



Neutral Citation Number: [2024] EWHC 2004 (Ch)

CR 2022 001672

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

**IN THE MATTER OF PHB ETHICAL BEAUTY LIMITED**  
**AND IN THE MATTER OF THE COMPANIES ACT 2006**

Royal Courts of Justice  
7 The Rolls Building  
Fetter Lane  
London  
EC4A 1NL

Date: 1 August 2024

**Before :**

**ICC JUDGE BARBER**

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**Between :**

**SALLY ANN GIBBINS**

**Petitioner**

**- and -**

**(1) JOHN PETER FRANCIS TIERNEY**  
**(2) ROSE ANNA BROWN**  
**(3) PHB ETHICAL BEAUTY LIMITED**

**Respondents**

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**Mr Steven Reed** (instructed by **DFA Law LLP**) for the **Petitioner**  
**The Respondents did not appear and were not represented**

Hearing date: 18 July 2024  
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**Approved Judgment**

This judgment was handed down remotely by email and MS Teams. It will also be sent to The National Archives for publication. The date and time for hand-down is 9 a.m. on 1 August 2024.

## ICC Judge Barber

1. At a hearing on 18 July 2024, on an uncontested disposal of a s.994 petition, I ordered the First and Second Respondents to purchase the Petitioner's shares in the Third Respondent at fair value as at 1 August 2020 with no minority discount, together with attendant relief. This judgment sets out my reasons for that order.

### **Background**

2. I shall begin by setting out the factual background to the petition. To the extent that there might in theory be any issue over aspects of this history, the following paragraphs constitute my findings in this respect.
3. The Petitioner is the First Respondent's mother. The Second Respondent is the First Respondent's partner. For the purposes of this judgment, the First and Second Respondent shall be referred to collectively as 'the Respondents'.
4. In or about December 2010, the Petitioner and the Respondents began selling cosmetic products from a small shop in Birmingham as a partnership.
5. Prior to the commencement of the partnership, it was orally agreed between the partners that (i) the Petitioner and the Respondents would jointly manage the business with each of them being entitled to participate in the management of the business, (ii) the Petitioner would be responsible for management of the finances and the accounts and (iii) each partner would have an equal share in the business.
6. On 6 June 2011, the partnership was incorporated into the Third Respondent ('the Company'), PHB Franchise Limited and PHB Wholesale Limited.
7. The Company has a nominal capital of £2.999997, divided into three ordinary shares of £0.999999, which are held equally by the Petitioner, the First Respondent and the Second Respondent. By reason of the agreement, understanding and close relationship between the Petitioner and the Respondents, the Company is and was at all material times a quasi-partnership.
8. Pursuant to the agreement and understanding of the Petitioner and the Respondents,
  - (1) the Petitioner and Respondents were appointed as directors of the Company, holding one share each;
  - (2) from 6 June 2011 until August 2020, the Petitioner and Respondents participated in the management of the Company and its business;
  - (3) from 6 June 2011 until August 2020, the Petitioner was responsible for management of the finances and Company accounts.
9. The Petitioner lent substantial capital sums to the partnership, and latterly the Company, to enable them to carry on business. The capital introduced by the Petitioner was financed by the encashment of a private pension and by taking out a mortgage over a property owned by her. The Respondents did not contribute any capital to the partnership or the Company.

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10. In 2017, the Company entered into a lease for the occupation of a warehouse known as Unit 21 Forge Trading Estate, Mucklow Hill Halesowen B62 8TP ('the Warehouse'). On 3 July 2017, the warehouse became the registered office address for the Company.
11. In 2019, the Respondents found a property in Brighton which they wished to purchase and use as their residence. Rather than purchase it themselves, they wanted to use the Company to finance the purchase. Their plan was that the Company would take a loan from Funding Circle Limited ('Funding Circle') in the sum of £250,000 and would transfer those loan monies, together with the sum of £325,000 from the Company's own cash reserves, to a special purpose vehicle ('the SPV') set up in connection with the purchase and controlled by the Respondents.
12. The Petitioner was not in favour of the Company taking a loan from Funding Circle or using its own cash reserves to purchase a property beneficially for the Respondents. Having made her position clear, however, the Petitioner was pressurised by the Respondents to agree to the proposed acquisition. The First Respondent shouted at the Petitioner during various phone calls, stated that the Petitioner ought to agree because she was his mother and told her that, as she was the minority shareholder, the Respondents, as the majority shareholders, could do what they wanted in any event.
13. Ultimately, the Petitioner agreed to the Company taking a loan from Funding Circle for onward transfer to the SPV and for the Company's cash reserves to be used, but on condition that the sums would be paid back to the Company within a reasonable period.
14. On 10 June 2019, Virtue & Edge Limited was incorporated as the SPV. In October 2019, the Company applied for and obtained a loan from Funding Circle in the sum of £250,000.
15. On 10 December 2019, the Respondents became the sole directors and shareholders of the SPV. Thereafter, the £250,000 Funding Circle loan and £325,000 from the Company's cash reserves were transferred to the SPV and the SPV purchased the property known as 2 Septima Cottages, The Street, Fulking, Henfield BN5 9LU ('the Property').
16. The Respondents did not stop there, however. They went on to use further Company funds to pay the stamp duty and conveyancing fees on the purchase, plus additional sums for the renovation and improvement of the Property, without the Petitioner's consent.
17. By early 2020, it had become clear to the Petitioner that the sums loaned by the Company to the SPV was not going to be paid back within a reasonable time. Rather than make proper payments to repay the loan, the Respondents sought to repay the loan by reducing the amount of their wages from the Company. The wage reductions however were not sufficient to cover the monthly payments to the Funding Circle. At the rate of repayment put in place, it would take approximately 16 years for the sum of £575,000 to be repaid to the Company, without taking into account any interest payable.

