



**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2025] CSIH 6**  
P401/23

Lord President  
Lord Pentland  
Lord Tyre

**OPINION OF THE COURT**

delivered by LORD TYRE

in the Reclaiming Motion

by

(FIRST) ALLAN DAVIDSON, (SECOND) SARAH DAVIDSON,  
and (THIRD) ARGYLE ASSET MANAGEMENT LIMITED,

Petitioners and Reclaimers

against

(FIRST) PINZ BOWLING LIMITED, (SECOND) DARREN MARGACH,  
and (THIRD) ROSS ANDERSON,

Respondents

**Petitioners and Reclaimers: Brown; DAC Beachcroft Scotland LLP for Levy & McRae LLP**  
**Respondents: Ower KC, Horn; Davidson Chalmers Stewart LLP**

18 February 2025

**Introduction**

[1] The issue for determination in this reclaiming motion (appeal) is whether the circumstances, which are largely undisputed, amount to unfairly prejudicial treatment of the petitioners as members of a company called Angus Park Limited (“the company”). The first and second petitioners and the first respondent are the whole members of the company.

The first and second petitioners and the second and third respondents are the directors of the company. The petitioners seek an order under section 996 of the Companies Act 2006 that the first respondent purchase their shares at fair value. The Lord Ordinary refused to grant an order and the petitioners now reclaim that decision.

### **Factual background**

[2] The primary facts are largely undisputed. On one disputed issue of fact mentioned below, the Lord Ordinary made a finding in favour of the petitioners and that finding is not challenged.

[3] The first respondent (“Pinz”) is owned by the second and third respondents, Mr Margach and Mr Anderson, who are also its sole directors. It was built up from a single ten-pin bowling site to the holding company of a group of indoor leisure businesses using inflatable equipment. During the Covid-19 pandemic, the group accumulated considerable debt. Mrs Davidson had experience of operating a soft play centre in Glasgow; Mr Davidson was an experienced businessman in the hotel industry and latterly in the provision of student accommodation. Mr Margach and Mrs Davidson met as members of a pressure group lobbying the Scottish Government for better treatment of the soft play sector during the pandemic. The four individuals agreed to go into business together, and to form the company as a joint venture, initially to operate a new indoor inflatable leisure business at a site in Monifieth, trading under the “Innoflate” brand owned by Pinz.

[4] In August 2021 the parties agreed to set up another company, DRS Leisure Ltd, which would provide services to Pinz and the company and charge fees for those services. Seven DRS shares were allotted to Pinz and three to Argyle Asset Management Ltd (“Argyle”). Mrs Davidson was to work unpaid as operations director for Pinz. By

agreement among the parties, DRS was struck off in December 2021 without having traded, and a new company, DRSA Leisure Ltd, was incorporated in January 2022 to fulfil the same role as DRS and with the same proportionate shareholdings. Initially Argyle held one share in the company and Pinz held the other, but as a result of a reorganisation instructed by Mrs Davidson in April 2022, Mr and Mrs Davidson came to hold one share each and Pinz two.

[5] The company opened for trading in leased premises on 2 April 2022 and was immediately successful and profitable. Shareholder loans were repaid by September 2022 and dividends were declared. However the seeds of subsequent discord had been sown. Mr Anderson became dissatisfied with the way in which Mrs Davidson was carrying out her role as operations director for Pinz, and towards the end of August 2022 she was told to leave (in effect sacked) with immediate effect. Messrs Margach and Anderson began to doubt the wisdom of their venture with the Davidsons. The cash flow difficulties that had encouraged Mr Margach to enter into a business venture with Mrs Davidson were in the past. Going forward, no agreement had been reached regarding Pinz charging for management services. The DRSA model turned out not to be acceptable to Messrs Margach and Anderson. It was agreed that DRSA would be dissolved and that Pinz would present proposals for charging directly for its services.

[6] Matters came to a head in mid-October 2022. Without any agreement, Pinz raised a number of invoices against the company and took payment of £10,000 plus VAT in respect of one of them from the company's bank account. A virtual meeting took place while the Davidsons were on holiday, in the course of which Mr Anderson proposed a charging structure and stated that he would go and remove Innoflate signage and branding from the site if agreement was not reached immediately. Under protest, Mr Davidson proposed an

alternative charging structure which was agreed in its essentials. It was intended that this would be set out in writing but that did not happen, despite a “chasing” email from Mrs Davidson on 19 December 2022. Invoices were thereafter rendered by Pinz on a monthly basis. The Davidsons regarded the charges as excessive but the business continued to make profits.

[7] The next flashpoint occurred on 20 March 2023. At a meeting between Mr Davidson, Mr John McGee, a business consultant who was chairman of the Pinz group, and Mr Christopher McQuade, financial director of the Pinz Group, Mr McGee asked questions about the reorganisation of share capital that had resulted in the transfer of shares from Argyle to the Davidsons in 2022, stating that Messrs Margach and Anderson had known nothing about it. This was the major disputed fact. The Lord Ordinary accepted Mrs Davidson’s evidence that Mr Margach and Mr Anderson did know about it at the time and agreed to it.

