OUTER HOUSE, COURT OF SESSION

[2024] CSOH 42

P401/23

OPINION OF LORD SANDISON

In the Petition of

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

Petitioners

for

orders under sections 994 and 996 of the Companies Act 2006 in respect of ANGUS PARK LIMITED

Petitioners: J Brown; DAC Beachcroft LLP for Levy & McRae LLP
Respondents: Ower KC, Horn; Davidson Chalmers Stewart LLP

12 April 2024

Introduction

[1] By this petition, Allan and Sarah Davidson, a married couple, and Argyle Asset Management Limited ("Argyle"), a company owned and controlled by them, seek orders under sections 994 and 996 of the Companies Act 2006 in respect of Angus Park Limited ("the Company"), claiming to have been subjected to unfairly prejudicial treatment as members of the Company. The Davidsons are directors of the Company. They maintain that they are also members of the Company. Against the eventuality that they are found not to be such members, they claim alternatively that Argyle is a member and they have

accordingly caused it to concur in this petition. The respondents to the petition are, firstly, Pinz Bowling Limited ("Pinz"), a member of the Company; secondly, Darren Margach; and thirdly, Ross Anderson. The second and third respondents are directors of the Company. They are also the only directors of Pinz, and control it. The Company itself was not called as a respondent to the petition. The matter came before the court for a ten-day diet of proof for determination of all issues in dispute.

Relevant statutory provisions

[2] Sections 994 and 996 of the Companies Act 2006, so far as material, are in the following terms:

> **"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–
>
> > (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."

Summary of factual background

[3] The accepted factual background to the dispute includes the following matters. Mr Margach and Mrs Davidson first met as members of a pressure group set out to lobby the Scottish Government for better treatment of the soft play industry during the Covid-19 pandemic. Mr Margach owned Pinz and had (with the assistance of his partner Mr Anderson) built it up from a single ten-pin bowling site to the holding company of a group of indoor leisure businesses using inflatable equipment with ancillary catering provision. Although very successful pre-pandemic, the group had built up considerable debt during the various lockdowns and pandemic restrictions on public association. Mr Margach was, as the pandemic continued, increasingly diffident about his abilities to turn its fortunes around and continue its previous growth without some external assistance. Mrs Davidson had experience of operating (through Argyle) a soft play centre in Glasgow, "Whale of a Time". Mr Davidson was an experienced businessman in the hotel industry and latterly was employed in a business involved in a substantial way in the provision of student accommodation. The four individuals formulated a plan (actuated primarily by Mr Margach and Mrs Davidson) to go into business together. In essence, they agreed to form the Company as a joint venture to operate a new indoor inflatable leisure business from a site in Monifieth, trading under the "Innoflate" brand owned by Pinz. If things went well, the intention was to replicate that plan with other such businesses in future. They

agreed to set up another company, DRS Leisure Limited ("DRS" standing for Darren, Ross and Sarah respectively) which would in due course provide services to companies in the Pinz and joint venture groups and charge fees for those services. Mrs Davidson was to work (initially unpaid) as Operations Director for Pinz, thereby taking some strain from Mr Anderson, who had previously been performing that role amongst others, and giving him more time for relaxation and the enjoyment of his relationship with Mr Margach. Mr Davidson was to continue with his existing full-time employment elsewhere, but was to be available to advise and assist with issues which fell within his particular experience and aptitudes.

[4] In furtherance of that plan, the Company was incorporated on 20 August 2021, at premises leased from Dobbies Garden Centre Limited. Incorporation of the Company was attended to by Mrs Davidson, and on incorporation two ordinary shares of £1 each were allotted; one to Pinz and the other to Argyle. DRS Leisure Limited was incorporated on the same day with an issued share capital of ten ordinary shares of £1 each, seven of which were allotted to Pinz and the remaining three to Argyle.

[5] By agreement amongst the parties, DRS Leisure Limited was voluntarily struck off the Register of Companies on 30 December 2021. A further company, DRSA Leisure Limited, was incorporated on 7 January 2022 with 100 shares in issue, seventy of which were allotted to Pinz and fifteen to each of the Davidsons. The additional "A" in the name was a reference to "Allan". This company was intended to carry out the role initially intended for DRS Leisure Limited. In April 2022, changes were also made to the shareholdings in the Company, the result of which was that Mr and Mrs Davidson came to hold one share each, and Pinz held two. These changes were made by a bookkeeper instructed by Mrs Davidson. She maintains that they were authorised by Pinz at the same time as the change from DRS to

DRSA, but Mr Margach and Mr Anderson deny that, saying that they only found out about it after the event.

[6] The Company opened for trading on 2 April 2022. The business was carried on successfully and profitably from the point of opening, and shareholder loans advanced to it for the purposes of enabling it to set up were repaid in full by September 2022, with substantial additional profit remaining. However, by that time all was not well in the personal relationships amongst the Davidsons, Mr Margach and Mr Anderson.
Mr Anderson had come to entertain a degree of dissatisfaction about the way in which Mrs Davidson was carrying out her role as Operations Director for Pinz. Towards the end of August 2022 she was brusquely given to understand that she was no longer wanted in that (or any other) role, and left it with immediate effect. Mr Margach and Mr Anderson were also questioning more generally the wisdom of their intended venture with the Davidsons, and had engaged a business consultant with whom they had previously worked, Mr John McGee, to advise and assist them with their future plans. He was, where possible, put forward by them to discuss any matter that needed to be discussed with the Davidsons. Put short, the milk was rapidly turning sour.

[7] The Company had started trading without any agreement having been made about the arrangements whereby Pinz was to charge for the provision of management services. It had become clear that the model of charging through DRSA was not acceptable to Pinz. At a shareholders' meeting of the Company on 26 September 2022, it was formally agreed that DRSA would be dissolved and that Pinz would present proposals to the Company for charging for the services it was providing. In mid-October 2022, without any further discussion or agreement having taken place, Pinz raised a number of invoices against the Company and indeed took some money in payment thereof from the Company's bank

account. At a virtual meeting shortly thereafter between the Davidsons on the one hand and Mr Margach and Mr Anderson on the other, at which the latter proposed on behalf of Pinz a certain charging structure, Mr Anderson said that he would personally go and remove Innoflate signage and branding from the Company's site if agreement was not reached immediately. Under protest, Mr Davidson proposed an alternative charging structure, which was then in its essentials agreed. It was intended that those arrangements would be set out in writing, but that never in fact occurred.

[8] On 20 March 2023, in the course of a meeting involving Mr Davidson and Mr McGee, the latter asked questions about the reorganisation of the Company's share capital, stating that Mr Margach and Mr Anderson had known nothing about it. A notice was issued by Pinz on the same day, stating that it would cease to provide services to the Company on 20 April 2023. A letter dated 23 March 2023 was subsequently issued by Mr Margach and Mr Anderson on behalf of Pinz, demanding the resignation of the Davidsons as directors of the Company and the transfer of their shares to Pinz for £1 each, and stating (wrongly) that the booking service run by Pinz on behalf of the Company had been shut down for bookings after 20 April.

[9] These proceedings began in May 2023 and the deadline for the withdrawal of services was extended until June, with offers to acquire the petitioners' shares for relatively low prices being made by Pinz and equally unrealistic counter-proposals being made. A proposal by the petitioners as to steps which could be taken to enable the Company to continue to trade after the withdrawal of the Pinz services and brand was met with a rather indefinite response by the respondents. A dispute broke out about whether the Company could be regarded as a going concern for the purposes of its statutory accounts, standing the possibility that the services it was receiving from Pinz might be withdrawn on short notice,

and was resolved only after the Company was forced to cease trading for a fortnight or so after its insurers refused to renew cover standing that uncertainty; the respondents then agreed to give at least 3 months' notice of the withdrawal of those services, and in practical terms intended to await the outcome of the litigation before doing anything further. Finally, the Company's landlords issued it with an estimated invoice for electricity which it had been using at their expense since commencing trading, and the parties delayed somewhat in dealing with that threat to the Company's solvency. Although all parties agree that any relationship of trust and confidence between them has been irretrievably destroyed, the petitioners maintain, and the respondents deny, that the former have been subjected to unfairly prejudicial conduct of the Company's affairs at the hands of the latter.

The evidence as to matters of fact

[10] That brief summary of the facts having been given, it is necessary to set out the evidence in the case in much more detail in order to understand the many nuances which here, as in many cases brought in terms of section 994 of the 2006 Act, provide the key to determining the proper treatment and disposal of the complaints made. Each of the witnesses provided one or more witness statements and was cross-and re-examined.

Petitioners' case

[11] **Allan James Davidson** (53) gave principal and two supplementary affidavits to which he spoke, and in which he stated that his business background was in the hotel industry, for the last 20 years in hotel management and management consultancy. He had come to be involved in the Company through his wife Sarah, who had dealt with its incorporation and the subsequent transfer of shares from Argyle to the two of them.

[12] The Company's business was the provision of an indoor inflatable leisure facility, trading as "Innoflate", from premises at Monifieth. The rights to that name and the associated website were owned by Pinz, which operated a number of other similar facilities under the same brand. The Company made money through entry charges for access to the facility, food and drink sales, the sale of socks for use on the inflatable areas, and from vending or amusement machines. There were both "walk in" and pre-booked customers. The Company's premises were prominently situated on the main A92 road between Dundee and Arbroath, at a location adjacent to other businesses such as a garden centre, gym, hotel and restaurants. The premises were held by the Company on a sub-lease from Dobbies. They had been lying empty from about 2018 until the sub-lease was agreed around the end of 2021 or the beginning of 2022. Their size and formation particularly lent themselves to the nature of the Company's business. The premises were fully fitted out for operation as an inflatable park. The inflatable apparatus had been purchased new, with the Company having been able to negotiate some deferment on paying the whole price, so that the cashflow generated from the first couple of months' trading was used to pay the outstanding balance of the cost. All of the initial capital costs were paid in full from the revenue of the first year's trading. The equipment was shown on the Company's balance sheet at cost less an annual depreciation charge. The realistic working life of the equipment was at least as long as the remaining duration of the lease, which was to run for a period of 10 years from 7 March 2022 at a rent fixed at £45,000 a year for the duration of the lease, paid monthly in advance, with an initial rent-free period of 6 months. There was a service charge of £5,000 a year, also paid monthly. A tenant-only break option was available on 7 March 2027, subject to one year's notice of intention to exercise it being given. The terms of lease were relatively advantageous to the Company because the premises had previously been

vacant for some time. Mr Davidson expected the Company not to exercise the break option and to remain in occupation at least until 2032.

[13] The Company used the Innoflate website for bookings, but the bookings themselves were processed by a third-party provider, with the website simply providing the contact point to that provider. Although the arrangements for the Company's operations had loosely been referred to from time to time as a franchise agreement, that was not accurate. There was nothing proprietary or exclusive in any of the operating methods, systems or equipment. Other similar businesses operated in very substantially the same way, and anyone who wanted to open a similar business could do likewise, buying the necessary equipment from third party suppliers and copying the operating methods without infringing anyone else's rights. If the Company was to sever its connection with Pinz it would require to re-brand away from the Innoflate name, since Pinz held the rights to that name and controlled the website. Mr Davidson did not believe that the Innoflate branding contributed to any material extent to the custom of the Company, or that any customer visited because the business was called Innoflate rather than something else. The brand and website were already in existence at the point the Company commenced trading so using them saved it the cost and effort of setting up its own. In addition to the use of the name and the website, Pinz provided the Company with various management services, mostly routine day-to-day operational or financial management, including payroll, banking, VAT returns, book-keeping and accounts functions, collation of data and preparation and presentation of monthly management accounts, and dealing with accountants for the statutory accounts, insurance brokers for the insurance and other third party suppliers. Pinz had an existing infrastructure and was already doing all of those things for its own units, so making use of that avoided the need to make new arrangements for the Company. The

Company paid two separate charges to Pinz. One was described as a "franchise fee" and the other as a "management charge". In the year to the end of 2022, the total cost of these charges was about £185,000. That was excessive and was imposed on the Company under improper threat of immediate and unplanned withdrawal of the services.

[14] The Company's trading had been successful. In addition to repaying all of its start-up costs in the first year, it also paid dividends of £72,000. It had positive cash flow and held a material positive cash balance.

[15] When the Company was set up Sarah Davidson was working closely with Pinz. She was employed by it and had a management role in relation to its wider business. That relationship deteriorated in August 2022 when it decided to remove her from that wider role. The Davidsons were unhappy about the way that was done but accepted that Pinz was entitled to decide its own future direction. At the same time Mr Margach and Mr Anderson had decided not to proceed with the separate joint venture company which had been set up. That company had never traded so there had been no difficulty with that. Although the relationship amongst the individuals effectively broke down at that stage, the Company would still have been capable of operating satisfactorily. It had day-to-day management in place and board decisions could have been made by email, with meetings virtually or in person a few times a year.

[16] The starting point of the real problem had been in agreeing the charges for management services. The original conception was that there was going to be a separate company which would be held 30% by the Davidsons and 70% by Pinz, which would perform the management function. However, before that arrangement got started, Pinz had changed their minds about it. That meant that terms had to be agreed with Pinz for the provision of services to the Company. In principle, there was no issue with that, since there

were things the Company needed to have done for it which Pinz had the capacity to do and which it was reasonable for it to be paid by the Company for doing. If the Company had not paid Pinz to do them, it would have had to pay others. Not much attention was paid to working out the detail of that in the early stages of the business, because cash flow had to be carefully managed and start-up costs repaid. It was only once that had been done and there was available cash for other purposes that attention turned to the detail of the figures. An initial discussion had taken place in which the principle of a charge was agreed, a number was allocated to it in the business plan, and it was left that the Pinz team would come back to the Davidsons with a detailed proposal for discussion. The dispute about management charges had come to a head in October 2022. While on holiday, the Davidsons had received an email from Chris McQuade, the Group Finance Director for the Pinz group of companies, who was performing the financial controller function for the Company. The email had attached to it a management profit and loss account, which was normal, but also had a number of invoices from Pinz to the Company for amounts that had never been proposed by Pinz, far less agreed by the Company. Payment had already been taken for some of those invoices from the Company's bank account. Mr Davidson had responded by email and correspondence ensued, resulting in the arrangement of a Teams call with Mr Margach and Mr Anderson on 17 October. On that call, without any prior discussion, they had said that they would remove the management services from the Company with immediate effect and close the business down unless terms were agreed. The meeting was fraught, with no real negotiation. There had been no proper reason for invoices to be raised without even a discussion of what the basis of calculation should be, and still less for payment to have been taken without agreement. After the call, the Davidsons felt that they had to do what was necessary to keep the business trading. If the services being provided by Pinz were

withdrawn immediately, the business would have had to close immediately and when or whether it could be re-opened was uncertain. Cash flow pressures would result from any prolonged period of closure. There was a risk of the Davidsons losing all of their investment in the Company. In those circumstances they decided to offer Pinz most of what they were demanding. Mr Davidson had sent an email on 17 October proposing some changes to the way in which the charges should be calculated, but essentially delivering around the same amount of money to Pinz, at least if the business performed well. Mr Margach had accepted that proposal in principle the same day, and various minor details were clarified in subsequent emails. It was said that Pinz would have their solicitors draft a management agreement, but none ever appeared. Invoices were then rendered monthly more or less on the basis agreed, although with some overcharge. The Davidsons agreed to these charges because they had had no realistic choice given the threat of immediate closure and the loss of the value of their investment. The charges levied were grossly excessive given the services which were being provided.

[17] Thereafter, the situation settled down, despite the Davidsons being unhappy with what had occurred and relations being further strained. The business was operating satisfactorily and was making good profits. The Davidson would have been prepared to let sleeping dogs lie and to get a dividend income, or to sell their stake in the Company, but no acceptable offer in that regard was made.

[18] In late 2021 all interested parties had agreed that the 50% shareholding in the Company held by Argyle could be transferred to the Davidsons personally. That caused no prejudice to Pinz. It had 50% of the Company beforehand, and still had 50% afterwards. There was some delay in recording the share transfer as it was unclear to Mrs Davidson how

that should be done on the Register of Companies. Eventually an outside adviser engaged by Mrs Davidson had dealt with the matter.

[19] At a meeting in Glasgow on 20 March 2023, Mr Davidson was told out of the blue that Pinz was terminating the provision of services to the Company and that it was also concerned about the transfer of shares from Argyle to the Davidsons. The same day the Davidsons received a letter from Mr Margach and Mr Anderson attached to an email from John McGee, the chairman of Pinz. It gave notice of termination of Pinz's services to the Company with one month's notice. A similar communication was received on 23 March suggesting that Mr Margach and Mr Anderson had only just found out about the share transfer, when Mr McQuade had noticed it when preparing the Company accounts, which was not true. Mr McQuade had been copied in on the details by Mrs Davidson at the time of the transfer. He had attempted to prepare a confirmation statement in April 2022 and, having failed to lodge that, had been copied into the confirmation statement as lodged by Mrs Davidson and showing the shareholding as changed, on 23 September 2022.

Mr Margach and Mr Anderson had demanded by the letter of 23 March 2023 that the Davidsons should resign as directors of the Company and should transfer their shares to Pinz for the nominal sum of £1 each. The letter stated that service provision would cease on 20 April 2023 and that the booking system would be closed to bookings made for events occurring on and after that date (although in fact that did not happen). A further email had been sent by Mr McGee on 27 March demanding a response by the following day and suggesting that failure to do so would be seen as a deliberate attempt at blocking an investigation into the share transfer matter. Mr Davidson replied on the same day, maintaining that there had been nothing underhand or improper about the share transfer, noting that the parties' relationship was broken beyond repair, and inviting proposals for an

agreed exit. Mrs Davidson had also sent an email that evening with a full explanation of what had been done in relation to the share transfer. The next day Mr McGee had replied raising, amongst other things, the prospect of an insolvent winding up, and offering the Davidsons £11,000 for their shareholding together with payment of a dividend of £2,000 each provided everything was settled and documented by 31 March. At this point matters had been passed into the hands of solicitors, through whom communications had thereafter tended to pass, given the difficulties in the relationships amongst the individuals concerned.

[20] The Davidsons' solicitors wrote to Mr Margach and Mr Anderson on 30 March 2023 rejecting the £11,000 offer but indicating that they were prepared to proceed by way of an independent valuation. The letter also raised the question of the notice to withdraw services to the Company and suggested that a reasonable period of notice was at least 3 months. Correspondence between solicitors ensued, in the course of which an offer was made that Pinz would buy the Davidsons' shares in the Company for £48,000 or else would sell its shares to them for £1 million. The 20 April deadline for withdrawal of services was extended until 20 June.

[21] The Davidsons were also provided with a copy of a letter dated 24 April 2023 from Scott Dunbar of Johnston Carmichael to Mr Margach. Johnston Carmichael were the accountants for all the Pinz companies and it had previously been proposed and agreed that they should also act in that capacity for the Company. Mr McQuade continued to do the in-house management accountancy work and he was the primary liaison with Johnson Carmichael for preparation of the statutory accounts. The Company was not subject to audit and all of the required data was already available from the management accounts, so getting the statutory accounts done was not a particularly major exercise. The letter from Johnston

Carmichael suggested that the Company was involved in a franchise arrangement with Pinz which could be withdrawn at any time, that the major element of the value of the business was tied up in that arrangement, and that the Company would have to cease trading if it was withdrawn.

[22] Court action had been commenced in May 2023, and interim orders had been sought to prevent Pinz from withdrawing services to the Company unless and until it had put in place alternative provision. That was intended to stabilise the situation for the duration of the court action. A series of short-term undertakings not to withdraw services, for a month or so at a time, was then given, which resulted in continuing uncertainty. The Davidsons had worked out a plan for replacing the Pinz services to the Company and a proposal in that connection had been sent by their solicitors to those acting for Pinz on 26 June 2023. That proposal was rejected and no counter-proposal made. Pinz owned the Innoflate name, the website domain name and related intellectual property rights, so a relatively straightforward re-branding exercise would have been required, involving a primary one-off cost with some recurring marketing costs. The Company's premises were the only inflatable park in the Dundee area, so there was very little prospect of the public being confused. The bookings were already run through a third-party provider with the Innoflate website being just the landing point from which customers were directed to the third-party provider, so that could be straightforwardly reconfigured to run in exactly the same way from a website exclusively used by the Company. A provisional assessment of the work the Company would have to do and the expenditure it would have to incur to replace the services provided by Pinz was carried out, and concluded that the following was necessary:

(i) Selection and engagement of a design and marketing agency to advise on the rebranding exercise, with an initial budget of about £10,000;

(ii) Selection and engagement of an IT contractor to design and build a website, with an initial budget of £15,000, and an ongoing monthly support cost of £2,500;

(iii) Engagement of a contractor to carry out digital and social media targeted advertising at a monthly cost of £2,500;

(iv) Replacement of signage at the premises and replacement of all other branded material;

(v) Selection and engagement of a contractor to provide external management accounting, bookkeeping and payroll functions, at a maximum budget of £25,000 a year;

(vi) Migration of the booking system service to the new website at a one-off cost; and

(vii) Recruitment and engagement of a general manager reporting to the board, with duties including cash flow monitoring and management, health and safety and regulatory compliance, organisation of insurance, liaison with external contractors such as accountants and insurance brokers; being a part-time post with an indicative budget of £30,000 a year.

If these steps were taken, the Company would have been able to trade at the same level as previously, and would have made significant cost savings from not paying Pinz, thereby increasing profits. Ultimately, however, Pinz gave an undertaking to maintain services through to conclusion of the court action so no alternative steps were actually required.

[23] There was no other indoor inflatable park in Dundee; the nearest one was in Perth, to where the local clientele would be unlikely to travel. To some extent other leisure offerings aimed at the same demographic were in competition with the Company for the finite amount of leisure spending in the area. The Company had enjoyed an initial novelty

value and perhaps there would be some downturn from the initial peak of trading activity. Mr Davidson expected the business to be broadly stable, with seasonal variations.

[24] In August 2023 the issue with the accounts came to a head. The deadline for lodging the Company's statutory accounts for the previous accounting period was 20 August. There was no general difficulty with the content of the accounts, which was derived from the management accounts. A draft was circulated, but warned that there was a concern about the Company's status as a going concern. There had been no correspondence or discussion amongst the directors, or between the Davidsons and Johnston Carmichael, about such a warning being issued. Pinz had simply instructed Johnston Carmichael to draw the accounts in that way, and they had done so. The Davidsons' solicitors wrote to Johnston Carmichael on 26 May 2023 drawing attention to the filing deadline, pointing out that the going concern warning was disputed, and asking for drafts for approval in good time. There was no response and a reminder was sent on 12 July asking for the draft by return. A reply from Johnston Carmichael appeared on 2 August, but just enclosed the same draft as before. As well as the going concern warning, that draft had an entry towards the end suggesting that the Company had future liabilities under the lease in excess of £5 million, which was obviously wrong given that the rent was £45,000 a year and the service charge £5,000 a year, the lease had already run for 18 months with a tenant break option at 5 years, and payments were fully up to date. The entry was more than twenty times higher than the most it could have been. There were also other more minor errors. A call between the Davidsons and Johnston Carmichael was arranged for 18 August. Mr Dunbar of Johnston Carmichael had said that the accounts were not audited and it was a matter for the directors, not Johnston Carmichael, to make the determination as to whether or not the Company was a going concern. He said that the going concern warning had been put in the draft accounts

on instructions from Pinz and that Johnston Carmichael had not at any stage given advice that it was necessary or appropriate. He made clear that he had given and would give no advice on whether or not the Company could continue to trade without the assistance of Pinz. He also said that it was not for Johnston Carmichael to broker some agreed position between two groups of directors who had a difference of opinion. Mr Davidson agreed with all of that and said so. The matter was left on the basis that Mr Dunbar would have a further discussion with Pinz and that any change in its position would be communicated to the Davidsons. Mr Dunbar had also recognised that the entry of more than £5 million for the lease liability was obviously wrong. He said the figure had been provided by Pinz and he would look to get it corrected. An updated figure for that liability of £450,000, which was said to have been provided by Mr McQuade and which was also obviously way too high, had subsequently been provided. The filing 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, and also agreed to the correction of the lease liability statement. The statutory accounts were lodged on 3 October. They showed that the Company was a going concern and had the lease liability at a total of £187,500, which was about right.

[25] As a direct consequence of what had happened with the accounts, the Company experienced a significant insurance issue. On 6 September Mr Margach had forwarded an email to Mr Davidson from the Company's contact at its insurance broker, Mr Chris Cole. Renewal of the Company's insurance was dealt with by Pinz as part of a general renewal involving all of the other Pinz sites, and input from the Davidsons on insurance issues was not routinely asked for. The broker knew that there was an issue with the accounts being drafted on the basis that the Company should be subject to a going concern warning, which

information must have come from Pinz. Mr Margach must have known when the broker first asked to see accounts at the start of August that there was going to be a problem unless the dispute could be resolved quickly, but had waited a month before telling the Davidsons about it. The Company paid its insurance premiums by monthly instalments, which allowed the cost to be spread through the year. That was technically a credit facility and there was at least some basic credit checking involved in getting it. However, the Company had cash in the bank and was in a position to pay the whole annual premium if need be. Mr Davidson telephoned Mr Cole, who asked what the position was about the Company having its management services terminated. Thereafter, Mr Davidson had been told that the insurer was not willing to offer cover. Mr Davidson was able to get an indicative quote for cover from an alternative insurer subject to a number of conditions, but Pinz had not co-operated with answering the questions which were posed. The insurance cover lapsed and the Company's premises had to be closed for about 3 weeks from late September until the matter was sorted out.

