OUTER HOUSE, COURT OF SESSION

[2025] CSOH 34

P628/24

OPINION OF LORD BRAID

in Petition of

FOTHERINGAY LIMITED

Petitioner

for

orders under sections 994 and 996 of the Companies Act 2006 in relation to the affairs of West Ranga Developments Limited

Petitioner: Mackenzie, (sol adv); Harper Macleod LLP
First and Second Respondents: Brown; DAC Beachcroft Scotland LLP

1 April 2025

Introduction

[1] This petition concerns the affairs of West Ranga Developments Limited, a company incorporated under the Companies Act 2006, having its registered office in Scotland ("the company"). The petitioner seeks orders under sections 994 and 996 of the 2006 Act, on the ground that the affairs of the company have been conducted in a manner unfairly prejudicial to the petitioner's interests as a member of the company. Among the orders sought by the petitioner is an order for the purchase of its shares in the company at fair value. The petition is opposed by the company, which is the first respondent, and by its majority shareholder, West Ranga Property Group Limited, the second respondent (WRPG).

The remaining respondents are called for their interest as shareholders and directors of the company, as the case may be, but have not lodged answers.

Background

[2] The petitioner was incorporated on 31 March 2021 at the instance of David Reid, an experienced chartered surveyor and property developer. Mr Reid owns 50% of the shares in the petitioner, and is a director of it. The company was incorporated on 25 March 2021, as the vehicle for Mr Reid entering into a joint venture property development with WRPG. At the time of its incorporation, it had an issued share capital of four shares of £1, all of which were owned by WRPG. The petitioner subsequently acquired one share, giving it 25% of the company's issued share capital. At the same time, a shareholders agreement was entered into between the petitioner, WRPG and the company.

[3] The business to be undertaken by the company was, in the words of the petition, that of a commercial property development and investment company undertaking a diverse array of property projects including, but not limited to: design and build to suit both freehold and leasehold (that is, to meet the needs of specific clients such as landowners, occupiers or investors); speculative new-build developments; speculative redevelopments; and land acquisition, promotion and sale. It is the petitioner's position that the purpose of the joint venture was to combine the economic wherewithal of WRPG with the expertise and contacts of Mr Reid (through the petitioner).

[4] In or around August 2023, the share capital of the company was altered such that it became 1000 shares of £0.01. Around that time the third respondent (Romar CS Ltd) became a shareholder of the company, and a separate shareholder agreement was entered into among the company, WRPG, Romar and the petitioner. The petitioner avers that that

agreement did not supersede the prior shareholders agreement. Following the introduction of Romar as a shareholder and the restructuring of the share capital, WRPG owns 700 shares (70%), the petitioner owns 200 shares (20%) and Romar owns 100 shares (10%).

[5] Certain provisions of the (original) shareholders agreement are prayed in aid by the petitioner. The second recital stated that the parties had agreed that each project undertaken by the company would be held in a wholly owned subsidiary set up for the purpose. Thereafter, clause 3.1 provides:

> "For so long as [the petitioner] holds at least 25 per cent or more of the issued share capital of the Company and there has been no Change of [Petitioner] Control in respect of [the Petitioner] (*sic*), [the Petitioner] shall have the right to appoint, maintain in office and remove David Reid as a Director and any such appointment or removal of David Reid as a Director appointed in accordance with this clause 3.1 shall be by notice in writing served on the Company and shall take effect immediately."

Clause 4.1 provides:

> "The Company shall and the Shareholders shall use the rights and powers available to them in relation to the Company so as to procure (so far as they are able by the exercise of such rights and powers) that the Company shall: …..(b) keep the Shareholders promptly informed as soon as reasonably practicable of all material matters relating to the business of the Group; …. provided that a Shareholder's rights to receive information pursuant to this clause 4 will apply only for so long as such Shareholder holds 25 per cent or more of the issued Shares and provided that such Shareholder is not in breach of any of the restrictions contained in clause 14 (Non-Competition)."

Pursuant to clause 3.1, Mr Reid was appointed as a director of the company on 21 June 2021 and he remains a director.

The petitioner's complaints of unfairly prejudicial conduct

[6] Against that background, the petitioner's complaints about unfairly prejudicial conduct are essentially two-fold. First, it complains that on 8 May 2024 the respondents disabled Mr Reid's access to his company email account and to the company MS365

OneDrive (on which documents are accessed). Thus, although he remains a director, he has been practically excluded from the company's affairs. Further, in breach of clause 3.9 of the shareholders' agreement the company has not held a board meeting since 8 May 2024, whereas it is obliged to hold board meetings at least once every 2 months (in fact, arguably once every month: see para [22]). Any purported board meeting held without his presence would be inquorate (but again see para [22]). While they do not accept that it was unfairly prejudicial for them to do so, the respondents accept that they have excluded Mr Reid from the company's affairs - they say, for good reason in light of his own conduct.