[8] Also on 20 March, a formal letter was sent by Messrs Margach and Anderson on behalf of Pinz stating that it would be withdrawing all franchise products from the market and would cease to provide its services or brand to the company on 20 April 2023. A further letter dated 23 March 2023 from Messrs Margach and Anderson on behalf of Pinz demanded the resignation of the Davidsons as directors of the company and the transfer of their shares to Pinz for their nominal value of £1 each, on the ground that the transfer had been unauthorised and prejudicial to Pinz. In their pleadings and at least initially in evidence, the respondents sought to justify this stance on the groundless basis that they could as a consequence of the share transfers find themselves in business with an insolvency practitioner appointed to administer the affairs of Argyle. The letter of 23 March wrongly stated that the booking service run by Pinz for the company had been shut down for

bookings after 20 April 2023 and reiterated the intention to remove the brand and management from the site on that date.

[9] A further dispute broke out in April 2023 as to whether the company could be treated as a going concern for the purposes of its statutory accounts for the year ending 31 December 2022, if Pinz's services and brand could be withdrawn at short notice. The issue was first raised by Mr McQuade, who sought advice from Mr Scott Dunbar, a business advisory partner with Johnston Carmichael CA who were Pinz's accountants and who were also engaged to prepare the company's accounts. Mr McQuade introduced the matter to Mr Dunbar in an email dated 20 April 2023, in which he described the share transfers as "[s]ome *interesting* transactions" (emphasis in original). On 24 April Mr Dunbar sent a letter to Mr Margach stating:

"Further to our recent telephone conversation I write to confirm that when a company is preparing a set of statutory Accounts under the FRS102 1A standard, the company must assess whether it will continue on a going concern basis for a period of 12 months from the date of approval of the Accounts. Companies are required to adopt the going concern basis of accounting, except in circumstances when the directors have determined at the date of approval of the Financial Statements either that they intend to liquidate the entity or to cease trading or have no realistic alternative to liquidation or cessation of operations.

Therefore, on the basis in the near future the above-named company will have its franchise licence removed, which will result in the company no longer being able to trade, the Accounts of Angus Park's [sic] Limited should be prepared on the basis that the company will not continue as a going concern..."

The letter was forwarded to the Davidsons by Mr McQuade, with the comment that "due to the planned removal of the Innoflate franchise and management contact [sic] that the statutory accounts due to be filed by 20<sup>th</sup> May 2023 cannot be prepared on a Going Concern basis". Mr McGee proposed a meeting to discuss the issue between himself, Mr McQuade and the Davidsons in Johnston Carmichael's Elgin office; the Davidsons did not respond but instead intimated, via their solicitors, their intention to raise proceedings under section 994.

[10] In May 2023, the Davidsons commenced the present proceedings. Interim orders were sought in relation to withdrawal of services by Pinz and a series of short-term undertakings were given. The deadline for withdrawal was extended until the end of June and then the end of July. Unrealistic counter-offers for the purchase of shares were made by both sides. The Davidsons, through their solicitors, proposed steps by which the company could continue to trade after withdrawal of Pinz's services and brand. Requests by the Davidsons' solicitors to Mr Dunbar to provide the draft company accounts went unanswered until 2 August 2023, when a draft which still contained the going concern qualification was provided. The draft accounts also contained a major error in relation to the company's future liabilities under its lease, which were stated at a grossly excessive figure of £5 million. In a telephone call to the Davidsons on 18 August 2023, Mr Dunbar stated that the going concern qualification had been inserted on Pinz's instructions and that he had not at any time given advice that it was necessary or appropriate. He acknowledged that the lease liability figure was wrong. Eventually the accounts showed the lease liability as £187,500.

[11] The deadline for submission of the company's statutory accounts was 20 August 2023. That deadline came and went with no movement from Pinz on the going concern issue. By late September Pinz conceded that the accounts should be lodged on the basis that the company was a going concern; the accounts were lodged on 3 October 2023.

[12] As a direct consequence of Pinz's delay in agreeing to the submission of the accounts on a going concern basis, a problem arose with the premises' insurance. The broker was aware of the going concern issue and had informed Mr Margach that cover could not be renewed unless the management accounts were up to date. Mr Margach delayed in bringing this to the Davidsons' attention. The company's insurance cover lapsed and the

premises had to be closed for three weeks from late September 2023 until the matter was resolved. Thereafter the respondents agreed to give at least three months' notice of the withdrawal of Pinz's services, and in practical terms to await the outcome of this litigation before doing anything further.

### **The law**

[13] So far as material, sections 994 and 996 of the Companies Act 2006 provide as follows:

#### **"994 Petition by company member**

(1) 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 part 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 or would be so prejudicial...

...

#### **996 Powers of the court under this Part**

(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—

...

(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."

[14] As regards the concept of unfairness, the guidance of Lord Hoffmann in *O'Neill v*

*Phillips* [1999] 1 WLR 1092 at 1098-99 remains authoritative:

“...[A] member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But... there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.”

The petitioner must prove both prejudice and unfairness; one without the other is not sufficient: see eg *Jesner v Jarrad Properties Ltd* 1993 SC 34; *Rock (Nominees) Ltd v RCO Holdings Plc (In Members Voluntary Liquidation)* [2004] BCC 466; *Re Neath Rugby Ltd* [2008] BCC 390, Lewison J at paragraph 202. In this regard the court disagrees with the observation of the Lord Ordinary at paragraph [229] of his opinion that the statutory concept of unfair prejudice is a unitary one; the authorities are clear that both aspects must be separately satisfied.

