Neutral Citation Number: [2021] EWCA Civ 1135

Case No: A3/2020/1350

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN NEWCASTLE
BUSINESS LIST (ChD)
Mr Justice Snowden
[2020] EWHC 2000 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/07/2021

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE NEWEY
and
SIR NIGEL DAVIS

- -

Between:

TAYLOR GOODCHILD LIMITED	**Claimant/ Appellant**
- and -	
(1) SCOTT TAYLOR **(2) SCOTT TAYLOR LAW LIMITED**	**Defendants/ Respondents**

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- -

Mr Daniel Lightman QC (who did not appear below) (instructed by **The Endeavour Partnership LLP**) for the **Appellant**
Mr Mark Harper QC (instructed by **DWF Law LLP**) for the **Respondents**

Hearing dates: 22 & 23 June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Friday 23rd July 2021 at 10:30am

Lord Justice Newey:

1. A shareholder obtains an order in unfair prejudice proceedings under which he is able to buy someone else's shares. The company subsequently seeks relief against the person who was required to sell his shares in respect of matters which were relied on in support of the unfair prejudice petition. Can the defendant to that claim have it struck out as an abuse of process? On the facts of this case, Snowden J concluded that he should accede to a strike out application. That decision is now, however, challenged in this Court.

The facts

2. The appellant, Taylor Goodchild Limited ("the Company"), was established in 2011 to take over the solicitors' practice which the first respondent, Mr Scott Taylor, had been carrying on in partnership with Mr Lee Goodchild. Mr Taylor and Mr Goodchild became the Company's only directors and each acquired 50 of the 100 issued shares.

3. In time, relations between Mr Taylor and Mr Goodchild soured and in the latter part of 2016 they agreed in principle that each should go his own way, with Mr Taylor taking the civil work and Mr Goodchild the criminal work. While, however, a number of important matters remained unresolved, Mr Taylor set up the second respondent, Scott Taylor Law Limited ("STL"), of which he is the only shareholder and director.

4. On 12 May 2017, Mr Taylor told Mr Goodchild that he would cease carrying out any civil work for the Company with effect from 16 June 2017 and that several employees of the Company would also be leaving the Company for STL. Thereafter, Mr Taylor wrote to certain clients of the Company informing them that he was no longer working there and inviting them to instruct STL in place of the Company. He also moved various client files and other documents from the Company's premises to STL's. In all, Mr Taylor appears to have taken between 90 and 100 files, on at least many of which there was unbilled work-in-progress for which the Company would have been entitled to charge the clients. As yet, however, Mr Taylor was still a director of the Company. He did not resign as a director of the Company until August 2018.

5. On 21 November 2017, Mr Goodchild presented a petition under section 994 of the Companies Act 2006 ("the 2006 Act") in which he alleged that the affairs of the Company had been conducted in a manner that was unfairly prejudicial to his interests. He relied on, among other things, STL's trading in competition with the Company, the "poaching" of Company staff, and diversion of business to STL. Paragraph (1) of the prayer asked that:

> "it be ordered that the Petitioner [i.e. Mr Goodchild] do purchase the Respondent's [i.e. Mr Taylor's] shares in the Company at fair value and upon the following bases:
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> (a) that the Company be valued as a going concern excluding any premium to reflect the loss suffered by the Company as a result of the matters of unfair prejudice pleaded above;
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> (b) that the Respondent is required to give credit to the Petitioner against the purchase price of the shares for

> 50% of the profit made by STL on the business unlawfully diverted by him to STL;
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> (c) that the sale be as between a willing purchaser and willing vendor;
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> (d) that there be a discount by reference to the minority nature of the Respondent's shares in the Company".

6. The petition first came before the Court on 8 December 2017. On that occasion, Judge Kramer, sitting as a Judge of the High Court, gave directions for, among other things, further pleadings, disclosure to be given on 2 February 2018, the parties to have permission to instruct a single joint expert to provide a report on the value of Mr Taylor's shares in the Company, the parties to have an opportunity to ask the expert questions, and the matter to be listed for trial on the first available date after 30 April 2018.

7. On 20 February 2018, Judge Kramer nominated Mr Andy Poole of Armstrong Watson LLP, chartered accountants, as the joint expert. Mr Poole prepared a report dated 22 May 2018 in which he valued Mr Taylor's shareholding in the Company on two different bases: the "Continuing Basis", in which Mr Taylor was assumed to remain with the business, and the "Exiting Basis", which took account of the move to STL. Mr Poole calculated Mr Taylor's shares to be worth £184,486 on the "Continuing Basis" and £157,311 on the "Exiting Basis". In each case, Mr Poole arrived at his valuation by applying a multiple of 2.25 to "maintainable profits". Mr Poole assessed the Company's "maintainable profits" at £163,988 on the "Continuing Basis" and £139,832 on the "Exiting Basis".

8. Mr Poole considered whether to value Mr Taylor's shares by reference to the Company's net recoverable assets rather than maintainable profits but rejected the idea. He explained in paragraph 9.3.1 of his report that net recoverable assets tended to be used "only where the profits generated by those assets are not expected to exceed the value of those assets". Here, Mr Poole said in paragraph 9.3.5, the profits "exceed the net asset position, and therefore it would not be appropriate to use the net recoverable assets approach as the basis of this valuation". In this connection, Mr Poole referred to two appendices to his report in which the Company's balance sheets were analysed. His approach can be seen from, for example, his treatment of the Company's position as at 30 November 2017. On the footing that a total of £445,221 was owed by Mr Taylor and Mr Goodchild on their directors' loan accounts, Mr Poole calculated that the Company had net current assets of £584,408 and net assets of £597,210, but he then proceeded to deduct the £445,221 with the result that he ended up with a final figure of £151,989.

9. With regard to work-in-progress (or "WIP"), Mr Poole said this in paragraph 9.3.7 of his report:

> "I understand that it is not possible for the case management software of the Practice to produce an historic time recorded report, therefore there is no information available as at 30 June 2017 or 31 March 2018 regarding the unbilled time recorded on the system. Ideally, I would have liked access to that information in order to assess any potential movement in the position of the

> work in progress at those dates. Had this been available, I would have assessed the potential value of contingent work in progress to determine whether to add any amounts to the balance sheet to calculate a true net asset position …. Given the work types undertaken by the Practice, I have assumed any level of contingent WIP to be immaterial, and have made no adjustment to the balance sheet valuation and so the multiple of profits remains the most appropriate valuation method."

