



SHERIFF APPEAL COURT

**[2024] SAC (Civ) 51
AYR-B207-19**

Sheriff Principal S F Murphy KC
Sheriff Principal N A Ross
Appeal Sheriff P A Hughes

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in the appeal in the cause

STEPHEN MILLER

Petitioner and Respondent

against

JACQUELINE MILLER

First Respondent and Appellant

and

FRASER STEWART

Second Respondent and Appellant

and

DONALD ROSS ESTATE AGENTS LIMITED

Third Respondent

**Appellant: R Anderson, advocate; Levy & McRae LLP
Respondent: McShane, advocate; Oracle Law Ltd**

27 December 2024

[1] The petitioner (“Mr Miller”) seeks an order under section 994 of the Companies Act 2006. Mr Miller and the first appellant (“Mrs Miller”) are joint shareholders in the third respondent (the “Company”). They have been directors and shareholders of the Company since shortly after incorporation in 2005, but Mr Miller was purportedly dismissed in 2019. He lodged a petition seeking, in summary, orders reducing an entry in the Company’s register showing his removal as a director of the Company and of another company, reduction of the entry showing the second appellant (“Mr Stewart”) being appointed a director in 2017, and consequential orders for notification, delivery of accounts and exhibition of company records. He also sought an order that Mrs Miller purchase Mr Miller’s shares, or alternatively that the Company be ordained to do so. By the time the matter reached proof, Mr Miller sought only the latter orders for share purchase, as he no longer sought to be involved in the Company affairs.

[2] Mr Miller and Mrs Miller are married, but they separated in February 2018. They set up the Company in 2005, and each own 50 per cent of the issued share capital. The Company successfully traded as estate agents and factors. They were co-directors. As a small family company, the Company was run informally, and decisions were taken without the formality of directors’ or members’ meetings. Mr Stewart was employed by the Company in 2006. Mr and Mrs Miller received income in the form of a small monthly salary, supplemented by drawings, and dividends. In mid-2016 their accountant advised that they should make certain changes to that arrangement. They did not immediately act on that advice.

[3] In December 2016 Mr Miller suffered a significant stroke. That caused lasting symptoms which rendered him unable to return to work. In April 2017 Mrs Miller unilaterally appointed Mr Stewart as a director, without observing the formal requirements

for appointment set out in the articles, or holding a meeting. She did not hold a majority shareholding necessary to secure that appointment in the absence of agreement by Mr Miller. He was not consulted, his consent was not sought and he did not agree to the appointment, but did not challenge it for a further two years.

[4] In 2018 Mrs Miller discussed with the accountant certain concerning behaviours of Mr Miller, such as spending excessive amounts of money. The accountant advised her that Mr Miller remained able to contractually bind the Company, and that she should consider removing him as a director. She took advice, and as a result wrongly reached the conclusion that she had power to unilaterally remove him. Separately, she unilaterally implemented earlier financial advice, which resulted in Mr Miller receiving no further salary payments after December 2018. In January 2019 Mrs Miller intimated to Mr Miller that he had been removed as a director. Mrs Miller admits that the said removal was unlawful.

[5] The sheriff found that the Company's affairs had been conducted in a manner unfairly prejudicial to the interests of the pursuer, and continued the cause of consent for parties to consider what orders should be granted. Mrs Miller and Mr Stewart appeal.

Submission for appellants

[6] Counsel represented both appellants. He submitted that the sheriff had wrongly accepted affidavit evidence from Mr Miller in the absence of oral evidence. On the merits, the sheriff had erred in finding that it was unfair for Mrs Miller to insist on the continuance of their association as members of the company. There had also not been any breach of Mr Miller's legitimate expectations as a member. Unfair prejudice required both prejudicial conduct and unfairness, and both of these elements were not present. The sheriff had gone beyond the pleadings in finding examples of unfair prejudice.

[7] The sheriff had erred in finding that exclusion from the Company's affairs was caused by Mrs Miller's conduct. It was caused, instead, by Mr Miller's own medical condition. Mrs Miller had acted appropriately to protect the Company from Mr Miller's erratic behaviour. Any breaches of the articles were of a technical nature and did not amount to unfair conduct, because the company was run as a quasi-partnership and did not observe formalities of board meetings or minutes. As a result, the sheriff's decision failed to have regard to relevant matters, had taken a distorted view of the evidence, and ignored the reality that Mr Miller could no longer work and had no equal claim to remuneration. The sheriff had incorrectly identified unfair outcomes without considering what had caused those outcomes.

Submission for respondent

[8] For Mr Miller, it was submitted that Mr Miller's evidence was correctly admitted, on the basis of an earlier interlocutor. The sheriff had recognised that he needed to treat the evidence carefully, and did so. On the merits, the sheriff did not err in holding that ill health put an end to the basis on which the parties entered business, and that it was unfair to enforce continuation. The illness amounted to a frustration event. The observations were based on the appellants' own averments. Those averments did not amount to a defence.