[15] When applying the test of unfairness, the court is applying an objective standard of fairness: *Re Saul D Harrison & Sons plc* [1994] BCC 475, Hoffmann LJ at 488; Neill LJ at 501.

In that case Hoffmann LJ observed that the starting point for determining fairness will generally be the terms of the articles of association. He continued (*ibid*):

“...the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole. If the board act for some ulterior purpose, they step outside the terms of the bargain between the shareholders and the company.”

### **The Lord Ordinary’s opinion**

[16] At paragraph [229], the Lord Ordinary identified the issue as being whether the company’s directors relevantly breached their duties to it, or whether the affairs of the company were conducted contrary to shared understandings and expectations which equity required in all the circumstances to be observed. He had no reason to doubt the credibility or reliability of any of Mr and Mrs Davidson, Mr Margach or Mr Anderson. He found



Mr Dunbar's evidence to have an overall unsatisfactory quality but was not convinced that he could be characterised as either a conspirator with the respondents or at least their useful idiot.

[17] The Lord Ordinary made certain findings which were favourable to the petitioners' case:

- By August 2022 the Pinz directors had come to see the Davidsons as a dead weight best shrugged off (paragraph [240]).
- The raising of the 2022 share reorganisation in March 2023 was part of a premeditated plan to identify and prosecute a fresh *casus belli* against the Davidsons (paragraph [243]). It was more plausible that Mr Margach and Mr Anderson chose to make such an issue of it because they had been given to understand by someone involved in the affairs of Pinz or advising it that it could be weaponised against the Davidsons, and they were prepared to use it as such (paragraph [244]).
- The ultimate lapse in the company's insurance cover, which undoubtedly prejudiced it, was entirely a product of the going concern issue and the consequent failure of the company timeously to lodge its statutory accounts (paragraph [250]).

Nevertheless, the Lord Ordinary held that the petitioners had failed to demonstrate unfairly prejudicial conduct by the respondents.

#### *Events of March and April 2023*

[18] The Lord Ordinary addressed first the events of March and April 2023 and their consequences. As regards the share reorganisation issue, he did not consider that

Mr Margach or Mr Anderson had thought of it or even understood it. There was no legal substance to it, and in court the focus shifted to how the supposedly secret reorganisation (which as the Lord Ordinary found had not been secret at all) had finally undermined any trust which Pinz had in the Davidsons. The letter demanding the resignation of the Davidsons as directors and the transfer of their shares for £1 each was legally inaccurate and was not understood by Messrs Margach and Anderson. The overall tone and content were risible, and the Davidsons did none of what was demanded. In the event the letters of March 2023 contained nothing that made any difference to the course of the company's affairs.

[19] The Lord Ordinary acknowledged that it might be said that the repeated threat to withdraw the Pinz services resulted in uncertainty as to the company's ability to continue trading in an orderly manner, but the reality was that all parties were aware that the threat was a hollow one. The respondents had received legal advice that such action would probably have been prevented by the court; that advice was well-founded. When this litigation commenced and interim orders were sought, the respondents gave and renewed an undertaking and the matter was never ruled on by the court. If the emptiness of the threat was obvious to the respondents, it must have been equally obvious to the Davidsons. Had they taken the threats seriously they would have taken more definite and vigorous steps to protect the company's interests. The Lord Ordinary did not accept that those representing the Pinz interest set out deliberately to destabilise or devalue the company; their target was the Davidsons.

[20] As regards the going concern issue, the Lord Ordinary observed that this could, with hindsight, be interpreted as a deliberate attempt to manufacture an apparent existential crisis for the company, enlisting the assistance of Johnston Carmichael to that end.

However, he decided without much difficulty that the whole episode fell to be regarded as one of “bumble and blunder” rather than anything more sinister. His assessment of Mr Dunbar was that, despite a lack of circumspection and an infelicitous mode of expression, he was not someone prepared knowingly to compromise his professional integrity. Mr McQuade might have been inclined to ingratiate himself with Mr Margach, and over-enthusiastic in seizing upon and reacting to the careless statements being made by Mr Dunbar, but he genuinely thought that the issue was a real one which had to be taken seriously. Neither Mr Margach nor Mr Anderson had any real grasp of the nuances of the going concern issue; they took advice from professionals and acted upon it. The Davidsons were not beyond criticism: they ignored the invitation to discuss the issue at a meeting in Elgin. As regards the lapse of the insurance cover, neither side intended that to happen, and when it did the respondents put the undertaking not to remove the Pinz services on a more long-term footing. The core problem lay in the failed personal relationship amongst the corporators.

### *Events of October 2022*

[21] The Lord Ordinary rejected the petitioners’ contention that in relation to the charging arrangements Mr Margach and Mr Anderson were in breach of their fiduciary duties as directors of the company by advancing the interests of Pinz over those of the company. It was plain that they had been acting in the capacity of directors of Pinz, presenting its position to the Davidsons as representing the interests of the company. Decision-making on behalf of the company was left to the Davidsons. The October 2022 negotiation was not at odds with the company’s articles or the statutory provisions regarding directors’ duties.

