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COMPANIES AND SHAREHOLDERS IN THE SPOTLIGHT

MINORITY SHAREHOLDER

PREJUDICE AND DELAY

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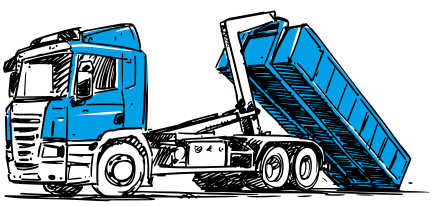
In a recent judgment given by the English Court of Appeal in Bailey v Cherry Hill Skip Hire [2022] EWCA Civ 531, the Court was asked to consider whether, prior to trial, the Court at first instance was wrong to dismiss in its entirety a petition seeking relief under sections 994 to 996 of the (UK) Companies Act 2006 i.e. unfair prejudice, on the grounds of long delay or acquiescence by the petitioner.

The equivalent section under the (Bermuda) Companies Act 1981 is section 111; an important difference between the provisions is that under section 111 petitioners have to additionally establish that the facts of the case would justify the making of a winding up order in respect of the company on the ground that it was just and equitable to do so: see De Shaw Oculus v Orient-Express Hotels [2010] Bda LR 32.

The origins of the claim lay in a bitter family dispute between members of the Bailey family. Cherry Hill Skip Hire Ltd ("the Company") was incorporated in 1982 and 51% of the shares were allotted to Norma Bailey, the mother, and 49% of the shares to her son Andrew; both became directors.

There was a falling out between mother and son and by 1985 the son was excluded from any management in the business. He was removed as a director by resolution in 1999 and replaced by his daughter, Jenna Dudley-Bailey; by then Andrew and Jenna had too fallen out.

Between 2001 and 2003 solicitors for Andrew wrote to the Company's solicitors seeking copies of its accounts from 1997 onwards and other information relating to the Company's affairs; Andrew complained that he had no accurate idea as to the present position concerning the Company's financial state and whether steps had been taken to devalue his shareholding.



Although the solicitors threatened an unfair prejudice petition if the enquiries were not satisfactorily met, no such petition was issued until July 2020, over 17 years later. Andrew's mother and daughter were the defendants. They sought to strike out the petition on the grounds of delay. It was said that Andrew had been excluded from participation in the running of the Company and had been denied his rights as a shareholder.

At first instance the Judge found that by 2003 at the latest Andrew knew enough to have been able to take legal proceedings in respect of the matters he now complained about and dismissed the petition in grounds of delay and acquiescence. On appeal Andrew argued that the Judge was wrong in principle to dismiss the petition on this basis at this stage.

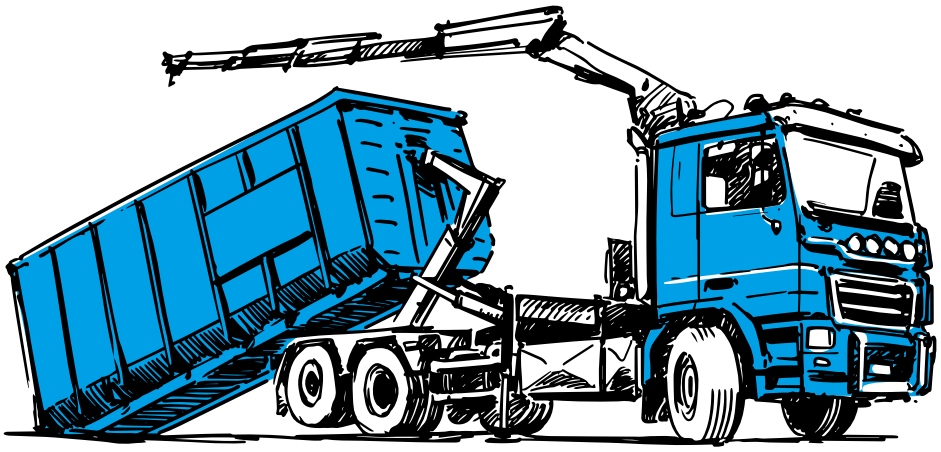
Andrews LJ, giving judgment in the Court of Appeal, highlighted certain extraordinary features of the case

including the fact that the allegations in the original petition were between 12 and 37 years old and the allegations now sought to be made in an amended petition were between 12 and 19 years old.

The Court of Appeal then considered the correct approach to delay in the context of unfair prejudice petitions. In England, as in Bermuda, there is no statutory limitation period applicable to unfair prejudice petitions. Also, given that the relief usually sought (a share buy-out) is not equitable, the doctrine of laches does not strictly apply where this is so.

The Court of Appeal found that the correct approach was that which was adopted in Re Edwardian Group Ltd, Estera Trust (Jersey) Ltd and another v Singh and others [2018] EWHC 1715: to consider whether there was unjustified delay resulting in prejudice or an irretrievable change of position and whether there was any evidence that the petitioners have previously acquiesced in the state of affairs of which they now complain; and whether, in view of the delay and the reasons for the delay, it was unfair or inappropriate in all the circumstances for the petitioners to obtain the relief that they seek.

In Re Edwardian Group Ltd, Fancourt J concluded at that it would be disproportionate to deny the petitioners a remedy for the unfair prejudice which they had proved, and that their conduct in delaying the issue of the petition did not make it inequitable for them to be granted one, given the nature of the wrongdoing and the consequences of refusing a remedy. In reaching that conclusion, he weighed the reasons for and seriousness of the delay against the nature of the unfairly prejudicial conduct, and the consequences for the petitioners of refusing relief against that background. The Judge considered that the behaviour of the company had been seriously prejudicial and unfair and that 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.



In an important passage in Andrews LJ's judgment, she found that there was a distinction to be drawn between a shareholder who knows he has been excluded from active involvement in the company's affairs and fails to complain about that for many years, and a passive shareholder who knows he is not getting the company's accounts or an invitation to the AGM and is not receiving dividends and does nothing about any of those matters, but then discovers years later that money or corporate opportunities have been diverted from the company for the benefit of its directors, and moreover, that his shareholding was apparently expropriated ... The distinction lies in the fact that in the absence of evidence to the contrary, a shareholder is entitled to assume that the company is being managed properly by its directors in accordance with their fiduciary and statutory duties, and that its constitution has been followed.

Accordingly, in both England and Bermuda misfeasant directors necessarily cannot expect the Court's sympathy even in the face of extensive delay and a passive shareholder (who knows he is not getting the company's accounts or an invitation to the AGM and is not receiving dividends and does nothing about any of those matters) who then decides to petition. Combined with the absence of a statutory limitation period applicable to unfair prejudice petitions, this should give pause to those who assume that they are off the hook even after a decade or more of inaction by disgruntled minority shareholders.