10. Mr Poole noted that a company's assets and liabilities can also have an impact on a maintainable profits valuation. He explained in paragraphs 5.2.10 and 5.2.11 of his report that, "Once a valuation has been established on using the multiple, it may be necessary to make adjustments for a proportion of surplus cash or deficiencies in working capital, depending on the circumstances of the business" and that "Other assets not directly involved with the earning capacity of the business, such as land and buildings, would need to be valued separately and added to the valuation". As I read his report, however, Mr Poole did not see the need for any such adjustment in relation to the Company. He explained in paragraph 9.9.6 that each of his valuations of Mr Taylor's shares in the Company had been "treated separately to any balance owed by/to the Company by/to Mr Taylor, an issue which will require separate consideration".

11. In late April 2018, Mr Taylor had supplied Mr Poole with a schedule ("Schedule 9(e)") listing files he had moved to STL and, as regards nine of those files, detailing sums received in respect of costs and their division between disbursements, Company profit costs and STL profit costs. At much the same time, Mr Goodchild had made an application for specific disclosure in respect of, among other things, the files which Mr Taylor had taken and the receipt by STL of moneys belonging to the Company. The witness statement in support of the application noted that "the value of the shares in the Company is in issue in these proceedings as is the value of the diversion of any business", that "the monies due to the Company is obviously relevant to [the value of the shares]" and that Mr Taylor had proposed that sums paid to STL for work which the Company had undertaken should be paid into an escrow account.

12. In the event, Mr Poole's report did not refer to Schedule 9(e), but on 25 May 2018 Judge Kramer made an order which required Mr Taylor to permit Mr Goodchild to inspect various documents relating to the files included in the schedule. Correspondence ensued as to whether Judge Kramer had intended Mr Goodchild to inspect only sample files and it was agreed that, in the first instance at least, he should inspect just ten files. Mr Goodchild visited offices of Mr Taylor's solicitors on 5 June for this purpose, but the parties subsequently disagreed about the adequacy of what had been made available.

13. On 7 June 2018, Mr Taylor's solicitors asked Mr Poole a number of questions about his report. However, none of the questions related to the significance of either the directors' loan account figures or the files which Mr Taylor had taken.

14. There was a five-day trial before Barling J between 10 and 16 July 2018. A central issue was whether Mr Goodchild was to be considered to have consented to Mr Taylor leaving and setting up STL with Company staff while still a director and shareholder of the Company. Mr Taylor had explained in points of defence that he had remained

such a director and shareholder "only because of [Mr Goodchild's] refusal to agree reasonable terms for [his] final departure".

15. Giving judgment on 20 July, Barling J found that there had been no more than an agreement in principle between Mr Goodchild and Mr Taylor and that even this had not extended to:

> "encouraging staff to leave the company for the new firm; taking files from the company to the new firm; inviting clients to leave the company for the new firm; starting to work for the new firm; taking pre-split work-in-progress for the benefit of the new firm; and doing any of these matters while remaining a director and/or a shareholder of the company; and doing any of these while the terms of the split, including the financial terms, remained un-agreed".

Barling J said that he had "reached the firm conclusion that … the affairs of the company have been conducted in a way which unfairly prejudices [Mr Goodchild]", explaining that Mr Taylor's actions "represent the clearest possible breach of directors' fiduciary and statutory duties" and that Mr Taylor's "manner of leaving produced a disorderly state of affairs from the company's point of view". The understanding between Mr Goodchild and Mr Taylor having been that the former should retain the Company, subject to buying the latter's shareholding at a fair valuation, Barling J considered it appropriate to make an order to that effect and decided that the price should be £170,500, splitting the difference between Mr Poole's two valuations on the basis that Mr Poole had not plumped for one or other as the more appropriate.

16. A section of Barling J's judgment headed "A late issue" addressed a point which Mr Taylor's then counsel had raised in the course of the trial in relation to the directors' loan accounts. The paragraphs in question read:

> "105. The issue, therefore, should now be straightforward. I have already described that the court ordered the instruction of a single joint expert to value the shares. The parties duly jointly instructed that independent expert. He produced a valuation on the two relevant bases. The parties asked some supplementary points to which he responded in writing. So the matter stood until last Friday, the fourth or fifth day of the trial, when [counsel for Mr Taylor] raised a new issue on the valuation report which had hitherto been presented to me as, in effect, unchallenged by either party.
>
> 106. [Counsel for Mr Taylor] produced three draft questions which he suggested I should send to the expert. The questions did not simply ask for clarification of what was in the valuation report but raised issues with which the report had not dealt. In particular, proposed question 2 asked, 'What would be the impact on each of your share valuations of a balance on the directors' loan account of £445,000 comprising Mr Taylor £229,000 and Mr Goodchild £215,000 and retained profits of £597,000?' (I have rounded those figures for convenience).

Question 3 was extremely convoluted and, as well as raising new issues, was very difficult to understand. [Counsel for Mr Taylor] accepted that there would need to be some redrafting of the questions.

107. I refused to permit these questions to be sent to the expert. The issues they raised would have affected the timetable of the trial. There would almost certainly have needed to be a further report by the expert, and cross-examination of him would have been virtually inevitable. An adjournment would have been the likely result. Such a result would have been disproportionate in terms of additional expense and delay and would have been unfair to the petitioner. [Counsel for Mr Taylor] therefore indicated that he would deal with the matter in submissions.

108. What the issue amounts to is this. In paragraph 9.9.6 of the expert report, the expert states that:

> '…each valuation of the shares of the respondent [ie whether as at March 2018 or June 2017 and whether on a continuing or exiting basis] has been treated separately to any balance owed by/to the company by/to the respondent, an issue which will require separate consideration.'

The expert valued the shares on the 'maintainable profit' basis rather than on a net asset valuation basis because he said that the recoverable value of the net assets of the company (taking account of the directors' loan accounts) was lower than the value produced by the maintainable profits approach, and that in those circumstances valuations of professional practices should adopt the latter approach.