[7] Second, the petitioner avers that in relation to 15 separate development opportunities, the company has either diverted those opportunities to another company within the WRPG group, or, at least, has organised its affairs in such a way that the company has been, or will be if the opportunities come to fruition, deprived of profits which rightfully belong to it, in breach of fiduciary duties owed to the company by its directors.

The debate

[8] The case called before me for debate on the motions of both the petitioner and the respondents. In summary, the solicitor advocate for the petitioner invited me to find in terms of section 994 of the Act that there has been unfairly prejudicial conduct in respect of the exclusion of Mr Reid (and, through him, the petitioner) from the company's business. He submitted that if that motion were granted, any future proof before answer could focus on the question of remedy under section 996. Counsel for the respondents resisted that motion, submitting that no finding of unfair prejudice should be made at this stage, pending the hearing of evidence. Additionally, he submitted that the petitioner's averments about

four of the 15 development opportunities were irrelevant and could not found a case of unfair prejudice.

The petitioner's averments

[9] In relation to that latter submission, the disputed averments are in statement 14 of the petition. Insofar as material, they are as follows:

> "The opportunities to enter each of the property development projects ... condescended upon belonged exclusively to the Company. Due to the newly incorporated status of the Company, it was verbally agreed between David Reid on behalf of the Petitioner and the Fourth Respondent on behalf of [WRPG] on an *ad hoc* basis that the commercial property development projects hereinafter condescended upon at (i), (ii) and (iii) would be carried on under the banner of other entities within [WRPG's] group with longer trading histories. However it was a term of such agreements that these would remain Company projects and any profits (or losses) associated with those projects would be reconciled into Company - consistent with (i) the Company's ownership of the relevant opportunities; (ii) the fiduciary duties owed by each of Mr Reid and Fourth, Fifth and Seventh Respondents as directors of the Company; and (iii) the purpose and terms of the Shareholders' Agreement. Neither the Petitioner, nor Mr Reid, had any financial interest in [WRPG] or its subsidiaries... Mr Reid would not have worked on projects for the benefit of other companies within the group in which neither he nor the Petitioner had any interest. When [Romar] became a shareholder of the Company and the [second shareholders agreement] was entered into, a side letter dated 1 August 2022 was issued to [Romar]... [It] contained an undertaking by the Fourth, Fifth and Seventh Respondents and David Reid, jointly and severally, to pay [Romar] the difference between £100,000 and the dividends received by [Romar] from the Company in the two years following execution of the agreement. The letter also contained a waiver by [Romar] of its 'right to receive any profits ... in respect of the AMZL Project Dundee, Cazoo Sale and Leaseback Portfolio, 10 Murraygate Development and the Scania Falkirk project.' The 'AMZL Project Dundee' is the project hereinafter condescended upon at (iv). The Cazoo Sale and Leaseback Portfolio is the project hereinafter condescended upon at (i). The 'Scania Falkirk project' is the project hereinafter condescended upon at (iii). The reason these projects were included in this side letter, is because they were Company projects. Those projects had commenced prior to Romar becoming a shareholder ... of the Company... David Reid would have not have given the personal undertaking he did by the side letter dated 1 August 2022 if those projects did not belong to the Company. In line with the above arrangements, following its incorporation the Company proceeded to undertake a number of commercial property development projects, including:-

(i) A sale and leaseback portfolio for Cazoo. The opportunity to carry out this project was sourced for the Company by Mr Reid, who then carried out the requisite work to deliver the project. This project did not require funding. Mr Reid and the Fourth Respondent sourced a funding partner who purchased four properties from Cazoo. Under the arrangements hereinbefore condescended upon, the project was carried on under the banner of West Ranga (Dundee) Limited, but it remained a Company project.