[26] The latest dispute had been about electricity. The Company occupied its premises on a sub-lease from Dobbies, which occupied and traded from a garden centre on the site while the Company occupied a section previously used by various concessionaires for retail purposes other than gardening activities. There was a single electricity supply which originally served the whole premises, which had originally been run by a single occupier as a unified business. The supply came into the Dobbies premises and was metered there. There was no separate supply and no separate meter for the Company alone. This had been the subject of some discussion at the point of negotiation of the lease, when Dobbies indicated that they might want to split the supply at some point, which would involve a new metred supply coming into the Company premises and the Company having its own

contract with a supplier. If that happened then the Company would have to enter into a contract with a supplier and pay its bills directly. Mr Davidson had contacted Andrew Horrix, Head of Concessions and Store Development at Dobbies, to try to find out what was happening and was told that Dobbies had a meter in its plant room that was able to measure all of the electricity going to the Company's premises. No one had taken any readings from it at the point the Company took possession of its site, so there was no historic reading from which one could ascertain directly the total consumption since it had been in occupation. There were nine sub-meters in the Company's premises, reflecting the fact that those premises had previously been sub-divided for retail use, and Dobbies had proceeded on the basis that the total readings from those meters would bring out the Company's total electricity usage. Mr Horrix had said that Dobbies wanted to have an amicable discussion about resolving the issue and would act reasonably in doing so. He had suggested that Dobbies could take readings from that point onwards at fixed intervals and invoice for the consumption in that period, and once sufficient data had been amassed to give an accurate picture of energy consumption, that could be used to work out the cost of the historic usage, and a staged payment plan to settle the historic balance could be agreed. However, Dobbies had then issued a further invoice on 15 December 2023 which bore no relation to any previous discussion and appeared to have been calculated by taking the cost of electricity that Dobbies had consumed before the Company took occupation and ascribing all increases in consumption after that to it. Various assumptions about the instance and constancy of consumption had been made. Mr Davidson had again contacted Mr Horrix, who had said he was now aware of the shareholder dispute and was leaving matters in the hands of the local manager. The sum requested by Dobbies from the Company would have to be negotiated. The consumption going forward could be measured accurately. The annual cost

would probably be between £40,000 and £67,000. The management charges that Pinz had levied on the Company had been calculated on the basis of a percentage of its EBITDA (Earnings Before Interest, Tax, Depreciation and Amortisation), which would reduce if electricity charges had to be paid to Dobbies, and would result in Pinz having to refund the Company 20% of whatever sum was ultimately agreed with Dobbies. In early January 2024, the Davidsons and Pinz had agreed to a joint approach to Dobbies, involving payment of instalments meantime and the gathering of usage data so that an accurate assessment of the sum owed could be made. That had been agreed to and was in the course of being worked through.

[27] In cross-examination, Mr Davidson further explained his business background in hotel and asset management. He was an experienced businessman who had been involved in many commercial negotiations and had been involved with his wife, through the medium of Argyle, in the "Whale of a Time" soft play centre in Glasgow.

[28] The Company had been able to get good terms for the purchase of its inflatable equipment due to the prior connection between the supplier and Pinz. He was not involved in the day-to-day management of the Company, and had only visited the site two or three times. In September 2022 it had been agreed that the business model using DRSA would not be used as initially intended and that the Company would operate as a franchise.

[29] He had never intended to have the Company set up with one share to Argyle and one to Pinz. It had simply been agreed that the shares in the Company would be held equally between the Davidson interest and the Pinz interest. Mrs Davidson had involved Argyle by mistake initially, subsequently altering the shareholdings in the Company so that each of the Davidsons had one share and Pinz had two. Argyle was a dormant company which had no assets. It owed about £33,000 in respect of a Covid-19 bounceback loan, which

he and his wife were covering, and about £50,000 in rent arrears, in respect of which an arrangement had been entered into with its former landlord. It was not insolvent and there was no realistic prospect of a liquidator being appointed to it. There had been no formal discussions or board meeting to approve the changes in the Company's shareholding. He had had no discussions about it with Mr Margach or Mr Anderson; Mrs Davidson had done that, and he was aware that the change was going to be effected around November 2021, although it did not actually happen until April 2022.

[30] At the end of the meeting on 20 March 2023, under the "Any other business" heading of the agenda, Mr McGee and Mr McQuade had said that Pinz had just found out about the share reorganisation and it was under investigation. Mr Davidson had been aware at that point that the reorganisation had taken place, but did not comment on it, saying that it was a matter for Mrs Davidson, who was unwell and absent from the meeting. He did not know who Mrs Davidson had approached for advice about how to effect the reorganisation. It transpired that it had ultimately been done by an accountant who had worked for the Davidsons and Argyle in the past, and her bill had been paid by the Davidsons as they were the ones who wanted the changes to take place. Although he could not remember exactly the conversation which had taken place at the meeting on 20 March, he was shocked that the matter had been raised in the way it was. He had been handed a letter saying that the business would close because of it, which he had read in silence so as to be sure to take its contents in. It had also mentioned a breakdown in communication amongst the individuals behind the Company, a failure to hold meetings, and rumours in the industry about the Davidsons (which he assumed related to an issue with the person to whom "Whale of a Time" had been sold by Argyle), and concluded by saying that the services being provided

by Pinz, and the Innoflate brand, would be withdrawn from 20 April 2023, although that had never actually happened.

[31] A subsequent letter dated 23 March 2023 had claimed again that Pinz had previously been unaware of the share reorganisation, that the Company's Articles had not been observed, that the shares should have been valued, and that Pinz would not have consented to what had occurred had it been asked. It demanded the resignation of the Davidsons from the board of the Company and the transfer of their shares to Pinz for £1 each.

[32] Mrs Davidson's position was that Mr Margach and Mr Anderson had agreed to the dissolution of DRS Limited and the setting up of DRSA Limited and had agreed to the reorganisation of the Company's shares at the same time. Nothing had been put in writing. Mr Davidson had been aware that it was happening, but was not aware of the exact timings.

[33] After this turn of events, the Davidsons' solicitor had written to Mr Margach and Mr Anderson offering to sell the Davidsons' shares at an independent valuation, given that the relationship between the individuals concerned with the Company had broken down beyond repair. Although the services being provided by Pinz had not been withdrawn, there was a lack of information and clarity about any way forward. Pinz had then offered to sell its shares to the Davidsons for £1 million, and they had made the same offer in return. Neither side had accepted the other's offer. Pinz had no right to control the Company's operating method, and Mr Davidson did not think that their branding was a particular attraction for customers. There was no customer survey or other evidence supporting the suggestion that it was.

[34] There had been a meeting of the members of the Company on 26 September 2022. It had formally agreed to dissolve DRSA Limited, which was just confirmation of something that had already been informally agreed. It was agreed that Pinz would provide

management services to the Company and the principle that it would be paid for those services was uncontroversial, but no amounts had been agreed.

[35] On 14 October 2022, Mr McQuade had issued the Company with invoices on behalf of Pinz. Mr Davidson had replied, disputing that the amounts invoiced had been agreed. Mr Margach and Mr Anderson had then got involved in a virtual meeting and subsequent emails. Proposals for a fee structure for Pinz had been put forward. Mr Margach stated that the alternative was for the Company to rebrand and for the Davidsons to run it themselves. Mr Anderson had threatened to go to the Company's site himself and remove the Innoflate branding if agreement was not reached immediately. The financial demands made were ridiculous. Mr Margach had asked for a franchise fee of 12% of gross revenue, when the original business plan which had been agreed had only put forward a fee of 4% of booked revenue. He also wanted to charge a management fee in excess of anything that had been agreed. Mr Davidson made counter-proposals, but only in the context of the threat to close the business imminently if agreement was not reached. Eventually agreement was reached on a fee structure of 12% of gross revenue as a franchise fee, 20% of EBITDA as a management fee, and 30% of excess profit over budgeted figures. Payment was made as agreed and the relationships between the individuals appeared to stabilise. A contract setting out the parties' agreement formally and in writing was promised, but never materialised.

[36] In June 2023 the Davidsons, through their solicitors, made a rebranding suggestion to Mr Margach and Mr Anderson. Mr Davidson had found out that a company called Inflatenation could provide services to the Company similar to those being provided by Pinz. He proposed that the Company could be run by its shareholders with the assistance of Inflatenation or a comparable service provider. It was a realistic proposition. A reasonably

positive response had been received, but it did not accept all of the proposals and looked to cut the anticipated costs of the exercise. No steps to implement the plan had ever been taken. Although Pinz ran the business very well, it was apparent that shareholder approval to move on from that situation would be difficult to get.

[37] Mr McQuade had sent management accounts for the Company to the Davidsons on 2 February 2023, to which no response or comment had been made. Towards the end of April, he had raised an issue about whether the Company could be treated as a going concern given the threatened withdrawal of the services of Pinz which had been made in March. At Mr McQuade's request, Johnston Carmichael, the accountants for the Pinz group, who had been asked to prepare the Company's statutory accounts for approval and submission, invited the Davidsons to a meeting to discuss the matter by letter dated 28 April 2023. All directors of the Company would have to sign off on those accounts before they could be submitted to Companies House. On the basis that it was not Johnston Carmichael's business to call a shareholders' meeting and that it was unclear what the agenda was going to be, the Davidsons did not attend the meeting or make alternative arrangements to discuss the matter with Johnston Carmichael until 18 August. They had not been provided with the draft statutory accounts until 2 August, despite their solicitors having asked for them at the end of May and again in mid-July. At the discussion with Johnston Carmichael on 18 August, their partner Mr Dunbar said that he had been directed to use the "not a going concern" basis for the Company's accounts. He said that it was not up to him to change that, even if presented with evidence that the Company was a going concern. The deadline for lodging the statutory accounts came and went. That caused the Company's insurers to refuse to renew cover and a crisis had thus been created, forcing the temporary closure of its business and damaging it. Mr Davidson had spoken to the insurance broker and informed

him of the dispute amongst the shareholders. The insurance lapsed on 5 October 2023 and was renewed on 12 October, retrospectively dealing with the gap in cover.

[38] The Company's lease from Dobbies could extend to 2032. On 9 November 2023, Mr Anderson had forwarded to Mr Davidson an email from Keith Lough of Dobbies concerning outstanding electricity charges due from the Company, said to amount to £59,000. Mr Margach and Mr Anderson wanted an urgent meeting with Mr Davidson about the matter, but in view of the imminence of the proof in these proceedings, he did not think it appropriate to engage directly with them. He contacted Mr Horrix of Dobbies to gain an understanding of the situation. On 15 December, Dobbies had issued the Company with an invoice for £130,000. Mr Margach had suggested that insolvency advice be taken, but Mr Davidson did not consider that necessary. In his view, the Company was devalued by what had happened, but not insolvent. The invoice presented was an estimate of the Company's liability which was not indubitably due and payable. Mr Davidson denied that he had caused Dobbies to send the invoice. After much to-ing and fro-ing by way of email correspondence, the directors of the Company had met on 4 January 2024 and a suggestion had been made as to how Dobbies might be approached, which gained general approval.

[39] Mr Davidson stated that he thought that the Company's inflatable equipment ought to last until the expiry of its lease in 2032, but accepted that Mr Margach would be better informed on that subject. He denied being a "silent partner" in the Company, saying that before the dispute broke out, he had discussed a variety of Company matters with the other individuals, and had participated in meetings, emails and decision-making.

[40] In re-examination, Mr Davidson stated that Mr Margach and Mr Anderson had not initially responded to a statement made by him and lodged in the court process just before Christmas 2023 setting out how he proposed the invoice from Dobbies should be dealt with.

[41] The initial start-up funds provided by the Davidsons to the Company had come from their own resources, not from Argyle.

[42] After agreement had been reached on the nature and level of charges to be made by Pinz in October 2022, he had expected to be provided with a contract detailing the services to be provided, the duration of the agreement and termination provisions, and had asked to see a draft, but nothing had been made available.

[43] The alternative proposals made by the Davidsons in June 2023 for the operation of the Company's business included hiring a manager to carry out higher managerial functions than those done by the existing manager on site, replicating some of the services then being provided by Pinz. Mr Margach and Mr Anderson appeared not to understand that, and had made no alternative suggestions. Progress could not be made without their co-operation.

[44] If Johnston Carmichael had responded more quickly to his solicitors' correspondence about the accounts issue, it could have been resolved more quickly and the accounts lodged timeously. He did not know why that had not happened.

[45] **Scott Dunbar** (39) gave statements to the petitioners and the respondents, to which he spoke. He stated that he was a Chartered Accountant and had been a partner in Johnston Carmichael for 5½ years, with a specific role in business advice. He acted for Pinz as its accountant and business advisor, and had been engaged to prepare the statutory accounts and corporation tax returns for the Company on 17 April 2023. In March 2023 he had been provided with the Company's accounting information for the period to 31 December 2022 by Mr McQuade. Subsequently Mr Margach had telephoned him to say that there was a dispute between the directors and that Pinz proposed to withdraw from its agreement to supply services to the Company. Mr Dunbar considered, on the basis of what Mr Margach had said to him, that that presented a material threat to the business as it had never traded

without that agreement in place and there was no evidence to suggest that it could trade successfully without it. He did not consult with the Company's other directors before reaching that view. Notes to statutory accounts prepared by Johnston Carmichael would always contain a paragraph about the views of the directors as to whether the business would continue as a going concern for 12 months after the date of signing the accounts. As there was material uncertainly about whether that would be the case if the agreement with Pinz was terminated, he communicated his concerns on that point to Mr Margach by letter dated 24 April 2023, which Mr Margach had asked him to write in order to get things in black and white to share with the other directors. He understood that Mr Margach would circulate the letter to them, but was not aware of any other agenda which Mr Margach may have had. The letter had been badly phrased and might have appeared too definitive about the effect of the withdrawal of the services on the Company; if so, that was his own mistake, and neither Mr Margach nor anyone else had indicated what he should write. He had written the letter in good faith and without any intention to mislead. The Davidsons could have raised any concerns they had about the terms of the letter directly with him, but did not. He subsequently wrote, at Mr Margach's request, to all the directors asking to meet with them to discuss the accounts before they were approved, but the Davidsons had not responded to that suggestion. Their solicitor had subsequently contacted him and Mr Davidson had expressed the view that the Company could remain in business without the agreement with Pinz. Mr Dunbar had requested evidence to support that view, but had not received it. In September or October 2023 Mr Margach had contacted him to say that it had been agreed that Pinz would continue to provide its services on the basis that they could be removed on 3 months' notice. On that basis, the Company's directors had agreed that the accounts could be approved and lodged on a going concern basis, which was done

on 3 October 2023. Mr Dunbar clarified that he did not advise any of the parties that the Company could not be described as a going concern. He had explained to Mr Margach in April 2023 what the concept of a going concern was and that a company could not be described as a going concern if there was a material uncertainty as to its ability to trade going forward. In that case, the directors had to report the issue in the accounts in terms of the FRS 102 accounting standard. He had told Mr Margach that the dispute between the shareholders was something that the directors needed to assess, especially taking into account the removal of the franchise agreement and withdrawal of the services under it. The question was whether in the directors' opinion that created a material uncertainty as to the Company's continued ability to trade.

[46] In further examination in chief, Mr Dunbar stated that he had acted for some time for Pinz and its associated companies, and for the Company since 17 April 2023. The going concern issue was one for the Company's directors, in co-operation with their appointed accountants; all he could do was offer advice about the relevant financial reporting standard. The trading figures themselves gave rise to no issue about whether the Company was a going concern. He had discussed the matter with Mr Margach, who was his point of contact for the Pinz companies. He had not initially met or spoken with Mr Davidson, and had never met or spoken with Mrs Davidson. A draft of the proposed statutory accounts had been prepared by about the end of April or the start of May 2023. The draft suggested that the Company might not be considered to be a going concern. Generally a draft was formulated for the purposes of review and discussion. It was possible that the draft had only been sent at that time to Mr Margach and Mr McQuade. There had been emails and some calls with them. Had he known that there was a dispute amongst the shareholders, he would have sent the draft to all of the directors. He had learned that there were court

proceedings in dependence through Mr McQuade and Mr Margach, and thus that solicitors had been instructed, around May 2023. He did not recall contact with any solicitors at that stage; he was aware in general terms that the dispute was about shares, but had not asked to see, or been shown, the court papers. The matter had nothing to do with the going concern issue as far as he was concerned. He had considered whether Johnston Carmichael had a conflict of interest, but it was not giving any opinion or advice about the subject-matter of the dispute, just about the statutory accounts. That advice (concerning the going concern issue, but not the consequences of the Company being deemed not to be a going concern) was given to all of the Company's directors, and it was up to them to form their own view. Mr Margach was concerned about the Company's future, and in particular how it could continue in business should the services being provided by Pinz be removed.

[47] The going concern issue had initially been raised by Mr Margach calling him in April 2023 and explaining the dispute, which was said to be about the share reorganisation which had taken place, causing a divide and lack of trust amongst the shareholders. It was said that an application had been made to remove the Innoflate brand and the support being provided by Pinz to the Company, causing uncertainty about the future. A material uncertainty was all that was needed to require the going concern issue to be considered. Mr Dunbar had said that the impact of the proposed withdrawal of services on the Company had to be considered. It was not until 18 August 2023 that Mr Dunbar had heard from Mr Davidson that he had a different view from that of Mr Margach as to the effect that the removal of the brand and services would have on the Company's ability to carry on business. Mr Dunbar told Mr Davidson then that he would draft the accounts on a going concern basis if he was provided with a suitable business plan and projections. Johnston Carmichael had to be satisfied that drawing the accounts on that basis would be a

responsible thing to do. If Pinz withdrew its brand and services, there would have to be a restructuring exercise, which would not be simple.

[48] Mr Dunbar believed that he had sent the draft accounts to the Davidsons on a couple of occasions. Their solicitors had written to him asking for them on 26 May 2023, but he was aware of issues amongst the shareholders at that stage and did not send the accounts or contact the solicitors or the Davidsons. He was concerned about confidentiality and forwarded the solicitors' email to Mr Margach, Mr Anderson and Mr McQuade. Mr Margach and Mr Anderson had authority to say that it would be in order to send the accounts. He could not remember speaking to them, and did not reply to the solicitors. He was very busy at the time, as Johnston Carmichael's financial year finished at the end of May. If the Davidsons themselves (as opposed to their solicitors) had asked for the accounts, he would have provided them without asking Mr Margach and Mr Anderson. When the solicitors chased for a response after 6 weeks or so, he had communicated again with Mr Margach and Mr Anderson and the draft accounts had been sent to the solicitors. No one had told him to delay sending the accounts. In sending them, he had said nothing about the going concern issue - it had probably escaped his attention at that point. The draft accounts had contained an error about the Company's liability under its operating lease, stating that to be £5 million rather than the true figure of £150,000 to £160,000. Johnston Carmichael had not had a copy of the lease when drafting the accounts and had stated the liability on the basis of the information available to it at the time. He could not recall what, if anything, Pinz had said about the error.

[49] On being referred to FRS 102, the relevant accounting standard, Mr Dunbar maintained the position that the termination of the Pinz services was a material uncertainty for the purposes of the standard. He had given no advice about the directors' options. In

early October 2023, it had been decided that the Pinz services would not be withdrawn, thereby removing the material uncertainty. As at the date the accounts were signed off by the board, there was no evidence that the services or the Innoflate brand were to be withdrawn, so there was no relevant uncertainty.

[50] In cross-examination, Mr Dunbar repeated that he thought that he had sent the draft statutory accounts to all directors of the Company by the end of April 2023. Any of the directors could have asked for them, especially when invited to the meeting to discuss them, but the Davidsons had not done so at that stage. The meeting had been intended for the purpose of presenting the accounts, going through the figures, and discussing the going concern issue.

[51] Had he been aware of Mr Davidson's views about the effect of the withdrawal of services on the Company, he would still have advised that it was a matter that needed to be considered from the going concern point of view. Johnston Carmichael was entirely neutral. It had not been asked for insolvency advice concerning the Company, and had had no engagement with the solicitors acting for Pinz at the time. The deadline for submission of the Company's statutory accounts had been extended to 20 August 2023.

[52] Nothing of further relevance was stated in the course of Mr Dunbar's brief re-examination.

[53] **Sarah Rose Davidson** (42) adopted principal and supplementary statements in which she stated that her professional background was in hospitality and hotel management and that in recent years she had been involved in owning and managing the "Whale of a Time" soft play centre in Glasgow. She got to know Mr Margach around August 2020, when the Scottish soft play and children's entertainment venue industry was working together to lobby the Scottish Government for funding to support its businesses which had been closed

as result of Covid-19 restrictions. She, Mr Margach and two others had led that group and were in regular communication in connection with its affairs. She first met him and Mr Anderson in person on 8 June 2021 at a protest at the Scottish Parliament about the ongoing closure of their businesses. Afterwards, she visited the Innoflate facility in Livingston. Mr Margach had already mentioned to her that he and Mr Anderson were looking for investors and partners who had skills to support the growth and development of the Innoflate business. After discussing the matter with her husband, she came to the conclusion that that was something in which they would be interested. They agreed to work together at the end of July 2021 and she became Operations Director of Pinz on 30 August, having agreed to open new Innoflate-branded properties together on a 50/50 joint venture basis. She initially worked for no salary to show her commitment to the business in the expectation of future dividend income. The Monifieth site was identified as the first site where the joint venture would operate. The Company was set up to take the lease of that site and trade the business. It was set up online by Mrs Davidson while she was on a telephone call with Mr Margach and Mr Anderson on 20 August 2021. She was unsure of exactly what she was doing and initially listed only Mr Margach as a director, even though it had been agreed that both the Davidsons, Mr Margach and Mr Anderson would all be directors. She had realised and pointed out her error in the course of the call. The Davidsons and Mr Anderson had been added as directors on 12 October 2021, without any resolution to that effect having been made. Ownership of the Company was to be split equally between the Davidson interest and the Pinz interest. Mr Margach and Mr Anderson wanted Pinz to hold its interest directly and Mrs Davidson had followed that example by having the Davidsons' interest held by Argyle, of which each of them owned half. Mrs Davidson was not aware of the legal requirement to keep a register of members of the

Company and none was kept. Nor had the Registrar of Companies been informed of any desire on the part of the Company to use the public register in lieu of keeping its own. No share certificates had been prepared or issued when the Company was set up.

[54] She also set up DRS Leisure Ltd as a vehicle to capture the franchise fees for the businesses to be opened and in the course of time for head office costs in relation to all the businesses yet to be set up. That company was owned to the extent of 70% by Pinz and 30% by Argyle.

[55] Mrs Davidson's role involved the operational day-to-day running of the Innoflate sites, including the creation of Standard Operating Procedures (SOPs) for the cafes and for parties, and inflatables maintenance and general management. She also dealt with the purchasing and procurement of food and beverages, managed the relationship with the human resources and health and safety advisers, dealt with recruitment and human resource issues for the senior team and supported the implementation of the booking system. She visited the central belt sites during her working week and the Aberdeen site less regularly. She sourced a new uniform and sock supplier for the group. For the Company, she procured and purchased all of the food and beverage and office equipment, purchased all the cleaning and disposable products, recruited and created all human resource information for 34 team members, wrote the induction booklet and created various SOPs. She trained the café team, created the food safety folder for the site, and liaised with the Environmental Health function of Angus Council.

[56] Around late 2021, Mr Davidson had come to appreciate that the Davidsons' interests in DRS Leisure Ltd and the Company were held by Argyle and suggested to her that that was inappropriate since all investment had come and would in future be coming from the Davidsons personally. Mrs Davidson spoke to Mr Margach and Mr Anderson about

changing the shareholdings in DRS and the Company into the names of the Davidsons personally, and they said that they were content with that. Mrs Davidson visited the Companies House website, but was unsure how to effect the requisite changes. As DRS had not yet traded, she agreed with Mr Margach and Mr Anderson that that company should be dissolved and a substitute created. That was done at the end of 2021, and all of its directors agreed to it. A new company, DRSA Leisure Ltd, was created in the course of a call with Mr Margach and Mr Anderson on or around 6 January 2022. Its shares were held, as they knew and agreed, to the extent of 70% by Pinz, 15% by Mr Davidson, and 15% by Mrs Davidson.

[57] In relation to the Company, it was already in the course of negotiations with Dobbies about the lease of the Monifieth site and so could not simply be dissolved. Mrs Davidson spoke to the group accountant for Pinz, Hazel Croudace, but was not confident in asking her to make the desired changes. She spoke to Mr Margach on the telephone on or around 24 April 2022 and told him that she had still not made the changes. She asked him if it would be in order if she asked the accountant that she was using for Argyle to make those changes. He agreed and she accordingly instructed Jacqueline Pollock of JPS Bookkeeping to do so, which she did, charging a fee accordingly. Mrs Davidson told JPS that the shareholding was to change to 50% to Pinz, 25% to Mr Davidson and 25% to herself. On 23 September 2022 she had received an e-mail from Mr McQuade, group finance director for Pinz. He copied her a letter from Companies House stating that the confirmation statement for the Company was overdue. He indicated that he had tried to lodge the statement but had been unable to log onto the Company's account on the system to do so. He asked her to attend to it and confirm that she had done so. She had JPS deal with it and sent a copy to

Mr McQuade on 28 September by way of confirmation. The confirmation statement showed that the shareholdings had been re-arranged. Mr McQuade raised no queries.

[58] At the beginning of July 2022 Mr Margach had stopped speaking to her as he and Mr Anderson had decided that they no longer wanted to continue in a joint venture with the Davidsons. She had a phone call with Mr Anderson on 5 July 2022 when he told her that he and Mr Margach no longer wanted to continue with joint ventures but did still want her to work for Innoflate. She and Mr Davidson had visited Mr Margach and Mr Anderson on 8 July 2022. In the course of that meeting, the latter had said that they had a large tax bill to pay and had no funds to pay it. The Davidsons agreed that the loans made to the Company by Pinz could be repaid before loans due to the Davidsons. It was agreed that the Davidsons had experience in hospitality and finance which Mr Margach and Mr Anderson did not have, and that matters should continue as before. At that point there were four potential sites under consideration, at Inverness, Ayr, Glasgow and Dunfermline. A set of inflatable equipment was bought by the Company at an online auction on 20 July 2022 for around £14,000, with the intention to use it outdoors in the summer or to keep it to fit into new premises in the future. Funds from the Company were used for this purchase.