109. The first respondent now complains that this leaves him *prima facie* liable to repay his directors' loan account (or the balance of it after the value of the shares to be paid to him by the petitioner are taken into account).

110. [Counsel for Mr Taylor] submitted that in these circumstances I should not adopt the share valuations in the single joint expert's report, but should increase those valuations by some or all of the amount owed by the first respondent to the company. This would wholly, or partly, extinguish his directors' loan account and compensate for the lack of a declaration of dividend in 2016 and 2017. The problem with this submission, as [counsel for Mr Goodchild] points out, is that I would have to descend into the expert's arena, and in effect decide how much of the first respondent's loan account should be written off as dividend or how much of it should otherwise be added to the value of his shares, but without any material with which to make such an assessment. It is quite impossible for me to do so.

> 111. The expert said that the loan accounts would require 'separate consideration'. I do not consider that it is my role to give them such consideration in the context of this case, nor do I have the wherewithal to do so. If the first respondent had wished the expert to opine on this issue, he should have raised it when the report was received, at the very latest some weeks ago, and when other matters were being raised by the parties with the expert.
>
> 112. I therefore propose to use the valuations in the single joint expert report. I acknowledge that this leaves some matters unresolved between the parties, but that is unavoidable. It would obviously be highly undesirable for there to be further litigation between them, and one hopes that they will find a way of resolving remaining issues without recourse to the courts."

17. The upshot was that Mr Goodchild was able to buy Mr Taylor's shares in the Company for rather less than either (a) the £229,000 which Mr Taylor was said to owe the Company on his loan account or (b) half of the £445,000 which Mr Taylor and Mr Goodchild were between them said to owe on their directors' loan accounts.

18. The present proceedings were issued on 17 April 2019. By them, the Company, which is now in the sole ownership of Mr Goodchild, makes claims against Mr Taylor and STL. In the first place, the Company seeks payment by Mr Taylor of £229,431.43 as the sum outstanding on his loan account ("the Loan Account Claim"). Secondly, the Company asks for relief as against STL in respect of sums received for work which the Company had undertaken on files taken by Mr Taylor (including £105,632.15 for payments up to 6 April 2018) ("the WIP Claim"). Thirdly, the Company contends that Mr Taylor and/or STL should account for profits attributable to work which STL carried out when Mr Taylor was still a director of the Company and on the files which Mr Taylor took ("the Account of Profits Claim").

19. On 10 July 2019, Mr Taylor and STL applied for the particulars of claim to be struck out on the basis of *res judicata* or the principle in *Henderson v Henderson* (1843) 3 Hare 100. Further or alternatively, Mr Taylor asked for summary judgment in respect of the Loan Account Claim on the ground that it had no real prospect of success. In that regard, Mr Mark Harper QC, who was by then appearing for Mr Taylor (not having done so before Barling J), advanced defences based on contract, estoppel and unjust enrichment.

20. It was that application which came before Snowden J. He held that the Loan Account Claim must be allowed to proceed, explaining that he did not consider the Company's pursuit of the claim to constitute an abuse of process and that he had not been persuaded that the claim had no real prospect of success on the merits. As regards the WIP and Account of Profits Claims, Snowden J considered that neither cause of action estoppel nor issue estoppel applied to prevent the Company from bringing either claim. On the other hand, he concluded that pursuit by the Company of the WIP and Account of Profits Claims would be an abuse of process under the rule in *Henderson v Henderson* and that these should therefore be struck out.

21. In the course of the hearing before Snowden J, the possibility of the WIP and Account of Profits Claims being limited to 50% of their value was raised. Snowden J observed that Mr Goodchild might be said to obtain a windfall if the WIP and Account of Profits Claims accrued solely to his benefit when he had owned only 50% of the Company when any diversion of business had taken place. In response, Mr Goodchild's then counsel "accept[ed] the Court could make an award of equitable compensation to the company to reflect the fact its 100% shareholder and sole director has already had in the 994 proceedings, the benefit of part of what it is claiming" and said that, "had there been a defence filed to this, frankly that is what, the sort of thing we expected to see". He then agreed with Snowden J that he accepted that there "could be a reduction in any award of equitable compensation to the company to reflect the fact that the company is now 100% owned by Mr Goodchild and that the value of Mr Taylor's shares did not include a valuation of the diverted business when it was done on the exiting basis". When Mr Harper replied on behalf of Mr Taylor, Snowden J referred to the "concession" which Mr Goodchild's counsel had offered but Mr Harper said that the concession did not work. In the discussion which followed, Snowden J said that "it could be dealt with if the company limited its claim to 50%, which it currently hasn't", and that "it's always possible for the company voluntarily to decide how much it seeks". Snowden J also mooted the possibility of his saying that abuse could be cured by reducing the Company's claim whereupon "it would be for the Claimant to then apply to amend to save its claim accordingly". Mr Harper countered that "we shouldn't be having to wrestle with these issues to save a claim where on the face of it, we say that this is an abuse of process".

22. The Company now appeals against Snowden J's decision to strike out the WIP and Account of Profits Claims. It does not, however, ask to be allowed to pursue the WIP and Account of Profits Claims to their full extent. It seeks an order dismissing the strike out application "on condition that [it] applies for permission to amend the Particulars of Claim so as to limit the claims for WIP and an account of profits to 50% of their value".