[22] The conclusion that Mr Margach and Mr Anderson did not act in breach of their fiduciary duties to the company did not, however, necessarily result in a conclusion that its affairs were not being conducted in a manner unfairly prejudicial to the petitioners. The company's situation was in some respects analogous to that of the company in *Meyer v Scottish Co-operative Wholesale Society* 1954 SC 381; 1958 SC (HL) 40. At the outset, at least, the company had been a quasi-partnership within the meaning of *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, formed on the basis of a relationship of trust and confidence which the individual participants conceived to exist amongst themselves at the time. Although that relationship had ceased to exist by October 2022, as a consequence of the decision of Messrs Margach and Anderson to withdraw from the original business plan and to sack Mrs Davidson, Pinz was not entitled to rid itself *brevi manu* of the obligation which had been implicit in its original business relationship with the company, and which in October 2022 continued to oblige it to deal with the company fairly.

[23] The question was whether it had been demonstrated that what occurred in October 2022 was relevantly unfair. The evidence as to whether the charges demanded by Pinz were excessive was vague and inconclusive. Expert evidence was given on behalf of the Davidsons by Mr Matthew Geale FCA that the amount demanded by Pinz fell within the range of franchise fees which were, as a matter of fact, charged and paid in the market (typically being 10% to 14% of gross sales). Mr Geale expressed doubts, however, about what exactly Pinz was providing in return for its charges, which appeared to represent a substantial imposition upon the company. In the absence of any detailed analysis of what was provided and what the market rates might have been for equivalent services, the Lord Ordinary considered that any conclusion that what was demanded was excessive could not amount to anything more than speculation.

[24] As regards the manner in which the October 2022 negotiation was conducted, there was little doubt that a robust, even aggressive, approach was taken by Mr Margach, with Mr Anderson threatening to remove the Innoflate signage from the premises if agreement was not reached. The Davidsons did not however regard this as more than a very substantial inconvenience. Although Mr Davidson had not had a free hand to negotiate as he might have wished on behalf of the company, the arrangements agreed were not sufficiently intolerable to cause the Davidsons to resort to legal action; that had come later. The Lord Ordinary concluded that on the whole, the events of October 2022 also failed, by a small but decisive margin, to qualify in law as unfairly prejudicial conduct.

[25] For these reasons the Lord Ordinary declined to grant the order sought by the petitioners for purchase of their shares by the respondents.

### **Argument for the petitioners**

[26] The majority of the grounds of appeal proceeded on the basis of acceptance of the Lord Ordinary's findings in fact. The appellate court was accordingly less constrained in its ability to reach a different conclusion from that of the Lord Ordinary than where primary findings of fact involving questions of credibility and reliability were challenged. In relation to certain matters, however, it was submitted that the Lord Ordinary had misunderstood or omitted to consider material evidence. As regards the law, the case raised no novel issues and parties were in broad agreement as to the test to be applied. The Lord Ordinary had sufficiently focused the issue (at paragraph [229]) as being "whether the Company's directors relevantly breached their duties to it, or whether the affairs of the Company were conducted contrary to shared understandings and expectations which equity required in all the circumstances to be observed".

[27] The evidence was overwhelmingly to the effect that the respondents' interactions with the petitioners between August 2022 and March 2023 were directed at achieving the objective of forcing them out. Although the Lord Ordinary had held that the respondents sought in bad faith to manufacture a grievance out of the share transfer, he declined without explanation to attribute any similar intent to the extensive parallel course of conduct about the statutory accounts and withdrawal of services. He erred in failing to analyse these matters within the context of his overarching findings regarding the respondents' objectives and motivation.

[28] Prior to October 2022, a breakdown of relations was not inevitable. Arrangements agreed in September were breached by the respondents imposing a management fee and taking payment without discussion. That must have been done on the respondents' instructions. There had been no urgent need for the remote meeting while the petitioners were on holiday. Mr Anderson's threat to withdraw services had been intended to be, and was, taken seriously. The Lord Ordinary erred in holding that the Davidsons did not regard it as anything more than an inconvenience; objectively it was an existential threat. The Lord Ordinary's characterisation of the negotiation as one conducted at arm's length between Mr Davidson on behalf of the company and Messrs Margach and Anderson on behalf of Pinz did not withstand scrutiny. The breach of fiduciary duty arose from the respondents' use of an improper threat to cause Pinz to breach contractual obligations owed by it to the company, against which breach Messrs Margach and Anderson had fiduciary duties to protect the company. The Lord Ordinary had correctly recognised that *Meyer v Scottish Co-operative Wholesale Society* provided valuable guidance as to the underlying principle, but erred in holding that the application of that principle – the existence of a continuing duty to deal fairly with the company – did not entitle the petitioners to a remedy

under sections 994 and 996. He had failed to recognise the restrictions on Messrs Margach and Anderson's conduct due to their being directors of both Pinz and the company. The company had been deprived of its ability to conduct a commercial negotiation. The Lord Ordinary further erred in his evaluation of the level of the charges and the existence of prejudice to the company.

[29] As regards the events of March 2023, the only possible characterisation open on the evidence was that the respondents had determined to try to force the petitioners out, to acquire their shares at a gross undervalue, and to do so by improper means, including threats of disorderly cessation of trading. The Lord Ordinary appeared to have accepted that the entire course of conduct was intended to force the petitioners out but erred in concluding that it was not to be characterised as unfairly prejudicial because of the respondents' ineptitude. But there was no inconsistency between a course of conduct being wholly improper and motivated by malign intent, and at the same time lacking subtlety or being ineptly executed. The respondents did not desist when challenged, but only when court proceedings were initiated. The ability of the petitioners to defend their interests and those of the company only by means of litigation was properly to be seen as an indicator of the unfairly prejudicial character of the respondents' conduct. The reason no draft written agreement had been produced by the respondents was because they wanted the Davidsons out.