[59] After the Davidsons returned from holiday in August 2022 Mrs Davidson experienced difficulty in getting Mr Margach or Mr Anderson to meet with her, eventually managing to do so only virtually on 22 August. The call seemed very strained and communication afterwards was sparse. It became apparent to Mrs Davidson that decisions she would normally be involved in were being made without her, and emails were being exchanged on operational matters without her involvement. Towards the end of August Mr Margach told her that he had changed his mind again about the joint venture and definitely did not want to move forward with it. He told her that he had started to involve a

person called John McGee as a consultant on business strategy. That surprised Mrs Davidson, as Mr Margach and Mr Anderson had previously told her that that Mr McGee had been expensive to work with, as well as being incompetent. She was also told on that call that an approach had been made to Mr Margach by a third party to purchase all of the Innoflate sites. She arranged a call with herself, Mr Davidson, Mr Margach and Mr Anderson later that week to discuss the offer. On that call they agreed to discuss the joint venture at a later date depending on the outcome of the purchase offer. Mr Margach had stated that the offer was for £19 million and valued the Davidsons' shares at around £2.5 million.

[60] On 29 August 2022 she was told by Mr McQuade that John McGee had joined Pinz as Chairman. She had not previously been aware of this, although Mr Margach and Mr Anderson subsequently claimed that she had been. It became clear to her at that point that a move was being made to remove her from her role. At a prearranged meeting on 30 August 2022 Mr Anderson had told her that he and Mr Margach did not want to do further joint ventures with the Davidsons but did want Mrs Davidson to continue to work for Pinz for the meantime. She said that in that case she would have to be paid the proper amount for the role, having worked from August to December 2021 for nothing. When the amount of a salary was discussed, Mr Anderson stated that in fact her job could be taken on by the general managers and that she would not be further required. She was thus effectively dismissed without notice, severance pay or appropriate processes being followed. On 30 August she had requested the holding of a shareholders' meeting of the Company, which took place on 26 September and agreed the basic points of how the Company would be run thenceforward. In October, invoices had been rendered by Pinz to the Company and money taken from its account without any opportunity for it to discuss or challenge them.

Mrs Davidson emailed to challenge this on 16 October 2022 without response, but at a virtual meeting with Mr Margach, Mr Anderson, Mr McQuade and Mr McGee the Davidsons were in essence told to accept what was happening or see the business close. She felt that there was no choice but to accept what was being done to protect the business in the short term. Thereafter, the general manager at Monifieth had been promoted to group operations manager and assumed the role Mrs Davidson had previously been doing.

[61] In further examination-in-chief, Mrs Davidson stated that she and her husband had not been sent the Company's draft statutory accounts at the end of April 2023.

[62] In cross-examination, Mrs Davidson gave further details of her own business background in hospitality and soft play, repeated her husband's evidence about Argyle, and confirmed how she had met Mr Margach. All four individuals involved in the Company had first met in June 2021, and they had first viewed the Monifieth site on 25 July 2021. She was unaware of any pre-existing negotiations between Pinz and Dobbies regarding a lease of the site, believing that nothing of the kind would have happened during the pandemic. The four had met again in Nairn on 26 July and had agreed to work together. She was to be the Operations Director for the Innoflate Group, ie the Pinz businesses involved with inflatables. She was the sole director of Argyle, her husband having resigned as such before the company took a Covid-19 loan. She had used the loan to pay Argyle's staff, heat its premises, and for general business expenses. She had refurbished the assets of "Whale of a Time" during the pandemic, and had then sold those assets. Her husband had noticed that Argyle had mistakenly been made a member of the Company, and asked her to rectify that. She discussed the proposal to remove Argyle as a shareholder, to give one share each to herself and her husband, and another one to Pinz, with Mr Margach and Mr Anderson, who agreed with it. Their denials of that were wrong. There had been no board meeting, and no

emails or text messages dealing with the matter, as they were her best friends; they spoke many times a day and she trusted them. The matter had not been "fixed" behind their backs. She had not asked Johnston Carmichael for help in effecting the reorganisation. They were not the Company's accountants at that stage. After realising that she did not know how to do it herself, she had contacted Jacqueline Pollock to do it for her. Mr Margach and Mr Anderson did not know her, but knew that Mrs Davidson was instructing her. Ms Pollock had billed the Company for her work, but should have billed the Davidsons as they were the ones who wanted the work done.

[63] Mrs Davidson thought that in her role as Operations Director for the Innoflate Group she had technically been employed by the company running the Innoflate site at Livingston. She, Mr Margach and Mr Anderson had operated the businesses, not Mr Davidson. It had been agreed that future Innoflate sites would be 50/50 joint ventures between Pinz and the Davidsons, and a 70/30 split had been proposed and agreed for the levying of franchise fees for all sites, through DRSA, with the Davidsons having the minority share. Their expected receipts from the future sites and from DRSA made the joint venture more attractive to them. Mrs Davidson had initially worked without salary as Operations Director, with a restricted salary of £30,000 a year from December 2021. However, by early July 2022 Mr Anderson had told her that there would be no future joint venture sites.

[64] At the end of August 2022, John McGee had been appointed Chairman of the Pinz Group, including the Innoflate sites. Mrs Davidson was not happy about that. On 30 August there had been a meeting at the Pinz offices in Hillington, Glasgow, to discuss the way forward for Innoflate. She had asked to meet with Mr Margach and Mr Anderson in private. Mr Anderson told her that there would be no new joint ventures, but that she should continue to work for the Innoflate group. She had asked for a salary of £75,000, but

Mr Margach had refused that, saying that she had the dividends from the Company as additional remuneration. Then Mr Anderson had said that they did not want to work with her. She had not resigned her position, but rather had been told that she was no longer wanted. They had agreed to find a way to continue to work together in some way.

[65] On 26 September 2022 there had been a meeting of the shareholders in the Company to discuss the way forward. It was agreed that DRSA would be dissolved and that Pinz would continue to provide services as before to the Company. Then, on 14 October, Mr McQuade had issued invoices to the Company on behalf of Pinz. The next day her husband had complained about the invoices, as there was no agreement in place dealing with the rates which Pinz could charge, only that its genuine operating expenditure in connection with the Company would be paid. He wanted a resolution to the matter within 48 hours, and a refund of the money which Pinz had taken in respect of its charges from the Company's account. Email exchanges with Mr Margach had ensued, and it became clear that there was disagreement about what had been agreed at the September meeting. There was no disagreement in principle about Pinz being paid for the use of the Innoflate brand and for running the Monifieth site, just about the amount of the charges. There had been a Teams call during which Mr Margach had raised the option of "debranding" the site and leaving the Davidsons to run it. He had made certain proposals about the charging basis which Pinz wanted, and Mr Davidson had made counter-proposals. Ultimately agreement had been reached.

[66] On 2 February 2023 Mr McQuade had sent out to the Company's directors draft final year end accounts, and had invited any comment. The Davidsons had made no comment. Mrs Davidson had already agreed that Johnston Carmichael would complete the Company's statutory accounts. At a meeting on 20 March 2023 attended by her husband but not by her,

a letter from Pinz had been handed over indicating its wish to terminate the existing arrangements with effect from 20 April and setting out reasons for that. One reason was the share reorganisation which Mr Margach and Mr Anderson had known about and agreed to. A similar letter had followed on 23 March, further complaining that the Company's Articles had not been complied with in relation to the share reorganisation, and asking for the Davidsons to resign as directors and transfer their shares to Pinz. On 27 March, Mrs Davidson had emailed Mr McGee, setting out her position that Mr Margach and Mr Anderson had known of the proposed reorganisation and had approved it at the same time as they had agreed to the dissolution of DRS and the setting up of DRSA. All of the directors of DRS had signed the requisite papers to dissolve it. Mr Margach had agreed to the use of JPS Bookkeeping to carry out the reorganisation in April 2022.

[67] On 25 April 2023 Mr McQuade had emailed the Davidsons to say that Johnston Carmichael was raising issues about drawing the Company's accounts on a going concern basis. A letter had then been sent by Mr Dunbar inviting the Company's shareholders to a meeting at the Johnston Carmichael offices in Elgin. The Davidsons had not replied, and no meeting had taken place. On 9 November 2023 Mr Anderson had emailed the Davidsons suggesting that a board meeting of the Company take place to deal with the electricity charges issue that had been raised by Dobbies. No reply had been sent. Similarly, a suggestion by Mr McQuade on 10 November that it would be wise to have a shareholders' meeting to deal with the electricity charge issue had not been responded to by the Davidsons. Various other requests from Mr Margach and Mr Anderson for a meeting about the issue had not been acceded to. After Dobbies had issued their invoice on 15 December, Mr Margach had complained about lack of engagement from the Davidsons on the matter, and Mr Davidson had replied pointing out the issues which existed between the parties and

noting that the invoice was an estimate rather than an established liability of the Company and was not a matter requiring urgent attention in the whole circumstances. The Davidsons had taken legal advice on any communications from Mr Margach. Finally, on 2 January 2024, Mr Margach had called a directors' meeting for 4 January and on 3 January Dobbies had issued an invoice for £134,000, demanding payment within 7 days. The board meeting took place with all four directors present, and it was agreed that an approach should be made to Dobbies along the lines of a suggestion made by Mr Davidson. Mrs Davidson was prepared to attend any board meeting of the Company which was properly called.

[68] In re-examination, Mrs Davidson stated that an approach had been made to Dobbies after its exact terms had eventually been agreed by Mr Anderson, and that Dobbies had accepted the suggestion as to how to establish and pay off the electricity liability of the Company at once. The liability would involve the Company in VAT reclaims and entitle it to a refund of an element of the management charges levied by Pinz, as it would require a restatement of historical earnings and profit.

Respondents' case

[69] **John McGee** (58) stated that he had a background in running successful businesses in the UK and USA, and had been involved in various public sector regeneration and redevelopment projects. He had been Chairman of the Pinz group since 29 August 2022, working on a paid consultancy basis 3 to 4 days a week.

[70] He had first got to know Mr Margach in February 2018 after having been contacted by him by telephone, and having met him the following day to discuss the business vision which he and Mr Anderson had. They believed that he was someone who could help them deliver a sustainable future for the Innoflate brand, and he agreed. He was assigned a role

creating the strategic approach in the Innoflate business. Innoflate had an extensive reach in the market and there was widespread recognition of the value it provided to local communities. Scottish Enterprise had facilitated workshops to allow the brand to be expanded to a larger audience, and offered a grant and access to legal services provided by Harper Macleod. Advice had been given on what the appropriate franchise fee rate might be, and Harper Macleod had identified a rate in the region of 12-16% of gross revenue, which could have been reduced to 8-12% of gross revenue should the franchisee have hands-on day-to-day park management. The franchisee got the value of a recognisable and respected brand, which in turn led to increased profitability. A franchisee could not simply drop the Innoflate brand and have a business of the same calibre or profitability. The franchise fee also covered things like on-the-ground support, assistance with negotiating lease terms, sourcing of materials necessary for the running of the venue at competitive prices, and staff training. The business model also involved a management fee, in exchange for which the franchisee was provided with management services, including day-to-day management of the venue, the administration of health and safety policies and procedures and general compliance. The franchisee also had the benefit of the Innoflate website, booking system and database of themed events. Mr McGee had ceased working with Innoflate in November 2019 after an issue arose about co-operating with the former tenant of a site being opened at Cumbernauld, but remained on good terms with Mr Margach and Mr Anderson.

[71] In August 2022 he had received a call from Mr Anderson asking for a meeting, which took place the following week. Mr Anderson had asked whether he would consider taking a role as Chairman of the Pinz group, and he had agreed. He had not been involved with the set-up of the Innoflate Monifieth site, but understood that it was a joint venture between

Pinz and Argyle, which was owned by Allan and Sarah Davidson. He was introduced to Mrs Davidson at a meeting on 30 August 2022. At the meeting, Mrs Davidson had asked to be left alone for a period with Mr Margach and Mr Anderson, and afterwards it transpired that she had resigned from her position. It was becoming clear that there was a problem in the relationship between Mr Margach and Mr Anderson on the one hand, and the Davidsons on the other. He had subsequently joined a virtual meeting with the Davidsons on 17 October 2022, in the course of which Mr Davidson was disrespectful, arrogant and bullish. He had put that to Mr Davidson, who had shrugged it off with smirks. Mr McGee had suggested to Mr Margach and Mr Anderson that further contact with the Davidsons should be by himself and Mr McQuade. It was subsequently discovered that Mrs Davidson had been engaging with competitors to establish if they would be interested in purchasing the shares in the Company controlled by the Davidsons.

[72] The straw that arguably broke the camel's back was when Mr McQuade uncovered a transfer of shares in the Company, and found an accountant's invoice for doing that addressed to Innoflate but which had been paid directly by Mrs Davidson. A meeting to address the matter was fixed for 20 March 2023, although Mrs Davidson was unable to attend. Mr Davidson had been provided at the meeting with a copy of the relative invoice, which greatly surprised him. He said that he did not know about the matter and would ask Mrs Davidson about it. She had subsequently claimed that she had discussed the matter with Mr Margach in April 2022 and that he had agreed to it.

[73] Advice was sought from the company solicitors, and thereafter an email had been sent to the Davidsons offering options for moving forward. The options were either dissolving the Company or seeking to buy the Davidsons out. The Pinz team considered that the main value of the Company rested with the Innoflate brand and that if that were to

be withdrawn, it would either have no or only nominal value. The Davidsons had offered no realistic plan for the continuation of the business.

[74] Mr McQuade had raised the issue of whether the Company could be described as a going concern, and the solicitors acting for Pinz had confirmed those concerns, which Mr McGee shared. Pinz had continued to engage with the Davidsons subject to legal advice, but had not received co-operation.

[75] In further examination-in-chief, Mr McGee further explained his history with the Pinz group and noted that the Innoflate concept was in his view a unique opportunity to help people with mental or physical health issues, which was what attracted him to it.

[76] In cross-examination, Mr McGee stated that he had had discussions with Mr Margach and Mr Anderson in September 2022 in which it was agreed, probably on his suggestion, that he and Mr McQuade should represent the Pinz group in meetings with the Davidsons. He had offered his services in this regard to try to facilitate meetings. The Davidsons agreed that it would be a good way forward. He was not a member of the board of the Company and did not attend any of its board meetings.

[77] In the lead-up to the meeting scheduled to take place on 20 March 2023, Mr Davidson had circulated a proposed agenda with nine items on it, and Mr McGee and Mr McQuade had done the same with an agenda that had five items on it, with some degree of overlap. The heading of "communication" on the draft agendas was to enable discussion of the way forward for the Company. That included the share reorganisation issue. A lot of discussion had gone on amongst Mr Margach, Mr Anderson, Mr McQuade and himself about that matter before the meeting, to make sure that they were right and had all the facts about what had happened. Mrs Davidson had been unwell and had not attended the meeting. It was professional in tone and content. Pinz was looking at its options in order to

protect its brand and staff. Many options were looked at. One was to withdraw the services and brand provided to the Company by Pinz with effect from 20 April 2023. It was clear that the Davidsons' thoughts and values were at odds with those of Pinz. Mr Davidson had behaved unprofessionally at the Teams meeting which had taken place in October 2022, and in the way in which he expressed himself in emails, and Mr McGee had chided him for that. The differences between the Davidsons and Pinz had not simply come to light for the first time in the course of the meeting in March 2023. Mrs Davidson had been attempting to interest competitors of Pinz to buy the Davidsons' shares in the Company. That was not honest or ethical. It was not good for the brand or for mutual trust and respect amongst the shareholders. It should have been discussed amongst them.

[78] At the meeting on 23 March, everything on the joint agenda was discussed. The Pinz representatives wanted to find out from the Davidsons who had paid the invoice of the accountant who had done the reorganisation, and why. No games were played, but the Pinz interest wanted to get its ducks in a row and decide what to do. Mr Davidson had appeared composed, but looked shocked when the share reorganisation issue was raised. He said that he was sure that Mrs Davidson would have the answers to the questions being posed.

[79] At the conclusion of the meeting, or possibly afterwards, a letter which had been composed with the benefit of legal assistance was provided to the Davidsons. Mr McGee had had no input into its composition, and it was not discussed at the meeting. A further letter had been emailed on 23 March to the Davidsons by Mr McGee as the appointed Pinz communicator. Again, it was composed with legal input and he could not recall whether he had seen it in draft form. It was simply a suggestion as to a way forward, namely the withdrawal of the brand and services from the Company. Pinz had to consider the message it was sending to the industry, government and local councils if it continued to be associated

with the Davidsons and their behaviour through the Company. The letter gave some sense of direction for the Company. The services and brand had never actually been removed as the letter suggested. There had been no intention to damage the business of the Company.

[80] On 27 April 2023 Mr McQuade had emailed the Davidsons, having talked to Mr McGee and the solicitors then acting for Pinz, trying to get a meeting about the going concern issue. Scott Dunbar had been asked to draft an invitation to the meeting, as Mr Davidson often did not respond timeously, or at all, to communications from Pinz. The meeting was to go over the draft statutory accounts face-to-face and get a solution for progressing the accounts towards signature that would work for everyone. Draft accounts had already been circulated. Mr McGee was not aware of what Johnston Carmichael had advised about the going concern issue. The idea was that he and Mr McQuade would attend the meeting; he did not want Mr Margach or Mr Anderson to be in the same room as the Davidsons. There was nothing untoward about the suggested meeting at all. If agreement about signing the accounts had been reached at the meeting, they would have been signed by Mr Margach and Mr Anderson afterwards. Mr McGee was unaware of the deadline for lodging the signed accounts at Companies House. He and the others at Pinz were simply doing their best to resolve the issue while still running all the Innoflate sites.

[81] Pinz was an approved supplier to the Scottish Government and had been referred to Harper Macleod as respected franchise lawyers. Various workshops had been attended, and percentages for franchise fees discussed, all of which would be subject to negotiation. A franchise agreement had never been entered into between Pinz and the Company. He could not remember the details of what had been agreed about fees and charges in October 2022. The meeting in that month had been very heated, and various emails had been exchanged. The drafting of a formal franchise agreement would have been left to the

legal team, but then the share reorganisation and other issues were discovered, and no draft agreement was ever sent to the Davidsons.

[82] In re-examination, Mr McGee confirmed that he was not a member of the Pinz board. The relationship between Mr Margach and Mr Anderson on the one hand, and the Davidsons on the other, was fragile and the idea of Mr McGee attending meetings with the Davidsons on behalf of Pinz was to assist with the process of exploring options. He was not there to sign off on anything. The first Teams call he had attended between the Davidsons and Mr Margach and Mr Anderson had seen considerable aggression being directed by Mr Davidson at them, and it was discussed and agreed then that Mr McGee would represent them in meetings and correspondence thereafter.

[83] The agenda circulated for the meeting on 20 March 2023 included an item which permitted discussion about the share reorganisation issue which had been discovered and how to deal with the situation. There was no ambush at the meeting; that was not Mr McGee's way of operating. He was aware that Mrs Davidson had been trying to sell the Davidsons' shares to a competitor; it was a fact, not merely a rumour. That undermined the business.

[84] Mr Margach and Mr Anderson were concerned about the share reorganisation. They were honest, decent individuals whom he had known since 2018 or 2019. That something like that had been done behind their backs was very disturbing.

[85] **Darren Margach** (30) stated that he was the Chief Executive Officer of Pinz Bowling Group, the business interests of which included a bowling alley in Elgin, and six Innoflate sites across Scotland and Wales, being Monifieth, Livingston, Cumbernauld, Dundee, Newport and Glasgow, together with the Beach Bar in Aberdeen,. The venues (except that in Wales) were owned by operating companies wholly owned by Pinz. It was originally set

up about 10 years ago, initially ran a bowling centre in Elgin, and latterly had become the holding company for all the Pinz Bowling, Innoflate and Beach Bar sites. It provided the executive team and management services to those sites. He had been employed by Pinz for 10 years, operating the business during that period. His day-to-day responsibilities involved the expansion and quality control of the business, providing the highest standards for customers, and engaging with internal and external stakeholders to that end. He oversaw the executive team and ensured that the business ran efficiently with best use of resources. He had previous management experience with "Bowl 2000" before a management buyout in 2013 resulted in that company becoming Pinz.

[86] The Company traded the Monifieth Innoflate site and was a partnership between Pinz and Argyle. It was established to operate the site under an agreement to franchise the Innoflate brand owned by Pinz. The site operated an inflatable park, capable of handling 120 participants per hour, with ancillary arcade, café, spectator area and two party rooms. There were 28 employees including local management. The Davidsons had wanted a company to be set up into which a franchise fee would be paid by the Pinz bowling alley and the Innoflate sites at Aberdeen, Cumbernauld, Livingston and Monifieth, 30% of which company would be owned by the Davidsons, but that idea was eventually dismissed on the basis that Pinz owned the brand, operated as a holding company already, and held group debt. There was no franchise agreement for Innoflate Monifieth in the beginning, and once an agreement for fees and charges was made, the outstanding franchise fee was backcharged and paid over 3 months. Thereafter, it was taken monthly in arrears and was based on revenue. At the point of agreeing the franchise fees, the relationship with the Davidsons had broken down and they wanted Pinz to take on the exclusive running of the site by providing management services. Mrs Davidson had originally proposed a franchise fee of

5 - 7%, but at a workshop organised by Scottish Enterprise in July 2019, Pinz had been told that its franchise fee should be set at 12.5%, and that if there was a lot of management being done it should be substantially higher. The Innoflate brand was known by customers. Pinz organised extensive marketing on social media, had 358,000 subscribers to its mailing lists, and held special events all year round. Negotiations on the fees to be charged to the Company took place in October 2022 and resulted in a commercial deal agreed by way of email by all parties and to mutual benefit. Mr Davidson had had a lengthy business career and would not have agreed to anything that did not suit him. Pinz had proposed a 12% franchise fee, a £10,000 management fee, and head office recharges. Mr Davidson had countered with a 12% franchise fee, 20% management fee based on EBITDA and an "incentive fee" of 30% of excess profit. That had been agreed. While the negotiations were going on, Mr Margach had received a WhatsApp message from Abid Faqir, owner of the Wonderworld group which incorporated Airthrill, the largest competitor in Scotland to Innoflate. He said that he had been contacted by Sarah Davidson wanting to discuss a deal, which transpired to be a proposal to sell him the shares in the Company held by the Davidsons or Argyle. Mr Faqir had declined the offer.

[87] Mr Margach had got to know Mrs Davidson through a group that was set up during the pandemic to fight for the reopening of the soft play sector and get fair grants for it. They had become friends and she had said that she was looking for a new challenge, which resulted in the joint venture at Monifieth. Pinz was not looking for investors, as the businesses were supported by a blend of asset finance and bank debt. It was looking for assistance to help to run the sites to allow Mr Margach and Mr Anderson to have time away from the business on a joint basis. It was agreed that Pinz and the Davidsons would each hold a 50% interest in the Monifieth business. It was not agreed that there would be such a

split in relation to future sites; that would remain for discussion. The negotiation of the lease terms for the Monifieth site started before the Davidsons had any involvement. Mr Margach had attended a meeting on 6 March 2020 with the landlord, Dobbies, after one of their staff had seen the Innoflate site at Livingston. Dobbies perceived that the Innoflate brand would bring footfall to its garden centre and that was one of the reasons why the lease terms offered were relatively advantageous. The purchase of the inflatable equipment had been on credit terms which were only available because Innoflate was a well-established client of the supplier, Airquee. The useful lifespan of the equipment would be 5 years or less, based on the experience at other sites in the group.

[88] The Davidsons had had no money to buy into the franchise and it was agreed that Mrs Davidson would provide operations support to the Pinz group in the role of Operations Director, unpaid, with the idea being that she would be remunerated by way of dividend from the Company. That arrangement had not lasted long, and she had asked for a salary, which she set herself at £30,000 per annum. It had been said that Mr Davidson would help with the expansion of the business and negotiation with landlords given his background. However, his involvement was extremely sparse, and he had only visited the Monifieth site very occasionally. The premises at Monifieth opened for business in April 2022. The business had been profitable from the point it opened. However, there was no current relationship with the Davidsons, and Pinz was running the Company to the best of its ability, without any input from them. Mrs Davidson had not been sacked from her position as Operations Director; rather, there had been a mutual parting of ways. Another employee, Mark Stevenson, had been promoted after making a presentation on how he could support the group with sales, and his role was focussed mainly on sales and

relationship building, rather than being a direct replacement in the operations role previously carried out by Mrs Davidson.

[89] The Company might well exercise the break option in its lease if trading continued on recent trends. Trading was down £128,000 in the calendar year to October 2023, profit was down £142,000, and half of the first ten trading months in 2023 had been loss making, compared to only two in 2022.

[90] The original shareholding arrangement at the incorporation of the Company was one share for Pinz and one share for Argyle. Mr Margach had become aware that that was no longer the case when Mr McQuade had submitted the second annual confirmation statement for the company. The first such statement had been submitted by Mrs Davidson. She had asked Mr McQuade if he wanted her to submit it, and he had not then noticed anything amiss. Pinz had not been told that the Davidsons had transferred a share away from Argyle or that any new shares had been created. No board meeting had approved that happening and Mr Margach did not accept that the Davidsons were indeed members of the Company. Had any such thing been agreed, Johnston Carmichael could have made the necessary arrangements, and would have been asked by Pinz to do so. The invoice to the Company from JPS Bookkeeping for doing it had been tabled at a meeting on 20 March 2023. Mr Davidson appeared to know nothing about it. The Company had been disadvantaged by what had supposedly happened as Argyle was potentially insolvent, and if it were to become so, its administrator or liquidator could unwind the share transfer it had made, leaving Pinz in business with an insolvency practitioner.

[91] The Davidsons had made no proposals to remedy the current unsatisfactory state of the Company's shareholdings. Consequently, Pinz wanted to remove the brand and management services being provided to the Company. Services were to be withdrawn due

to a lack of trust and the breakdown in communication caused by the Davidsons having transferred shares fraudulently and without consent. Pinz did not want its brand to be associated with that behaviour. It had had to keep the business running to the best of its ability without input from the Davidsons and without any idea as to what the future might be. An agreement made by the Company's board on 26 September 2022 to meet virtually on the third Friday of each month and in person every quarter had not been observed. Important decisions could not be made. The directors of the Company would have to devise a way of operating the business under a different name, and of finding different operating methods. The Davidsons had provided no input in planning for those changes. If there was engagement, it could all be dealt with in about 4 weeks. It just needed a logo, website and booking system built, and the business could continue with its existing staff. The current booking platform was provided by a third-party provider, Roller, but required intensive updating and scheduling which was done by Pinz as part of the management services.

