that if the minority rejected it, the majority could apply to strike out any subsequent petition. Unfairness, said Lord Hoffmann, did not lie in the exclusion from management alone but "*in exclusion without a reasonable offer*". Although important to appreciate that in the context of an offer made by the respondent majority, the issue is whether, in all the particular circumstances of the case, the continued prosecution of the petition would be an abuse of process (rather than the degree of compliance with the guidance set out by Lord Hoffmann in his judgment in O'Neill) the basic features of an appropriate offer, as set out by Lord Hoffmann, included that it be to purchase the shares at a fair value; that if not agreed, the value should be determined by a competent expert, acting as an expert, consistent with the objective of economy and

expedition "*even if this carries the possibility of a rough edge for one side or the other*"; and that the offer should provide for equality of arms between the parties.

101. In the present case, Mr Candey sought to exercise his option to acquire Mr Tom's shares on various occasions: at a board meeting of 24 September 2015, and by letters dated 17 August 2016, 26 August 2016, 2 September 2016, and 14 September 2016. In his witness statement, Mr Candey therefore said: "*Ultimately, at no point did the Petitioner accept my exercise of the Option. In the Petition, the Petitioner accepts that I had an Option to purchase his shares upon departure at an independent valuation of his shares as of the date of his exit. As the above correspondence highlights, I sought on several occasions to exercise this Option. Save for the Petitioner's clear desire to delay in order to benefit from a higher value of his alleged shareholding ... the Petitioner was offered and refused, many years ago, exactly what he now seeks.*"

102. As to those offers and/or the exercise of Mr Candey's option:

102.1. On 17 August 2016, Mr Candey said, "*I hereby repeat my open offer, made for amicable reasons only and strictly without prejudice to my or the Firm's position that your shares fell in on your retirement, to pay you whatever your interest was worth on the open legal market as at the date of your departure and retirement from the LLP and the Firm. You will recall that this offer was last made by me at our penultimate board meeting in October 2015*".

102.2. On 2 September 2016, Mr Candey repeated, "*In the spirit of my previous offers I hereby formally exercise my option to acquire your shares in CANDEY Limited, at a price to be independently valued, as at the date of your departure. If we cannot agree a price and/or valuation mechanism then this will plainly have to be determined by the Court*".

103. For the following reasons, I reject the argument that these matters, whether taken alone or in combination with the other allegations of abuse, are sufficient to justify the relief sought on this application.

104. First, for the purposes of this application (and whilst wishing to reserve the Respondents' position at trial) Mr Cook did not positively contend that Mr Candey's offers were

compliant with the guidance given by Lord Hoffmann in O' Neill, although he submitted that what was offered was “*an adequate alternative*”, which was or would be “*highly material*” to the court’s decision whether or not to give any remedy at trial. Ms Staynings submitted that the offers that were made were certainly not compliant, because:

- 104.1. past offers cannot necessarily be relied upon as a remedy for conduct yet to occur; they do not give the offeror “*carte blanche to behave in future as he wishes*” (see Re Sprintroom Ltd [2019] EWCA Civ 932 at [136]); in the present case, the offers relied on pre-dated certain of the allegedly unfairly prejudicial conduct, in particular, the share dilution on 2 November 2016;
- 104.2. no formal terms were offered and neither was equality of arms (for example, access to financial information);
- 104.3. the adjustments now sought by Mr Tom (for example, in relation to unpaid commission or the loan or the amortisation exercise or the number and proportion of shares claimed) were not part of what was offered;
- 104.4. certain of the offers imposed terms which were unreasonable; for example, that made on 17 August 2016 included the term that “*the position at Companies’ House must reflect the fact that you have no ownership in the Firm as at the date of the next annual return, with any claim by you resting on the ascertainment and valuation of your interest. You will agree to execute whatever documents are required to give effect to this.*” That term would have deprived Mr Tom of his shareholding in the Company prematurely, before any price had even been determined for those shares, and (on his case, albeit apparently not accepted by the Respondents) deprived him of standing to bring an unfair prejudice petition;
- 104.5. in any event, some of the alleged “*offers*” were in fact statements by Mr Candey of an intention (which he never sought to enforce, but could have done) to exercise his personal option to buy Mr Tom’s shares.

105. Whilst, as I have said, the Respondents wish to reserve their freedom to advance further evidence and argue otherwise at trial, those submissions were not positively opposed at the hearing of the present application.
106. Second, on 4 November 2016, two days after the significant dilution of Mr Tom's shareholding on 2 November 2016, Mr Candey offered £1,000 for his shares; on 1 December 2016, Mr Candey told Mr Tom that since the dilution, his shares had only a nominal value and that it would be disproportionate to incur any further costs of providing voluntary disclosure of information. The Respondents have not made any offers at all since that time, and there are no outstanding offers to purchase Mr Tom's shares. It follows that if the petition were to be struck out on this basis, Mr Tom would be left with no remedy at all in respect of the unfair prejudice of which he complains.
107. In those circumstances, in this respect, whether taken alone or in combination with the other allegations of abuse, there was no proper basis on which to strike out the petition. To return to the words of Lord Hoffmann, on the evidence and submissions before me, I cannot conclude that the offers (including any exercise by Mr Candey of his option) were so "*plainly*" reasonable as to cure the alleged unfairness, render the subsequently issued petition abusive, and entitle the Respondents to strike it out.
108. In conclusion, for all of the reasons stated above, I will dismiss the Respondents' application. I am grateful to counsel for their careful and comprehensive submissions.

Dated 12 June 2024