The rule in *Henderson v Henderson*

23. The rule in *Henderson v Henderson* was explained by Lord Bingham (with whom Lords Goff, Cooke and Hutton agreed) in these terms in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any

> additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

24. In *Johnson v Gore Wood*, the question was whether it was an abuse of process for Mr Johnson to bring proceedings when a company which was his "corporate embodiment" had already done so. Lord Bingham said at 32 that an argument that the rule in *Henderson v Henderson* was inapplicable on that account had been rightly rejected, a "formulaic approach to application of the rule [being] mistaken". Similarly, the fact that a claimant has previously advanced a claim against one defendant can potentially make it an abuse of process for him now to proceed against a different one. As Clarke LJ (with whom Scott Baker LJ agreed) noted in *Dexter Ltd v Vlieland-Boddy* [2003] EWCA Civ 14 at paragraph 49 (i), "Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process". On the other hand, as Clarke LJ observed in paragraph 49(ii), "A later action against B is much more likely to be held to be an abuse of process than a later action against C". As to that, Clarke LJ said this:

> "50. Proposition ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C, D, E, F and G) in one action. There may be many

> entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others.
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> 51. Those reasons include, for example, the cost of proceeding against more than one defendant, especially where B is apparently solvent and the case against B seems stronger than against others. More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means follows that either the public interest in efficiency and economy in litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all.
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> 52. It seems to me that the courts should be astute to ensure that it is only in a case where C can establish oppression or an abuse of process that a later action against C should be struck out. I could not help wondering whether the defendants in this case would have given their lawyers the same instructions on the question whether they should have been sued in the first action if they had been asked before that action began as they have given now that a later action has been begun.
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> 53. It is clear from the speeches of both Lord Bingham and Lord Millett that all depends upon the circumstances of the particular case and that the court should adopt a broad merits based approach, but it is likely that the most important question in any case will be whether C, D, E or any other new defendant in a later action can persuade the court that the action against him is oppressive. It seems to me to be likely to be a rare case in which he will succeed in doing so."

In a similar vein, Thomas LJ commented in *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748 ("*Aldi*") at paragraph 10, "The fact that the defendants to the original action and to this action are different is a powerful factor in the application of the broad-merits based judgment; it does not operate as a bar to the application of the principle".

25. Another point which emerges from the authorities is that the fact that a claim could have been raised in a set of proceedings will not necessarily make it an abuse of process to advance it later. Lord Bingham said as much in the passage from *Johnson v Gore Wood* quoted above, and Thomas LJ echoed him in *Aldi* at paragraph 17, adding in paragraph 25:

> "there is a real public interest in allowing parties a measure of freedom to [choose] whom they sue in a complex commercial matter and not to give encouragement to bringing a single set of proceedings against a wide range of defendants or to complicate proceedings by cross-claims against parties to the proceedings".

In *Stuart v Goldberg Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823 ("*Stuart*"), Lloyd LJ noted in paragraph 65 that "a party is not lightly to be shut out from bringing before the court a genuine cause of action" and that a claim "must be clearly shown to be an abuse of process before it can be struck out". Likewise, Lord Neuberger MR said in *Henley v Bloom* [2010] EWCA Civ 202, [2010] 1 WLR 1770 at paragraph 25:

> "However desirable it may be for a party to bring all his claims forward in one go, the abuse principle, as the judgments in the *Stuart* case [2008] 1 WLR 823 underline, does not bar a claim simply because someone fails to raise a claim when he could have done so. The facts must be such that the second action amounts to an abuse of process before it can be struck out."

26. The authorities also show that it can be important to disclose the possibility of future proceedings. Thomas LJ, in a passage with which Longmore and Wall LJJ both expressed agreement, said this on the subject in *Aldi*:

> "29. I also wish to add a word as to the approach that should be adopted if a similar problem arises in the future. In circumstances such as those that arose in this case, the proper course is to raise the issue with the court. Aldi did write to the court … , but not in terms that made it clear what the court was being invited to do. WSP and Aspinwall knew of Aldi's position and were before the court on numerous occasions; they did nothing to raise it.
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> 30. Parties are sometimes faced with the issue of wishing to pursue other proceedings whilst reserving a right in existing proceedings. Often, no problem arises; in this case, Aldi, WSP and Aspinwall each in truth knew at one time or another between August 2003 and the settlement of the original action in January 2004 that there was a potential problem, but it was never raised with the court. I have already expressed the view that it should have been. The court would, at the very least, have been able to express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation. It may have seen if a way could have been found to determine the issues applicable to Aldi in a manner proportionate to the size of Aldi's claim and without the very large expenditure that would have been necessary if Aldi had to participate in the trial of the actions. It may be that the court would have said that it was for Aldi to elect whether it wished to pursue its claim in the proceedings, but if it did not, that would be the end of the matter. It might have inquired whether the action against excess underwriters could have been expedited. Whatever might have happened in this case is a matter of speculation.
>
> 31. However, for the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seised of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of

> the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future."

In *Stuart*, Sedley LJ warned at paragraph 77 that "a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process" and Sir Anthony Clarke MR said in paragraph 96:

> "For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. On the contrary they should come clean so that the court can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the CPR, namely that of co-operation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated."

Sir Anthony Clarke MR went on to conclude his judgment in paragraph 101 as follows:

> "I only add by way of postscript that litigants and their advisers should heed the points made by this court in the *Aldi Stores Ltd* case and underlined here that the approach of the CPR is to require cards to be put on the table in cases of this kind or run the risk of a second action being held to be an abuse of the process."

27. In *Gladman Commercial Properties v Proctor* [2013] EWCA Civ 1466, Briggs LJ (with whom Longmore and Ryder LJJ agreed) concluded that in *Aldi* Thomas LJ had "regarded the requirement to refer a contemplated future claim for case management directions in the earlier claim as mandatory" and that the judge whose decision was under appeal had been "correct to treat a failure by the Appellant to follow guidelines laid down as mandatory future conduct … as relevant matters pointing to a conclusion that the Second Claim constituted an abuse of the process of civil litigation" (see paragraphs 64 and 65). In a similar way, in *Clutterbuck v Cleghorn* [2017] EWCA Civ 137 Kitchin LJ (with whom Floyd LJ agreed) said at paragraph 81 that "the deputy judge was … right to say that the *Aldi Stores* guidelines are mandatory and that an inexcusable failure to comply with them is a relevant factor to be taken into account in assessing whether, having regard to the relevant private and public rights and in light of all of the facts of the case, a party is abusing the process of the court by seeking to raise before the court an issue that it could have raised in prior proceedings".

