Neutral Citation No: [2021] NICh 18	*Ref:*	**HUM11607**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**09/09/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE MATTER OF WEIR TRAVEL LIMITED

Between:

FERGUS SHAW

Petitioner

and

(1) DAVID WEIR
(2) SHARMAYNE WEIR
(3) WEIR TRAVEL LIMITED

Respondents

_____

Richard Shields (instructed by Johnsons) for the petitioner
The respondents did not appear and were not represented

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HUMPHREYS J

Introduction

[1] The petitioner in this case presented a petition seeking relief pursuant to section 994 of the Companies Act 2006 ('the 2006 Act') on the grounds that the affairs of Weir Travel Limited ('the company') had been conducted in such a manner as to cause unfair prejudice to him as a member of the company.

[2] The first and second respondents are directors of the company and each were formerly represented in these proceedings. Leave was granted to solicitors to come off record for each of these parties on 15 December 2020 and 14 April 2021 respectively. The third respondent, the company, has never been represented.

[3] At the hearing of the petition I was satisfied that steps had been taken to bring the matter of the hearing to the attention of the respondents but that they had chosen not to take any further part in the proceedings.

Background

[4] The company was incorporated under the 2006 Act on 25 June 2012 with company number NI613323, with its registered office at 26 New Row, Coleraine, Co. Londonderry.

[5] On incorporation, the statement of capital provided that there were 30,000 allotted ordinary shares, of a nominal value of £1, each of which carried identical rights in terms of voting, dividends and distributions. The initial shareholdings were recorded as 10,000 in each of the names of the petitioner, the first and the second respondent.

[6] On 6 August 2013 a resolution was purportedly passed at a general meeting of the company to reduce its issued share capital from £30,000 to £100, on the grounds the company *"should have been established with 100 ordinary shares valued at £1 each"*. The resolution records that the first Respondent, the second respondent were present at the meeting together with Kevin Duffin and Margaret Duffin, who appear to have been the company's accountants at this time.

[7] This resolution and the accompanying solvency statement were filed in Companies House and the reduction in share capital registered. In the 2014 Annual Return, it was recorded that the shares in the company were owned by the first and second respondents 50 shares each, with the petitioner owning no shares.

[8] These matters came to light in late 2018 and early 2019 when the company changed accountants. The petitioner subsequently discovered other matters which form part of the unfair prejudice claim and which led to this petition being issued in late 2019.

The Petitioner's Standing

[9] The first question to be addressed is whether the petitioner has the requisite standing to bring a section 994 claim given the statutory requirement that only a 'member' of a company may petition.

[10] The company adopted the model articles of association contained in Table A. These provide that the company may only reduce its share capital by special resolution or otherwise in accordance with the 2006 Act. A special resolution can only be passed at an extraordinary general meeting, called for that purpose. Fourteen days' clear notice of such a meeting must be given to all members. By section 283 of the 2006 Act, a special resolution requires a majority of not less than 75% of the members.

[11] The purported resolution in this case could only have been passed by 66.67% of the members. The evidence of the petitioner is that he never received any notification of the holding of an extraordinary general meeting for this purpose. The purported resolution is therefore void and of no legal effect.

[12] In his affidavit, the first respondent states:

> *"I recognise and accept that the Petitioner had no knowledge of the meeting, nor the proposal to reduce the share capital. I do not in any way seek to maintain or stand over any resolution or entitlement to deny the Petitioner his one third interest in the company"*

[13] This concession was quite properly made. Insofar as the second respondent seeks to contend that the petitioner and the first respondent are guilty of some connivance in order to adversely affect her entitlement to ancillary relief on divorce from the first respondent, I entirely reject that assertion. It is one which is wholly unsupported by the evidence and runs contrary to the financial management issues relating to the company which I will address in due course.

[14] Section 125 of the 2006 Act provides:

> *"(1) If –*
>
> *(a) the name of any person is, without sufficient cause, entered in or omitted from a company's register of members…*
>
> *the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register."*

[15] Given that the special resolution to reduce the share capital was void, I propose to declare that the petitioner is the owner of 10,000 ordinary shares in the company of nominal value £1 and I will order rectification of the register accordingly. On this analysis, the petitioner has standing to bring these unfair prejudice proceedings as a member of the company.

Unfair Prejudice

[16] The court had the benefit of hearing evidence from the petitioner and also from Catherine Maciocia ACMA, of Fife Business Services, the company's accountant. This revealed that in the company's books of account, there is a ledger entry indicating that the £10,000 investment from the petitioner had been converted into a loan following the purported resolution reducing the share capital. It was the

petitioner's evidence that at no time did he agree that his equity investment be replaced by a loan to the company.