[92] The business had had to close for 2 weeks in consequence of the insurance issue. The delay in getting engagement from the Davidsons on the accounts meant that the brokers could not renew the site insurance. The removal of cover was on the basis that Mr Davidson had advised the insurers that there was an ongoing dispute in terms of management services. All available documents had been provided to the insurers when requested. Mr Margach had sought alternative sources of cover without success.

[93] The Company was profitable due to the Innoflate branding and goodwill, and the services and experience that Pinz and its staff had provided. Its marketing services pre-opening had provided substantial sales at that point. Turnover had been dented by the 2 week period of closure and the need to build back customer confidence. There was a downward trend in turnover and profit, which was to be expected given that the first years

of trading were always higher in such businesses. There were two competing venues in the area, namely Fun Factory Dundee and Ryze Dundee, which had city rather than outlying locations. There was also a new 29-lane bowling centre in Dundee with ancillary soft play, escape rooms, arcade and restaurant, and the Kingsway retail park had several empty units with leisure consent obtainable. These factors meant that the trading of the business was unlikely to stabilise at previous levels.

[94] The solicitors acting for Pinz had raised the question of whether the Company could be treated as a going concern. Advice was sought from Johnston Carmichael and provided on 24 April 2023. The Davidsons had put forward no plans for replacement management services. The accounting advice on completion of the statutory accounts received after the giving of notice of withdrawal of the services had been that the Company was not a going concern and that it could not be signed off as such unless it was likely to survive and trade for 12 months after the end of that accounting period. The removal of the brand with no engagement or plan from the Davidsons made that unlikely. The Davidsons had refused to engage with the process of settling the draft statutory accounts, and could have contacted Johnston Carmichael at any time to give their input, as ultimately they did. The amount stated in the draft accounts for future liabilities in connection with the lease was an error by Johnston Carmichael. Once engaged in the process, Mr Davidson had continued to propose changes to the accounts as late as 3 October 2023. Finally, in order to get the draft accounts finalised, Pinz made a proposal to continue its management services with either side being able to give 3 months' notice.

[95] On 7 November 2023, Keith Lough, the landlord's representative at the Monifieth site, had contacted Mr Anderson to say that the Dobbies accounts team had picked up that the Company had not been charged for electricity since occupying the site. That contact had

not been instigated by anyone at Pinz. Mr Anderson had asked Mr Lough to confirm the charges, and calculations had been done to try to work how much the cost was likely to be. The electricity used appeared to cost more each month than either the rent or the service charge. Mr McQuade had asked for a Company board meeting to be held urgently with a view to discussing whether the proposed charges were actually due, and how they could be paid if they were, but the Davidsons had not agreed to attend.

[96] Offers to buy the Davidsons' shares (at a nominal value, given their fraudulent transfer) and for Pinz to be bought out by the Davidsons had been made.

[97] In further examination-in-chief, Mr Margach stated that Mr Davidson had only attended the Monifieth site on three occasions, once before the opening of the business, and twice thereafter. The share reorganisation had been fraudulent because it was done without the knowledge or consent of Pinz. The Davidsons' shares had been acquired from an insolvent company, Argyle. That share transfer could be reduced and Pinz could find themselves in business with a liquidator or third-party purchaser.

[98] The Company's trading was still down, but had improved during December 2023 and was looking a bit better than it had been. That would potentially affect the decision as to whether or not to activate the break option in the lease. Advice had been taken from a franchising expert, Andrew Fraser, during the negotiations in October 2022 with the Davidsons about the franchise fee to be charged to the Company. That was where the figure of 12% had come from. There had never been any agreement on a lesser percentage. The franchise fee would cover the use of the brand, marketing resources, website, and signage. The separate management fee would cover ongoing financial services such as payroll, accounts, benchmarking, and data analysis. It gave access to area managers, graphic design,

strategic advice, human resources and health and safety functions. The terms proposed by Mr Davidson had been accepted by Pinz.

[99] The indicative offer which had been received for the Innoflate group had been for £7 million, not £19 million.

[100] DRS had been dissolved because, according to Mrs Davidson, there had been errors in recording the spelling of the names of Mr Davidson and Mr Anderson at Companies House, resulting in difficulties in getting banking services for the company. It was said that it would be easier to dissolve and restart the company rather than to correct the errors. There had been no mention of changes in shareholders in the replacement company, DRSA, when it had been agreed that that would be set up. In any event, Argyle had only become insolvent after the change from DRS to DRSA, when it sold "Whale of a Time" in September 2022.

[101] The transfer of Argyle's shares in the Company to the Davidsons represented the removal of assets from an insolvent company. There had been issues with the person to whom the assets of the "Whale of a Time" business owned by Argyle had been sold, and Mr Margach and Mr Anderson sensed trouble. They did not want the risk of finding themselves in business with a liquidator, and had taken advice from their former solicitors about the matter. Mr Margach had found out about the share reorganisation from Mr McQuade in early 2023. His concern was genuine, as ownership of the shares in the Company had been all that had been keeping Argyle solvent. There had been no board meeting to discuss the reorganisation. He did not think that he has ever been aware of the reorganisation, and certainly had not and would not have agreed with it. He would definitely not have agreed to the changes being effected by JPS Bookkeeping, and would have required any such changes to be carried out by Johnston Carmichael.

[102] In 2023, Pinz was looking for a way forward for the Company's business that did not involve the Innoflate brand. There were issues with the proposals put forward by the Davidsons in that regard, not least the silliness of the proposed trading name of "Zillionaire", and a lack of clarity about management structures. Pinz had expressed its reservations about the proposals and had heard nothing further about them. It did not appear to be a serious attempt to settle on a way forward.

[103] In relation to the claim that Pinz had levied excessive charges on the Company by way of franchise fee and management charges, Mr Margach pointed out that the charges had been agreed. Mr Davidson had suggested that the management fee should be 20% of EBITDA and that there should be an excess profits charge. He was not someone who could be forced to do anything against his will. Those charges had been agreed in October 2022 and had not been queried until April 2023. In the meantime, charges had been made in accordance with the October agreement, although no formal contract had been provided to the Davidsons. Mr McQuade had issued invoices in October but had only taken payment for two of them at that time.

[104] In relation to the "going concern" issue, that had not been engineered by Pinz, which had no power over Mr Dunbar as an independent professional. All that Mr Margach wanted was to talk about and resolve the issue with the Davidsons. He did not want to create an artificial crisis for the Company, although the failure to lodge accounts timeously had eventually led to a crisis in the form of the insurance issue. Pinz had not sought to create that situation, and was glad when matters were resolved on the basis that its services would be continued unless 3 months' notice from either side was given, and the court would rule relatively quickly on the issues before it.

[105] In relation to the electricity charges by Dobbies, he wanted the Company's directors to agree how to resolve the matter, and was not trying to engineer a solvency issue. He did consider that it was something that needed to be addressed urgently, and had taken insolvency advice from Interpath between Christmas 2023 and the New Year. After Mr Davidson had engaged with the matter, a proposal had been agreed and made to Dobbies, which appeared to have resolved the situation, at least for the immediate future.

[106] In cross-examination, Mr Margach re-iterated the genesis of the arrangements with the Davidsons. Mrs Davidson had set up both the Company and DRS during a call with him and Mr Anderson. Errors had been made at that stage in the appointment and names of directors. There was no particular discussion about whether the Davidsons were going to hold their interest in the Company directly or through Argyle. At the stage of incorporation, Mr Margach would not have been concerned about the Davidsons holding shares in the Company directly.

[107] The errors made at the stage of incorporation of DRS led to banking and other problems, resulting in its agreed dissolution and replacement with DRSA at the end of 2021. Pinz was aware that Argyle was not going to hold the 30% minority interest in DRSA, which was to be split 15% to each of the Davidsons, and was content with that. There had been no explanation as to why that was being done. It made no difference to Pinz. However, there had been no discussion at all about altering the shareholdings in the Company. Had such discussion taken place, he would have remembered it. He did not know what his reaction would have been in December 2021 had the reorganisation been suggested, but since Argyle was not then insolvent, he would probably not have been concerned about a transfer of its share in the Company to one or other of the Davidsons. The Company was then taking steps with a view to trading, so could not easily have been dissolved like DRS. No

formalities about shares in the Company had ever been observed. There was no register of members, no agreement to use the public register as such, and no share certificates. There had been board meetings, but not all business had been minuted. The addition of directors after the initial errors at incorporation had not been agreed in any meeting, nor had a change in the address of the registered office which had been made, though neither of these matters was controversial.

[108] The funds required to enable the Company to start trading in the first quarter of 2022 had been contributed by Pinz and the Davidsons themselves, not by Argyle. Everyone had got on well before the Company's site had opened. There had been pre-opening publicity and the first month of trading had been very successful. He had no recollection of the share reorganisation, which took place in April 2022, being discussed. If it had been, he would have wanted the Pinz accountants to deal with it. He had no concerns about Argyle's solvency at that stage. The Company at that point had liabilities to directors and payment terms to meet with its equipment supplier, as well as liabilities in terms of its site lease. It could not have paid all of those creditors at that time. Although what had been done by way of the reorganisation had been visible on the Companies House public website since late April 2022, he did not use the site often and had not seen it there. In August or September 2022 Mr McQuade had told Mrs Davidson that he was not able to log on to the Company's account with Companies House so as to lodge its annual confirmation statement, and had asked her if she could do it instead. She had done it in late September and had told Mr McQuade that she had dealt with it. He was relatively new to the business at that time and would not have appreciated the significance of the share reorganisation. Mrs Davidson had been careful to deal only with him rather than copying others who would know more into her emails. She had been trying to keep what she had done as quiet as

possible, which Mr Margach considered meant that she had been trying to deceive him and Mr Anderson.

[109] Between April and August 2022, everything appeared to be going well. Mrs Davidson was still working for Pinz and the personal relationships were fine. The Company paid off its start-up costs, then its debt to Pinz, then the Davidsons. Pinz had been paid first because it had cash flow issues due to a VAT charge. It was that, however, which had first begun to cause a rift in the relationship, because the preferential repayment to Pinz had been used by the Davidsons to treat Mr Margach and Mr Anderson in a belittling manner, as if they were two small boys who were getting something that they were not entitled to. After its creditors were repaid, the Company had paid dividends; first, £40,000 with £20,000 to Pinz and £10,000 to each of the Davidsons, then £8,000 a month, with £4,000 going to Pinz and £2,000 to each of the Davidsons. Total dividends paid had amounted to £72,000 before they ceased in the first half of 2023.

[110] In August 2022 there had been a mutual parting of the ways with Mrs Davidson. That caused a significant cooling in the parties' relationships. Mr Anderson had told her that Pinz did not want her to continue to work for it, and Mr Margach had supported that. At the meeting on 27 September, it had been formally agreed that DRSA would be dissolved and a new way forward would be found. It was common ground that Pinz had to be paid for its services. The meeting was not entirely amicable; the Davidsons were unhappy about how Mrs Davidson had been treated, but the relationship was not beyond repair at that time. The meeting concluded that Pinz should prepare commercial terms, but it was agreed that its head office recharges would be invoiced and paid. On 14 October Mr McQuade had issued various invoices to the Company in respect of charges by Pinz. In respect of one invoice only, for £10,000 plus VAT, payment had been taken from the Company's account

without its consent. That must have been done on the instruction of Mr Anderson or himself, but he was not sure exactly how or why it had been done, other than that Pinz was looking for payment for the work it had done. The amount in question had ultimately been credited back to the Company. He accepted that the Company had not agreed in advance to pay all the sums invoiced, and that any authority to take sums from the Company's account had been exceeded. Pinz was in the wrong; it had taken a decision to take the money first and negotiate afterwards, charging more than had been agreed. Mr Margach accepted that a number of things had contributed to the breakdown of trust and confidence between Pinz and the Davidsons, and that this might have been one of them. A heated discussion had followed, but he did not recall any threat of immediate closure for the business or Mr Anderson saying that he would personally take the Innoflate signage at the Company's site down. The removal of the services being provided by Pinz had been talked about, but not without notice. Mr Davidson had negotiated strongly for the Company in dealing with the proposals made on behalf of Pinz by Mr Margach and Mr Anderson. It was plain that Pinz stood to gain (or lose out) from the negotiation. No steps had been taken to manage conflicts of interest. The franchise fee rate had been negotiated without reference to the duration of the franchise. He considered that one month's notice of its termination would be reasonable. After the negotiation, input into a formal franchise agreement had been sought from a lawyer, but there was no progress beyond a draft he had produced. The agreed payments were being made, the services were being provided and the production of a formal contract was not being demanded by the Davidsons and had drifted somewhat. There was no agenda to get rid of the Davidsons, but he had formed the view that they wanted out after the plans for DRSA were abandoned, and the events of October 2022 had

probably reinforced that wish. It would have been constructive if they had asked to be bought out at that stage.

[111] The Davidsons had some experience and transferable skills relevant to the Company's activities. Pinz could probably negotiate better terms for the Company from suppliers, but he could not say what the difference would be exactly. The Innoflate brand would assist the Company's trading, as would association with the Pinz marketing resources and customer data. The higher management functions carried out by Pinz added value to the Company and would have to be done by others if the relationship was severed. When the Davidsons had put forward their proposals for how to operate the Company without Pinz, no attempt had been made to veto anything.

[112] It had been the discovery of the share reorganisation which had particularly changed his views about the Davidsons. The relationship had deteriorated gradually as a result of Mrs Davidson's attempt to sell her shares to a competitor and the inability to arrange meetings, and had broken down completely when the share reorganisation came to light.

[113] The share reorganisation had been brought to his attention by Mr McQuade when the latter was trying to prepare a further confirmation statement for the Company at some point in early 2023. Mr McQuade had accessed the Company's account on the Companies House website at the end of January 2023 in order to extend the Company's year end. He had prepared a profit and loss account and a balance sheet and sent them to all directors on 2 February 2023. The Davidsons had not queried the figures. The balance sheet contained no provision for long-term liabilities. Mr Margach did not know what information had been provided to Johnston Carmichael in relation to such liabilities, but their inclusion of £5 million under that heading in the draft statutory accounts was wrong and had not been picked up by Pinz. He accepted now that the Davidsons had not been provided with the

draft statutory accounts until August 2022 (although he did not know that at the time) and that he had received them in May. He had never instructed that Johnston Carmichael should withhold that draft from the Davidsons, and it could have sent the draft to them at any time.

[114] He could not say exactly when in early 2023 he had found out about the share reorganisation, but wanted to get to the bottom of it, and thought it best that a meeting should take place. Mr McGee had prepared an agenda for the meeting which was circulated, and it was intended to deal with the share reorganisation issue under the heading "the way forward" on the agenda. Mr McGee had not been given any instructions other than to attend the meeting on behalf of Pinz and to raise the share reorganisation issue. There was no game plan. Other business had been discussed, such as the Company's financial performance. He was concerned about what else was being done behind his back, such as the attempt to sell the Davidson shares to the Company's competitor in October 2022. It was all about trust, and he wanted an explanation, which the meeting did not provide. He did not think that any letter giving notice to terminate the Pinz services had been handed over at the meeting; rather, a letter or two had been drafted after the meeting once it had become apparent that trust had broken down. It was the share reorganisation which had rendered Argyle insolvent and which had destroyed his trust and confidence in the Davidsons. When he had himself had discussions about selling the Innoflate group to the same competitor as Mrs Davidson had approached, the Davidsons had been involved in those discussions or at least had known about them, and all of the Company, not just half of it, would have been sold had those discussions proceeded to a deal.

[115] On 23 March 2023, Mr McGee had sent a letter to the Davidsons setting out the proposal for their exit from the Company which had been discussed at the meeting,

including a share transfer form for them to sign which would have transferred their shares to Pinz. That was on the basis of legal advice obtained by Pinz, and was drafted by its lawyers on instructions from Mr Margach. It remained a proposal, not a demand.
Mr Margach was unclear about the details of what the lawyers were telling Pinz to request, and what its legal entitlements were, but followed the advice he was given. The letter, including a threat to terminate the Pinz services and remove its brand, may have looked heavy-handed, but was simply a suggestion as to how matters might proceed, given that trust and confidence had finally evaporated and the Davidsons were not engaging with the affairs of the Company. Mr Margach did not believe that the Davidsons' shares were only worth £1, which was the transfer price suggested in the letter. He did, however, want the Pinz brand insulated from the Davidsons' behaviour. Although the letter had stated that the booking system for the site had been programmed to refuse attempted bookings for 20 April and afterwards, that was not true. It would have damaged the business. The Davidsons had replied to the letter asking about dividends and requesting a sensible price for their shares, and Mr McGee had responded saying that the Company's business would close in the absence of a plan to move it forward. Such a plan could have been implemented within about 4 weeks, but Mr Margach had not sought to call a board meeting to discuss re-branding, nor resigned as a director of the Company. It was not in his interests to devalue the Company. Everything that had been done was on the advice of the solicitors formerly acting for Pinz. The Davidsons' lawyers had also been involved by the end of March.

[116] Pinz had then offered £11,000 for the Davidsons' shares, which was probably less than they were worth, but in the ballpark due to the absence of any plan to move forward and the going concern issue. The Davidsons had in turn offered to sell for £1 million, and

Pinz had responded by saying that it would sell to them for that price. It had not consulted an insolvency lawyer at that stage, despite saying that it had done so.

[117] In April 2023, Mr McQuade and the former solicitors for Pinz had raised the question of whether the Company could be seen as a going concern standing the wish of Pinz to withdraw its brand and services. Mr Margach had spoken to Mr Dunbar of Johnston Carmichael as an independent professional about his worries on that account, and he had explained the applicable accounting standard and how one defined a going concern. He had not said that the Company was not a going concern. When he wrote the letter setting out his advice, he had been more emphatic on that matter. Mr Margach had not asked for projections or modelling to be done to assess the effect on the Company of the withdrawal of the Pinz services. He probably should have done so, but it would have been a difficult exercise and would have depended on assumptions about marketing and so on. Pinz could certainly be replaced, but he did not know at what cost to the Company, or whether the Company would thereby make savings. The immediate problem was that there was no alternative plan to assess.

[118] Mr McQuade had stated to the Davidsons that the Company could not be regarded as a going concern. He was the one who had raised the issue in the first place. Mr Margach had not sought to get Mr Dunbar to say that the Company ought not to be regarded as a going concern. He wanted a record of the call he had had with Mr Dunbar to pass on to the Davidsons. The letter written by Mr Dunbar in that connection did not quite accurately repeat the oral advice he had had from him. Mr Margach simply wanted to get to a position on the accounts with which everyone would be happy. As the Davidsons had not been co-operative with him, he wanted Johnston Carmichael to invite them to, and host, a meeting about the matter.

[119] At the end of May, Mr Dunbar had sent him an email received from the Davidsons' solicitors requesting a copy of the draft statutory accounts and asking whether he had authority to send them. Mr Margach had not replied substantively in writing, and was not sure whether or not he had spoken to Mr Dunbar about it or given him any instructions. He and Mr Anderson were in Wales busy setting up a new Innoflate site at the time. A subsequent email on 12 July from the Davidsons' solicitors to Mr Dunbar had been passed on by the latter to Mr Margach on 25 July, and on 1 August he had responded, saying that there was no difficulty in Mr Dunbar passing on another copy of the draft statutory accounts as requested. He had said "another" copy because he had then been under the impression, which he had subsequently realised to be wrong, that the Davidsons had had a copy of them already. The Davidsons had come back with comments on the draft accounts, which were correct and related to matters not spotted by Mr McQuade. Ultimately Pinz had, with the resolution of the litigation in sight, entered into an agreement that its services would not be withdrawn on less than 3 months' notice and on that basis had accepted that the Company was a going concern.

[120] In relation to the insurance issue, Pinz had been dealing with the renewal as part of its services to the Company and was aware that the statutory accounts would require to be lodged before the renewal could be effected. The broker had asked for them and Pinz had had to tell him that they had not been filed and that notices to terminate its services had been sent. That raised the insurers' perception of risk, no renewal was available, and the Company's site had had to close. The remedy had been to withdraw the termination notices, deal with the going concern issue and file the statutory accounts. There had been no intention to cause the Company stress and damage.

[121] As to the electricity charges, Dobbies had been asked to cancel their invoice, but the contract with them had not quite been agreed or signed. Mr Margach had done everything he could to sort the issue out by getting a meeting with the Davidsons, and when that had eventually happened, a way forward had been agreed. The electricity issue would result in a diminution of the Company's EBITDA, and a reduction in management charges due to Pinz, which had yet to be reflected in the Company's accounts.

[122] In re-examination, Mr Margach re-iterated various matters, including that he had had no conversation with Mrs Davidson about the share reorganisation. No conversation had taken place - he would have remembered if it had.

[123] The notice to withdraw the services of Pinz given in March 2023 was to allow an alternative plan to be put in place by the board of the Company, but the Davidsons had provided no plan. There had been no intention to do the business down.

[124] **Chris Cole** (35) an account handler employed by Tower Insurance Brokers Limited, stated that Pinz had been an insurance client of his employer for a year or two. On 3 August 2023, he had emailed Mr Margach regarding insurance renewal, requesting turnover and wage tables, a completed material damage questionnaire, management accounts information for premium finance approval, a survey documents checklist, and the previous 5 years' claims experience for each site. He had not been provided with the claims experience information in respect of the Company, nor its management accounts. The accounts were primarily required in respect of premium finance, but if there was an issue with overdue accounts, that could be an indicator of more serious underlying financial issues within the business. On 1 September 2023 Mr Margach had emailed him to advise that the accounts for the Company were overdue, that there was an ongoing dispute between the shareholders, and that a decision might be made to remove the Innoflate brand from the site. He had

requested that the accounts be provided as soon as possible in order that the renewal could be effected. He had subsequently received a call from Mr Davidson in which the ongoing issues with the statutory accounts of the Company and the dispute between the shareholders were discussed. If the accounts could not be agreed and submitted, the public liability insurance policy could not be renewed. It expired on 5 October 2023. Discussions between the Company and his manager Mr Tim Forshaw then ensued which resulted in the renewal of the policy on 12 October, with backdating to cover the period between 5 and 12 October 2023. The delay in the renewal had not had any real impact on the Company's insurability; the same premium had been offered, premium finance had been secured, and there was no reason to suppose that the Company would be treated differently by the insurance market going forward because of the renewal delay or the reasons underlying it.

[125] In cross-examination, Mr Cole stated that, if he had been provided with the statutory accounts, no further questions about the state of the business would have been asked. When he had learned of the shareholder dispute, that gave rise to a problem with placing the risk with insurers. If the issues had been resolved by October, there would have been no further problem.

[126] **Ross Thomas Anderson** (38) stated that he was the managing director of Pinz and a director of the Company. At Pinz, his day-to-day responsibilities included managing and directing the business, staffing, human resource and marketing matters, liaising with consultants in respect of health and safety, and managing the booking system. The company was originally established to run the bowling alley in Elgin, but had since been restructured to be the head company of a group structure, holding the assets for each of the group's seven sites except Monifieth, but with each site being operated by its own subsidiary company.

[127] He had got to know the Davidsons through Mr Margach. Pinz was then already in discussion with Dobbies about the Monifieth site. Mrs Davidson had proposed that she wanted to join Pinz to enable it to expand as a company and suggested that the skills and experience she and Mr Davidson had could result in a great partnership moving forward. They were not to be employed by Pinz but would be paid by way of dividends from the Monifieth site. Mrs Davidson was to assist operationally with day-to-day tasks and checks, human resource issues and site visits and support. Mr Davidson was to assist with acquisition of new sites and negotiations on leases and rentals. Mrs Davidson started her work around August or September 2021. She had subsequently asked for a salary, which was agreed, and she became a Pinz employee in December 2021, employed first by the Livingston site company and then by Pinz directly from the end of May 2022 until 30 August 2022. The business relationship was normal and amicable for a period, and communication with the Davidsons was effectively exclusively through Mrs Davidson. She was based in the Glasgow area and was able to get to sites quickly and efficiently, with Mr Anderson being based 4 hours away from most sites. After the pandemic, staffing the business had changed significantly and there were additional strains with sickness and self-isolation. General recruitment was difficult. Mrs Davidson engaged a recruitment agency that she had worked with before, and managers were recruited through this platform. Mr Davidson had been involved in the recruitment of Mr McQuade and held him in high regard. Mrs Davidson's appointment took a lot of pressure off Mr Anderson and he was able to focus more on health and safety, maintenance, servicing, testing, recruitment, new site designs and work with trades and third-party contractors. They had a relaxed working relationship; she managed her own diary and was a support in the day-to day

processes and operations on site. There were regular update calls and Teams meeting about operations and discussions in relation to employee performance and HR issues.

[128] However, after the Monifieth site opened, Mrs Davidson's attitude changed and she became very money-orientated and was always looking for ways to cut costs. On occasion, cost was the main priority over quality, a situation with which Mr Anderson was unhappy. Staff were starting to play them off against each other. She proposed that Mr Anderson should have a job title which would suggest a limitation to his role. She had started to see herself as an owner of Innoflate rather than as an employee with a restricted business interest. That fuelled Mr Anderson's uncertainty about the future of building sites together, and it became clear that the working relationship was not going to work out long term. Mr Anderson sought advice from John McGee, with whom Pinz had worked previously. Pinz was able to review its growth strategy and how to achieve it. Part of that strategy was to leave the Monifieth site on the sidelines. A meeting was arranged at the Company's offices in Hillington at the end of August 2022 for Mrs Davidson to meet Mr McGee and discuss operational matters. She had asked Mr McGee and Mr McQuade to leave the room so she could speak to "the boys", ie Mr Margach and Mr Anderson. That term was perceived as insulting. She had opened up the conversation by asking them what was happening. Mr Anderson explained his view that their relationship had broken down and that he and Mr Margach did not wish to proceed with further joint ventures, as they did not see any value in the arrangement, especially since the Davidsons had, and would take, no responsibility for the group debt incurred over the pandemic period. She had asked Mr Anderson if he wanted her to continue working for Pinz and he had said that he did not. She accepted that and said that a way would have to be found to deal with the business of the Company. She left the room after shaking their hands. Shortly afterwards the

Davidsons had visited Mr Margach and Mr Anderson at their home, and indicated that they wanted the existing arrangements for the Company to continue, saying that it was better to be 50% of something than 50% of nothing. Mr Margach and Mr Anderson had acceded to that, although it was not really what they wanted.