28. On the other hand, a failure to comply with the *Aldi* guidelines will not automatically render a later claim an abuse of process. In *Otkritie Capital International Ltd v*

Threadneedle Asset Management Ltd [2017] EWCA Civ 274, [2017] 2 Costs LR 375 ("*Otkritie*"), Arden LJ (with whom Henderson LJ and Sir Christopher Clarke agreed) explained at paragraph 49 that the *Aldi* guidelines are "a facet of the principle of a 'broad merits-based judgment' as to whether [striking out] is the just outcome which was established in *Johnson v Gore Wood*". In making such a judgment, the judge had been "clearly entitled to assess the seriousness of the breach and so to seek to determine what would have happened if the necessary application had been made" (paragraph 52). As Arden LJ said in paragraph 8, "the *Aldi* guidelines do not … mandate striking out", but "the judge had to consider all the circumstances of the case, including the seriousness of the non-compliance with the *Aldi* guidelines".

Unfair prejudice petitions

29. Section 994 of the 2006 Act allows a member of a company to apply to the Court by petition on the ground that the affairs of the company are being or have been conducted in an unfairly prejudicial manner. Where the Court is satisfied that a petition is well founded, section 996(1) empowers it to "make such order as it thinks fit for giving relief in respect of the matters complained of". By section 996(2), an order may in particular:

> "(a) regulate the conduct of the company's affairs in the future;
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> (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. In practice, the relief most commonly granted on an unfair prejudice petition is an order for the purchase of the petitioner's shares. Sometimes, though more rarely, the Court will require a respondent to sell his shares to the petitioner, as Barling J did in the present case. It is open to the Court, too, to grant a variety of other remedies, including an order for a respondent to pay compensation to the company or to account to it for profits in respect of a wrong done to the company. In that connection, the Privy Council held in *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26, [2007] Bus LR 1521 that no objection could be taken at the strike-out stage to a prayer for an

order that respondent directors pay damages to the company for breaches of their duties as directors of the company, Lord Scott observing in paragraph 28:

> "There is nothing in the wide language of article 143(1) [which was equivalent to section 996 of the 2006 Act] to suggest a limitation that would exclude the seeking or making of such an order: the court 'may make such order as it thinks fit for giving relief in respect of the matters complained of'."

In a similar vein, Vos J said in *Apex Global Management Ltd v Fi Call Ltd* [2013] EWHC 1652 (Ch), [2014] BCC 286 at paragraph 125:

> "In my judgment, these authorities all speak with one voice. They show that ss.994–996 provide a wide and flexible remedy where the affairs of a company have been conducted in a manner that is unfairly prejudicial to the interests of some or all of its members. A s.994 petition is appropriate where, for whatever reasons, the trust and confidence of the parties to a quasi-partnership has broken down. Relief can be granted to remedy wrongs done to the company, and in such a situation the alleged wrongdoers must be made parties to the petition. Non-members of a company who are alleged to have been responsible for such conduct can be joined as respondents, and, in an appropriate case, such non-members can be made primarily or secondarily liable to buy the petitioners' shares. Artificial limitations should not be introduced to reduce the effective nature of the remedy introduced by ss.994–996."

31. There is more scope for argument, however, as to when it is appropriate for the Court to grant relief in favour of the company in unfair prejudice proceedings. In *Re Chime Corp Ltd* (2004) 7 HKCFAR 546 ("*Chime*"), Bokhary PJ, sitting in the Hong Kong Court of Final Appeal, said at paragraph 27 that, while he "would not rule out the possibility of circumstances in which it can be seen that [an order for the payment of damages or compensation, or for the grant of restitution, to the company itself] could properly be made", "such circumstances, even if they can arise, would in any case of complexity be rare and exceptional". "No such circumstances", he said in paragraph 28, had arisen in the case before him, adding:

> "Quite apart from anything else undesirable, pursuing relief in respect of the CAL loans by way of an unfair prejudice petition rather than by way of a derivative action would entail the risk of the respondents or one or more of them facing a claim for such relief in a derivative action after the petitioners had failed to obtain the same in the petition."

For his part, Lord Scott NPJ endorsed at paragraph 47 doubts which Millett J had expressed in *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 as to the "propriety of seeking [an order for payment or restitution to the company] on an unfair prejudice petition if the essence of the complaint was not of mismanagement of the company but of misconduct by the director". Later in his judgment, Lord Scott said:

> "62. As a general rule, in my opinion, the court should not in a s.168A [i.e. unfair prejudice] petition make an order for payment to be made by a respondent director to the company unless the order corresponds with the order to which the company would have been entitled had the allegations in question been successfully prosecuted in an action by the company (or in a derivative action in the name of the company). If the order does not so correspond then, either the company will have received less than it is entitled to, in which case it will be entitled to relitigate the issue in an action against the director for the balance, or the company will have received more than it was entitled to, in which case a clear injustice to the director will have been perpetrated. Nor, in my opinion, should the court allow a prayer in the petition for payment by the respondent director of compensation or of restitution to the company to stand unless it is clear at the pleading stage that a determination of the amount, if any, of the director's liability at law to the company can conveniently be dealt with in the hearing of the petition. In any other case, in my opinion, if the allegations against the director are proper to be relied on as evidence of unfairly prejudicial conduct, the appropriate relief to be sought would be an order under s.168A(2)(b) for a derivative action to be brought for the recovery of the sum legally due. It would be proper for the company to express its views as to whether it would be in its interests for such an action to be brought.
>
> 63. Moreover, the use of a s.168A petition in order to circumvent the rule in *Foss v Harbottle* (1843) 2 Hare 461 in a case where the nature of the complaint is misconduct rather than mismanagement is, in my opinion, an abuse of process."

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

> "Unfair prejudice proceedings are concerned to bring mismanagement to an end; derivative actions are concerned to provide a remedy for misconduct: see *Re Charnley Davies Ltd (No.2)* [1990] BCLC 760; *Re Chime Corp Ltd* (2004) 7 HKCFAR 546. While the court may have jurisdiction in the strict sense on a petition under s.168A to order payment of compensation to the company, the derivative action is the proper vehicle for obtaining such relief where the plaintiff's complaint is of misconduct rather than mismanagement: see *Re Chime Corp Ltd* at p.571."