18. In or around July 2020, the Respondents proposed that the Company pay back the Funding Circle loan, using its own funds. However, the Petitioner was unwilling to allow further Company funds to be used by the Respondents. She was also concerned that whatever she said on the matter, the Respondents would press ahead and use Company funds regardless. In order to protect the Company therefore, the Petitioner removed the Company's existing funds from its bank account, set up a new business account called 'PHB holding' with HSBC and placed the Company funds into that holding account, so that the money would be protected and wages could be paid.
19. Since that time, the Petitioner has used the sums in the PHB holding account to pay company expenses, such as the wages of the staff working at the Warehouse and to repay sums loaned by her. However, the funds in the PHB holding account have now been exhausted.
20. Following the transfer of the Company funds into the holding account, the Respondents arranged for the Company's original bank account to be frozen and thereafter removed the Petitioner from the bank mandate. They also caused the Company to repay the Funding Circle loan in full, without the consent of the Petitioner. Since August 2020, the Petitioner has had no access to the Company's bank account and no knowledge of the financial position of the Company.
21. On 16 August 2020, the Respondents arranged for a new company, Highest Value Holdings Limited (formerly known as Virtue & Edge Manufacturing Limited) ('HVHL') to be incorporated. The Respondents are the sole directors and shareholders of HVHL, which is stated at Companies House to be in the business of manufacturing perfumes and toilet preparations and wholesaling perfume and cosmetics. From the timing of incorporation and the nature of the business, it is in my judgment legitimate to infer that the purpose of HVHL is and was at all material times to act as a vehicle through which to divert some or all of the Company's business. I so find.
22. On 4 September 2020, the Respondents called a general meeting of the Company to be held on 18 September 2020 to consider and vote upon, inter alia, the removal of the Petitioner as a director of the Company and her dismissal as an employee. Following correspondence from the Petitioner's solicitors, the general meeting was postponed and did not take place. However, the exclusion of the Petitioner from the management of the Company from August 2020 onwards has had the same effect as if she had been removed as a director.
23. On 11 September 2020, the Respondents caused the registered office address for the Company to be changed from the warehouse to Werks Central Business Centre 15-17 Middle Street, Brighton BN1 1AL without the Petitioner's knowledge or consent.

### **The Petition**

24. On 7 June 2022, the Petitioner presented an unfair prejudice petition.
25. The Respondents have taken no part in the proceedings and, pursuant to paragraph 3 of the order of ICC Judge Greenwood dated 6 December 2022, are now debarred from defending the petition without the permission of the court ('the Greenwood Order').

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26. Pursuant to paragraph 4 of the Greenwood Order, a hearing was to be listed ‘for the purpose of (i) the uncontested trial of the petition limited to the determination of issues relating to liability and/or (ii) further directions (including for the determination of relief, should the Respondents or any of them be held liable)’.
27. The initial trial date of 25 May 2023 was adjourned for better evidence of service. Evidence of service is now in order.
28. The Respondents have not engaged with the Petitioner or the court since the Greenwood Order.
29. Since excluding the Petitioner from the management of the Company, the Respondents have also failed to cause the Company to file statutory accounts at Companies House for the period ending 30 June 2022 by the filing date of 31 March 2023 or any further accounts since. The latest confirmation statement, which was due on 11 April 2024, has not been filed either.
30. By an application notice dated 21 December 2023, the Petitioner applied for specific and non-party disclosure. Following a hearing on 6 February 2024, ICC Judge Jones ordered specific and non-party disclosure. The non-party, Cosmetic Bases Limited, complied with the non-party disclosure order. The Respondents, however, have ignored the specific disclosure order and, once again, have chosen not to engage.
31. It is against this backdrop that the petition now comes before me for uncontested disposal.