[129] There had been a meeting on 26 September at Dundee, during which Mr Davidson had been angry about the treatment of his wife. There were discussions about management agreements and service agreements, and Mr Davidson had proposed low remuneration for Pinz in those regards. Mr Anderson and Mr Margach had not agreed any fees on the day, and sought further external advice from franchise experts. The Davidsons had subsequently refused to attend many meetings and there was no current relationship with them.

[130] The original shareholding of the Company was one share held by Pinz and one share held by Argyle. Mr Anderson became aware that this was no longer the case in March 2023 when Mr McQuade was preparing the Company's annual accounts, noticed the change and alerted Mr Margach and himself. It transpired that Mrs Davidson had created two additional shares and allocated one to herself and one to Pinz so that Pinz held two shares. Argyle's original share was transferred to Mr Davidson and the additional share was assigned to Mrs Davidson. Mr Anderson had had no previous knowledge of this change. He was concerned since the relationship with the Davidsons had already broken down and this raised more doubt about their integrity as business partners. A meeting with the Davidsons was called, but Mrs Davidson could not attend as she had Covid-19 at the time. Mr Davidson had denied any knowledge of the transfer. As to DRS Leisure Limited, the Davidsons wanted to have the minority interest split with a 15% share to each of them. As the company had not traded, Pinz had no issue with that, but there was no connection between that and the shareholdings in the Company.

[131] Mr Anderson and Mr Margach did not want the Innoflate brand to be affected by what the Davidsons had done, so offered to purchase the Davidsons' shares for a value which would allow Pinz to continue to trade from the site and the Davidsons to part ways from the group. Alternatively, the Innoflate brand would be removed and then a new company created to operate and run the Monifieth site. That would remove the Innoflate branding but leave Pinz and the Davidsons still in business together trading under a separate name. Otherwise, the Company could be equitably closed down. However, the Davidsons would not agree anything and threatened to go to court. It was agreed to continue with the status quo on a short-term basis while the Davidsons came back with a plan as to how they would operate the business going forward, but nothing substantive in that regard had been forthcoming.

[132] The most recent accounts for the Company had been delayed due to the Company's accountants, Johnston Carmichael, being unable to prepare accounts for it on a going concern basis. Johnston Carmichael had been informed of the impact of the Pinz withdrawal of services on the Company and they indicated there might be an issue in respect of the potential for the business to cease operations within 12 months of the signing of the accounts. Mr Margach and Mr Anderson were uneasy about signing the accounts as a going concern on that basis. The Davidsons had refused to engage with the issue, leaving the finalisation of the accounts in limbo.

[133] The process of renewing all the group's insurance policies had begun. The Company's policy was separate from the rest of the group. The broker advised that it was unable to offer the Company the facility of paying its premium over a year as it had identified that the accounts were overdue. Pinz had advised the broker that no agreement could be reached amongst the shareholders on the accounts being filed on a going concern

basis, and told the Davidsons of that. Mr Davidson had in turn contacted the broker and advised that there was a litigation between parties, in consequence of which the broker said that it did not wish to quote while there was ongoing litigation. Alternative quotes had been sought but discussions on that were still continuing when the issues with the existing broker were resolved.

[134] On 7 November 2023, Dobbies had telephoned Mr Anderson and advised that it had not charged the Company for electricity since its opening. It had subsequently provided details of proposed costings and intended to make a back charge to the Company for the units used. He wanted to have a shareholder meeting, but got no engagement from the Davidsons.

[135] In further examination in chief, Mr Anderson stated that Mrs Davidson had initially brought value to the business at a time when he and Mr Margach had almost had enough of it. She was experienced and had brought more management coverage. Mr Davidson had not done anything for the business on a day-to-day basis. He felt the relationship with the Davidsons had begun to deteriorate when they were told that Pinz did not want to proceed with the DRSA plan, which was around June or July 2022. That would deprive the Davidsons of an expected income stream, but Pinz had considerable debt and the DRSA proposal would have entitled the Davidsons to take income from its businesses without investment. After that, the Davidsons had visited Mr Margach and himself at their home and had persuaded them to continue the arrangements for the Company as before, although Mr Anderson was not happy about it. About the same time he had reached out to Mr McGee, as his confidence was down and he felt locked into the arrangement with the Davidsons. Mr McGee had said that he and Mr Margach were young and inexperienced, and that there were no bad decisions, only learning opportunities. A meeting had been

arranged at the Hillington offices of Pinz at the end of August to confirm formally the decision not to proceed with DRSA. He and Mr Margach appreciated that Mrs Davidson would need notice of any termination of her role as Pinz Operations Director. She had asked Mr McGee and Mr McQuade to leave the room, and was upset, but calm. He and Mr Margach had said that they did not want her to continue in her existing role. She was let down. She asked Mr Anderson if he wanted her to carry on, and he felt it best to say no. The same had happened with Mr Margach. She was disappointed, but shook their hands and left.

[136] There had been a follow-up meeting in Dundee to identify a way forward. The site was continuing to trade well and eventually fees were being paid to Pinz. It had been the discovery of the share reorganisation that was the straw that broke the camel's back. He had definitely not known about that before March 2023. There had been talk in the industry that the person to whom Argyle had sold "Whale of a Time", Stephen McKinlay, had fallen out with the Davidsons about some aspect of the sale. Mr Anderson had telephoned him to talk about that. The dispute was to do with rent payments, and Mr Davidson had supposedly said that he would fold Argyle if need be. It had also been discovered that the Davidsons were trying to sell their shares in the Company to a competitor, and were looking for an exit. When he subsequently found out about the share reorganisation, he wanted to bring the relationship with the Davidsons to an end. They were, further, not attending meetings to deal with the Company's affairs.

[137] As to the suggestion that Pinz had levied excessive charges on the Company, that was incorrect. There had been a negotiation. In return for the franchise fee, the Company got the brand, marketing, the booking system and the business get-up and know-how. The Innoflate brand brought value to the Company. The management charge got it the head

office functions, payroll, health and safety and human resources assistance. Although he was not aware of why invoices had been issued without agreement in October 2022, there had been agreement in principle in September that charges would be payable, going forward and also backdated, and that there would be an interim payment based on a division of head office costs. The issue of the invoices had provoked a Teams meeting to reach a faster and final agreement. Nothing had been forced upon the Davidsons, although the call had been heated.

[138] The proposal by the Davidsons in summer 2023 as to how the business might be rebranded had not been taken seriously by Pinz. A cautious reply had been given to it, and nothing more had been heard about it. As to the going concern issue, Pinz had simply been following the professional advice of Johnston Camichael. The insurance issue had caused a difficult time, but Pinz had not wanted the business to close. The electricity issue had not been set up by Pinz; he and Mr Margach had tried to get engagement from the Davidsons, but they were not taking it seriously. Once they did, the matter was resolved straightforwardly and Dobbies had accepted what was put to them on behalf of the Company.

[139] In cross-examination, Mr Anderson stated that the Davidsons wanted to carry on with the DRSA proposal. Mr McGee had not advised about that matter, and he did not make decisions. The Company had been a test to see how the relationship with the Davidsons would work out. It had traded successfully and paid off the equipment suppliers before going on to pay dividends, with half of the total going to Pinz and a quarter to each of the Davidsons. Although initially arrangements had been friendly and informal, there had come to be an element of disagreement with Mrs Davidson in relation to site management about things for which Mr Anderson had previously been responsible. There could not be

two bosses on site. By the time of the meeting at Hillington at the end of August, the relationship with her had broken down and there was no trust. It would not have worked had she continued in the role.

[140] At the meeting in September 2022, it had been agreed that Pinz was entitled to be paid for the services it was providing, and it had agreed to provide a formal management agreement by the end of October. The meeting had been amicable. Authorisation levels to make payments on behalf of the Company had been agreed. It was agreed that there would be consultation about business changes. There had been discussion about some inflatable equipment which the Company had purchased for £14,000 at auction and which turned out to be unusable. It had eventually been disposed of in September 2023 without reference to the Davidsons, who by then were demonstrating no interest in the Company's affairs.

[141] Mr Anderson had not been involved in the issuing of invoices to the Company by Pinz in October 2022, and the taking of £12,000 from the Company's bank account without consent, although he knew it had happened. He understood that the invoices had been issued in accordance with what had been agreed in September. The payment of head office recharge costs had been agreed, although he could not say that there had been agreement on the amount due. There had been no agreement about the mechanism for calculating the management charge that would be due. He did not know who had authorised Mr McQuade to issue the invoices; he might have done it on his own. Invoicing was a matter for Mr Margach and Mr McQuade. Mr Anderson had intended to adhere to the agreement made in September, and had not raised or authorised the invoices. The money which had been taken from the Company's account ought not to have been taken, but had been credited against a bigger invoice which was due. Trust between Pinz and the Davidsons was already non-existent at this time, and it was reasonable for the Davidsons to be angry

about what had happened. Mr Davidson had been irate and a polite discussion was by then out of the question, although the situation could have been defused. Pinz had not set out to engineer a confrontation. At the Teams meeting which followed, Pinz had said that it would remove its services, but did not say that it would do so immediately. Mr Anderson probably did say that he would drive down to the site himself and remove the Innoflate signage, but no timeline was put on that. The purpose of the threat was to get an agreement that would avoid further situations like that which had occurred. Mr Anderson acknowledged that Pinz had an interest on both sides of the negotiation. The 4% franchise fee being suggested by Mr Davidson was not in line with the advice Pinz had received. It was beneficial to the Company to have Pinz and its brand involved at a reasonable price. He was content, wearing his Pinz hat, to threaten to withdraw the brand. An agreement was reached. At the end of the process, Mr Davidson had said that he was looking for a written contract. A contract had been drafted but never shared. It had probably just been forgotten about. Invoices were being raised and paid in accordance with the agreement and there was no active dispute and no need to engage with the Davidsons. No agreement had been made about the duration of the franchise arrangements. Had there been such an agreement, that would have avoided further dispute about termination notices and so on.

[142] There had been no discussion about reorganising the shareholdings in the Company. There had been a discussion, and agreement, about changing DRS into DRSA, with different shareholders. If Mr Anderson had been asked to consent to the proposed share reorganisation in the Company at the end of 2021, or in April 2022, he would probably have agreed, as it would have made no difference to Pinz. In February 2023 he had spoken to Mr McKinlay, who had bought the assets of "Whale of a Time" in September 2022. Mr McKinlay was no longer in an amicable relationship with the Davidsons, and what he

said caused Mr Anderson to think hard about who he was in business with. The conversation had been an eye-opener. He was not speaking to the Davidsons at that stage. When the share reorganisation came to light in March 2023, it was not so much the situation which had been created, but the fact that it had been done behind his back, and that it had removed assets from Argyle, which caused concern. A letter drafted by the former solicitors for Pinz, and signed by himself and Mr Margach without extensive discussion, had been sent to the Davidsons. It had contained what the lawyers had advised should be said. Mr Anderson had signed it, probably without reading it. The solicitors had given poor advice. They had said that Pinz had a pre-emption right. He did not know what a pre-emption right was. The letter asked for the Davidsons' resignation as directors and the transfer of their shares to Pinz for £1, which was the price they had used in the transfer to them from Argyle. That was all done on legal advice. The Davidsons could have put forward a better price, but asked Pinz to do so, so it then offered £11,000. A month's notice of removal of the brand and services had been given by Mr McGee. That was also done on advice, to get a resolution and put pressure on the Davidsons. Mr Anderson could have rebranded the site in that period, and he expected that the Davidsons could have done so also. However, no plan to that end had been put together, although the Pinz services could probably have been replaced at lesser cost. Pinz had put forward no alternative plan. The services, brand and booking system had not in fact been removed. The letter had prompted the legal dispute. Pinz had been advised that it would be interdicted from withdrawing services at short notice, so had continued to supply them and had ultimately agreed not to withdraw them on less than 3 months' notice. Everything had been done to try to get an out-of-court settlement.

[143] Mr Anderson had not been involved in dealing directly with Johnston Carmichael, but had been told that it wanted to see a trading plan, without which it would be difficult to sign off the accounts on a going concern basis. Johnston Carmichael had said that the decision was for the Company's directors to make. Although it had turned out that the letter written by Mr Dunbar saying that withdrawal of the Pinz services would result in the Company being unable to trade was wrong, that was not something that Pinz had tried to set up, and an alternative to those services would still have to have been found.

[144] The Company had always known that there would be an electricity liability to Dobbies; a separate meter had been discussed when the lease was signed, but nothing had been done about it. No amount recognising the liability had been accrued in the Company' accounts; he did not know why.

[145] In re-examination, Mr Anderson stated that the payment authorisation limits agreed in September 2022 had been concerned with day-to-day operational needs, and were not intended to apply to franchise fee and management charge payments. Although there had been agreement that Pinz would be paid, money had been taken from the Company's bank account without agreement. Mr Anderson had always acted honestly, but could appreciate in hindsight that things could have been done differently.

[146] **Christopher McQuade** (34), the Financial Director of the Pinz Group and a member of ACCA, stated that his workload primarily related to Active Parks Limited (a company associated with Pinz) and Pinz itself, which had certain historic accounting issues. He paid less attention to the trading companies, including the Company. He was initially unaware of the precise shareholding pattern in the Company. On 29 August 2022 he had received an email from Mrs Davidson saying that she had received a reminder from Companies House in relation to the Company's confirmation statement and asking whether he would like her

to attend to it. He had gratefully agreed to the suggestion. On 17 September 2022, he had received another reminder from Companies House about the confirmation statement in the post and had forwarded it to Mrs Davidson by email on 23 September, asking her to confirm if she would deal with it as he had thought she had done it already. He had then received an email from Mrs Davidson on 28 September which had no text and had an attachment bearing to be the confirmation statement for the Company, to which he had not paid much attention. He must have moved the email straight to his Outlook folder for the Company without even opening it, as it was still showing as "unread" in that folder when he searched for it on 19 November 2023. He had no reason to suppose that there was anything wrong about it; Mrs Davidson was a director of the Company and he had no reason to question her actions. Even if he had opened the email, he would not have checked the shareholders' information, as he was not fully up to speed on how the shares were split between Pinz and the Davidsons at that point. The confirmation statements for the other companies in the group were being dealt with by Johnston Carmichael. He had discovered the share reorganisation on 17 March 2023 when he noticed that the latest confirmation statement for the Company disclosed that the shareholdings differed from those at incorporation. He had looked through Mrs Davidson's email archives on the instruction of Mr Margach and Mr Anderson, and had found that she had instructed the change.

[147] He had been at the Company's management meeting on 20 March 2023. Mrs Davidson was unable to attend, but Mr Davidson had been presented with a copy of the invoice to the Company for making the share changes which had been raised by the accountants instructed by Mrs Davidson. Mr Davidson appeared very surprised and could not explain why that had been done. A letter terminating the services of Pinz had been handed over at the meeting.

[148] The issue of whether the Company was a going concern was first raised by him. He was a chartered accountant, and it was his professional opinion that the dispute amongst the shareholders of the Company and the possibility of the franchise services having to be withdrawn by Pinz, was a material uncertainty that put into question whether the Company could continue to trade for the foreseeable future. As finance director of the Innoflate group, he advised Mr Margach and Mr Anderson about that issue, including suggesting that further advice be obtained from Johnston Carmichael. The issue could not be ignored, and it took time for matters to develop before it could be concluded that the Company could still appropriately be treated as a going concern. That was only clarified in October 2023.

[149] In further evidence in chief, Mr McQuade stated that he had had become aware of the Company's share reorganisation on 15 March 2023. He had not immediately thought that it represented anything untoward, but had informed Mr Margach of it.

[150] He assembled accounts in a management format for the directors and sent them to Johnston Carmichael with certain additional information so that they could prepare the statutory accounts. Sometimes Johnston Carmichael came back with queries. Mr McQuade had formed the view that if the Innoflate brand were to be removed from the Company without an alternative trading plan being in place, it would have to fold. He had raised that with Mr Margach too. It was decided to engage Johnston Carmichael for an independent opinion on the matter. It was thought that that would be useful. Pinz was looking for confirmation of Mr McQuade's view.

[151] In October 2022 Mrs Davidson had told him that she was happy for the Company to pay Pinz invoices for head office recharge costs. He had instructed that the invoices which became controversial be issued and money taken from the Company in partial payment of them. That had led to a directors' meeting and agreement about what should be paid.

[152] In cross-examination, Mr McQuade stated that Mrs Davidson had given him login details for the Company's account at Companies House, but they did not work. She had lodged the confirmation statement which was needed and forwarded it to him. He had subsequently accessed the Company's account to change its accounting year end, but did not look at the confirmation statement which had been lodged at that stage.

[153] He had sent the Company's management accounts to Johnston Carmichael around the middle of March 2023. He had not received a copy of the draft statutory accounts before the going concern issue had become live. He had informed Mr Dunbar of the share reorganisation issue on 20 April 2023. Mr Dunbar needed to know who held the shares in the Company. He also needed to know on what basis to prepare the statutory accounts, which raised the going concern issue. Mr McQuade had looked at the relevant accounting standard before going to Johnston Carmichael and formed his own opinion that the Company would be unable to trade if the Pinz services were removed. Johnston Carmichael had been asked whether Mr McQuade's view on the application of the relevant accounting standard matter was right, rather than simply to provide advice generally. He had spoken to Mr Dunbar on 21 April and expanded on his interpretation of the relevant accounting standard, FRS 102. He had explained that the Pinz services were being removed from the Company, that there was no other trading plan, and that in his view that meant that the Company could not continue to trade. Mr Dunbar had agreed. However, the decision was one for the directors to make, looking forward to the 12 month period from the signing of the accounts. They had to consider whether there was any material uncertainty on the matter. No specific advice on what exactly they should consider in that respect had been sought. Mr Dunbar had been asked to provide a letter confirming his advice so that a statement of his professional view was available. The involvement of Mr Dunbar, both in

providing that letter and in inviting parties to a meeting, was not aimed at giving a false air of independence to the view that the Company could not be regarded as a going concern. Mr McQuade had written to the Davidsons stating that the accounts could not be signed off on the going concern basis, and accepted that he had worded that communication clumsily. His facility lay in numbers, not words. He was simply trying to engage with the shareholders and was taking what was going on at face value. He had not asked Mr Margach or Mr Anderson for their views, and had had no engagement from the Davidsons. They refused to come to an in-person or virtual meeting. They could have taken their own advice if they wanted to. He did not know what Mr Margach might have said to Mr Dunbar at any point. The enquiry to Johnston Carmichael had been made on behalf of all of the shareholders in the Company, but he had not asked the Davidsons to agree to it being made. He could not remember whether the Davidsons' solicitors were involved at that point – the first letter from them which he had seen was dated 9 May 2023. He had received the draft statutory accounts from Johnston Carmichael on 17 May, and had forwarded them to Mr Margach and Mr Anderson. He had not spotted the mistake they contained about future lease liabilities. He had not sent them to the Davidsons; what he had received from Johnston Carmichael on 17 May also related to another company in which the Davidsons were not involved. It was not a conscious decision not to send the draft statutory accounts to the Davidsons; if they had asked for them, he would have sent them. He did not know when Johnston Carmichael had sent those accounts to the Davidsons' solicitors. He had not been particularly aware of the terms of any correspondence between those solicitors and Johnston Carmichael. Legal matters were not for him to deal with. He had met Mr Davidson at the meeting on 20 March 2023, but was not involved in the correspondence sent to the Davidsons at that time. He was aware that

there was a dispute by the stage of sending the management accounts to Johnston Carmichael. Although the Pinz directors wanted to move away from the relationship with the Davidsons, that was not the purpose of raising the going concern issue. He was not aware of any plan for replacement of the Pinz services. No modelling of the effect of the withdrawal of the services on the Company had been offered to directors or shareholders.

[154] In re-examination, Mr McQuade stated that Mr Dunbar's view about the going concern issue, as expressed to him, was that the Company might not be a going concern should the Pinz services be removed, not that that would definitely be the case. Mr McQuade had looked at the relevant accounting standard as a whole, and was not trying to engineer any particular outcome.

Agreed Evidence – Jacqueline Pollock

[155] Parties agreed by Joint Minute that Jacqueline Pollock operated a bookkeeping and accountancy business called JPS Bookkeeping and Accountancy Services Ltd in Paisley. She regularly dealt with company filings on behalf of clients. In April 2022 she was telephoned by Mrs Davidson in relation to the Company, with which she had not previously been involved.

[156] Mrs Davidson explained that she wished to effect a change in the shareholdings in the Company from the existing holding of one share held by each of Argyle and Pinz, to there being one share held by each of Mr and Mrs Davidson and two shares held by Pinz. Ms Pollock indicated that she could complete the necessary administration but that she would not give advice on what was proposed. Mrs Davidson instructed Ms Pollock to proceed to give effect to those changes. Ms Pollock had no communication with any other director or other representative of the Company or with any other shareholder or

representative of any other shareholder. She gave no advice to Mrs Davidson or anyone else in respect of the proposed changes. Ms Pollock did not request, and Mrs Davidson did not provide her with, any board minute or other document indicating the approval of the members or directors of the Company to the actions that she instructed Ms Pollock to carry out. Mrs Davidson provided Ms Pollock with the Companies House account login details for the Company. On 25 April 2022 Ms Pollock submitted a return of allotment of shares to Companies House recording that one ordinary share of £1 had been allotted to Mr Davidson and one ordinary share of £1 had been allotted to Pinz. On the same day she prepared a stock transfer form recording the transfer of the single share held by Argyle to Mrs Davidson and emailed it to her. Mrs Davidson appended an electronic signature to it on 26 April 2022.

[157] Ms Pollock did not prepare or issue any share certificates in respect of either the newly allotted shares, or the share transferred from Argyle to Mrs Davidson. She was not asked to do so and did not suggest that she should do so. She made no entry in any register of the Company to record either the allotment or the transfer. She was not asked to do so and did not suggest that she should do so. On 28 April 2022 Ms Pollock issued an invoice from JPS Bookkeeping and Accountancy Services Ltd addressed to the Company for £75 plus VAT in respect of the work done by her.

[158] In September 2022 Mrs Davidson asked Ms Pollock to prepare and submit a confirmation statement for the Company. On 22 September 2022 Ms Pollock submitted a confirmation statement to Companies House recording that there were four issued shares, that one was held by each of Mr and Mrs Davidson and that the other two were held by Pinz. Ms Pollock gave no advice in respect of the submission of the confirmation statement.

Expert evidence – valuation

[159] Expert evidence was led by both sides as to the value of the Company. The matters ultimately in dispute between them transpired to be few, and so what follows is simply a summary of their views.

[160] The expert instructed by the petitioners was **Matthew Geale** FCA, forensic partner in the accountancy firm of Armstrong Watson LLP. He was instructed to state his opinion on the value of the Company based on an arm's length sale between willing buyer and willing seller and initially provided an opinion dated 17 November 2023. He had at that stage been provided with financial information pertaining to the Company comprising a spreadsheet containing monthly management accounts (including profit and loss account and balance sheet) for the period ended December 2022, and a series of spreadsheets containing monthly profit and loss accounts for the period from January 2023 to August 2023. From that information he calculated that in 2022 the Company made sales totalling £989,000; that its gross margin was 87%; that the profit before any recharges levied by Pinz was £482,000; and the recharges levied by Pinz totalled £247,000, or 51% of net profit before recharges. There had been an initial peak in sales, which presumably followed the publicity surrounding the opening, followed by a more consistent performance at a lower level for the remainder of the year. There was some evidence that there was a seasonal drop in sales around the summer months. The financial performance of the Company in 2023, until August, showed sales totalling £635,000; a gross margin of 87%; profit before any recharges levied by Pinz of £289,000; and recharges levied by Pinz of £151,000, or 52% of net profit before recharges. The rate of sales on a *pro rata* basis in 2023 was less than that achieved in 2022, but the gross margin was consistent across both periods. The recharges represented a consistent proportion of the Company's profits in both periods, amounting to an aggregate

total across the whole period of £398k, although the recharges for the period from April 2022 to September 2022 were not invoiced at the time on a regular monthly basis but were included retrospectively on a single invoice dated 30 September 2022.

[161] The typical cost for a franchise deal varied depending upon a number of factors, including the industry in which the franchisor and franchisee operated; the extent of the business system provided by the franchisor; the cost of any mandatory initial equipment or stocks; and how well-known the brand was. The franchise fee was commonly determined as a percentage of sales. As a rule of thumb, an initial franchise fee was typically around 5 to 10 per cent of the total investment. The exact percentage and payment terms of royalty fees might vary depending on the franchise agreement and the specific industry, but typically ranged from 10% to 14% of the franchisee's gross sales or revenue. Ultimately, agreement on the franchise fees payable would be a matter between the parties involved and there was no one prescriptive rate in any given circumstance.

[162] In relation to management charges, franchisors often provided other goods and services which the franchisee could opt to use. In these circumstances, the franchisor would probably levy a charge to the franchisee in the form of a management charge or an invoice recharge. Such goods and services might include consulting advice from experienced advisors on a range of matters, eg business development, property selection and development, and legal advice; specific marketing assistance; audit and accounting services; and temporary help from experienced staff within the franchises. In September 2022 the Company had been invoiced franchise fees by Pinz at the rate of 10% of gross sales for the period from February 2022 to September 2022, and had been invoiced monthly at 12% of gross sales from October 2022 to July 2023. A franchise fee had been charged for August 2023 and was included in the management accounts to that date, but

Mr Geale had not seen the relative invoice. As to management charges levied on the Company by Pinz, the charge for September 2022 was a round sum amount of £10,000; the charges for October 2022 to December 2022 were originally issued at a rate of 10% of EBITDA but these were subsequently credited and new invoices issued at the rate of 20% of EBITDA; and charges for all months in 2023 were calculated as 20% of EBITDA. The EBITDA values used for this purpose varied from the EBITDA figures in the management accounts in respect of some months. Management charges would normally be calculated on the basis of the specific costs of goods and services used by the franchise rather than, as in this case, simply a percentage of EBITDA. In that regard, the management charges appeared to be more in the nature of appropriation of profit than charges for specific items. Although a charge was also payable in respect of excess profits, Mr Geale had not seen any actual payment of that head of charge, presumably because the profits actually made did not exceed the budgeted amount.