[9] In determining unfair prejudice, the sheriff had not erred in his assessment of the facts. Unfairness could be assessed by reference to the articles or other agreements, and issues such as the good faith of the parties, exclusion or exceeding powers. Removal of a director and exclusion from decisions is of fundamental importance, and were here carried out in substantial breach of the articles, without consultation. These breaches of the articles could not be dismissed as trivial.

Decision

[10] The first ground of appeal is an evidential point, and relates to the sheriff's treatment of the evidence of Mr Miller, which was taken by affidavit evidence only. By interlocutor dated 6 August 2020 the court ordained that, where possible, evidence in chief was to be given by affidavit evidence.

[11] The first day of proof was 24 October 2023. This was the second diet of proof, and further productions and affidavits were lodged on the day. It was intimated that Mr Miller would not give oral evidence. His affidavit dated 23 October 2023 was lodged at the bar. The respondents appear to have assumed that it was a copy of an earlier affidavit, dated 20 October 2021, and did not object to it being received. In the event, counsel accepted that nothing turned on this, as the new affidavit brought matters up to date but added nothing of significance to the earlier affidavit. The interlocutor of 24 October 2023 allowed, amongst other matters, Mr Miller's supplementary affidavit to be received. It noted he was unavailable to give evidence and be cross-examined. It noted, having been addressed by counsel for Mrs Miller and Mr Stewart, that "this may be raised in submissions at a later stage".

[12] The sheriff's judgment explains that he treated this situation with care. For Mrs Miller it was submitted that he should not rely on Mr Miller's evidence because he did not make himself available for cross-examination, and therefore could not prove the case. The sheriff rejected that submission. He noted Mr Miller's ability to communicate was severely restricted. The sheriff could detect no unfairness, as he found that cross-examination would not have amounted to any complex or nuanced exploration of the evidence. He assessed the evidence while expressly excluding any adverse inference against the defence, or benefit of the doubt to Mr Miller where evidence was in conflict.

[13] Counsel submitted that this amounted to unfairness, and that Mr Miller's evidence should be excluded entirely. We do not accept, in the absence of authority, that these propositions are soundly based either in fact or in law. The affidavit was lodged without opposition. It therefore formed part of the evidence in the case and the sheriff required to consider it and decide what weight he attached. He did so, in careful and balanced terms, having heard submissions. How this amounted to unfairness is not clear. The case turned largely on analysis, which is a matter for the court. The sheriff noted there was relatively little factual dispute. At appeal counsel did not identify any actual prejudice. The witness had severely restricted ability to communicate. The sheriff expressly addressed this point and made appropriate adjustment, which he explained. We see no substance in this point.

[14] On the merits, the next ground was that the sheriff erred in partly deciding the case on grounds which were not averred. The sheriff relied on two grounds which Mr Miller did not plead: a case that his ill-health had brought to an end the basis on which the parties had entered business association, thereby entitling him to a reasonable offer for his shares, and a case that he was deprived of his ability to withdraw his capital. It was submitted that the sheriff had no basis on the pleadings to do so, and had thereby erred (*Kennedy v Chivas Brothers* 2013 SLT 981 per L. Drummond Young at para [35]). Counsel for Mr Miller relied on the fact that this inference had arisen from averments in the defences, and so had been available as a basis for a finding of unfair prejudice.

[15] We will sustain this aspect of the appeal. We are bound by the explanation of principle in *Kennedy*. Where evidence becomes available during proof, which might be taken into account for making findings in fact, there must also be a basis in the pleadings to make those findings. Evidence without a basis in the pleadings cannot lead to findings in fact. Amendment is required to introduce such a case. That principle applies not only to

findings in fact but also to findings in law. Where evidence becomes available, or the pleadings contain averments, which might be capable of supporting a case in law, but that case in law does not appear in the pleadings, no such case can be sustained. The case in law requires to be pled. If such a case arises during proof, leave to amend must be sought. Whether the pleadings provide sufficient basis for the findings in fact or in law is a matter of specific assessment in each case.

[16] We are unable to find reference to a case based either on ill-health ending the basis on which the parties had entered association and requiring an offer to purchase shares be made, or on being deprived of ability to withdraw capital. We will therefore disregard the findings based on those propositions, and proceed to assess whether the remaining findings support the sheriff's conclusion.

[17] The next ground was that the sheriff erred in finding that the exclusion of Mr Miller from management of the Company was attributable to unfair conduct. Rather, it was attributable to his own medical condition which precluded him from participation. At the least, the sheriff did not have enough evidence to exclude illness as a material reason.

[18] We do not agree. The sheriff found in fact and law that the affairs of the Company had been carried out in an unfairly prejudicial manner in a number of respects. Mr Miller was unlawfully removed as a director. He was unlawfully excluded by Mrs Miller, as well as precluded by ill-health, from participation in significant affairs, from the daily running and management of the Company, and from significant decisions such as dividends, fixing remuneration, changing employment status and dismissal of directors. The attempted distinction, between actings and illness, does not recognise that these findings are cumulative, or that illness is not capable of excusing conduct which removes personal

patrimonial interests such as dividends or remuneration. Mr Miller's inability to work did not justify being stripped of his rights in the Company.