(ii) Development of a site for Cazoo at Bankhead Drive, Edinburgh. The opportunity to carry out this project was again sourced for the Company by Mr Reid. Mr Reid then worked to deliver the project for the Company. It was necessary to demonstrate the ability to fund a purchase of £4m, but no outlay was required on the part of the Company as Mr Reid and the Fourth Respondent sourced a funding partner which purchased from the vendor and immediately leased to Cazoo. This project and the Cazoo sale and leaseback condescended upon at (i) generated an aggregate net profit after tax of £1,510,000. The Petitioner's profit share arising from these projects was 25% per cent of that (£377,629) in line with its shareholding in the Company when the projects completed. However, as [Romar] became a shareholder of the Company immediately before distribution of the proceeds, it was agreed between the Petitioner and [WRPG] that £300,000 of the Petitioner's profit share in relation to this project would be paid as consultancy fee by West Ranga (Dundee) Limited. The details of this agreement were confirmed in an email from [WRPG's] Finance Director to David Reid dated 26 August 2022. A copy of that email is produced, referred to for its full terms, and held incorporated *brevitatis causa*. It was also agreed that the remaining profit share owed to the Petitioner (£77,629) and an equivalent portion of [WRPG's] profit share (£232,887) would be included as a cash balance on the Company's balance sheet. The ... Financial Director stated that: 'I'm trying to assess how best to get this across to [the company] without creating a corporation tax charge….'. The remaining profit shares were never reconciled onto the Company's balance sheet as they ought to have been, and the Company's assets on subsequent accounts are accordingly understated by that £310,516 (£77,629 plus £232,887).

(iii) Development of a site for Scania at Ivanhoe Drive, Falkirk. The opportunity to carry out this project was sourced for the Company by Mr Reid and the Fourth Respondent. Mr Reid worked to deliver this project for the Company. The project generated a profit of £597,319.97 following deduction of a 'development management fee' paid to West Ranga Management Limited. Whilst the project was carried out under the banner of West Ranga (Dundee) Limited, the profits ought to have been reconciled into the Company and proceeds paid into the Company accordance with the arrangements hereinbefore condescended upon.

(iv) Development of a site for Amazon global online retailer at Dundee. The opportunity to carry out this project was sourced for the Company by Mr Reid. Mr Reid was in the process of carrying out this project when he was excluded from the Company. Following detailed discussions with Amazon, Heads of Terms were issued by the Company on 3 April 2024, together with the Company's fee proposal. The Heads of Terms and fee proposal were each agreed by Amazon. The project is anticipated to generate a net profit for the

Company of approximately £1,704,342 after tax in early 2025. The Petitioner shall be entitled to receive 25% of those profits (£426,085.50), as [Romar] is not entitled to share in these profits standing the terms of the side letter dated 1 August 2022."

The statutory framework

[10] Section 994 of the 2006 Act provides:

"**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."

Section 996 of the 206 Act provides:

"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–
   (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."

[11] It is also relevant to note the terms of section 175:

"(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)."

Submissions for the respondents

[12] Counsel for the respondents submitted that the petition was, at least in part, misconceived. While he did not dispute that the directors owed fiduciary duties to the company, and that third party companies would have had to account to the company for a diversion of opportunities owned by the company in breach of those duties (whether or not the company was itself able to take advantage of the opportunities), the fact was that the petitioner accepted that all of the projects in statement 14(i) to (iv) had been carried out by West Ranga (Dundee) Ltd with the consent of the petitioner, in circumstances where the company itself lacked the funds to progress the projects. There had therefore been no breach of fiduciary duty, and the company could not claim an accounting as if there had been. Any remedy which the company might have had sounded in contract, although, under reference to cases such as *Crawford* v *Bruce* 1992 SLT 524 and *East Anglian Electronics Ltd* v *OIS plc* 1996 SLT 808, the agreement founded upon amounted to no more than an agreement to agree, which was void for uncertainty and unenforceable: it was unclear what was meant by the averment that profits were to be "reconciled into" the company, and the reference simply to "profits" said nothing about how those profits were to be calculated. Reference was also made to the very recent Supreme Court case of *Rukhadze and others* v *Recovery Partners GP Ltd and another* [2025] UKSC 10 where there had been a breach of fiduciary duty giving rise to the right to an accounting, as an example of the type of case which the present was not. For all of those reasons, the averments in statement 14(i) to (iv) were irrelevant and should not be admitted to probation.

[13] As regards the petitioner's argument that a finding of unfair prejudice should be made in respect of the admitted exclusion of Mr Reid from the company's business, counsel for the respondents submitted that there would be little practical advantage in such an order, which in any event should not be made at this stage. The respondents averred that Mr Reid had himself breached his own fiduciary duties to the company by forwarding emails to himself and by pursuing opportunities on his own account. They were entitled to proof of those averments before the court reached any decision as to whether the exclusion was unfairly prejudicial. Any order made that Mr Reid should be afforded access to the company's business might be difficult to apply in practice, since he had resigned as a director of WRPG, which had a common server with the company.