[30] The "going concern" issue had been a part of the respondents' overall purpose. None of Messrs Margach, Anderson, McQuade or Dunbar had been able to justify in evidence the view that termination of the franchise agreement with Pinz would necessitate the company ceasing to trade. The draft accounts had been prepared on the basis that the company was not a going concern without any work having been done to support that

conclusion and without the directors having agreed to such a course of action. Mr Dunbar's evidence about the advice he gave and his reasons for failing to provide the petitioners with the draft accounts was patently dishonest. Mr McQuade's immediate forwarding of Mr Dunbar's letter to the petitioners was a clear indication of the intended purpose of the letter: to create the impression of imminent distress, bolstered by the view of Johnston Carmichael, to encourage the petitioners out of the company and to drive the price down. The Lord Ordinary resisted that conclusion on the basis of his view that Messrs Margach and Anderson lacked sufficient understanding or guile to pursue such a campaign, but it was no different from their willingness to weaponise the share transfer issue. That they embarked upon it clumsily and were ultimately forced to back down did not detract from its unfairly prejudicial character. It was not necessary for them to understand the subtleties. The Lord Ordinary had set the bar for access to the section 994 remedy far too high. When the insurance problem emerged, Mr Margach delayed for more than a month before informing the petitioners. The respondents removed the "going concern" qualification from the accounts and withdrew their threats to withdraw services. But by then actual damage had been done.

### **Argument for the respondents**

[31] On behalf of the respondents it was submitted that the reclaiming motion should be refused. The nature of a petition under sections 994 and 996 is that it is inherently fact dependent. The conclusions which the Lord Ordinary reached were based on the facts as presented to him in evidence. He had the benefit of having seen and heard all the witnesses give evidence and was best placed to assess the credibility and reliability of the witnesses. The conclusions which he reached were clear and entirely reasonable. It could not be said



that any of his conclusions were plainly wrong in terms of the evidence. The petitioners simply did not agree with various findings made. That was not a valid ground of challenge to a decision of a Lord Ordinary following proof: *Henderson v Foxworth Investments Ltd* 2014 SC (UKSC) 203; *McGraddie v McGraddie* [2014] SC (UKSC) 12; *Royal Bank of Scotland Plc v Carlyle* 2015 SC (UKSC) 93.

[32] The petitioners' case was based on the notion that the respondents set out on a premeditated, and somewhat complex, course of conduct to distress, destabilise and devalue the company in order to remove the petitioners. The Lord Ordinary found that there was no such premeditated plan. Whilst some of the events could, in the Lord Ordinary's words, be categorised as risible, they were not unfairly prejudicial. The trust and confidence and personal relationships between the parties simply broke down. In any event, even if any of the conduct of the respondents had been unfair, the absence of actual prejudice to the petitioners was fatal to their case.

[33] The Lord Ordinary had been correct to hold that the events in October 2022 did not amount to unfairly prejudicial conduct. The petitioners had asked for a meeting at short notice. The arrangements for payments to Pinz were not forced on them but were a matter of agreement. The petitioners were content to let the business run and to benefit from dividends. No expert evidence was led by the petitioners to support the bald assertion that the franchise or management charges levied by Pinz were excessive. The imposition of reasonable fees could not be said to be unfair or prejudicial. As regards the alleged breach of fiduciary duties by Messrs Margach and Anderson, the Lord Ordinary had correctly held that it had been clear that they were not wearing two hats during the negotiations but were representing the interests of Pinz, with the Davidsons representing the interests of the

company. As the Lord Ordinary noted, not every breach of fiduciary duty results in unfair prejudice.

[34] The Lord Ordinary had also been correct to hold that the respondents' conduct in March 2023 did not amount to unfairly prejudicial conduct. The letter of 23 March 2023, which had been prepared by the respondents' former lawyers, had not been fully understood by them. The franchise and management services were never in fact removed. It followed that the letters had no effect at all on the business of the company, and occasioned no prejudice to the company or to the petitioners. In any event the Lord Ordinary had found that by March 2023, all parties were aware that the repeated threats to withdraw Pinz's services were hollow. The Davidsons took no steps to ascertain whether alternative sources of services were available until June 2023.

[35] Nor did the Lord Ordinary err in holding that the issue of the filing of the company's accounts did not amount to unfairly prejudicial conduct. Mr McQuade had considered that whether the company was a going concern was a real issue. Advice had been sought from Mr Dunbar. The Lord Ordinary was correct to find that neither of Messrs Margach or Anderson had a real grasp of what "going concern" meant and relied on professional advice. The Davidsons had not taken up the offer of a meeting to discuss the matter. Requests for the draft accounts had not been pressed, and they were provided on 2 August 2023. Mr Davidson did not engage with the respondents thereafter and the filing deadline was missed. The Lord Ordinary had found that Mr Dunbar was not someone who would compromise his professional integrity, and that there had been no form of conspiracy to fabricate a crisis in the company in order to destabilise it. The actions of the Davidsons in relation to the going concern issue were not beyond criticism, having failed to attend the meeting at an early stage. Mr Davidson was an experienced businessman who could have

addressed the problem of the draft accounts himself, but he had taken no action. Although the Lord Ordinary had correctly held that the temporary closure of the business due to the lapse of insurance cover prejudiced the company, he was also correct to note that none of the parties had wished this to happen. The directors bore collective responsibility. The closure of the business was the only instance of actual prejudice. When Mr Davidson engaged with the respondents, the issue was resolved on a more long-term footing.