[19] The submission founds in part on Mr Miller giving consent to Mrs Miller assuming control. That, however, does not demonstrate consent to loss of rights, as it is consistent with ensuring good governance. It also founds on the sheriff's observation that removal had little or no practical effect in terms of his participation in management: however, as the sheriff also observes, non-participation does not equate to consent to decisions against his own interests. Mrs Miller and Mr Stewart conducted the Company business in breach of the articles, in disregard of Mr Miller's interests, and to the benefit of their own.

[20] Counsel submitted that there needed to be "but for" causation, and that it could not be said that but for Mrs Miller's actings Mr Miller would have participated in management. In our view that is an incomplete analysis. The petition does not seek to vindicate Mr Miller's right to participate in the daily decisions of the Company, but instead to protect his overall patrimonial interests in the business. Illness might affect the former, but not the latter. In relation to patrimonial interests, unfairly prejudicial conduct meant that Mr Miller was removed as director, and was forced to take a proportion of dividends and remuneration that he had not consented to. His illness did not mean he lost all rights, or the opportunity to seek advice, representation or an attorney to protect his own interests in the Company, or to bring the business association to an end.

[21] The next ground related to breaches of the articles. It is a matter of admission that Mrs Miller breached the articles in removing Mr Miller as director and employee, and appointing Mr Stewart, but on behalf of Mrs Miller these are described as technical only, and not unfair (*Re Saul D Harrison* [1995] 1 BCLC 14). That submission founded on the fact that Mr Miller is unable to work again, and so his removal did not impact management. In

addition to his inability, Mr Miller had spent large sums unwisely, and had withdrawn or attempted to withdraw large sums from the Company, and posed a risk to the Company. It was not necessary for a small company to act formally or even in strict accordance with the articles (*Ciban Management Corp v Citco (BVI) Ltd and anor* [2021] AC 122 at paragraph 21). That was so where the parties are aware of and consent to such actings.

[22] For Mr Miller it was submitted that adherence to the articles is a measure of whether there has been unfair prejudice. In a quasi-partnership business such as this, good faith and conduct are of central importance, and exclusion and ulterior motives are a sound basis for finding unfair prejudice.

[23] We consider that the sheriff was justified in finding that the breaches of the articles were not merely trivial. He observed that informal arrangements were only valid if the parties had the necessary information and had given consent. Where one of the parties had suffered severe impairment, thereby inhibiting fully-informed and consensual decision-making, informal decisions could no longer be regarded as validly made. Mr Miller's estrangement from Mrs Miller meant that there was no informal conversation about business. The sheriff found that the parties were no longer in a situation where they could make decisions informally. The nature of the relationship between the parties had fundamentally changed. In our view the evidence supports the sheriff's view. The breach of the articles in purporting to remove Mr Miller and appoint Mr Stewart meant that Mr Miller could no longer act as a director. The informal nature of the Company management cannot serve to cloak an arrangement to strip him of his patrimonial interests.

[24] The submission for Mrs Miller placed reliance on a number of other features. The first was instances where Mr Miller had received distributions from a group company without arranging a distribution to Mrs Miller. That argument is of no assistance in this

action. If the Company, or Mrs Miller, has any complaint about the arrangement, they have their own remedy against Mr Miller. The sheriff found that those actings did not amount to deliberate misfeasance on the part of Mr Miller, having regard to his limited capacity for financial decision making. In any event, even if Mr Miller had acted inappropriately in relation to Company affairs, that might be relevant when considering remedies, but would not excuse unfair conduct by Mrs Miller. This submission is no more than a disagreement with the sheriff's findings.

[25] Another submission was a claim that the pursuer's evidence was given every positive inference, whereas Mrs Miller was subject to significant cross-examination. It amounts to a position that the sheriff did not act justly. If this is to be an appeal point, it is necessary to explain why the sheriff's inferences were in error, or not justified on the evidence, by reference to transcripts of the evidence if need be. That exercise is not attempted. This point is unsupported, unexplained and unworthy.

[26] Another submission was that Mrs Miller was faced, in effect, with no option but to act unfairly, as there was a risk of dissipating Company funds. We do not agree. In a quasi-partnership business relationship, where the joint relationship is no longer workable, the obvious and primary remedy is to bring that relationship to an end. Whether that meant buying Mr Miller's shares, or buying the business from the Company, or winding up the Company and selling the assets, or selling the Company, these were all options open to her to initiate. They would require consensus or court sanction, but both parties would have received a fair outcome. Mrs Miller made no such attempt.

[27] In conclusion, we do not find the grounds of appeal to be established save in one respect. That was the ground relating to findings made in the absence of pleadings on record. That finding is not sufficient to permit this appeal to succeed, as there remain

sufficient established grounds on which the sheriff found there to be unfair prejudicial conduct.

Disposal

[28] The appeal is refused. Counsel agreed that expenses should follow success. We will find the appellants jointly and severally liable to the respondent in the expenses of the appeal. Sanction for counsel has already been addressed.