[163] The Innoflate brand had progressively expanded into six locations since 2018. It had made recent openings in Newport and Glasgow, in both cases in substantial premises with significant lease costs. Each location, once up and running, was highly profitable and Pinz had no substantial borrowings beyond a bank loan of £180,749 as at 31 December 2022. It had a considerable commitment to future lease payments and a key to the success of its strategy would be the maintaining of profitability in and cashflows from the existing locations to finance the initial investment in new locations. It was common for start-up businesses without any previous public presence to go through an initial period following the commencement of trade in which sales increased from a low point as a customer base was established through a combination of marketing and word of mouth reports. By contrast, in the case of an established chain of businesses opening in a new location, the

initial level of sales might be higher due to a pre-existing awareness of the branded businesses operating elsewhere. The opening of the Company's site at Monifieth had been accompanied by promotion which drew on a number of references to the Innoflate brand and the achievements and reviews of the existing Innoflate locations. The peak in sales achieved in April 2022 appeared to result from an initial flurry of interest which decreased to a positive but lower level. While there might have been some impact of the brand at the outset, this value diminished as the Company quickly became established.

[164] A large global franchise providing a comprehensive support and training package could charge franchise fees of approximately 20% to 30%, but for more typical franchises, fees anywhere in the range from 5% to 14% were common. However, in most such cases, the franchisor provided some form of well-developed formalised support beyond the simple use of a name. The actual franchise rates charged by Pinz were only increased, retrospectively, at the end of September or early October 2022, which was when the parties' relationship was deteriorating. The rate of 5% of gross sales originally proposed in the Company's business plan did not appear unreasonable as a franchise fee for the use of the Innoflate name.

[165] As to management charges, the Company bore its own costs for advertising, marketing and website. The management charge invoices did not particularise any specific goods and services. However, in the first 6 months of trading, the management charges were particularised in the accounts and related to "wages", "rent", and "other" costs. After September 2022, the particularisation in the management accounts disappeared and the management charges were recorded on a single line with no analysis. They also increased in overall amount. Mr Geale had seen no evidence that would allow him to assess the validity of management charges after September 2022 and so had assumed that the

Company needed to incur such charges at the rate of £5,000 per month, which was consistent with the period up to September 2022. The effect on the Company's reserves, and the amount available for distribution, on the assumptions that those lower franchise fees and management charges were all that were properly payable, would be to increase them by £104,239 for the whole period to the end of August 2023.

[166] Against that background, valuing the Company as at 31 August 2023, Mr Geale assumed that there would be no impact on sales revenues if the agreement with Pinz for the use of the name "Innoflate" were to be terminated, as the name was not likely to be the primary driver of sales and 5% of gross sales represented a fair market cost for the value provided by the use of the name, or in any event was equivalent to the amount which the Company would have to spend to offset the impact of any termination of the agreement with Pinz.

[167] The most appropriate basis of valuation was the earnings basis, based on a multiple of EBITDA. It was also important to review the adjusted net asset value of the Company as at 31 August 2023, which Mr Geale had calculated as £228,000. In its present form, the Company was capable of generating future maintainable earnings of £308,200, assuming that a cost of £61,200 per annum would be incurred as a reasonable franchise fee or else as the cost of replacing any support or benefit of the brand, and that a further cost of £60,000 per annum would be incurred by way of the cost of management. As to the price-earnings multiple, in Mr Geale's experience a business of this type would be capable of attracting a multiple of between 3 and 5. He selected an average multiple of 4. That resulted in an earnings valuation of the Company of £1,232,800. Once it had been established what the annual liability to Dobbies for electricity was, that would represent a cost of sales which

would result in a pound for pound reduction in profit, EBITDA, and hence the calculation of future maintainable earnings.

[168] After providing his first report, Mr Geale was provided with the report of the expert instructed on behalf of the respondents, Peter Gouw of BDO LLP, and met with him in an attempt to narrow the matters in dispute. He was further provided with a supplementary report by Mr Gouw, and himself prepared a further report dated 22 December 2023, the burden of which was as follows.

[169] The experts agreed that the appropriate method of valuation was an earnings valuation calculated by taking an estimate of future maintainable earnings (the multiplicand) and multiplying this by a suitable price-earnings multiple (the multiplier). Similar methods of deriving the respective estimates of future maintainable earnings had been deployed, comprising the following components: (a) Turnover; (b) multiplied by gross profit percentage (= Gross Profits); (c) less overheads (= Operating Profit); (d) less any appropriate management charges; and (e) less any franchise fees. Gross profit percentage had been agreed at 87%. After considering Mr Gouw's suggested price-earnings multiple of 4.5 and the reasoning underlying it, Mr Geale accepted that that multiple should be used. In relation to future turnover, further data as to the Company's performance to November 2023 had been made available. Mr Gouw had identified four factors which he considered explained a reduction in turnover in 2023: (a) the cost of living crisis; (b) warmer weather; (c)delay in installation of air-conditioning; and (d) new local competitor(s).

[170] In relation to the cost of living crisis, the question was what impact it might have on a putative buyer of the Company looking to invest for a number of years. Changes in the economic environment were a normal part of business life. While the cost of living crisis

might not yet be fully over, the forecast was better for the short and medium terms and it was reasonable to expect that during the remaining 8 years of the Company's lease the economic cycle would gradually improve, leading to better trading performance.

[171] The weather in the UK was changeable. At the end of November 2023, the Company had been trading for 20 months, which included two summer seasons. That was a short period from which to draw any meaningful conclusion on the seasonal impact on sales. There was clearly an initial boost to sales at opening and that should be excluded as non-recurring when calculating earnings. Sales in May 2023 and June 2023 had been low compared with earlier months, possibly due to warmer than usual weather during these months, but there was no firm evidence on that. July and August 2023 appeared to achieve normal levels, with July reaching in excess of £100,000 for the month. Sales in September 2023 had again been particularly low but no information had been provided as to why that was the case. In early October 2023, there was disruption to the business which saw it closed for a period of approximately 2 weeks. It appeared from press reports that when the closure occurred, customers might have gained the impression that the venue might be affected not only for October 2023, but also into November 2023. It would be inappropriate to include, or place any reliance on, the sales in October 2023 (and possibly November or even December 2023) in any reference period for future sales; as the confusion was almost certain to have resulted in cancelled bookings, or customers going elsewhere to secure parties, events etc., especially during the October half-term week.

[172] It was possible that the delay in the installation of air-conditioning as a result of the litigation, together with other effects from the same cause, might explain the low sales values in May, June, and September 2023.

[173] In relation to new local competitors, there was no firm evidence as to the impact that might have had on sales. There had been a short period of above average sales on opening but, after that initial flush of activity, sales settled down to a more sustained level. It was reasonable to suggest that that was a normal pattern for new venues. If so, any impact on the Company from new competitors might be short-lived and sales would increase again after the competitor's own "honeymoon period". There might even be a benefit to an area of new venues which, while appropriating market share, might have the effect of increasing the draw of an area and increasing overall activity in such a way that a smaller share of a bigger market was comparable with the situation prior to the openings. Taking these matters together, an estimate of future maintainable sales should include recent data but should exclude any non-recurring impacts on sales insofar as they did not give rise to doubts about the longer-term future. For those reasons, Mr Geale excluded both the initial flush of sales and sales in the period from October 2023 to December 2023. It was difficult to ascribe a cause to the low level of sales in September 2023. The most representative 12-month period appeared to be between September 2022 and August 2023, when the total sales revenue was £965,258. If September 2023 was taken into account, then the equivalent figure for the most recent 12-month period to that date was £938,164. Mr Geale had taken an approximate average of those two figures, £950,000, as the appropriate figure.

[174] In relation to overheads, those comprised four key components: (a) salaries; (b) property costs; (c) electricity costs; and (d) other overheads. Salaries varied with different levels of turnover and hence business activity. A staff cost to sales ratio of 29.4% was not unreasonable as a measure of sustainable staffing costs. Mr Geale accepted that property costs (ie, rent and rates) should be restated at £93,000 as opposed to his initial £108,000 estimate in the light of further information provided by Mr Gouw.

In relation to electricity costs, Dobbies had invoiced the Company for £112,319.02 exclusive of VAT, but that calculation assumed that all usage which Dobbies did not consider to be its own fell to be attributed to the Company, which might not be the case. The daily usage rate had been applied evenly across the period while the usage was likely to have been seasonal, and the cost calculation included the period from 1 September 2022 to 30 June 2023, when electricity prices charged to Dobbies were elevated due to the energy crisis and might, therefore, not be representative of future costs. The calculation also assumed that the premises were in full usage for all 31 days of October 2023, when that was not the case. If one assumed that the "excess usage" was all attributable to the Company, and applied the current energy cost per unit, the annual ongoing electricity costs would be £61,679.60. However, since costs of electricity might fall in the future and the "excess usage" figure was likely to be a maximum, Mr Geale assumed an annual electricity cost of £50,000 exclusive of VAT. Other overheads had been stated by Mr Gouw to be £60,148 as against Mr Geale's estimate of £50,000. Three cost categories had increased on an annualised basis despite lower turnover and might therefore include non-recurring costs that should be excluded from earnings. Legal and professional fees had increased from £9,147 (for the 9 months to December 2022) to £13,347 (for the 11 months to November 2023). Insurance costs increased from £8,635 to £18,250 for the same period. Sundry costs had likewise increased from £4,644 to £7,700 in that period. No explanation for these increases was apparent, and so Mr Geale retained his original estimate of £50,000 on an annualised basis.

[175] In relation to management charges, Mr Geale remained unable to comment any further on what the management charges levied by Pinz were intended to cover, whether the charges for the services provided were made at market rate and, if not, the extent of any overcharge. The management charges actually levied did not represent 20% of EBITDA.

Prior to September 2022, management charges appeared to have been levied on the basis of actual recharged costs, rather than at 20% of EBITDA and, as these costs were lower than 20% of EBITDA, the overall ratio in the 2022 accounts was also lower. In relation to the 11 months to November 2023, substantial electricity charges had recently been accrued on a monthly basis and, given these additional costs and the lower turnover in recent months, some of the months showed EBITDA losses. In months when EBITDA was negative, no credit of management charges had been given. As a result, the ratio of management charges to the EBITDA shown on the current management accounts was appreciably higher than 20%. Otherwise, Mr Geale continued to hold the views on management charges expressed in his original report, in particular that a deduction from earnings of £60,000 per annum going forward was a reasonable assumption.

[176] Updating the valuation of the Company to 30 November 2023, the basis of valuation; the price-earnings multiple; the gross profit percentage; and the assessment of property costs at £93,000 per annum were agreed. Electricity and staff costs were not agreed. The major determinant of value was the level of future turnover that would be agreed by a willing buyer and willing seller. It was clear that turnover had decreased rapidly and substantially since September 2023. Mr Gouw had weighted his valuation towards 2023 data, using a 2:1 weighting, for that reason. Mr Geale considered by contrast that the Company's results since October 2023 were not representative of underlying activity and should not be relied upon, and that there was doubt over whether the results for September 2023 had been affected by the current litigation or other reasons. Mr Gouw had made his calculation by combining the actual turnover to 31 December 2022 of £989,181 and the annualised turnover for 2023 of £777,464 in the ratio of 1:2, which had implicitly produced an average turnover of £848,036. The figure of £777,464 represented the lowest

value of the benchmark for future sales given the transient, non-recurring nature of at least three of the four negative factors identified by Mr Gouw. Mr Geale considered that this value should also be adjusted for the effects of the closure in October 2023 and that the average weighted figure of around £850,000 should be treated as a minimum possible turnover for the purpose of the valuation. His revised view of the likely level of future turnover was, as stated, £950,000. That brought out a value of the Company as a whole of £1,594,000 if franchise fees and management charges were disregarded, £1,324,000 if management charges were deducted, and £1,067,000 if franchise fees at 5% of gross revenue also fell to be deducted. If future turnover was deemed to be £900,000, then the relevant figures on each basis would be £1,464,000, £1,194,000 and £951,000 respectively. If future turnover was deemed to be £850,000, then the relevant figures would be £1,335.000, £1,065,000 and £835,000 respectively.

[177] The petitioners' shares would be worth 50% of the appropriate figure. If the court determined that a minority discount was appropriate then any discount would be minimal. Mr Gouw's discount rate of 25% was excessive. The ACCA factsheet upon which he relied showed a possible discount range for a 50:50 holding as being in the region of 15%-25%, but also acknowledged that, where using its figures for the purpose of a dispute, the discounts shown were excessive and gave an example which indicated a possible reduction of 50% on the ranges provided. The appropriate range for a discount in that context was therefore likely to be a maximum of 7.5%-12.5%. The factsheet also acknowledged that the strategic value of a shareholding should be considered. The Company was the only entity within the Pinz group that operated under the Innoflate banner which was not wholly-owned. If Pinz were to acquire the 50% shareholding owned by the petitioners, then it effectively gained full control of the Company and was able to bring it within the Pinz group. It was

significantly more beneficial for Pinz to acquire the petitioners' 50% shareholding than for that shareholding to be owned by an external investor, which again would create a potential position of deadlock. Mr Geale therefore considered that in this particular case, if a minority discount was relevant, it should be 0%, or at least less than the 7.5% minimum acknowledged by the ACCA factsheet. The key questions for the court which had an impact on value were therefore: (a) the level of turnover; (b) the appropriate level of management charges, if any, to deduct from earnings; and (c) the appropriate franchise fees, if any, to deduct in calculating earnings.

[178] In examination in chief, Mr Geale explained that, in calculating maintainable earnings, he had been looking for a normal trading period, preferably over 12 months to allow for seasonality. He had excluded the first 4 months of trading so as to leave the Company's honeymoon period out of account. By contrast, Mr Gouw had included both that period and the period during which the Company had encountered trading issues towards the end of 2023, and had applied a weighted average in favour of the 2023 trading year. It would have been better all round to have had 2 or 3 years' trading history, but that was not possible, and in those circumstances it was best to look for a steady trading period of 12 to 15 months. If the current, seemingly adverse, trading continued, then the maintainable earnings figure might come down to £900,000 or even £850,000.

[179] There was no basis for a 12% of revenue franchise fee other than the putative agreement in October 2022. Such fees were ordinarily open to negotiation. A franchise agreement would typically have a duration of 2 to 5 years. It was not clear what the franchise fee in the present case covered, and the same applied to the management charge. A franchise fee could be in the range of 6% to 12%, or more.

[180] In cross-examination, Mr Geale stated that he had proceeded to some extent on material and explanations provided by the Davidsons. The Innoflate brand appeared, from Mr Margach's LinkedIn postings, to have been increasing in strength for 9 years. The Company's offering was unique, and was more than just an inflatable park. It was a business that needed experience and knowledge to set up. Franchising situations varied considerably, and one benefit of them could be access to the franchisor's know-how. In the present case, there had been no upfront franchise fee to be paid. Everything was a matter for agreement between the parties involved in smaller franchising arrangements. He was not aware of a comparable franchise situation in the same, or a similar, line of business to the Company.

[181] He could not express a concluded view on the value of the Innoflate brand to the Company, but it was a diminishing one in his opinion. Although he was aware of an initial business plan having been drawn up for the Company, he had not produced it with his reports. The net asset value of the Company had not been used in the valuation process. If the inflatable equipment used by the Company had a shorter life than figured, then the depreciation which ought to be applied to it ought to be correspondingly greater.

[182] It was difficult to determine the impact of the factors Mr Gouw had posited as reducing future maintainable earnings. Permanent factors should be taken into account; temporary ones less so. He considered that the factors mentioned by Mr Gouw had been taken into account in the range of figures which he, Mr Geale, had used to arrive at his conclusions.

[183] Nothing material was added by Mr Geale's re-examination.

[184] **Peter J Gouw**, partner in the Forensic Accounting & Valuations department of BDO LLP, provided an initial expert accountancy report on behalf of the respondents on 21 November 2023.

[185] He noted that the Company's turnover for the period to 31 December 2022 was around £989,000, effectively for a 9 month period of trade, which equated to around £110,000 per month or an annualised turnover of around £1,320,000. However, the first period of trade was at an exceptional level and was not likely to be replicated going forward. The forecast level of turnover for the year to 31 December 2023 showed a decrease to £862,000. Gross margin had stayed constant at 87%. However, certain costs had not been included in the 2022 results or were at a rate significantly different to 2022 levels in the 2023 figures. Rent in 2022 was around £20,000 but was £50,000 in the 2023 figures. Rent going forward would also be in the order of £50,000. Rates charged in 2022 were around £1,000, but in 2023 were shown at £44,000, which would be the rate going forward due to the absence of ongoing rates relief. Insurance costs in 2023 were shown at £29,000 in 2023 compared to around £8,600 in 2022. The base level of those costs going forward would be in the order of £29,000. The franchise fee included in the results for 2023 was only up to and including September 2023. Utilities costs of £72,000 were included in the 2023 figures, but there was no comparable charge in the 2022 figures. On the other hand, the Company's site was forced to close for a period of time between 5 and 20 October 2023, meaning that it was possible that 2023 results and profits were actually lower than would ordinarily have been achieved. However, Mr Gouw had elected not to make any further adjustment to reduce total turnover for 2023.

[186] Typically, shares in unquoted companies were valued by reference to their open market value. The International Valuation Standards Council set out that market value was

the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion. The earnings basis of valuation involved a calculation of the Company's maintainable profits, being EBITDA, based on a consideration of its past and expected profits, to which was then applied a multiple to give the enterprise value. The enterprise value was then adjusted for any surplus assets, excess cash and debt to arrive at the value of the shares of the company, or the equity value. The earnings basis was a suitable method for valuing the Company. Mr Gouw's approach to valuing the business was to take the actual turnover for 2022 and forecast turnover for 2023, and then to apply a gross margin of 87% to each to derive a notional gross profit. He then applied the actual 2023 expenses, as he considered that those provided a more reliable assessment of the costs associated with the business. He had assumed they were not materially impacted by levels of turnover. He had then deducted management charges calculated on 20% of net profit before franchise fees and franchise fees of 12% of net turnover, resulting in a maintainable EBITDA position. He had then applied a weighted average of 2022: 1 and 2023: 2. This placed a greater emphasis on the 2023 results. That recognised the ability of the business to achieve higher levels of turnover (as in 2022), but also recognised that the 2023 results were significantly lower (with recent months at only 50% of 2022 levels) and were not expected to increase significantly. That resulted in an adjusted EBITDA for both years. The most persuasive level of EBITDA was £92,486 (£93,000 rounded) based on that weighted average of profits. In Mr Gouw's opinion that provided the most robust assessment of the likely performance of the business going forwards and also recognised that whilst 2023 results were lower, the business did actually achieve a higher level of profit in 2022.

[187] He had then considered the information available about multipliers for comparator companies in order to derive an appropriate multiplier. His research into publicly-traded companies in a similar sector to the Company showed listed companies had EBITDA multiples ranging from a low of 5.7x to a high of 16.5x. If high and low outliers were excluded, then the average was 8.0x. However, the figures for valuing the whole of a private company had to be increased because of a control premium, arising due to the shareholder of a private company holding more influence over the business than the shareholder of a large publicly-listed company; and reduced due to the smaller size of the company and lack of diversity. He had applied a 40% discount in this case, given the fact that the business of the Company was significantly smaller and less profitable than the comparator entities. That would result in an adjusted mean EBITDA multiple of 4.8x. That had been checked by reference to the Small and Medium Enterprises Valuation Index produced by the UK200 Group (composed of independent accountancy and law firms) which collated key data on actual transactions involving the sale and purchase of businesses from various sectors. The valuation index for the year to November 2022 indicated a mean EBITDA multiple of 5.4x and a median multiple of 4.9x. The mid-point was approximately 5.2x. The average deal size was £7.1m, so that the companies included in the data for the Index were typically larger than the Company. Therefore, he had applied a discount of 20% to the mid-point EBITDA of 5.2x, which gave a suggested multiple of 4.2x. Taking those indications together, he considered that a multiple of 4.5x EBITDA was appropriate, being the approximate mid-point between the publicly-traded company information and the UK200 Group data. The enterprise value for the Company was therefore approximately £414,000. He had considered whether the enterprise value of the Company ought to be adjusted for any surplus assets, excess cash and net debt, but had not

identified any significant items or balances that required adjusting for, assuming that any cash held would be required for trading purposes and any amounts owed to Pinz would be considered a trading debt rather than borrowings. On that basis, the equity value of the Company was around £416,000. The pro-rata value of a 50% interest would therefore be approximately £208,000.

[188] In Mr Gouw's experience, typically where a valuer was asked to value commercially an interest in a private company that was less than a 100% interest, it might be appropriate for that interest to be discounted from the full *pro rata* value. In his experience, 50% interests could be difficult to value. Much would depend on the nature of the other interests in the company. If the 50% interest was faced with a single other 50% interest (as in the present case) then a deadlock position ensued and a larger discount (perhaps of 25% or 30% where a dispute existed) might be appropriate. As suggested by Factsheet 167 produced by the Association of Chartered Certified Accountants, a typical discount of up to 25% for a 50%/50% owned company was a starting point. However, in addition, the level of any minority discount to be applied would also typically depend upon various factors, including the size of the interest, the spread of other interests, the degree to which the shareholding is locked in and the pattern of dividend payments, both historic and going forward. The court might conclude that the Company was effectively a quasi-partnership and thus no discount was appropriate. However, were a minority discount to be considered appropriate, a discount of 25% would not be unreasonable. Assuming a 25% discount was deemed appropriate, the value of a 50% holding in the Company would become £155,000.

[189] In a supplementary report dated 15 December 2023, Mr Gouw updated his original calculations to reflect more recent management information concerning the results for the Company for the 11 months to November 2023. He also had management accounts for the

year to 31 December 2023 but those contained the Company's forecasts for December 2023 and he had not relied on those forecasts. Turnover in the eleven-month period to 30 November 2023 had decreased to £733,000 from around £989,000 for the 9-month period to the end of December 2022. It had to be recognised that in October 2023 there had been some disruption to the business when the site had to close for about 3 weeks following issues with insurance. Gross margin had stayed constant at around 87%. However, certain costs had not been included in the 2022 results or were at a rate significantly different to 2022 levels in the 2023 figures. Rent in 2022 was around £20,000 but came to £45,000 in the 2023 figures. Going forward, it would be of the order of £50,000. Rates charged in 2022 were around £1,000, but in 2023 were shown at £28,000 for the 11-month period. Insurance costs in 2023 were shown at £29,000 compared to around £8,600 in 2022. A franchise fee was shown in the 2022 results at £124,000, but for the 11 months to 30 November 2023 was around £87,000, reflecting the downturn in turnover. Electricity also now required to be accounted for given the claims made by Dobbies. He had made his own estimate for December 2023 so as to enable him to prepare a forecast full year's trading results that he could use in his calculations, checking that estimate for reasonableness against the December 2023 management information with which he had been provided. In order to estimate the likely turnover figure for December 2023 he had reviewed the levels of turnover by month achieved in 2022 and 2023 and looked to identify the decrease that had occurred in percentage terms. The average decrease was 41.86%. If this was applied to the December 2022 turnover of £76,267, the expected figure for December 2023 would be £44,341 (being £76,267 less 41.86%). His estimated total turnover for 2023 thus became £777,464, being £733,123 plus £44,341. Based on his assessment of turnover for December 2023, he estimated gross profit for the full year would be in the order of a rounded figure of £676,000,

based on a gross margin of 87%. The franchise fees payable would be around £93,000 in the year to 31 December 2023 based on the estimated rounded turnover of £777,000. Adjustments were required to the overhead figure of £419,318 in the management accounts for the 11-month period to 30 November 2023 in order to derive a more robust level of overhead for that period. No cost had been included for cleaning and waste in the figures for November 2023 and he had added £600 as an adjustment. No cost had been included for rates in the management accounts for January, February and March 2023, and he had added a figure of £10,800 based on 3 months at around £3,600 per month. The utilities cost in the management accounts to 30 November 2023 were shown at £65,268, which included an amount of £29,500 effectively included in respect of 2022 costs which were not accounted for there. The revised utility costs for the eleven-month period therefore become around £36,000 (being £65,000 less £29,500). The remainder of the overheads included in the management accounts appeared to be broadly consistent on a month-by-month basis. Mr Gouw therefore decided to pro-rate his adjusted overheads figure for the 11 months to 30 November 2023 to derive an estimated level of overheads for the year to 31 December 2023, resulting in a range of £437,799 to £465,250, depending on what the amount due to Dobbies by way of electricity charges transpired to be.

[190] Mr Gouw then took the actual turnover for 2022 and his estimated turnover for 2023, to give him two alternative levels of potential turnover, then applied a gross margin of 87% to each to derive a notional gross profit. He then applied the adjusted 2023 expenses of £437,000, as he considered them to provide a more reliable assessment of the costs associated with the business, assuming that they were not materially impacted by levels of turnover. That produced a profit before adjustment figure. He then deducted management fees calculated on 20% of net profit before franchise fees at 12% of net turnover. He then

applied a weighted average, with a weighting of: 2022: 1 and 2023: 2. That placed a greater emphasis on the 2023 results, over those for 2022, which saw a level of turnover significantly higher than appeared to be achievable in 2023 and beyond. That resulted in EBITDA of £137,764 or £123,124, again depending on what view one took of the likely resolution of the amount due to Dobbies each year in respect of electricity. The multiplier remained at 4.5x EBITDA. The enterprise value of the Company did not need to be adjusted for any surplus assets, excess cash or net debt. On that basis, the rounded equity value of the Company was in the range of £620,000 to £554,000. Based on that, the strict pro-rata value of a 50% interest would be in the range of £310,000 to £277,000. While it was a matter for the court whether a minority discount fell to be applied, Mr Gouw remained of the view that a discount of around 25% would not be unreasonable, bringing out the value of a 50% holding as in the range of £232,000 to £207,000.