## Decision

### *The role of the appellate court*

[36] The circumstances in which an appellate court can interfere with the decision of a judge at first instance have been subject to considerable scrutiny in recent years and may now be regarded as well settled. As regards primary findings in fact, the circumstances were summarised in *Woodhouse v Lochs and Glens (Transport) Ltd* 2020 SLT 1203 (opinion of the court delivered by Lord President Carloway) at paragraph [31]:

“...In reviewing [primary findings of fact], an appellate court must exercise appropriate caution, especially where the Lord Ordinary’s decision has been based on determinations on credibility or reliability. Where this occurs, the appellate court must be satisfied that the findings of the Lord Ordinary were ‘plainly wrong’ (*Clarke v Edinburgh and District Tramways Co*, Lord Shaw at 1919 SC (HL), p.37; (1919) 1 SLT, p.249, approved in *Thomas v Thomas*, Lord Thankerton at 1947 SC (HL), p.55; 1948 SLT, p.6, Lord Macmillan at p.59 (p.8)). These words mean that, in the view of the appellate court, the Lord Ordinary reached a decision which no reasonable judge could have reached (*Henderson v Foxworth Investments Ltd*, Lord Reed at 2014 SC (UKSC), p.219; 2014 SLT, p.784, para.62). This in turn is explained as meaning that the decision cannot reasonably be explained or justified (*ibid* p.220 (p.785) para.67).”

[37] In the present case the petitioners invited the court to reject the Lord Ordinary’s assessment of Mr Dunbar as a credible and reliable witness, and to find instead that he had been patently dishonest. We reject that invitation. Although, as the Lord Ordinary recognised, Mr Dunbar’s evidence was unsatisfactory, this court has no basis upon which to

be satisfied that the Lord Ordinary's finding that Mr Dunbar was neither a conspirator nor a useful idiot was "plainly wrong". The same applies to various submissions made on behalf of the petitioners that the Lord Ordinary misunderstood or disregarded material aspects of evidence.

[38] The position is, however, otherwise where the court is not reviewing primary facts but rather inferences from them (secondary facts). In that situation the court can more easily reverse a first instance conclusion: *Woodhouse v Lochs and Glens (Transport) Ltd*, above, para 33, where the court went on to observe:

"This is even more so when what is under review is the application of the law to the facts; whether primary or inferential (*SSE Generation v Hochtief Solutions* 2018 SLT 579, LP (Carloway) at para [282]; *Anderson v Imrie* 2018 SC 328, Lord Drummond Young at para [44]). In that situation, it may be that the benefits of the larger appellate bench can play a significant part in arriving at the correct decision (*ibid*, citing *Appellate courts parts 1, 2 and 3* 2015 SLT (news) 125, 130 and 138 at 127). When engaging in the intellectual process of applying the law to the facts, or in drawing inferences from primary facts, an appellate court may be more objective in its approach and be less influenced by the Lord Ordinary's perception of, and maybe even sympathy for, the witness (*AW v Greater Glasgow Health Board* [2017] CSIH 58, LJC (Dorrian) at para 44)"

[39] In the present case the court understands parties to be in agreement that the Lord Ordinary had correctly focused the issue as being whether the company's directors relevantly breached their duties to it, or whether the affairs of the company were conducted contrary to shared understandings and expectations which equity required in all the circumstances to be observed. These are inferences from the primary facts, which as already observed are not in dispute, and the issue as thus focused requires the application of the law to those inferences. That being so, this court is in at least as good a position as the Lord Ordinary to address the questions raised.

*Events of October 2022*

[40] In assessing the fairness or otherwise of the actions of Mr Margach and Mr Anderson in October 2022, it is important to bear in mind that as well as being the sole owners and directors of Pinz, they were also two of the four directors and, through Pinz, 50% shareholders of the company. Mr and Mrs Davidson could not, on their own, take binding decisions on behalf of the company. When Messrs Margach and Anderson negotiated on behalf of Pinz, they created an irresolvable conflict of interest as regards representation of the company, to which they owed fiduciary duties.

[41] As the Lord Ordinary observed, the circumstances of the present case are in some ways analogous to those of *Meyer v Scottish Co-operative Wholesale Society Ltd* (above). In that case a company was formed to enable the society to obtain licences to manufacture rayon cloth. The petitioners were directors of and minority shareholders in the company, and it was their connections and qualifications that had facilitated the granting of licences. Three other directors were nominated by the society. After an unsuccessful attempt to buy out the petitioners' shares at less than their market value, the society embarked on a policy of diverting the company's trade to itself, with a view to destroying the company's trade and devaluing its shares. This policy was known to the society's nominee directors on the company's board, who actively promoted it. The petitioners sought an order for purchase of their shares by the society at their value before the conduct complained of had commenced, on the ground (in terms of the then current legislation) that the society's conduct was oppressive. The court granted the order sought and the House of Lords dismissed the society's appeal. Lord President Cooper, in a passage at 1954 SC 391 approved and adopted by Viscount Simonds and Lord Keith of Avonholm in the House of Lords, stated:

“The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary.”