Submissions for the petitioner

[14] The solicitor advocate for the petitioner submitted that the averments complained of were all suitable for enquiry. It did not matter that the company was unable to pursue the opportunities itself: it owned the opportunities and was entitled to the profits therefrom. Had the WRPG diverted any of those opportunities to another company without the petitioner's consent, it would have required to account for the profits. The petitioner offered to prove that the agreement reached was that another company within the WRPG group could progress the opportunities, subject to those same profits (ie the profits for which it would have had to account had there been a breach of fiduciary duty) being paid to the company. Consent having been given on that basis, it was relevant to aver that it was unfairly prejudicial to the petitioner that the profits had not been paid. As regards statement 14(i) and (ii), the averments were clearly sufficient to found a case of unfair prejudice: the petitioner's case in summary was that WRPG's finance director had agreed

that the overall profit from those two transactions would be paid to the company, in line with the agreement, but that had never happened. As regards 14(iv), the petitioner had averred plainly that it had agreed heads of terms with Amazon. It did not accept, contrary to the submission advanced by counsel for the respondents, that it had agreed to West Ranga Dundee carrying out the project as it had admittedly done. The petitioner was entitled to proof of its averments which, if true, would be a clear example of diversion of a business opportunity owned by the company in breach of the directors' fiduciary duty.

[15] Separately, an order should be made at this stage, in terms of paragraph (iii) of the prayer of the petition, finding and declaring that at least to the extent that the petitioner had been excluded from the business of the company, the affairs of the company have been and are being conducted in a manner unfairly prejudicial to the interests of the petitioner. That practical exclusion and the denial of information to the petitioner was clearly unfair and prejudicial to the petitioner's interests *qua* shareholder: *cf Hawkins*, petitioners, [2024] CSOH 3, paras [164] to [166]. A declarator in the terms sought would then enable the parties, and the court, to focus on what remedy should be given under section 996. The petitioner did not require to prove all of the conduct complained of in order to be entitled to a remedy under that section.

Decision

[16] It is settled, and not controversial in the present case, that unfairly prejudicial conduct may consist of the exclusion of a shareholder from a company's business (as in *Hawkins*, above); or breach of directors' fiduciary duties: *Gray* v *Braid Group (Holdings) Ltd* [2015] CSOH 146, where both types of conduct were listed by Lord Tyre at para [24] as examples (among others) of unfairly prejudicial conduct. (Although that case was reclaimed

to the Inner House - see *Gray* v *Braid Group (Holdings) Ltd* 2017 SC 409 - no issue was taken with Lord Tyre's findings as to unfairly prejudicial conduct.)

[17] However, as Lord Tyre also observed, there is no limit to the types of conduct which may be unfairly prejudicial. The approach which requires to be taken to sections 994 and 996 was recently set out by the Inner House in *Davidson* v *Pinz Bowling* [2025] CSIH 6, at paras [14] and [15]:

> "[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.'
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> 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.
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> [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.'"

[18] With these observations in mind I now turn to consider the competing submissions.

The petitioner's averments in statement 14 of the petition

[19] The dual thrust of the submission by counsel for the respondents was that there could be no breach of fiduciary duty where, as here, the petitioner (through Mr Reid) admittedly knew that the projects averred in statement 14(i) to (iv) of the petition were to be undertaken by another company in WRPG group, and in any event that the averred agreement between the company and WRPG was void for uncertainty. Leaving aside the tension between that latter submission, and the argument that any remedy the company had must be pursued under the law of contract, the submission as a whole fails to address the point that while unfairly prejudicial conduct *may* consist of a breach of fiduciary duty, it need not do so, as the above *dicta* make clear.

[20] The question which must be addressed at this stage is whether the petitioner's averments that it agreed to opportunities which it owned being exploited by other companies connected with WRPG subject to the profits being accounted for to the petitioner, which agreement has not been honoured, could, if proved, viewed objectively, amount to unfairly prejudicial conduct under section 994. As an aside, for what it is worth, I am not persuaded that the averred agreement is void for uncertainty. I do not accept that it was no more than an agreement to agree, as counsel for the respondent suggested. Whether that is right or not, counsel's argument was that the terms "reconciled into the company" and "profits" are too vague to have any meaning, or to be enforceable. If this were an action for breach of that contract, which it is not, doubtless there would be averments of the factual matrix against which the contract would fall to be construed, but I have no difficulty, in principle, with the petitioner's submission that "reconciled into" is capable of meaning that the profits were to be accounted for to the company. The term "profits" might give rise to greater uncertainty but is also capable of the meaning proposed by the solicitor advocate for