[17] The first respondent identified a potential VAT issue relating to the company's affairs in 2018 and, as a result, Fife Business Services were instructed to act as the company's accountants. On Ms. Maciocia's evidence, the first and second respondents resolved that the company pay dividends to its shareholders (limited to the first and second respondents) as follows:

Year Ending	**Dividends**
31.03.15	£37,000
31.3.16	£46,000
31.3.17	£70,000
31.3.18	£100,000
31.3.19	£80,000
TOTAL	**£333,000**

[18] No further dividends were paid following the issue of these unfair prejudice proceedings. However, in years ending 31.3.17 and 31.3.18, salaries were paid to the directors totalling £16,080 and £16,320 respectively. This figure increased to £26,880 in y/e 31.3.19, then to £66,018 in y/e 31.3.20 and £96,580 in y/e 31.3.21. There is no explanation in the papers as to why these enhanced salaries were being paid. The inescapable conclusion is that the salary payments were made in lieu of the dividends.

[19] The question then arises as to whether the conduct of the first and second respondents in the management of the company's affairs gives rise to unfair prejudice to the petitioner.

[20] In *Re Coroin Ltd* (No. 2) [2012] EWHC 2343 at [630] David Richards J. stated:

> "*Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where*

> *the members have rights recognised in equity if not at law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of the member as such, without any financial consequences, may amount to prejudice falling within the section."*

[21] The model articles of association adopted by the company provide that dividends must be paid, if declared by the company, in accordance with the amounts paid up upon the shares on which the dividend is paid. I have already held that the petitioner was a shareholder of the company on the dates when the dividends were paid to the first and second respondents. It follows therefore that the petitioner had an equal right to payment of dividends once these had been declared by the company.

[22] In the circumstances of this case, the petitioner has clearly suffered unfair prejudice. He has been denied the payment of any dividend and the first and second respondents have taken steps to denude the company of its cash reserves by the payment of such dividends and inflated salaries, to the detriment of the petitioner's equity investment.

[23] The conduct of the first and second respondents constitutes multiple breaches of the fiduciary duties which they owe in their capacity as directors pursuant to ss. 171-175 of the 2006 Act. In particular, they have failed to act within the company's constitution, failed to promote the success of the company and allowed a conflict of interest to exist between their own personal financial positions and the well-being of the company.

[24] The petitioner's claim under section 994 of the 2006 Act therefore succeeds.

Relief

[25] Section 996 of the 2006 Act provides:

> *"(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."

[26] Section 996(1) therefore conveys a very wide discretion on the court. It is common in this type of case for a petitioner to seek, and for the court to order, a purchase of the petitioner's shares. However, in this case, the petitioner has eschewed such a remedy since he seeks to retain his equity investment but seeks other forms of relief from the court.

[27] The authorities make it clear that the remedies available to the court include an order that damages be paid to a petitioner personally (see *Atlasview Limited v Brightview Limited* [2004] EWHC 1056 (Ch)) or indeed to the company whose affairs have been conducted in an unfairly prejudicial manner (*Gamlestaden Fastigheter AB v Baltic Partners Limited* [2007] UKPC 26).

[28] The dividends paid out to the first and second respondents amount to £333,000. Given that the petitioner was the owner of an equal number of shares, £111,000 of those dividends ought to have been paid to him. The court will order this sum against both the respondents by way of damages or, alternatively, equitable compensation since the payments of dividends were impressed with a constructive trust by reason of the respondents' wrongdoing and deprivation of the petitioner's entitlement.

[29] In relation to the inflated payment of salaries, there is no claim that the petitioner himself was entitled to such a payment but that they affected the company's cash reserves and value. The evidence of Ms Maciocia was that the salaries were increased from a baseline of £48,000 for the two directors in January

2020. On that basis, and doing the best one can with the figures available, I will order that the sum of £75,000 be repaid by the first and second respondents to the company as damages for breach of duty.

Conclusion

[30] The court will make the following orders:

(i) A declaration that the petitioner, the first respondent and the second respondent are each the owners of 10,000 ordinary shares in the company;

(ii) An order, pursuant to section 125 of the 2006 Act, rectifying the register accordingly;

(iii) An order that the first and second respondents pay to the petitioner the sum of £111,000 damages, together with interest thereon at the rate of 2.5% from the date of issue of the petition to the date of judgment;

(iv) An order that the first and second respondents pay to the company the sum of £75,000 damages;

(v) The first and second respondents shall pay the petitioner's costs of these proceedings, same to be taxed in default of agreement.