Lord Keith of Avonholm added (page 63) that

“...conducting what are in a sense its own affairs may amount to misconducting the affairs of the subsidiary. It is difficult to say that misconduct in the affairs of the subsidiary is not conduct in the affairs of the subsidiary and that, I think, is what Lord Cooper had in mind. Misconduct in the affairs of a company may be passive conduct, neglect of its interests, concealment from the minority of knowledge that it is material for the company to know. That, in my opinion, is what happened here.”

[42] In the present case Pinz did not hold a controlling interest in the company, but its 50% interest rendered it impossible for the company's affairs to be conducted without its approval. By negotiating with the Davidsons on behalf of Pinz without regard to the interests of the company, including threatening summarily to remove the brand name, Mr Margach and Mr Anderson breached their fiduciary duties to the company. Applying an objective test, this conduct was unfair to the company and to its members, including the Davidsons. In failing so to hold, the Lord Ordinary erred in his application of the law to the primary and inferential facts. In having regard to the fact that the Davidsons did not regard the arrangements agreed by them as sufficiently intolerable to cause them to resort to legal action, the Lord Ordinary departed from the objective test that must be applied in assessing unfairness.

[43] Turning, however, to the question of prejudice, the court is not satisfied that prejudice has been made out in relation to this aspect of the petitioners' case. The Lord Ordinary found (paragraph [260]) that Mr Davidson's contention that the franchise fee and management charge demanded by Pinz – and largely agreed by Mr Davidson – grossly exceeded the market rate was not supported by the evidence. On the contrary, there was

evidence that the “franchise” fee fell within the range that could reasonably have been demanded. Mr Geale, the petitioners’ expert valuation witness, appears to have been of the same view. There remained doubt as to whether the arrangement could properly be described as a franchise, and also as to exactly what services were being provided by Pinz in return for the management charge, but the court sees no reason to differ from the Lord Ordinary’s view that a conclusion that what was demanded was excessive amounted to no more than speculation.

### *Events of March and April 2023*

[44] Assessment of the respondents’ actings in March and April 2023, and thereafter, must similarly take into account the fiduciary duties owed by Messrs Margach and Anderson to the company. In two clear respects, the court considers that those duties were breached: first, in relation to the persistent threats to withdraw Pinz’s services on a timescale that precluded an orderly transfer to an alternative service provider; and, secondly, by their insistence on presenting the company’s accounts with a going concern reservation despite having carried out no proper, or indeed any, analysis of whether such a reservation would be justified even in the eventuality that Pinz’s services were withdrawn in a disorderly fashion. The context of these actings, including the weaponisation of the share transfer issue, was the respondents’ desire to be rid of the Davidsons from the company. In terms of section 994, both of these courses of action were objectively unfair, in the sense enunciated by Lord Hoffmann in *O’Neill v Phillips* and previously in *Re Saul D Harrison & Sons plc*, to the company and to its shareholders. As in October 2022, the Davidsons’ 50% shareholding and equal representation on the board of the company were not sufficient to allow them to disregard the efforts being made to force them out, or to take remedial action on their own.

The observations of Lord President Cooper and Lord Keith of Avonholm in *Meyer v Scottish Co-operative Wholesale Society Ltd*, cited above, are apposite to the respondents' approach to the affairs of the company during this period.

[45] As regards prejudice, it is readily apparent that an abrupt withdrawal of services resulting in an interruption of the business would be prejudicial to the company and to its shareholders. In order to counter the threats by Pinz, via Messrs Margach and Anderson, to withdraw its services at short notice, the Davidsons required to resort to the expensive course of action of litigation, including enrolling for interim orders which did not require to be insisted in because an undertaking was given by Pinz to the court. The respondents' continued adherence to draft accounts which contained an unjustified going concern qualification ultimately resulted in actual prejudice to the company and its shareholders when the business required to shut down temporarily when insurance cover was withdrawn. On the face of it, therefore, the requirements of unfairness and prejudice are both met.

[46] The reasons for the Lord Ordinary's conclusion that none of the above matters, objectively viewed, amounted to unfairly prejudicial conduct of the company's affairs are to be found within paragraphs [243]-[251] of his opinion. Having found that the share transfer issue was part of a premeditated plan to prosecute a fresh *casus belli* against the Davidsons, the Lord Ordinary did not consider that either Mr Margach or Mr Anderson had really understood it. He nevertheless acknowledged that they were prepared to try to make it an issue in the relationship and signed the letters sent in March 2023 containing derisory offers for the Davidsons' shares despite failing to understand much of what was contained in them. In so far as the Lord Ordinary was influenced by his perception that Messrs Margach and Anderson did not understand, or fully understand, the measures that were being taken



to remove the Davidsons from the company, he fell into error in failing to assess the unfairness and prejudice objectively.