33. An unfair prejudice petition differs significantly from a conventional civil claim. The Court has a wide discretion as to what, if any, relief it will grant, albeit one that "must … be exercised judicially and on rational principles" (to quote Robert Walker LJ in *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031, [2002] 1 WLR 1024, at paragraph 19). Further, in *Re Premier Electronics (GB) Ltd* [2002] 2 BCLC 634,

Pumfrey J pointed out that there was no subsisting cause of action between petitioners in unfair prejudice proceedings and the shareholders who were respondents to it and, as a result, held that the Court lacked jurisdiction to make a freezing order against the relevant respondents. An unfair prejudice petition, Pumfrey J noted at 637, is "to be distinguished from, for example, a claim by the company itself in relation to misfeasance by directors".

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

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

The judgment

36. Snowden J made these points in his judgment when explaining why he considered that the WIP and Account of Profits Claims should be struck out:

    i) "[I]t was perfectly possible … for Mr Goodchild to seek the relief now sought through the WIP Claim and the Account of Profits Claim as part of the Petition" (paragraph 87). The authorities show that "Mr Goodchild could, without any difficulty, have joined STL as a respondent to the Petition" and that he "could have sought an order in the Petition for payment of compensation and/or an account of profits against Mr Taylor and STL for the benefit of the Company which he was seeking to own in its entirety, and with which, for this purpose, he is now to be identified" (paragraph 87);

    ii) With regard to practicalities, "the fact that Mr Taylor had not resigned served only to support and prolong any claims for unfair prejudice based upon such breach of duty" and "appropriate relief could have been sought in the Petition to deal with the continuing breaches" (paragraph 91). Moreover, "if and to the extent that details of the Retained Files removed [i.e. the files taken by Mr Taylor] and the work being done by STL was not known, further disclosure could easily have been sought" (paragraph 91);

    iii) "[I]n accordance with the *Aldi* guidelines, if there was an intention that the Company, once wholly owned by Mr Goodchild, should be entitled to bring claims to recover compensation or an account in respect of the Retained Files WIP or the profits from the business diverted to STL, it was … imperative that this should have been spelled out to Barling J" (paragraph 97). Snowden J said this on the subject in paragraph 98:

> "In my judgment, this is a weighty factor which strongly supports the conclusion that the Company's pursuit of the WIP Claim and the Account of Profits Claim for the ultimate benefit of Mr Goodchild is an abuse of process. For reasons that I have explained, the clear inference from the two bases of valuation of Mr Taylor's shares was that the Company would not have any future right to recover monies in respect of the Retained Files WIP or the profits from the diverted business. In my view, the onus lay clearly upon Mr Goodchild, who had originally raised such issues in his prayer for relief and was then seeking to take advantage of Mr Poole's approach to valuation to acquire Mr Taylor's shares at the lowest possible price, to raise the possibility that he might subsequently wish to cause the Company, which he would then wholly own and control, to seek to recover compensation or an account of profits from Mr Taylor in respect of those matters. To use the phrase from *Aldi*, there can be no excuse for his failure to do so";

iv) Application of the *Aldi* guidelines is "particularly apposite in the context of unfair prejudice petitions concerning small private companies, where there is a regrettable tendency for disputes over the breakdown of relations between shareholders to become deeply personal, hostile and lengthy" (paragraph 103). "In such cases, where possible the law should encourage a once-and-for-all determination and a clean break, and should do nothing that might be seen as permitting parties to keep matters up their sleeve and continue to litigate afterwards at further cost to themselves and imposing a further burden on the court to the detriment of other litigants" (paragraph 103);

v) Taking a broad merits-based approach, it would seem "fundamentally wrong that having had his 50% shareholding in the Company acquired for a price that reflected neither the value of the DLAs [i.e. the directors' loan accounts], nor the possibility that the Company (of which he owned half) might be entitled to the receipts and profits in respect of the Retained Files WIP and the diverted business, Mr Taylor should now face having to pay both those amounts in full to the Company for the sole benefit of Mr Goodchild" (paragraph 101). Without expressing any view on the merits of the loan account claim against Mr Taylor or the defences put forward to it, the fact that "Mr Taylor "will face the prospect of being ordered to repay that substantial debt to the Company" must be taken into account (paragraph 101).

Discussion

37. Lord Bingham confirmed in *Johnson v Gore Wood & Co* at 31 that "[t]he bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all". In the present case, Snowden J took the view that Mr Goodchild could both in principle and in practice have sought in the context of his unfair prejudice petition the relief that the Company is now claiming in these proceedings. That the Court would have had jurisdiction to grant such relief under section 996 of the 2006 Act is not in dispute. However, it is not always abusive to raise later a claim that could have been

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

38. Of course, Snowden J did not found his conclusion as to abuse solely on Mr Goodchild's ability to advance the WIP and Account of Profits Claims in the unfair prejudice proceedings. Another factor to which he clearly attached considerable importance was failure to adhere to the *Aldi* guidelines. In Snowden J's view, it was "imperative" that any intention that the Company bring the WIP and Account of Profits Claims should be spelled out to Barling J and there could be "no excuse" for Mr Goodchild's failure to do so.

39. Before us, Mr Daniel Lightman QC, who represented the Company (not having appeared before either Barling J or Snowden J), did not deny that Mr Goodchild had failed to comply with the *Aldi* guidelines. As, however, Mr Lightman stressed, non-compliance with the guidelines does not necessarily render subsequent proceedings abusive. The *Aldi* guidelines being "a facet of the principle of a 'broad merits-based judgment' as to whether [striking out] is the just outcome" (to quote Arden LJ in *Otkritie*), the seriousness of Mr Goodchild's failure to follow them must be considered.

40. As to that, it is relevant to ask what would have happened if Mr Goodchild had told Barling J that he intended the Company to bring proceedings in respect of the WIP and Account of Profits Claims. The best guide to that is, I think, to be found in Barling J's reaction to the "late issue" which was raised in relation to the directors' loan accounts. Despite the size of the sums said to be due to the Company on those accounts, Barling J declined to allow further questions to be put to Mr Poole, explaining that an adjournment would have been "the likely result" and that that would have been "disproportionate in terms of additional expense and delay" and "unfair" to Mr Goodchild. That some matters would be left unresolved between the parties was, Barling J said, "unavoidable".

41. There is no reason to believe that Barling J would have taken a different approach to the WIP and Account of Profits Claims. There could have been no question of resolving those claims at that stage. Apart from anything else, STL was not a party and there was only limited information about the files Mr Taylor had taken. Pursuit of the claims would have required the petition to be re-framed, STL to be joined, additional disclosure, further legal argument and, it may be, extra witness evidence.