**Unfair Prejudice- Liability- principles**

32. Section 994(1) of the Companies Act 2006 provides:

‘A member of a company may apply to the court by petition for an order under this Part on the ground – (a) that the company’s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some parts of its members (including at least himself), or (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is all would be so prejudicial’
33. In Re Tobian Properties Limited [2013] Bus L R 753, Arden LJ said:

‘21. The key phrase in section 994(1), “unfairly prejudicial”, comprises two elements, unfairness and prejudice but both of these must be understood in the context of company law. The concept of fairness inherent in this phrase is flexible and open textured but it is not unbounded. The courts must act on a principled basis even though the concept is to be approached flexibly. They cannot decide whether to grant or refuse relief from unfair prejudice on the basis of palm tree justice. The impact of the context was explained by Lord Hoffmann in O’Neill v Phillips [1999] 2 BCLC 1...

22. One of the most important matters to which the courts will have regard is thus the terms on which the parties agreed to do business together. These are commonly found in the company's articles. They also include any applicable rights conferred by statute. In addition, the terms on which the parties agreed to do business together include by implication an agreement that any party who is a director will perform his duties as a director. Primary among these duties are the seven duties now codified in sections 171 to 177 of the Companies Act 2006. Under these duties, a director must act in the way which he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. There is also the well-known duty to avoid conflicts of interest and duty: a director must avoid a situation in which he has an interest which conflicts with that of the company. Six out of seven of these duties are fiduciary duties, that is, duties imposed by law on persons who exercise power for the benefit of others. Non-compliance by the respondent shareholders with their duties will generally indicate that unfair prejudice has occurred ...

28. The dominant characteristic of the unfair prejudice remedy, both in statute and case law, is its adaptability. This enables the courts to produce a just remedy where minority shareholders can show wrongdoing that prejudices their interests. It also makes the unfair prejudice remedy important as a means of encouraging proper corporate behaviour in the management of smaller companies and building up the confidence of investors in them. This policy aim is as important today as it has always been since the original version of what is now the unfair prejudice remedy was introduced in the Companies Act 1947.'

34. In Re Coroin Limited [2012] EWHC 2342 (Ch), David Richards J (as he then was) stated at [630]:

'Prejudice will certainly encompass damage to the financial position of a member. Prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in

character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section’.

35. I was also referred to O’Neill v Phillips [1999] 1 WLR 1092 per Lord Hoffmann at pages 1098-1099.

**Findings and conclusions on liability**

36. The facts alleged in the petition are made out on the evidence.
37. Applying the principles summarised at [32] to [35] to the evidence before me, my findings and conclusions are as follows.

38. On the evidence before me, I am satisfied that:

(1) the Company is and was at all material times a quasi partnership;

(2) in August 2020, the Respondents wrongfully excluded the Petitioner from participation in the Company, contrary to the agreement and understanding that they would all participate in the management of the Company;

(3) the exclusion of the Petitioner from participation in the management of the Company from August 2020 onwards is prejudicial to her interests and, in the absence of any persuasive evidence of a legitimate reason for the exclusion, I find that the prejudice is unfair;

(4) since (at the latest) August 2020, the Respondents have used Company funds for their own benefit. Since August 2020, they have also diverted business of the Company to HVHL;

(5) such conduct has caused prejudice to the Petitioner’s interests in the Company and, in the absence of any persuasive evidence of a legitimate explanation or reason for that conduct, I find that the prejudice is unfair;

(6) by excluding the Petitioner from participation in the management of the Company in August 2020 without a legitimate reason, and by using Company funds for their own benefit and by diverting business of the Company to HVHL as pleaded, the Respondents have acted in breach of their duties under sections 172, 173, 174 and 175 of the Companies Act 2006 by (i) failing to promote the success of the Company, (ii) failing to exercise independent judgment, (iii) failing to exercise reasonable care, skill and diligence and (iv) failing to avoid conflicts of interest;

(7) such non-compliance by the Respondents with their duties is prejudicial to the interests of the Petitioner and on the evidence before me I find that such prejudice is unfair.

39. For all these reasons, I find that the Petitioner has been unfairly prejudiced by the acts of the Respondents complained of in the petition. In my judgment, on the evidence before me, the petition is well founded.

## Remedy - principles

40. Section 996 CA 2006 states:

‘(1) If the court is satisfied that a petition under this Part is well-founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of subsection (1), the court’s order may-

(a) regulate the conduct of the company’s affairs in the future;

(b) require the company – (i) to refrain from doing or continuing an act complained of, or (ii) to do an act that the petitioner has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company’s capital accordingly.’