[47] The Lord Ordinary accepted (paragraph [245]) that if the letter of 23 March 2023 represented unfairly prejudicial conduct of the company's affairs, Messrs Margach and Anderson would have had to accept that they, and through them Pinz, were to blame for that. His reason for holding that it did not represent such conduct was that the tone and content of the letter were risible and that the Davidsons did nothing in response to it. In fact Mr Davidson responded in an email dated 27 March 2023 that they were taking the matter "very seriously indeed" and had taken professional advice. The primary facts found by the Lord Ordinary do not support an inference that the Davidsons regarded the correspondence from the respondents and those acting on their behalf as risible. Nor do those facts support an inference that by March 2023 all parties were aware that the threat by Messrs Margach and Anderson to withdraw Pinz's services was a hollow one. The response of the Davidsons was not to ignore it but to instruct solicitors to intimate their intention to raise the present action, including interim orders if Pinz's deadlines were not withdrawn. Viewed objectively, the March 2023 correspondence was unfairly prejudicial in that it threatened to create a situation in which the company, and the interests of the shareholders, were significantly devalued, and it is not to the point to consider whether it was the intention of those representing the Pinz interest to achieve that result.

[48] In relation to the going concern issue, the Lord Ordinary observed that it could, with hindsight, be interpreted as a deliberate attempt to manufacture an apparent existential crisis for the company with the assistance, witting or otherwise, of Johnston Carmichael, the Pinz accountants, but as already noted, he preferred to characterise the episode as one of bumble and blunder rather than anything more sinister. Again he was influenced by his

conclusion that neither Mr Margach nor Mr Anderson had any real grasp of the nuances of the going concern issue. Once more the Lord Ordinary erred in placing emphasis on the personalities of the respective individuals and failing to address the matter objectively. The salient facts were that draft accounts were prepared on a basis that was prejudicial to the company in that the going concern qualification would be regarded with concern by anyone to whom the accounts were exhibited; that legitimate requests by the Davidsons' solicitor for sight of the draft accounts were not responded to; and that ultimately the failure timeously to lodge accounts (by now containing no qualification) resulted in financial loss to the company and consequently to its members including the petitioners. The fact that neither side sought such an outcome is neither here nor there.

[49] For these reasons we hold that the Lord Ordinary erred in law in deciding that none of these matters amounted to the conduct of the company's affairs in a manner that has unfairly prejudiced the company or the interests of the petitioners as its members. The requirements of section 994 are met, and the court must consider what order to make under section 996.

#### **Order under section 996**

[50] The Lord Ordinary found it unnecessary to express any detailed views on how he would have valued the petitioners' shares had an order for their purchase by the respondents been appropriate. He did however indicate in general terms how he regarded the valuation evidence and the legal issues which arose. In the light of the position adopted by the respondents, this aspect of the case can be addressed fairly shortly.

[51] In their note of argument, the petitioners translated the Lord Ordinary's conclusions on the valuation evidence into a price by the following calculation:

Turnover	900,000
Gross Profit percentage 87%	783,000
Overheads:	
Salaries at 29.4% of sales (£900,000 x 29.4%) (294,600)	
Property costs	(93,000)
Electricity	(55,000)
Other overheads	(55,000)
Total overheads therefore	(497,600)
Profit before management and franchise fees	285,400
Franchise fee at 12% of revenue (900,000 x 12%)	(108,000)
Management charge at 20% of EBITDA (285,400 x 20%)	(57,080)
Maintainable Profit	120,320
Multiplier: 4.5	
Adjusted earnings value	£541,440
The base value of 50% of the shares	<b>£270,720</b>

[52] At the close of the hearing of the reclaiming motion it was accepted by the respondents that if an order were to be made under section 996 for the purchase of the petitioners' shares, £270,720 was the correct figure. However the petitioners' calculation contains an arithmetical error: the figure for salaries at 29.4% of sales should be £264,600 and not £294,600. Working that correction through the calculation, the base value of 50% of the shares becomes £324,720.

[53] On behalf of the petitioners it was submitted that certain adjustments ought to be made to the figure for base value. The first, to reflect the passage of time, was an award of interest from the date of the Lord Ordinary's opinion. We accept that submission. It was

further suggested that the company might also be required to declare a dividend, it not having done so since the beginning of the dispute and having accumulated a material cash balance. In the absence of any information as to what cash balance had been accumulated or what level of dividend, if any, could reasonably be declared, this submission must be rejected.

[54] The petitioners reiterated their contention that the franchise fee and management charge were excessive. As we have held that this contention was not supported by the evidence we need not consider any proposed adjustment further. It was further submitted that in calculating the management charge the franchise fee should first be deducted from profit. We are not minded to make this adjustment either. The point is not addressed by the Lord Ordinary. In any event the Lord Ordinary's figures appear to have been based upon the methodology adopted by the parties and it is too late to raise the point now.

### **Disposal**

[55] The court will allow the reclaiming motion and recall the interlocutors of 14 May 2024, under exclusion of the expenses findings contained in paragraphs two and three thereof, the associated remit in paragraph six and accompanying decerniture. We will grant the prayer of the petition to the extent of ordaining the first respondent to purchase the petitioners' whole shareholdings in the company at a price of £324,720 with interest thereon at the rate of 4% per annum from 12 April 2024 (being the date of the Lord Ordinary's opinion) until the date hereof, payment to be made within 28 days after the court's interlocutor or within such other period as the parties may agree. Interest will run at the judicial rate thereafter. Questions of expenses are reserved.