# *Re Coinomi* – Reconsidering the remedies for unfair prejudice

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The English Court of Appeal has considered the scope of potential remedies available to a shareholder on a petition for unfair prejudice in a decision that may be persuasive in similar matters before the Royal Court of Guernsey.

Whereas the position at first instance (*Re Coinomi* [2022] EWHC 3178 (Ch)) had determined that a shareholder could not claim damages in favour of the company when invoking the statutory unfair prejudice jurisdiction, the appeal (reported as *Ntzegkoutanis v. Kimionis* [2023] EWCA Civ 1480) before an experienced panel of company law judges found on the facts that the applicant shareholder was able to advance a claim in favour of the company (rather than a personal claim), insofar as it was not the primary relief sought.

## Background

Mr Ntzegkoutanis and Mr Kimionis established Coinomi Limited (**Coinomi**) with the aim of creating and promoting a cryptocurrency wallet application. Both individuals served as the exclusive shareholders and directors of the company. A dispute arose regarding Mr Ntzegkoutanis' continued directorship.

Mr Ntzegkoutanis alleged, amongst other things, that he had been marginalised from Coinomi's management over time by Mr Kimionis (essentially a claim of mismanagement). Additionally, he claimed that Mr Kimionis had wrongfully misappropriated the company's business and assets (effectively a claim of misconduct). Mr Ntzegkoutanis initiated an unfair prejudice petition under sections 994-996 of the Companies Act 2006 (**CA 2006**), which provide remedies for shareholders akin to those found by way of application under sections 349-350 of the Companies (Guernsey) Law, 2008 as amended (the **Guernsey Companies Law**).

The petition sought the following relief:

1. an order for Mr Kimionis to sell his shares to Mr Ntzegkoutanis at a value reflecting the loss caused to the company, Coinomi, by his conduct;
2. an order requiring Mr Kimionis and/or companies affiliated to him to account or pay damages to Coinomi for gains made by him and losses incurred by Coinomi resulting from his actions;
3. declarations that assets misappropriated by Mr Kimionis and his affiliated companies were held in constructive trust for Coinomi; and
4. authorisation to pursue such litigation on behalf of Coinomi as may be necessary to vindicate its interests.

Mr Kimionis sought to strike out heads (2) and (3) above, asserting that they constituted an abuse of process. His argument contended that these specific claims sought relief on behalf of the company, addressing causes of action properly vested in the company, making their pursuit through an unfair prejudice petition (a remedy available to shareholders only) improper.

At first instance, the English High Court (HHJ Klein presiding) approved the strike-out application, determining that the relief at heads (2) and (3) were an abuse of process, falling as they did to be determined by way of derivative action on behalf of the company and not by way of personal remedy to a shareholder for unfair prejudice. Mr Ntzegkoutanis appealed.

## Unfair prejudice petitions and derivative actions: the established position

It has long been a fundamental principle of company law, expressed as part of the so-called Rule in *Foss v. Harbottle* (1843) 2 Hare 461, that where a wrong has been done to a company, it is the company itself which is the proper plaintiff (reinforcing the separate legal personality of the company from, for example, its shareholders). Allied to this longstanding principle is the rule against reflective loss (considered to have been formulated in the judgment of the English Court of Appeal in *Prudential Insurance Co Limited v. Newman Industries Limited (No 2)* [1982] 1 Ch 204) to the effect that a shareholder cannot recover damages merely because the company in which they are interested has suffered damage. A shareholder cannot recover a sum equal to the diminution in the market value of their shares, or equal to the likely diminution in a dividend, because such loss is "*merely a reflection of the loss suffered by the company*". The shareholder does not suffer any personal loss; their only 'loss' is through the company, in the diminution in the value of the net assets of the company. This rule was clarified further by what was then the English House of Lords in *Johnson v. Gore Wood & Co.* [2002] 2 AC 1, in which Lord Bingham said that (in summary), where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss; no action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company.

This area of the law was the subject of an important decision of the UK Supreme Court in *Sevilleja v. Marex Financial Ltd* [2020] UKSC 31 (15 July 2020), albeit it appears that *Sevilleja* was not cited in *Re Coinomi* either at first instance or on appeal.

Unfair prejudice petitions, regulated by sections 994-996 of CA 2006 (and akin to applications under sections 249-350 of the Guernsey Companies Law), afford shareholders a mechanism to seek redress when the management of their company is conducted in a manner unfairly prejudicial to their interests. As elucidated by His Honour Judge Eyre QC in *Re Hut Group Ltd* [2020] EWHC 5 (Ch), section 994 of CA 2006 aims to rectify situations where a company's affairs unjustly prejudice a shareholder's status, focusing on addressing mismanagement rather than remedying misconduct causing harm to the company.