42. It would have made the more sense for Barling J to decide that the WIP and Account of Profits Claims should, like the director's loan account issues, be left for the future given Mr Poole's approach to valuation of Mr Taylor's shares. As I have said, Mr Poole thought a multiple of profits method appropriate and attached no importance to the Company's asset position. "[A]ny balance owed by/to the Company by/to Mr Taylor", Mr Poole said, would "require separate consideration" and "any level of contingent WIP" was assumed to be immaterial. For what it is worth, it is not clear to me why Mr Poole deducted the £445,221 attributed to the directors' loan accounts when assessing the Company's balance sheet position. Had he included the £445,221, the Company would have been shown as having net assets as at 30 November 2017 of £597,210, a figure substantially in excess of the £368,972 or £314,622 to which the multiple of profits technique led him. On that footing, a net recoverable assets calculation might have been preferable to a multiple of profits one and the WIP and Account of Profits Claims could have played a part in such an assessment. However, Mr Taylor, in whose interests it would have been to challenge Mr Poole's approach, did not do so. The questions which his solicitors asked of Mr Poole did not bear on the aptness of a multiple of profits method and made no reference to either the directors' loan accounts or the files which Mr Taylor had taken. As matters stood when the unfair prejudice petition came on before Barling J, therefore, the WIP and Account of Profits Claims would not have appeared to affect the valuation of Mr Taylor's shares.

43. Snowden J considered it significant that Mr Goodchild had argued for Mr Poole's "Exiting Basis" before Barling J. However, the difference between the "Exiting Basis" and "Continuing Basis" valuations was only £27,175 and, in the event, Barling J split the difference and so valued Mr Taylor's shares at a figure only £13,986 less than that given by the "Continuing Basis". That being so, I find it hard to see how Mr Goodchild's adoption of the "Exiting Basis" could be a good reason for preventing the Company from claiming, say, the £105,632.15 sought in respect of payments up to 6 April 2018. In any case, as I have noted, Mr Poole valued Mr Taylor's shares by reference to maintainable profits rather than assets and so the WIP and Account of Profits Claims did not impinge on his calculations and, in particular, in no way

accounted for the (limited) divergence between the "Exiting Basis" and "Continuing Basis" figures.

44. Snowden J referred to Mr Goodchild having "raised such issues in his prayer for relief". He will have had in mind sub-paragraph (b) of the prayer, in which Mr Goodchild had asked that Mr Taylor be required to give credit against the purchase price of his shares for "50% of the profit made by STL on the business unlawfully diverted by him to STL". I find it difficult to understand how it could have been right for any such credit to accrue to the benefit of Mr Goodchild rather than the Company, but in any case Mr Taylor's then counsel promptly, in December 2017, disputed that an unfair prejudice petition was an appropriate vehicle to pursue such matters and, as a practical matter, it would have been quite impossible to determine at the hearing before Barling J for what, if anything, Mr Taylor or STL was liable in respect of "unlawfully diverted" business.

45. As Snowden J observed, litigation between shareholders can become "deeply personal, hostile and lengthy", and a clean break is of course a desirable objective. On the other hand, there is no suggestion that Mr Goodchild led Mr Taylor to believe that the Company would be writing off the indebtedness on Mr Taylor's loan account which featured in its accounts and, in the event, Snowden J declined to strike out the Loan Account Claim. To that extent, therefore, there was no clean break. Nor, as it seems to me, could Mr Taylor have been entitled to assume that the Company would not be pursuing, say, payment for work-in-progress. In fact, it appears that Mr Goodchild had pressed for payment of money which STL had received for work which the Company had undertaken and Mr Taylor had responded by proposing that such funds were paid into an escrow account. In any event, the desirability of a clean break cannot of itself be determinative.

46. That leaves Snowden J's feeling that it would be "fundamentally wrong" that Mr Taylor should face having to meet the Loan Account, WIP and Account of Profits Claims in full "for the sole benefit of Mr Goodchild". For my part, I do not think that the Loan Account Claim can have been material, not least because it was disputed. Even so, it is understandable that Snowden J should have felt uncomfortable about the WIP and Account of Profits Claims benefiting only Mr Goodchild when Mr Taylor had previously had a 50% interest in the Company. Against that, the striking out of the WIP and Account of Profits Claims operated to relieve Mr Taylor of the Company's claims in their entirety, not just as to 50%. More than that, although Snowden J did not mention this in his judgment, the Company's then counsel had specifically accepted that any award in its favour could be reduced "to reflect the fact that the company is now 100% owned by Mr Goodchild and that the value of Mr Taylor's shares did not include a valuation of the diverted business when it was done on the exiting basis". During Mr Harper's reply, Snowden J noted that the Company "currently" had not limited its claim to 50%, but Mr Goodchild's then counsel's "concession" was on the face of it apt to address Snowden J's concern and the possibility of the Company making a formal amendment does not seem to have been canvassed with Mr Goodchild's counsel.

47. Standing back, it seems to me, with respect, that Snowden J arrived at the wrong conclusion. It is to be remembered that "a party is not lightly to be shut out from bringing before the court a genuine cause of action" and that an action is less likely to be held abusive if the parties to it differ from those to the earlier litigation. In the present case, what Snowden J held to be abusive were claims by the Company against Mr Taylor and STL whereas the unfair prejudice petition had been presented by Mr

Goodchild and did not have STL as a respondent. Further, while the Court might have had jurisdiction to grant relief under section 996 of the 2006 Act along the lines that the Company now seeks, it is far from obvious that it would have been convenient for the WIP and Account of Profits Claims to be pursued in the unfair prejudice proceedings. Not only could doing so have been expected to delay, complicate and increase the cost of the unfair prejudice proceedings, but the legitimacy of advancing such Company claims would have been questionable. On top of that, I do not think the failure to comply with the *Aldi* guidelines mattered: the likelihood is that Barling J would still have left the WIP and Account of Profits Claims for the future. In the circumstances, I doubt whether there could have been any suggestion of the WIP and Account of Profits Claims needing to be raised, if at all, in the unfair prejudice proceedings but for the perceived unfairness of Mr Taylor having to meet the WIP and Account of Profits Claims in full when no account had been taken of them when his shares were valued. However, (a) on the basis of Mr Poole's approach to valuation, the WIP and Accounts of Profits Claims were unimportant, (b) Mr Taylor did not challenge that approach, (c) striking out would excuse Mr Taylor from *any* liability in respect of the WIP and Account of Profits Claims, not just 50% of those claims, and (d) the Company accepted before Snowden J that an award in its favour could be reduced to reflect the change in its ownership and, now, proposes that its appeal be allowed only subject to its limiting its claims to 50% of their value.

