

# Time's up! Shareholders, unfair prejudice & *Zedra*

**Georgina Squire** examines time limitations imposed by the Court of Appeal on unfair prejudice petitions

IN BRIEF

▶ Provides a detailed look at the case of *THG v Zedra*, which overturned decades of accepted authority on limitation regarding s 994 unfair prejudice claims.

Until recently, it was assumed the Limitation Act 1980 does not apply to claims for relief from unfair prejudice under s 994 of the Companies Act 2006. In a perhaps surprising decision in February 2024, however, in *THG Plc and others v Zedra Trust Company (Jersey) Ltd* [2024] EWCA Civ 158, [2024] All ER (D) 169 (Feb), the Court of Appeal held that such claims are in fact subject to the1980 Act, and the length of the limitation period will depend on the relief sought. What was it that led their Lords Justice Lewison, Arnold and Snowden to overturn 40 years of 'received wisdom'?

## Background

On 7 January 2019 a petition under s 994 was presented in the High Court by Zedra Trust Company (Jersey) Ltd against the respondents, The Hut Group Limited (THG) and its directors for conducting the company's affairs in an unfairly prejudicial manner to the interest of the petitioner.

On 14 June 2019, the respondents applied to strike out the petition, in whole or in part, and in the alternative for permission to serve a rejoinder to Zedra's points of reply. However, this strike out application was dismissed by HHJ Eyre QC on 10 February 2020, although he gave permission for the filing of a rejoinder.

## Round 1 at the Court of Appeal

The respondents then appealed to the Court of Appeal, in the first round of the litigation, at *Re The Hut Group Ltd* [2021] EWCA Civ 904, [2021] All ER (D) 46 (Jun). The court overturned the first instance decision and allowed partial strike out of the petition. All the original allegations under the first three grounds of appeal concerning relief sought by Zedra to vary the articles of the company and for the issue of new shares to Zedra were dismissed.

The next two grounds of the appeal, regarding the claim for equitable compensation, were allowed in part with the claim for compensation to be paid to Zedra surviving further consideration.

As for the final ground of appeal, concerning share allotments which caused the diminution in the relative size of Zedra's holding, Lord Justice David Richards held the issue was whether sufficient facts were pleaded from which findings of bad faith and/or improper purposes could be made in relation to the share issues and concluded this was 'not a sufficient pleading of a breach of shareholders' rights under the articles'.

Further, on 22 June 2022, the petitioner issued an application to re-amend the petition. In his judgment dated 18 January 2023, Mr Justice Fancourt allowed the petitioner permission to re-amend the petition, allowing Zedra to plead it had been wrongly excluded from the bonus share issue on 11 July 2016.

Fancourt J added he 'could not see how a limitation period under the Limitation Act 1980 can be said to apply to a claim for relief within a s 944 petition, on the basis that it is in substance a claim for compensation for breach of trust to which a statutory limitation period applied, if the claim did not exist in that form'.

The re-amended petition advanced two main grounds of complaint:

- that Zedra had a right to participate in eight of the ten share allotments previously the subject of complaint; and
- that Zedra was wrongly excluded from a bonus share issue on 11 July 2016, despite owning shares in the same class and with the same dividend rights as the shareholders who did benefit. This also includes an allegation that the directors acted 'in bad faith and/or for improper purposes in order to prejudice Zedra's interest as a minority shareholder', and that the effect of that exclusion was to dilute the petitioner's shareholding.

It was accepted the petition passed the threshold for permission to amend, but opposed on the basis there was an arguable limitation defence. Fancourt J rejected that argument, stating that the question of what, if any, relief should be granted lies in the discretion of the court and that that was a matter to be decided at trial, although considerations of delay in issuing the petition would be relevant. The main reason for doing so was that Fancourt J considered himself bound by the decision of the Court of Appeal in *Bailey v Cherry Hill Skip Hire Ltd* [2022] EWCA Civ 531, [2023] 1 All ER (Comm) 93.

## Round 2 at the Court of Appeal

Fancourt J's judgment dated 18 January 2023 was appealed by the respondents as to whether there was a limitation period applicable to s 944 petitions and, if so, what it is.

## The Court of Appeal decision

The court noted that in the current edition of *Palmer's Company Law* (para 8.3822) it is stated:

'Although there is no formal limitation period for bringing of an unfair prejudice petition and doctrine of laches does

not technically apply to this statutory remedy, a petitioner who delays bringing the petition may be penalised, in an extreme case, by being denied relief… and otherwise in the fashioning of the relief, for example, where the court chooses a date for assessing the value of the company which is unfavourable to the petitioner.'

The court went on and cited similar statements from text books, such as the current editions of *Buckley on the Companies Acts* and *Gore-Browne on Companies*, Robin Hollington KC's *Shareholders' Rights* (10th ed), *Minority Shareholders* by Victor Joffe and others (6th ed), as well as two Law Commission reports, and then concluded that none of the materials referred to above were binding on the court. It also held that although the absence of a statutory limitation period was part of the ratio in the decision of *Bailey v Cherry Hill*, the petition was not bound by that ratio because it proceeded on assumption, not argument.

When considering the question of whether a petition under s 994 is within the scope of the 1980 Act at all, the court viewed such petitions as 'proceedings in a court of law', and concluded that 'in principle, therefore, it is possible for a petition presented under s 994 to fall within the scope of the 1980 Act'.

> *"The implications of the Court of Appeal's decision are, no doubt, far-reaching and will have an impact on how unfair prejudice petitions are brought and the type of relief sought by the petitioners"*

Further, the Court of Appeal held that unfair prejudice petitions are, in principle, 'an action upon a specialty', which fall within the scope of a statutory limitation period of 12 years under s 8 of the 1980 Act. The court also considered Zedra's claim, being one for compensation in respect of a share issue more than six years ago, 'an action to recover any sum recoverable by virtue of enactment' and as such the claim was statute-barred under s 9 of the Limitation Act 1980 which sets out a limitation period of six years from the date on which the cause of action accrued.

## Conclusion

The implications of the Court of Appeal's decision are, no doubt, far-reaching and will have an impact on how unfair prejudice petitions are brought and the type of relief sought by the petitioners. According to this decision, a claim for compensation falls within s 9, and is restricted to six years from when the cause of action accrued, while a claim for a sum of money allegedly lost in respect of a share buyout order does not.

Another question to consider is whether a court can still strike out a claim on the ground of delay if it is brought within the 12-year statutory limitation period. However, as Snowden LJ said, 'The precise implications of our decision in this respect will need to be worked out in a future case in which it matters.' **NLJ**

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