[191] In cross-examination, Mr Gouw stated that he had not done any audit work on the management account figures provided to him. No obvious issue stood out from those accounts. A willing buyer for the Company might have any number of different characteristics. The management and franchise fees were in place and there was no guarantee that a new 50% shareholder would be able to change that. The experts differed about whether the franchise fee should be 6% or 12%. The figures for management charges came out about the same at the assumed levels of trading. Mr Geale's figures were 22% above actual performance, which a buyer would be unlikely to accept. The general trend for the Company was downwards. It was always difficult to know why trade fluctuated. A buyer would be more likely to look at recent trading, taking into account the closure in October and any knock-on effect. Only a relatively short trading period was available for

analysis. Judgments as to value could be crude in such circumstances. Electricity costs could vary with turnover, but Mr Geale's figure of £50,000 a year looked low to him.

[192] Nothing material was added in re-examination.

Petitioners' submissions

[193] On behalf of the petitioners, counsel submitted that the general principles governing the exercise of the jurisdiction conferred by sections 994 and 996 of the Companies Act 2006 were well-established and could be taken from *Re Saul D Harrison plc* [1994] BCC 475, [1995] 1 BCLC 14, *O'Neill* v *Phillips* [1999] 1 WLR 1092, [1999] BCC 600, *Grace* v *Biagioli* [2005] EWCA Civ 1222, [2006] BCC 85 and *Re Annacott Holdings Ltd* [2012] EWCA Civ 998, [2013] Bus LR 753. The petitioners had to demonstrate that the affairs of the Company had been conducted in an unfairly prejudicial manner. That required them to demonstrate unfairness in the sense described by Lord Hoffmann in *O'Neill*, viz. unfairness in the conduct of the Company's affairs which was prejudicial to the interests of the petitioners or the members generally. Conduct could be unfair without being prejudicial or prejudicial without being unfair. Unfairness would usually involve a breach of the terms on which the parties agreed to carry on business together, such as formally expressed in the Articles of Association of the Company, or in a shareholders' agreement. Those terms might also be implied by law, eg in the form of the duties owed to the Company by its directors, or they might arise from informal shared understandings, classically in the case of a quasi-partnership.

[194] The petitioners' allegations of unfairly prejudicial conduct were of breaches by Mr Margach and Mr Anderson of their fiduciary duties to the Company, in particular by prioritising the interests of Pinz over that of the members of the Company as a whole, in

relation particularly to the charges imposed on the Company for services provided by Pinz, and in relation to their recurring threats to withdraw services on inadequate notice and without responsible alternative arrangements being made. There had been no real intent on the part of Pinz to debrand the Company's site, merely to create uncertainty and drive the Company's value down. The supposed agreement of the charges with Pinz was reached in plain breach of the prohibition on directors voting on matters in which they had an interest. It was inherently impossible for a market rate to be set in such circumstances. The arrangements put in place resulted in the majority of the Company's profits going to Pinz as brand provider and supplier rather than to the members as a whole by way of dividends. The conduct of Mr Margach and Mr Anderson was deliberate and directed at destabilising the Company, motivated by the furtherance of their own interests over that of the Company (or the members of the Company as a whole). In that respect the present case was similar on its facts to *Meyer* v *Scottish Co-operative Wholesale Society Limited* 1958 SC(HL) 40, 1958 SLT 241. As Arden L.J observed in *Annacott Holdings* at [22], breach of directors' fiduciary duties would generally indicate that unfair prejudice had occurred.

[195] There had been an exclusion from management in a manner contrary to the reasonable expectation of inclusion. The dealings with the Company's accountants in respect of the statutory accounts were an obvious example. The respondents had first had private discussions with the accountants who were then authorised to disseminate the approved position to the respondents. That was nefarious and the resultant lapse in the Company's insurance was part of a consistent course of conduct designed to drive down its apparent value. It was accepted that the electricity issue was not in itself an example of the unfairly prejudicial conduct of the Company's affairs, although it remained relevant to its proper valuation.

[196] The overall detriment to the Company was obvious: it paid more for a brand and services than it should have done, and its business was destabilised and arguably devalued. There were direct consequences to the petitioners: they received less than they would have done by way of dividend and the value of their investment was reduced.

[197] Overcharging by one party was a commonly encountered example of unfairly prejudicial conduct which the court was accustomed to address when providing a remedy: see eg *Annacott Holdings*; *Fowler* v *Gruber* [2009] CSOH 36, [2010] 1 BCLC 563.

[198] It was evident, and perhaps unsurprising in all the circumstances, that there had been a departure from strict formality in respect of the operation of the Company. That was the case generally, rather than only in relation to the matters of which the petitioners complained. The Company's articles were the default articles for a private limited company, being those set out in Schedule 1 to the Companies (Model Articles) Regulations 2008 (SI 2008/3229).

[199] The essential requirements of the Companies Act 2006 in respect of allotment, certification, transfer and registration of shares and shareholdings might be summarised as follows:

(i) The directors could exercise the right to allot shares unless prohibited from doing so by the articles (section 550).

(ii) It was the duty of the Company to issue share certificates within 2 months of allotment (section 769); and certificates were sufficient evidence of title unless the contrary is shown (section 268).

(iii) The company was required to keep a register of members (section 113) and had to include in it the information specified in that section. It might do so itself in the traditional manner, in which case it was required to make the register

available for inspection (section 114). Since 2015 it had been entitled to make an election to use the public register as its register of members (Chapter 2A generally and section 128H specifically).

(iv) It was entry on the register of members that conferred the status of member (section 112). Allotment would generally carry the right to be entered on the register, but only being entered on the register would confer the status of member.

The Company in the present case appeared neither to have elected to use the public register nor to have kept a private one. Mrs Davidson, who dealt with incorporation, admitted that she was unaware of the requirement to keep a register. Only Mr Margach was appointed as a director at incorporation. That mistake was noticed as Mrs Davidson was attending to the incorporation. She added the other three directors by making the necessary entries. There were no minutes of either the single original director or the members in general meeting having passed any resolution to appoint the others. Those appointments were nonetheless effective, in accordance with the well-known principle derived from *Re Duomatic Ltd* [1969] 2 Ch 365, [1969] 2 WLR 114. The court could cure any want of formality under the power conferred by section 125 of the 2006 Act: *Re I Fit Global Ltd* [2013] EWHC 2090 (Ch), [2014] 2 BCLC 116; *Re Contingent and Future Technologies Ltd* [2023] EWHC 2451 (Ch). If the court took the view that consent sufficient to engage the *Duomatic* principle was not present, the only consequence was that neither the transfer from Argyle to Mrs Davidson, nor the allotment of an additional share to each of Mr Davidson and Pinz was effective. The consequence would be that Argyle held one of two issued shares and was entitled to the remedy.

[200] The scope of the statutory discretion to fashion an appropriate remedy conferred by section 996 could scarcely be wider: the court "…may make such order as it thinks fit for giving relief in respect of the matters complained of." In making an order for purchase at fair value the court was exercising its discretion to provide a remedy appropriate to the circumstances of the case, with what constituted fair value being dependent on the whole relevant circumstances. Since unfairly prejudicial conduct would almost always involve a breach of the terms on which the parties agreed to carry on business together, the ascertainment of those terms would almost always be a relevant factor in the assessment of the appropriate relief.

[201] As to the question of whether the Company was a quasi-partnership, the petitioners relied on the line of authority following *Ebrahimi* v *Westbourne Galleries Ltd* [1973] AC 360, [1972] 2 WLR 1289. In *Strahan* v *Wilcock* [2006] EWCA Civ 13, [2006] BCC 320 Arden LJ observed at [18] – [20]:

> "The question whether the relationship between shareholders constitutes a 'quasi partnership' is relatively easy to answer if the company's business was previously run by a partnership in which the shareholders were the partners. It is indeed common for partnerships to be converted into companies for tax or other reasons. It is also relatively easy to establish whether a relationship between shareholders constitutes a 'quasi partnership' when a company was formed by a group of persons who are well known to each other and the incorporation of the company was with a view to them all working together in the company to exploit some business concept which they have…"
>
> "…Thus, it is important to ask whether at that point in time the company would have been formed on the basis of a personal relationship involving mutual confidence. It would also be appropriate to ask whether, under the arrangements agreed between the parties, all the parties, other than those who were to be 'sleeping' members, would be entitled to participate in the conduct of the business. Likewise it would be appropriate to ask whether there was a restriction on the transfer of the members' interests in the company."

It was no bar to there being a relationship of quasi-partnership that the respective holdings were not held by individuals but were taken via interposed companies: *Re Sprintroom* [2019]

EWCA Civ 932, [2019] BCC 1031. All of the typical characteristics of quasi-partnership were present in the Company, at least from its incorporation until the defenestration of Mrs Davidson in August 2022. The respondents' complaints about the petitioners' dealings with the shares in the Company having broken down the parties' mutual trust and confidence tacitly acknowledged that.

[202] The remedy sought was orthodox: an order requiring the respondents to purchase the petitioners' shares at a value to be assessed by the court, and with such adjustments as might be appropriate to reflect the unfairly prejudicial conduct. On the assumption that the Company was a quasi-partnership the default setting was that purchase should be without discount for absence of control: *O'Neill*; *Strahan*; *Sprintroom*. The petitioners' 50% interest in the Company, being equal to the respondents' interest, was not a minority interest properly so called. In the more usual cases of this type the commercial value of a true minority interest was depressed because the majority might carry any resolution required for the ordinary business of the company without recourse to the minority's shares and so would have no commercial requirement to purchase. In the present case, however, the acquisition of the petitioners' shares would give the respondents the entirety of the issued share capital, consequentially enhancing the value of their own shares. There was an obvious "marriage" value which it would be wholly artificial to ignore, not only in terms of control of the Company itself, but also in terms of the respondents being able fully to integrate it with the group of other companies owned by them and which operated their other Innoflate branches. No such value presented itself to the Davidsons.

[203] There was a strong presumption that there should be no discount for minority status in a quasi-partnership. The rationale for this was most clearly explained by Lord Millett,

giving the opinion of the Privy Council in *CVC/Opportunity Equity Partners Ltd* v *Demarco Almeida* [2002] UKPC 16, [2002] BCC 684 at [41] and [42]:

> "41. The rationale for denying a discount to reflect the fact that the holding in question is a minority holding lies in the analogy between a quasi-partnership company and a true partnership. On the dissolution of a partnership, the ordinary course is for the court to direct a sale of the partnership business as a going concern with liberty for any of the former partners who wish to bid for the business to do so. But the court has power to ascertain the value of a former partner's interest without a sale if it can be done by valuation, and frequently does so where his interest is relatively small: see *Syers v Syers* (1876) 1 App Cas 174. But the valuation is not based on a notional sale of the outgoing partner's share to the continuing partners who, being the only possible purchasers, would offer relatively little. It is based on a notional sale of the business as a whole to an outside purchaser.
>
> 42. In the case of a company possessing the relevant characteristics, the majority can exclude the minority only if they offer to pay them a fair price for their shares. In order to be free to manage the company's business without regard to the relationship of trust and confidence which formerly existed between them, they must buy the whole, part from themselves and part from the minority, thereby achieving the same freedom to manage the business as an outside purchaser would enjoy."

Reference was also made to *Re Bird Precision Bellows* at p. 1389. On a proper analysis of the authorities the contrary proposition – that a discount would presumptively be appropriate where the company was not a quasi-partnership – did not follow. The high water mark of that proposition was the dictum of Arden LJ in *Strahan* [17]. Having outlined the settled presumption in favour of no discount being applied in quasi-partnership cases her Ladyship went on to make the following observation:

> "It is difficult to conceive of circumstances in which a non-discounted basis of valuation would be appropriate where there was unfair prejudice for the purposes of the 1985 Act but such a relationship did not exist. However, on this appeal I need not express a final view on what those circumstances might be."

As was obvious, that observation was *obiter*. It was also tentative, not followed through in any detailed analysis, and there was no indication that it was the subject of argument or that the court received a full citation of authority. The eminence of Arden LJ and the strength of the bench generally obviously lent it weight, but making all due allowance for that, it was

very difficult to see it as laying down any general presumption. Had the court intended to do so it would have required to reconcile any such presumption with the unfettered discretion conferred by the legislation, and with the apparently contrary dicta in prior authority.

[204] The subsequent case law tended to confirm that view. The dictum appeared to have been applied in *Irvine* v *Irvine (No. 2)* [2006] EWHC 583 (Ch), [2007] 1 BCLC 445. It was quoted with apparent approval in *Fowler* v *Gruber*. By contrast it was doubted, or at any rate not followed, in each of *Robertson, Petitioner* [2009] CSOH 23 at [35]; *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch), [2010] 1 BCLC 367 at [290] to [308]; *Re Blue Index Ltd* [2014] EWHC 2680 (Ch) at [19] to [38] and [48] to [57]; *Re Lloyds Autobody Ringway Ltd* [2018] EWHC 2336 (Ch) at [106] to [114]; *Re Edwardian Group Ltd* [2018] EWHC 1715 (Ch), [2019] 1 BCLC 171 at [637] to [655]; *Re AMT Coffee Ltd* [2019] EWHC 46 (Ch), [2020] 2 BCLC 50 at [194] to [216]; *Waldron* v *Waldron* [2019] EWHC 115 (Ch), [2019] BCC 682 at [138]; *Otello Corporation ASA* v *Moore Freres & Co LLC* [2020] EWHC 3261 (Ch) at [237] to [235] and *Smith* v *Smith* [2022] EWHC 1035 (Ch) at [144] to [147]. In *Re Dinglis Properties Ltd* [2019] EWHC 1664 (Ch), [2020] 1 BCLC 107 at [354] to [368] a hybrid position had been adopted, that the discretion was broad and there was no presumption, but that as a working hypothesis, one might assume that outside the quasi-partnership scenario, it would be a very unusual case which called for no discount to be applied.

[205] The most persuasive analyses of the authorities were those in *Re Blue Index* and *Otello Corporation*. Reference was also made to *Hollington on Shareholders Rights* (10th Ed.) at paras [8.51] to [8.56]. It was, however, clear that the number of cases in which no discount had been applied in non quasi-partnership cases and the variety of circumstances in which that course had been taken could not be reconciled with that being a wholly exceptional

course. The better view was that such an approach might be justified in a variety of circumstances which were far from exceptional, and that it was unhelpful to overlay terms like "exceptional" to what was better understood to be a broad discretion to reach a fair outcome in an infinite variety of circumstances.

[206] In the present case it was clear that there were several circumstances pointing away from the imposition of a discount. The first was the obvious marriage value, with the consequence that the imposition of a discount on the petitioners would generate a substantial windfall for the respondents. On Mr Gouw's proposed discount of 25% the petitioners' 50% holding would transact at 37.5% of the net value of the Company as a whole. By necessary implication the respondents' shares must have an identical value since they suffered from the same lack of overall control. But that would be cured by the acquisition, and afterwards they would hold 100% of the value. The consequence of the application of a 25% discount would be that they would pay 37.5% of the value of the Company as a whole and in exchange receive the 62.5% of that value that they did not already control. Such an outcome would reward them and penalise the petitioners for the unfairly prejudicial conduct in which the respondents had engaged. Secondly, it was clear that the circumstance which was material to the outcome in cases like *Lloyds Autobody* - that the applicant's own egregious misconduct had wholly justified his exclusion from management - was entirely absent in the present case. The respondents' attempts to characterise the petitioners' dealings with the Argyle shares as some sort of misconduct was eloquent only of their own bad faith and opportunism. Thirdly, the suggestion that the petitioners might be brought within the category of those who did not pay full value for their shares and so should not be entitled to expect to be bought out at full value was plainly unfounded. All of the original shares were acquired at the same price – the £1 par

subscription value. The value that had been generated was derived from the substantial investment made by the members, in the form of unsecured loans advanced to the company to fund its start-up costs and provide initial working capital, and to the efforts of the directors, contributed without salary or other direct emolument, and in the case of the petitioners without any other indirect interest. It was true that the loans made by the petitioners had been repaid but so had the loans made by the respondents, and there was no warrant for the proposition that in a loan of this type, which had as its only commercial rationale the hope or expectation of increasing the value of the underlying equity investment, repayment without interest was somehow sufficient reward for the commercial risk taken. As with the marriage value already described, the consequence of such an approach would be to expropriate the value from one shareholder and confer it gratuitously on another. It was also true that the respondents or their employees undertook most of the burden of management, but they did so by choice, and they did not do so gratuitously, but on the basis of substantial charges imposed by them upon the Company in exchange for such services. The court might reasonably conclude that but for the respondents' conduct the most likely exit would have been by way of agreed sale of the whole of the business with *pro rata* distribution of the proceeds. One test discussed in a number of the authorities was whether the petitioners would be entitled to a winding-up on the just and equitable ground were they to seek one. The significance of that in the present context was that the consequence of winding-up would be distribution of any surplus among the members *pro rata*. Not all unfairly prejudicial conduct would justify a winding-up. The respondents had consistently suggested that winding-up was appropriate. It was clear that the petitioners could satisfy the test for a just and equitable winding-up as explained most recently in *Lau* v *Chu* [2020] UKPC 24, [2020] 1 WLR 4656 (PC) at [17] to [26] and [64].

That was so regardless of whether the Company fell to be considered as a quasi-partnership. It was also clear that the breakdown in the relationship was such that there was no realistic prospect of the parties being able to work together in the future, and in that regard the present case was similar to *Jesner* v *Jarrad Properties Ltd* 1993 SC 34, 1994 SLT 83, in which the unfair prejudice remedy was refused but the court made clear that it considered the test for winding-up to have been met.

Respondents' submissions

[207] Senior counsel for the respondents moved the court to dismiss the petition with an award of expenses in their favour. It had not been established that the conduct of the respondents was either unfair or prejudicial to the Davidsons as members of the Company.

[208] The petitioners claimed that the respondents forced commercial arrangements on the Company which provided for grossly excessive payments to Pinz. However, the Davidsons agreed to those commercial arrangements. Indeed, Mr Davidson had suggested the arrangements which formed the basis of the agreement between the Company and Pinz and had only complained about them many months later, when these proceedings were raised. It was the breakdown of the parties' relationship which had led to the retrospective characterisation of the charges as unilaterally imposed and unreasonable. In any event, the payments to Pinz were not excessive, but rather were commercially reasonable. The occasion in October 2022 when invoices had been raised without agreement was an isolated incident, not subsequently repeated.

[209] The petitioners further claimed that the conduct of the respondents was calculated to destabilise the business of the Company, and to create artificial distress to drive down the value in its business. However, the business of the Company was not destabilised by any

conduct of the respondents. Since the date when the petition was raised, the business of the Company had suffered a downturn. It required to close for a brief period in October 2023, because of an issue with the renewal of insurance for the site, which in turn was caused by the existence of this litigation. In any event, the breakdown in the relationship of trust and confidence amongst the parties resulted, in the main, from the transfer of shares from Argyle to the Davidsons without the knowledge or consent of the respondents. In effect, the conduct of the Davidsons prejudiced Pinz, and a breakdown of trust and confidence flowed from that.

[210] The petitioners averred that the cessation of management services by Pinz with no other arrangements was an act which, if not restrained by the court, would cause significant prejudice to the Company and to the petitioners. However, the services had never been withdrawn. The threat to withdraw them had been the result of suboptimal legal advice received from former agents, for which Pinz accepted responsibility. Nonetheless, it had agreed to continue to provide the services for the benefit of the Company. Mr Margach and Mr Anderson asked the Davidsons for alternative management proposals, on the basis that the current arrangements could not continue in the circumstances. However, no such proposals had been forthcoming, and inaction generally had been the Davidsons' policy thereafter. The Davidsons had also failed to engage in the finalisation of any agreement to continue the services indefinitely. In any event, any decision to terminate management services had been a commercial decision, properly taken by the directors of Pinz.

[211] The petitioners contended that the Company was a quasi-partnership. However, there was a distinct absence of many of the features of a partnership. Mr Margach and Mr Anderson carried out the day-to-day management of the Company. Mrs Davidson had provided operations support to the wider Pinz group. Her role with the Company was one

aspect of her role with the wider group. Mr Davidson had a very limited role in the Company. It was anticipated that he would assist with identifying further properties at which inflatable parks could be opened. However, no further sites were identified by him, nor were any further sites opened by the Company. He had no role with the day-to-day running of the Company. In essence, the Davidsons were passive investors in a business which Pinz was operating. There was no agreement or understanding that all parties would be involved in running the business. All parties were not, in fact, involved in the running of the Company. That could be seen by the general lack of engagement in the operations of the Company by the Davidsons.

[212] In these circumstances, the respondents submitted that the petitioners had failed to establish a case of unfair prejudice in relation to any one or more of each of the three limbs of their case against the respondents.

[213] If the court was persuaded that such a case was made out and that an order ought properly to be made in terms of sections 994 and 996 of the 2006 Act, a discount of 25% ought properly to be applied to the valuation of the petitioners' shares. The Company was not a quasi-partnership. Even if the court found that it was, it should exercise its discretion in reaching a fair value for the shares of the Davidsons to apply a discount of 25% in any event.

[214] In *Martin* v *Hughes* [2021] CSOH 109, Lord Clark stated at [49] that:

> "The key principles applicable to the court's task in identifying unfairly prejudicial conduct of a company's affairs are summarised by Lord Hoffmann in the decision of the House of Lords in *O'Neill v Phillips* [1999] 1 WLR 1092 and by the Court of Appeal in *Grace v Biagioli* [2006] 2 BCLC 70 (per Patten J at para [61]). The petitioner requires to establish, assessed on an objective basis, that the acts or omissions complained about relate to the management of the affairs of the company, caused prejudice to the petitioner's interests as a member and that the prejudice is unfair (see also *Bovey Hotel Ventures Ltd, Re* unreported 31 July 1981; *RA Noble & Sons (Clothing) Ltd, Re* [1983] BCLC 273; *Saul D Harrison, Re* [1995] 1 BCLC 14; *Guidezone*

Ltd, Re [2000] 2 BCLC 321). Unfairness and prejudice are both required and establishing only one of these will not suffice: *Jesner v Jarrad Properties Ltd* 1993 S.C. 34; 1994 SLT 83; *Rock (Nominees) Ltd v RCO (Holdings) Plc (In Members Voluntary Liquidation)* [2004] EWCA Civ 118; [2004] BCC 466; [2004] 1 BCLC 439. The objective test is whether a reasonable bystander observing the consequences of the conduct, would regard it as having unfairly prejudiced the petitioner's interests. A member of a company will be entitled to complain of unfairness where there has been some breach of the terms on which he agreed that the affairs of the company should be conducted, or where the rules have been used in a manner that equity would regard as contrary to good faith: *O'Neill v Phillips* [1999], at 1099; *Re Phoenix Office Supplies Limited* [2003] 1 BCLC 76, at 85h; *Wilson v Jaymarke Estates Limited and others* 2006 SCLR 510, at para [10]. As Lord Hoffman explained in *O'Neill v Phillips*, compliance with equitable considerations is a more appropriate articulation of the concept than the expression 'legitimate expectations'. Within a quasi-partnership, a court may give effect to informal agreements and understandings which have been relied upon even if they would not otherwise have binding legal force (see eg *Re Guidezone Ltd*, at para [17]; *In Re Hart Investment Holdings Ltd* [2013] EWHC 2067, at para [38])."

[215] In *Gray* v *Braid Group (Holdings) Limited* [2015] CSOH 146, Lord Tyre had noted at [22] to [23]:

"22. The petitioner must therefore prove both prejudice and unfairness.

23. The concept of fairness must be applied judicially and the content which it is given by the court must be based upon rational principles: *O'Neill v Phillips* [1999] AC 1092, Lord Hoffmann at 1098. Lord Hoffmann went on to observe: '…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."

[216] In *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, Lord Hoffmann had previously observed (pages 17-18):

"In deciding what is fair or unfair for the purposes of [what is now section 994], it is important to have in mind that fairness is being used in the context of a commercial relationship… Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under [section 994] will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association.
The answer to this question often turns on the fact that 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 fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of [section 994]…"

[217] In *Jesner* v *Jarrad Properties*, the court had held that conduct which prejudiced a petitioner might not necessarily be unfair. The case involved two companies run as a single entity with little or no regard paid to the constitutional provisions of either of them. That was held not to be unfair because the petitioners had known and agreed to or acquiesced in the arrangement.

[218] Conduct might be unfair but not prejudicial. For instance, in *Rock (Nominees) Ltd* v *RCO (Holdings) Plc (In Members Voluntary Liquidation)* [2004] EWCA Civ 118, [2004] 1 BCLC 439, the Court of Appeal found that the directors of a company had acted unfairly by entering into a transaction on behalf of the company in relation to which they were conflicted. However, the court refused a remedy to the petitioner on the grounds that the petitioner was not prejudiced.

[219] In *Martin* v *Hughes*, Lord Clark noted at [53]:

> "It is not enough to found a petition for relief in respect of unfairly prejudicial conduct just to show that the trust and confidence between members of a quasi-partnership company have broken down, regardless of whether that breakdown can be said to be the result of the conduct of the respondent (*McKee v O'Reilly* [2003] EWHC 2008 (Ch); [2004] 2 BCLC 145, at [54], under reference to *O'Neill v Phillips* per Lord Hoffman at 1104F-1105B). In a quasi-partnership context where there is an implied understanding that each person will act in good faith and if there is conduct which breaches that standard, that may, on the facts, be unfair. Equally, the destruction of trust and confidence could arguably be prejudicial. But the breakdown of trust and confidence must flow from, or amount to, unfairly prejudicial conduct".

[220] In *Re Elgindata (No.1)* [1991] BCLC 959, the court did not accept that mismanagement, as such, amounted to unfair prejudice, unless it amounted to serious mismanagement. The court would not order a respondent to purchase a petitioner's shares if the prejudice to the

petitioner was not significant and the petitioner was in effect a passive investor: *Hale* v *Waldock* [2006] EWHC 364 (Ch), [2007] 1 BCLC 520.