the petitioner, namely, that it refers to the profits for which the second defender (or the group company which had benefited from the transactions) would have had to account had no consent been given. At all events, the parties seem to have had no difficulty in ascertaining the profits for the Cazoo projects in (i) and (ii). There is also some force in the petitioner's argument that the side letter issued to Romar, referred to in statement 14, is indicative of a common understanding that the company was entitled to the profits from the transactions referred to therein.

[21] Reverting, then, to the question of whether in statement 14(i) to (iv) the petitioner has relevantly averred a case of unfair prejudice in terms of section 994, I am satisfied that it has. In simple terms, it has averred that there was an agreement that certain projects be carried out by other companies within the WRPG group subject to the condition that it receive an accounting for the profits; that in relation to two of those projects, the amount of profits was agreed some time ago but has not been paid; that WRPG is otherwise (as is clear from its answers) now arguing that even if there was such an agreement, it is not enforceable, and the respondents are taking no steps to enforce it; that in relation to a fourth project (Amazon Dundee) WRPG has diverted it to itself *without* consent which, if true, would be a breach of the directors' fiduciary duties. When these averments are viewed in light of the exclusion of Mr Reid from the company's business, and in light of the other opportunities which the respondents are said to be diverting away from the company in breach of their fiduciary duties, they are, if proved, capable of amounting to unfairly prejudicial conduct, applying the approach described in *Davidson* v *Pinz Bowling*, above. Finally, in answer to the complaint that the company's remedy is an action for breach of contract, I observe that one of the remedies which the court may grant under section 996 is an order authorising civil proceedings in the name of the company.

The exclusion of the petitioner from the company's business

[22] There can be little doubt that the exclusion is prejudicial to the petitioner, but whether it is unfairly prejudicial or not is a fact-sensitive question. The petitioner's right, in terms of the shareholders' agreement, to nominate a director, existed for so long as the petitioner held at least 25% of the issued share capital of the company, but on the petitioner's averments, it has held only 20% since the introduction of Romar as a shareholder. The petitioner avers that it has a legitimate expectation to participate in the affairs of the company and to be provided with relevant information, which the respondents deny. The respondents also have a series of averments seeking to justify Mr Reid's exclusion. As regards the petitioner's averment that the company is required to hold a board meeting every 2 months, and that any purported board meeting held without his presence would be inquorate, that appears to be founded on the first shareholders' agreement, which provides: in clause 3.9 that the board "shall meet at regular intervals not exceeding once every two months" (which seemingly is intended to have the meaning contended for by the petitioner); in clause 3.4 that the maximum number of directors is to be four; and in clause 3.5, that the quorum for meetings is to be two (to include Mr Reid). However, the second shareholders' agreement, to which the petitioner is also party, provides in the corresponding provisions that the board is to meet at regular intervals not exceeding once every month; that the maximum number of directors is to be six; and that the quorum for meetings is to be three, with no requirement that Mr Reid be among that number. The petitioner avers that the second shareholders agreement did not replace the first one, but it is difficult to reconcile those conflicting provisions, and the matter may not be as clear-cut as the petitioner would have it. In all the circumstances, I have reached the

view that whether or not the exclusion of Mr Reid was unfairly prejudicial to the petitioner is something which can be decided only after the court has heard evidence, and that it would be going too far, too fast, to decide that matter at this stage. Finally, I observe that even had I made the order sought, I do not agree with the solicitor advocate for the petitioner that it would have had the advantages he perceived. While he was correct in saying that a finding of unfairly prejudicial conduct under section 994 necessarily leads to the question of remedy under section 996, the extent and nature of any remedy is inextricably intertwined with the extent and nature of the unfairly prejudicial conduct. For example, if the conduct consisted solely of the exclusion of Mr Reid from the company's business, the remedy might consist solely of an order that access be restored; whereas if it included a failure to account for profits which rightfully belonged to the company, the remedy might consist of an order to purchase the petitioner's shares at a fair value.

Disposal

[23] I have refused *in hoc statu* the petitioner's motion for an order in terms of the prayer of the petition. I have refused the respondents' motion to refuse to admit certain averments in the petition to probation. I have reserved all questions of expenses. I will put the case out by order to discuss further procedure in the light of this opinion.