41. By paragraph 1 to the prayer to the petition, the Petitioner seeks the following relief:

‘the First and Second Respondent be ordered to purchase her shares in the company at fair value with the following assumptions or bases: (i) that there is a willing seller and willing buyer, (ii) 100% value of the shares in the company are to be valued as a going concern taking into account the assets (including goodwill), profitability and future prospects of the company at a date properly selected, (iii) no discount for minority and (iv) after taking account of and making due allowance for the unfairly prejudicial conduct of the company’s affairs.’

42. In relation to valuation date, as confirmed by Robert Walker LJ (as he then was) in *Profinance Trust SA v Gladstone* [2002] 1 WLR 1024 at [60]-[62]:

‘60..... The starting point should in our view be the general proposition stated by Nourse J in *In Re London School of Electronics Ltd* [1986] Ch 211, 224: “Prima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased.” That is, as Nourse LJ said, subject to



the overriding requirement that the valuation should be fair on the facts of the particular case.

61. The general trend of authority over the last 15 years appears to us to support that as the starting point, while recognising that there are many cases in which fairness (to one side or the other) requires the court to take another date. It would be wrong to try to all those cases but some of them can be illustrated by the authorities already referred to.

(i) Where a company has been deprived of its business, and early valuation date (and compensating adjustments) may be required in fairness to the claimant: see *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324.

(ii) Where a company has been reconstructed or its business has changed significantly, so that it has a new economic identity, and early valuation date may be required in fairness to one or both parties...

(iii) Where a minority shareholder has a petition on foot and there is a general fall in the market, the court may in fairness to the claimant have the shares valued at an early date, especially if it has strongly disapproved of the majority shareholders' prejudicial conduct: see *In re Cuana Ltd* [1986] BCLC 430.

(iv) But a claimant is not entitled to what the deputy judge called a one-way bet, and the court will not direct an early valuation date simply to give the claimant the most advantageous exit from the company, especially where severe prejudice has not been made out: see *In re Elgindata Ltd* [1991] BCLC 959

All these points may be heavily influenced by the party's conduct in making and accepting or rejecting offers either before or during the course of the proceedings: see *In re A Company* (No 00709 of 1992) [1999] 1 WLR 1092.'

43. Where the Company is a quasi-partnership and the petitioner has been unfairly excluded from management, no minority discount should be applied: re *Bird Precision Bellows Ltd* [1984] Ch 419 at 431D-F.

44. As explained in *Hollington on Shareholders' Rights*, 9<sup>th</sup> ed at paragraph 8-59:

'The court will, in general, value the shares as if the unfairly prejudicial conduct had not taken place... The simplest method of achieving this may be, depending on the circumstances, to value the shares as at a convenient date shortly before the unfairly prejudicial conduct began...'

### **Discussion and Conclusions on remedy**

45. On the facts of this case, Mr Reed submitted that the court should order a valuation date of 1 August 2020, on the basis that this is a date which predates all the unfairly prejudicial conduct relied upon in the petition and is around the date that the Petitioner was excluded from the management of the company and its business.
46. On the evidence before me, I accept that submission. Whilst the starting point on a buy-out order is that the shares should be valued on the date of purchase, where, as here, the company has been deprived of its business or assets as a result of the unfairly prejudicial conduct found proven, an earlier valuation date (and compensating adjustments) may be required in fairness to the petitioner: *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324; *Profinance Trust SA v Gladstone* [2002] 1 WLR 1024 at [61](i) and (ii).
47. In my judgment the shares should be valued as if the unfairly prejudicial conduct had not taken place. In this case, particularly given the Respondents' wholesale failure to engage with these proceedings, the simplest method to achieve this is to select a convenient date shortly before the unfairly prejudicial conduct began. On the facts of this case as found proven, in my judgment the appropriate date for valuation purposes is 1 August 2020.
48. Accordingly, I shall order that the Respondents purchase the Petitioner's shares at fair value on the basis that (i) there is a willing seller and willing buyer, (ii) 100% value of the shares in the Company are to be valued as a going concern taking into account the assets (including goodwill), profitability and future prospects of the Company as at 1 August 2020 and (iii) with no minority discount.
49. I shall also grant the Petitioner permission to rely upon an expert report from Aaron Hemmington of Hawsons Chartered Accountants as to the valuation of the Company and shares and shall list the matter for a further hearing to deal with any consequential matters.
50. The Respondents will also be ordered to pay the costs of and occasioned by the petition to date, such costs to be the subject of detailed assessment if not agreed. Costs were specifically sought in the prayer for relief to the petition and, as the Respondents have been debarred from defending the petition, no good purpose would be served by delaying an order on costs. Pending detailed assessment, the Respondents shall be ordered to pay the sum of £37,500 on account.

**ICC Judge Barber**