The English court (the same as the Royal Court of Guernsey) holds broad discretion in providing relief for unfair prejudice cases, as outlined in section 996 of CA 2006. This section empowers the court to issue "*such order as it thinks fit for giving relief in respect of the matters complained of.*" While not limiting this authority, the section enumerates potential relief measures, including regulating future conduct of the company's affairs, mandating specific actions, or refraining from certain acts, facilitating the acquisition of shares by members or the company itself, and - importantly - authorising derivative actions to be brought on behalf of the company.

In contrast, derivative actions pertain to claims vested in the company rather than its shareholders and are governed by Part 11 of CA 2006 (with no equivalent, composite statutory code in Guernsey where derivative claims are governed by common law rules: see *Jackson v. Dear & Others* Unreported Judgment 10/2013, where this firm successfully represented the four independent director defendants). Section 260 of this part specifies that such actions may be initiated by shareholders "*seeking relief on behalf of the company*" concerning a cause of action arising from actual or proposed acts or omissions involving negligence, default, breach of duty, or breach of trust by a director (albeit in Guernsey it is the authors' view that a derivative action will not be permitted to proceed for allegations of mere negligence).

Court permission is a prerequisite for pursuing a derivative action, with a stringent approach, including the requirement of evidence demonstrating that the claim is in the best interests of the company and brought in good faith without ulterior motives.

Ultimately, a derivative action is for the benefit of the company; unfair prejudice petitions benefit the petitioner shareholder only.

## Lord Newey's Judgment in *Ntzegkoutanis*

The Court of Appeal granted the appeal and rejected the strike-out application. Newey LJ delivered the primary judgment (with which the other judges agreed, including the very experienced company lawyer, Lord Justice Snowden).

Mr Ntzegkoutanis contended that Judge Klein had erred by rigidly interpreting the available forms of relief in unfair prejudice petitions. Specifically, he argued that the judge was mistaken in applying principles from a decision by the Hong Kong Court of Final Appeal in *Re Chime Corp Ltd* (2004) 7 HKCFAR 546, which suggested that an unfair prejudice petition should be permitted only in rare and exceptional cases where a derivative claim could not be pursued (and notably an authority that has been cited often with approval in England and also Guernsey in *Jackson v. Dear* where the applicant also brought concurrent claims for derivative and unfair prejudice relief).

Newey LJ asserted that the statutory basis for derivative actions under CA 2006, Part 11 was not intended to modify the court's jurisdiction regarding unfair prejudice petitions, which existed statutorily before CA 2006. The two forms of relief did not substantially reference each other, and there were no indications that one part was intended to limit the application of the other.

After reviewing pertinent authorities and rejecting aspects of *Re Chime* (which aspects he called the "*Chime* approach") as a proper representation of the law in the jurisdiction of England and Wales, Newey LJ summarised that the court possesses the authority to grant relief in favour of the company in an unfair prejudice petition, however, such an order should generally align with what the company would be entitled to if the allegations were successfully prosecuted in a derivative action or an action by the company itself.

Continued

Striking out an unfair prejudice petition as an abuse of process is possible if the petitioner seeks relief only for the company or lacks a genuine interest in obtaining personal relief, attempting to bypass the restrictions on bringing a derivative action, which is already well established within the laws of England and Wales. Conversely, if a petitioner seeks both relief for the company and personal relief which is not available in a pure derivative claim, and the petitioner genuinely seeks the latter, striking out the petition or part of the relief sought would be inappropriate.

If a petitioner believes that facts could warrant a share purchase order or, alternatively, relief in favour of the company, claiming both in an unfair prejudice petition is not improper or abusive.

It was also noted *obiter* that when relief for the company is sought alongside relief available only in unfair prejudice proceedings, case management issues must be addressed. These matters may be dealt with concurrently in a single hearing, or depending on the circumstances, it might be advisable to defer matters related to relief for the company, either wholly or partially.

In Mr Ntzegkoutanis' case, the Court of Appeal concluded that his petition sought relief for the company while also seeking personal remedies as a Coinomi shareholder. There was no indication that he was not genuinely interested in obtaining an order to purchase Mr Kimionis's shares and was not merely attempting to bypass the derivative action regime under Part 11 to secure financial compensation for the company.

Therefore, the Court of Appeal determined that he was entitled to pursue both forms of relief in his petition, and Part 11 did not prohibit him from doing so.

## What does this mean?

Whilst it was previously considered that unfair prejudice claims and derivative actions were to a large degree mutually exclusive, the Ntzegkoutanis judgment confirms (subject to any appeal) that relief for both the company and a prejudiced shareholder may be sought within the same action, resulting in a streamlined process, providing the facts support such a departure from previously recognised rules.

There have been a number of claims for unfair prejudice brought before the Royal Court of Guernsey (albeit only the one known judgment in respect of derivative actions) and it is clear that the Royal Court of Guernsey has found the decisions of English courts to be material and persuasive to its consideration of similar cases in this jurisdiction. It will be interesting to see if the *Ntzegkoutanis* judgment is appealed and, if not, what role it may have in pleading relief for shareholders of Guernsey companies in the future.

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