48. All in all, it seems to me that the matters to which Snowden J referred were not such as could warrant the conclusion that the WIP and Account of Profits Claims were abusive and should be struck out. Further, Snowden J was, in my view, mistaken in, among other things, considering that "further disclosure could easily have been sought", failing to consider what would have happened if Mr Goodchild had told Barling J that he intended the Company to bring proceedings in respect of the WIP and Accounts of Profits Claims, attaching importance to the fact that Mr Goodchild had argued for Mr Poole's "Exiting Basis" before Barling J, attaching importance to the existence of the Loan Account Claim, failing to have regard to the Company's then counsel's "concession" that an award could be reduced on account of the change in the Company's ownership and failing to take account of the fact that there would not have been a clean break anyway.

Conclusion

49. I would allow the appeal and, as asked, dismiss the strike out application on condition that the Company applies for permission to amend its particulars of claim so as to limit the WIP and Account of Profits Claims to 50% of their value.

Sir Nigel Davis:

50. In jurisdictional terms I can accept that Mr Goodchild *could* have sought to introduce into the unfair prejudice proceedings the derivative claims in respect of the WIP and Account of Profits. The real question, as I see it, is whether he *should* have done, such that his failure to do so renders an abuse of process the subsequent proceedings brought by the Company raising these claims.

51. The judge seems to have thought that the derivative claims and appropriate remedies could readily have been introduced into and pursued in the unfair prejudice proceedings. But, whilst of course I acknowledge the particular expertise of Snowden

J in company law matters, the position with regard to introducing derivative claims into unfair prejudice proceedings is, in general terms, as I see it, potentially quite complex: as the observations in cases such as *Chime Corp* and *Waddington Ltd* indicate. It is, for the reasons there set out, by no means necessarily straightforward, or even standard, to introduce derivative claims of the present kind into s. 994 Petitions. The fact that, as in this case, allegations of breach of fiduciary duty are made as part of the basis for alleging unfairly prejudicial conduct does not necessarily alter that. In fact, as I see it, the approach of the judge in this case could, if accepted, potentially set quite an uncomfortable precedent for other s.994 cases. In the present case, moreover, given the relative urgency of the position, given the need for a prompt hearing and resolution in view of the deadlock and given the fact that the Loan Account Claim was in any event expressly being held over, I can for myself see every reason why these other potential claims were not sought to be introduced into the s. 994 Petition; and all the more so given the approach taken in the report of the single joint expert.

52. That really, then, brings the complaint on behalf of Mr Taylor down to the accepted fact that that Mr Goodchild did not draw to the attention of the court his (as I would be minded to infer) intention thereafter to pursue, via the Company, such claims. Much reliance is placed on behalf of Mr Taylor on the procedure indicated as appropriate in the *Aldi* case in this regard. But I would not regard that asserted failure as justifying, in this particular case, a strike out of these claims in the subsequent proceedings as an abuse of process. That is so for a number of reasons:

    i) First, there is no rule of law that a failure to draw attention to the prospect of further proceedings as proposed in *Aldi* will always render such further proceedings an abuse of process. The position still requires assessment on the overall circumstances and merits in each case. In any event, it may be queried if the decision in *Aldi* had in mind the rather special position relating to s.994 Petitions.

    ii) Second, it was, as I see it, at least open to Mr Taylor himself at the time to seek clarification of the position, particularly given the approach taken in the report of the single joint expert.

    iii) Third, it is clear enough that Barling J, even if informed, would not have entertained such further claims at that stage. Not only would that have brought a further party into the Petition proceedings it also would have operated to complicate matters by the need for further disclosure and evidence, most probably at the expense of the expedited hearing which this Petition unquestionably required. Besides, there was clear advantage in first resolving at that stage the primary issue in the unfair prejudice proceedings - that is, whether there was or was not an agreement of the kind which Mr Taylor was alleging. It is, in this respect, also noteworthy that Barling J himself acknowledged that there would still be some matters outstanding following his disposal of the unfair prejudice proceedings - thus no clean and final break was ever contemplated.

    iv) Fourth, the expert report had, in effect, left the position on this entirely open.

53. If the arguments advanced on behalf of Mr Taylor are right they would bring about, as Snowden J acknowledged, the result that Mr Taylor and his company would retain for themselves the entirety of the relevant profits and WIP. That is not attractive,

particularly in the light of the trenchant findings of Barling J as to the breaches of duty on the part of Mr Taylor. Snowden J was, contrariwise, concerned that if these claims could successfully be pursued then Mr Goodchild, via the Company which he now wholly owns, would himself potentially stand to obtain the entirety of the profits and WIP, and notwithstanding that, on the approach taken in the report of the expert, he had been enabled, having succeeded in the Petition, to buy out the shares at a valuation which had not factored in those matters. I see that. But ultimately that, it might be said, is the consequence of the approach taken in the valuation report which neither party queried in this respect and is the consequence of the way derivative claims generally work (could, for example, a liquidator or a subsequent purchaser of the shares in the Company have been precluded from causing the Company to pursue such claims?). In any event, in this particular case Mr Lightman QC has unequivocally confirmed to this court that Mr Goodchild will procure that the Company limits its claims to one half of the relevant profits and WIP. That was a very fair and commendable stance to take. That being so, I need express no concluded view on whether or not such a concession was required in order to avoid a strike out of these further claims or whether or not the court could or should of its own motion have insisted on such a limitation.

54. I have read the judgment of Newey LJ and I entirely agree with his reasoning and conclusion. Accordingly, I agree that this appeal should be allowed.

Lord Justice Moylan:

55. I also agree.