[221] The petitioner's heads of claim for unfair prejudice commenced with the allegation that commercial arrangements forced on them provided for grossly excessive payments to Pinz. However, the arrangements in question were not forced on the Davidsons. Indeed, the arrangements in question had been put forward by Mr Davidson. An amicable agreement had been made. The parties had originally discussed setting up the Company as a franchise. It was implicit in those discussions that there would be an associated fee payable to the franchisor. Agreement was, in fact, reached on the payment of such a fee. The Davidsons also desired that the Company be run with management services being provided by Pinz. On that basis, it was difficult to see how any arrangement in that regard was forced on the Davidsons. It would have been open to them to seek, before trading began, to have different management services or not to run as a franchise. The petitioners clearly had input into the feeing arrangements, and confirmed their agreement to the arrangements which were implemented. In any event, the petitioners' case essentially rested on the basis that the fees charged by Pinz were excessive. The fees charged by Pinz were reasonable and in line with the market. Mr Margach and Mr Anderson were very familiar with that market. The Davidsons were not. Their contention that the fees were not at market rate was not grounded in any factual basis. The petitioners did not offer to prove what a reasonable fee would have been for the services. They did not appear to have gone out to canvas the market. No averments were made as to what would be reasonable, in the circumstances. In the circumstances, the respondents' conduct was not unfair or prejudicial to the Davidsons.

[222] The next allegation was that the conduct of the respondents was calculated to destabilise the Company and create artificial distress to drive down its value. The basis of that allegation was not clear. Any alleged conduct on the part of the respondents did not drive down the value of the business. A drop in business after initial success was to be expected. The actions taken by Mr Margach and Mr Anderson in relation to the removal of management services was not proposed to destabilise the Company. Pinz was a shareholder in the Company. Any diminution of the value of the Company would have been adverse to its interests. In any event, the proposal to withdraw the services of Pinz did not destabilise the Company. The services were not withdrawn. The allegation that the behaviour of Mr Margach and Mr Anderson was motivated by a desire by them to acquire the Davidsons' shares at undervalue had not been made out. The breach in the relationship between the parties resulted from the purported transfer of the shares from Aryle to the Davidsons, and the associated breakdown of trust and confidence. In effect, the Davidsons' conduct prejudiced Pinz, and a breakdown of trust and confidence flowed from that. The petitioners' real issue was simply that there had been a breakdown in the relationship between the parties. That was insufficient to warrant the granting of any order in terms of sections 994 and 996 of the 2006 Act. There had been a dispute regarding the fees charged by Pinz. However, the parties resolved that issue and moved on with running the Company. It was some time later, when the share transfer was discovered, that there was a threat to withdraw the services of Pinz. At that point, the relationship of trust and confidence between the parties had arguably already broken down. In any event, the link between the threatened removal of services and any alleged destabilisation of the business was not clear. The business of the Company continued, and the management services had not been withdrawn. If anything destabilised the business and diminished its value, it was

the present litigation and the concomitant issues with the insurance renewal process. The going concern issue had been raised by Mr McQuade, and Mr Margach and Mr Anderson considered, as directors of the Company, that that was an issue which required to be considered. Ultimately, the issue was resolved, and the accounts were lodged on the basis that the Company was a going concern. There was no unfairness or prejudice to the petitioners in that regard. The provision of management services had not ceased. Mr Margach and Mr Anderson sought alternative management proposals from the Davidsons, but none had been made.

[223] In a quasi-partnership, understandings or arrangements about the future management of the company commonly existed between the members. In *Re Westbourne Galleries Ltd* [1973] AC 360, [1972] 2 WLR 1289, the company was one in which shareholders, who could have run the business as a partnership, preferred the form of a private company to be managed by all of them. The issue was whether the relevant company should be wound up on a just and equitable basis. Lord Wilberforce noted at 379:

> "The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. … There are very many of these where the association is a purely commercial one, of which it can be safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

Reference was further made to the observations of Lord Clark in *Martin* v *Hughes* at [49] set out above.

[224] The Company did not operate as a quasi-partnership. The business was run day-to-day by Mr Margach and Mr Anderson using the Pinz brand. Mrs Davidson provided operational support to the wider Pinz group. Mr Davidson had a limited role, and no role in relation to the day-to-day running of the business. The Davidsons were passive investors in a business which Mr Margach and Mr Anderson were already running. That was borne out by the lack of engagement, particularly by Mr Davidson.

[225] As to the questions of valuation and discount, Lord Clark in *Martin* v *Hughes* stated:

> "[71] In putting right, or curing, the consequences of unfairly prejudicial conduct the court has a wide discretion to do what is just and equitable: s 996 of the 2006 Act; *Re Bird Precision Bellows*. However, the normal remedy, and the most practicable and equitable, is to have the petitioner's shares purchased at a fair value by the respondents or the company. A price based on a pro-rata valuation is more likely (*Profinance Trust SA v Gladstone* and see also *In re Bird Precision Ltd*, at 430D) particularly where the company is a quasi-partnership: *CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002] 2 BCLC 108, at para [41]).
>
> [72] The overriding requirement is that the valuation should be fair on the facts of the particular case (*London School of Electronics, Re* [1986] Ch 211). Where unfair prejudice has been established, the court is obliged to consider the whole range of possible remedies and choose the one which, on an assessment of the current state of relations between the parties, is most likely to remedy the unfair prejudice and deal fairly with the situation which has occurred (*Grace v Biagioli*, at para [73]). There is no single appropriate method to be applied to any valuation. Rather, the appropriate basis for valuation will depend upon the whole facts and circumstances of the particular case, with the court requiring to make a choice that is fair to all the parties.
>
> [73] The choice of the date at which shares are to be valued for the purposes of a buy-out order is a matter for the exercise of the discretion of the trial judge (*Re Cumana Ltd* [1986] BCLC 430, at 436b-436c; *Re Elgindata Ltd* [1991] BCLC 959), but the overriding requirement is that the date of valuation should be fair on the facts of the particular case (*Profinance Trust SA v Gladstone*, at para [60]). The date should be that which best remedies the unfair prejudice held to be established: *Re Abbington Hotel Ltd* [2011] EWHC 635 (Ch); [2012] 1 BCLC 410. The starting point should be that *prima facie* an interest in a going concern ought to be valued at the date on which it is ordered to be purchased. However, there are many cases where fairness to one side or the other requires the court to take a different date. But a petitioner is not

> entitled to a 'one-way bet', and the court will not direct an early valuation date simply to give the petitioner the most advantageous exit from the company, especially where severe prejudice has not been made out: *Profinance Trust SA v Gladstone*. The remedy is to be proportionate to the unfair prejudice suffered *Re Edwardian Group Ltd* [2018] EWHC 1715 (Ch), [2019] 1 BCLC 171."

[226] A finding that there was a quasi-partnership created a general presumption that the minority interest should be purchased without a discount: *Re Bird Precision Bellows Ltd*. The rationale for applying a minority discount was summarised in *Re Blue Index Ltd* at [48]: "the discount that should be applied to reflect the lack of control that a minority shareholder has over the management of a company in contrast to the control that a larger shareholder has". In *Irvine* v *Irvine* at [11] it was noted that "…there is no reason to accord to it [a minority shareholding] a quality which it lacks".

[227] Regarding non quasi-partnerships, Arden LJ noted obiter in *Strahan* v *Wilcock* at [17] that "It is difficult to conceive of circumstances in which non-discounted basis of valuation would be appropriate where there was unfair prejudice…" In *Re Edwardian Group Ltd* it was stated at [640] that: "Any basis of valuation selected must be fair in all the circumstances. It must also provide a remedy that is proportionate to the unfair prejudice suffered by the Petitioners". In *Re Dinglis Properties Ltd* it was noted at [367] that the court had a broad discretion and must:

> "try to arrive at a valuation method which is fair in light of the facts of the case, including the nature of the unfair prejudice identified. As a working hypothesis I am prepared to assume that, outside the quasi-partnership scenario, it will be a very unusual case which calls for no discount to be applied."

[228] The Company was not a quasi-partnership. A discount should thus be applied for the Davidsons' minority shareholding. The suggested discount of 25% proposed by Mr Gouw was reasonable and should be applied. If the court should find that the Company was in fact a quasi-partnership, a discount of 25% should nonetheless be applied to any

order made against the respondents to purchase the Davidsons' shares. The application of such a discount would be fair in circumstances where the Davidsons essentially paid nothing for their shares, had had their initial loan investment repaid, and had little to no involvement in the running of the Company.

Discussion and decision

[229] This case raises no particularly novel question of law; as with most petitions raised in terms of section 994 of the 2006 Act, the legal framework against which the dispute falls to be decided is capable of clear, if somewhat abstract, expression and the court's task is to determine such disputed issues of relevant fact as may exist and fit its findings into that existing legal framework. I observe only that, when assessing how the Company's affairs have been conducted, although it may frequently be tempting in the course of the analysis to split the notion of unfair prejudice into its constituent parts of unfairness and prejudice, it is important to remember that the statutory concept is a unitary one and that to draw artificial distinctions between its two ingredients risks distorting it unnecessarily and unhelpfully. In this case, there is no shareholders' agreement and no suggestion that any breach of the Company's Articles (of which there were plenty, since the existence and content of the Articles never seems to have impinged upon the thought processes of any of the individuals involved) amounted to the unfairly prejudicial conduct of the Company's affairs. The focus will therefore be on 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.

The witnesses

[230] Some initial indication of the impressions I gained about the various witnesses in the course of the relatively lengthy proof may serve to provide a context illuminating the views I have formed about the issues which divide the parties. It is also appropriate to note here that I formed the general but distinct overall impression that, once the litigation commenced, a rather performative element appeared in the behaviour of both sides, by which I mean that everything done or left undone, said or left unsaid, happened with at least one eye on how it might eventually play out before the court. That element requires to be taken into account in assessing the true significance of various events which were examined critically in the course of the proof.

[231] Mr Davidson was, as his resumé evidences, an experienced and accomplished businessman, with all the insight and acumen which that entails, albeit his involvement in the Company was very much a sideline to his principal employment and, at least until August 2022, secondary and consequential to that of his wife. He was evidently much aggrieved (and justifiably so) about her treatment by the respondents at that point, and it is impossible to conclude that his views about how certain subsequent events should properly be characterised were unaffected by that or by the broader views which he had by that point formed about the characters of Mr Margach and Mr Anderson. However, on matters of substantive fact of which he had direct knowledge, I had no concerns about his credibility or reliability.

[232] Mrs Davidson, likewise, gave her evidence in a clear, straightforward and convincing manner, although from time to time she appeared, naturally enough, to find it a little difficult to recount events which were unpleasant to recall. After her sacking – for that is what it was – in August 2022, she took more of a back seat in the affairs of the Company

and left matters primarily to her husband, resulting in her evidence about subsequent events being less direct and weighty than his. However, in general terms she gave her evidence in all good faith and I had no reason to doubt her general credibility and reliability.

[233] Mr Margach is relatively young to have become successful in business to the extent that he has. It is clear that that success has not been accidental, and that he has a keen appreciation of business opportunities and risks in his field. However, there was in him a certain naivety, especially when it came to reliance upon the professional advice of others, especially lawyers and accountants, which, it seemed to me, he tended to follow with something of a blind and at times uncomprehending faith. It was hard to see him as someone who could form and subsequently implement a plan involving any degree of cunning to do down the Davidsons and their interest in the Company. I found him a fundamentally honest witness, able genuinely to accept that he had on occasion made mistakes in his dealings with the Davidsons, and had in some regards acted in a way which he now regretted, which was all to his credit.

[234] Mr Anderson was in essentially the same position as Mr Margach, in general terms honest, perhaps a little tougher in attitude, but likewise without the nous or indeed guile that would be necessary to engage in the sort of determinedly nefarious behaviour of which he was accused. Again, he accepted that his behaviour towards the Davidsons could properly be criticised, although as the proof had developed, by the time he gave evidence that would have been a difficult concession to withhold.

[235] The more minor witnesses in the case presented as a mixed bag. Mr Dunbar's initial evidence was as casual as his demeanour. He could not at first see that there might be any issue at all with the role that Johnston Carmichael had played in events, and when he came to appreciate that there was, made the unwise decision to double down on his assertions

that nothing unusual had happened, leading him to adopt unsustainable positions on, for example, why he had not provided the draft statutory accounts to the Davidsons' solicitors on their request. Ultimately his evidence had an overall unsatisfactory quality, but the petitioners' case in relation to the matters in which he was involved would require him to have been either a conspirator with the respondents, or at least their useful idiot, and I did not find either of those characterisations of him as convincing.

[236] Mr McGee was a somewhat curious witness. Before he appeared in the witness box, I had formed the impression that he had been brought in by Pinz as some kind of hardline frontman tasked to deal with Mr Davidson's ability robustly to defend his interests, and those of his wife, in the Company's affairs. However, on appearance it became clear that his favourite topics were social responsibility and business morality, on which subjects he expatiated frequently when given the chance, and which lent his evidence a somewhat ethereal air in the context of a hard-fought commercial dispute. I am not sure quite what I would have made of his evidence had anything of materiality turned on it, which happily transpired not to be the case.

[237] Mr McQuade declared himself at one point in his evidence to be a numbers man rather than a words man, an overall self-assessment with which I found it difficult to disagree. Again, the suggestion that he was conscripted into, or otherwise consciously lending his aid to, a scheme which would devalue and destabilise the Company to the detriment of the Davidsons seemed to me to involve an over-estimation of his relative comprehension what would be required to that end.

[238] Mr Cole's brief evidence was uncontroversial.

Assessment of the allegations of unfair prejudice

[239] It is next convenient to set out in some detail my assessment of the allegations of unfairly prejudicial conduct of the Company's affairs which have been made by the petitioners. It is common ground that the idea to set up the business which came to be carried on by the Company was hatched by Mr Margach and Mrs Davidson, whose friendship formed in the adversity created by the Scottish Government's reaction to the pandemic was the key relationship amongst the parties. They saw some synergy between the Pinz business in the state it was in towards the end of the pandemic (ie laden with unaccustomed debt and with an exhausted senior management) and Mrs Davidson's skills and experience. Their respective partners went along with the idea, albeit seemingly without their degree of enthusiasm. It was obvious to anyone who cared to think about it that the Company's business model, that is to say the operation of a facility which would use the brand and services of Pinz but would be owned 50/50 by Pinz and the Davidsons, immediately presented at least the potential for conflict between the two interests. However, that notwithstanding, the terms upon which Pinz would provide its brand and services to the Company, and in particular the charges that it would levy in those regards, were apparently left unagreed. There was mention in the evidence of a business plan which seems to have existed at or around the time of the Company's formation, but somewhat mysteriously neither side presented it in evidence and I can accordingly make nothing of whatever its contents might have been. In their haste to work together, the parties - assuming the continuation of an amicable relationship – simply left over for future agreement the details of the commercial arrangement between Pinz and the Company, thereby creating the core instability which, as matters turned out, has led them to the court.

[240] The Company's business was immediately successful, money flowed in, its debts were paid and handsome dividends were issued. For a while trouble loomed no more pressingly than would a small cloud on the horizon. However, Mrs Davidson's mode of working came to annoy, in particular, Mr Anderson. Again, there had been no precise working out of their respective roles and responsibilities, and he formed the view that she was not only treading on his toes, but was altogether too big for her boots. The difficulties which had seemed to assail Pinz during and at the end of the pandemic were rapidly receding, and it came to appear to Mr Anderson, and through him to Mr Margach, that the Davidsons were the answer to a problem that no longer existed, and indeed had rather come to represent a burden to which they had unwisely hitched themselves. The result was the - to the outsider – somewhat puzzling engagement of Mr McGee, apparently as some variety of corporate Svengali, the dumping of all existing plans for future collaboration with the Davidsons, and the sudden and brutal dismissal of Mrs Davidson from her job as Operations Director for Pinz in August 2022. From that point on, the conflict which had until then been simply a potential became all too real. Mrs Davidson was deeply hurt by what had been done to her, Mr Davidson was livid about her treatment, and the Pinz interest had come to see the Davidsons as a dead weight best shrugged off. It was out of that toxic mix that the events which form the subject-matter of the present litigation emerged.

[241] A somewhat fraught shareholders' meeting in September 2022 produced the framework for a future business relationship which neither side particularly wanted to continue. It was agreed in principle that Pinz would have to be paid for what it had provided to the Company and what it would in future be providing, and that while the details of that were being bottomed out, it would in the meantime be entitled to recharge an

appropriate proportion of the head office expenses which it was incurring in servicing the Company and other Innoflate outlets. What then followed was the key episode in the events forming the subject-matter of the litigation. That episode was triggered in mid-October 2022 by Mr McQuade issuing substantial invoices on behalf of Pinz to the Company, and to some extent accessing its bank account and taking payment therefor, in relation to sums which had not been agreed as due. It was suggested on behalf of the petitioners that this was a deliberate move on the part of Mr Margach and Mr Anderson, designed to assert the dominance of Pinz over the Company and to denude it of funds which were not properly due to Pinz. However, Mr Anderson had no usual involvement with the invoicing processes of Pinz, and I accept his evidence that he knew nothing about what happened in this instance before it had been done. Mr Margach would normally have had responsibility for initiating or at least approving any invoicing by Pinz that was out of the ordinary, but was unable to recall having been involved before the event in this instance and seemed genuinely puzzled by how it had happened. Ultimately, I understood Mr McQuade to accept responsibility for the issue of the invoices in question and the taking of the money from the Company's account. He did that on the basis of an imperfect understanding of what had and had not been agreed at the September meeting and from some rather vague exchanges which he had in the meantime had by email with Mrs Davidson. I thus find that the issue of the invoices which were not due, and the taking of money from the Company account, was the result of carelessness or lack of understanding on the part of Mr McQuade rather than any deliberate attempt by Mr Margach, Mr Anderson or Pinz to seize money from the Company. The money taken which was not then due was ultimately credited to the Company against sums subsequently agreed to be due by it to Pinz, so no ultimate detriment was suffered by it in that regard. Although the September meeting had agreed

authorisation limits for the taking of money from the Company's account, and the amount taken exceeded what could properly be taken without the Davidsons' authorisation, in my view the amounts agreed at the meeting were intended to relate to expenditure on the Company's day-to-day activities, rather than to any liability being accrued to Pinz.
It follows that I do not regard this particular aspect of events as an example of unfairly prejudicial conduct of the Company's affairs.

[242] However, the issue of the invoices and the taking of the money from the Company's accounts naturally provoked a reaction on the part of the Davidsons, who heard about it when trying to enjoy a relaxing holiday abroad with their children. What had happened up to that point in time had resulted in a lack of trust between them and Pinz, which was now transformed into positive and active mistrust. Mr Davidson, understandably enough, complained bitterly about what had happened, resulting in what can only be described as a muscular negotiation on the part of Pinz as to the amounts which were to be payable to it by the Company, backed by a threat, intended to be taken seriously, to withdraw its brand and services from the Company in the absence of agreement. Against that background, ultimately Mr Davidson suggested a charging structure between Pinz and the Company and that was agreed, implemented and (more or less) observed thereafter. It will be necessary to examine more closely in due course the legal significance of those events. For now, it suffices to say that they resulted in what can only be described as a cold war between the Davidsons and the Pinz interest in the Company. Neither side wanted the status quo to continue, but equally neither made, at that stage, any realistic suggestion as to how it might be brought to a mutually-satisfactory end. A written contract, promised by Pinz, to set out the nature of the relationship between it and the Company as agreed in October, did not materialise, although Pinz procured a professionally-prepared draft of such a contract which

it never shared. Equally, the Davidsons never pressed the matter. The fact was that both sides regarded the arrangements arrived at in October 2022 as the terms of an uneasy armistice rather than as the basis for any lasting peace.

[243] The cold war heated up again in March 2023, when the issue of the share reorganisation was raised at the meeting amongst Mr Davidson, Mr McGee and Mr McQuade, unexpectedly so far as the former was concerned. An attempt was made on the part of the respondents to present this merely as part of a neutral fact-finding exercise, but it plainly was no such thing. Rather, it was part of a premeditated plan to identify and prosecute a fresh *casus belli* against the Davidsons. Consideration must at this point be given as to whether Mrs Davidson's version of events, viz. that Mr Margach and Mr Anderson had at the end of 2021 been told about, and agreed to, the restructuring of the Company's shareholding so as to remove Argyle and substitute the Davidsons, or that of Mr Margach and Mr Anderson, that no such thing had occurred, is to be preferred. This issue represents the major (indeed perhaps the only) substantive dispute about a matter of primary fact in the case. I prefer Mrs Davidson's account, for two principal reasons. Firstly, her evidence on the matter was given in a definite and straightforward manner, with no discernible difference between this chapter of her evidence and chapters in relation to which no dispute arose. By contrast, at least initially the evidence of both Mr Margach and Mr Anderson was much more tentative on the subject, with each preferring to say at first that he did not recall or did not think that the matter had been raised and agreed. Although upon being pressed, particularly in cross-examination, the evidence of each became more definitive, overall the impression given by their evidence in comparison to that of Mrs Davidson on the subject was unfavourable. Secondly, and probably more tellingly, there did not seem to be any reason why Mrs Davidson would have sought to withhold from Mr Margach or

Mr Anderson what she and her husband wanted to do about the ownership of the Company. At the end of 2021, and well into 2022, the parties were still on entirely amicable terms. Neither Mr Margach nor Mr Anderson could suggest any reason why they would have refused to consent to the proposed change had they been asked to do so at the relevant time, or why the Davidsons might have conceived that they might do so. At around the same time, each had agreed without any issues to the substitution of the Davidsons for Argyle in the membership of DRSA, which replaced DRS as the vehicle then intended to be part of the future arrangements amongst the parties. It makes no sense that in these circumstances Mrs Davidson would not have asked Mr Margach and Mr Anderson also to agree to the apparently uncontentious proposed changes in the Company's membership structure, but rather would have preferred to proceed in secret, particularly since those changes would inevitably in due course have to become part of the public record of the Company's shareholders, and thus incapable of sure concealment. My conclusion that, through Mr Margach and Mr Anderson, Pinz agreed to the share reorganisation, entails that, by the operation of the *Duomatic* principle, Argyle is no longer a member of the Company and that both of the Davidsons are.

[244] That conclusion also raises the question of why Mr Margach and Mr Anderson chose to make such an issue of the share reorganisation in March 2023. By that time, of course, the landscape around the Company had changed dramatically, as already described. It is possible that by that stage they had simply forgotten about what would have been regarded at the end of 2021 by all concerned as an entirely inconsequential affair. Alternatively – and I think more plausibly – they may have been given to understand by someone involved in the affairs of Pinz or advising it that the share reorganisation was something that could be weaponised against the Davidsons, and they were prepared to try to use it as such. In their

pleadings and in the earlier part of the proof diet, the respondents' articulated ground of complaint about the share reorganisation was that, were Argyle to fall into liquidation, and its liquidator to succeed in reversing the share transfer to the Davidsons on the ground of inadequate consideration, Pinz could end up in business with an insolvency practitioner and anyone to whom he sold the Company's shares. I do not consider that either Mr Margach or Mr Anderson had thought of that possibility themselves, or even really understood it. When I pointed out that, had Argyle remained a member of the Company and gone into liquidation, exactly the same result would have been arrived at, and more directly, the wind seemed to go out of those sails and the focus came to be on how the supposedly secret reorganisation had finally and irrevocably undermined any trust and confidence which Pinz had in the Davidsons. That narrative came to be bolstered by the respondents' evidence about Mrs Davidson's apparent attempt to sell the Davidsons' shares in the Company to the business rival of Innoflate and the gossip which had come to their ears about the Davidsons' falling-out with the person to whom the assets of "Whale of a Time" had been sold in circumstances which supposedly reflected badly on them. However, it remained an unconvincing narrative, not least because the parties had thought nothing good of each other since the last quarter of 2022.

[245] Howsoever exactly it suggested itself to them as a good idea, Mr Margach and Mr Anderson were prepared in March 2023 to try to make the share reorganisation a major issue in the parties' relationship. A letter was issued at the meeting on 20 March repeating the threat of October 2022 to terminate the services provided by Pinz to the Company. A further letter, drafted by the respondents' then solicitors but signed by Mr Margach and Mr Anderson on behalf of Pinz, was sent 3 days later further threatening to remove its services (this time on a month's notice) and demanding that the Davidsons should sign over

their shares in the Company to Pinz for £1 each and resign as directors. Mr Margach and Mr Anderson signed that letter despite failing to understand much of what it said in relation to matters corporate. For example, the letter claimed that Pinz could have exercised pre-emption rights over the initial Argyle share in the Company, rather than allow it to be transferred. Not only was that inaccurate, but Mr Margach and Mr Anderson each accepted at proof that they did not even know what pre-emption rights were. They accepted, with the benefit of hindsight, that sending the letter had not been a good idea, but blamed it on bad advice received from the former solicitors instructed by Pinz. That may or may not be the case, but it does not absolve them of responsibility for its contents. Had the letter and its contents represented unfairly prejudicial conduct of the Company's affairs, they would have had to accept that they, and through them Pinz, were to blame for that.

[246] However, the overall tone and content of the letter were nothing short of risible, and the Davidsons, whether on their own account or because they were better advised, did nothing of what was demanded of them. Indeed, they used the letter as part of their complaints in this litigation, turning its contents back against the respondents. The services of Pinz continued to be supplied without interruption and the Company carried on trading regardless. In the event, although things could easily have turned out differently, the respondents' letters of March 2023 contained nothing which made any difference at all to the course of the Company's affairs.

[247] It might be said that the repeated threat abruptly to withdraw the Pinz services resulted in an uncertainty about the Company's ability to continue its business in an orderly manner, but the reality was that by March 2023 all parties were aware that that threat was a hollow one. The respondents disclosed in the course of the proof that they had been advised that any attempt to withdraw the services of Pinz in a manner that would have dislocated

the Company's ability to carry on business without interruption would in all probability have been prevented by the court. That advice was patently well-founded; the services being provided by Pinz were being furnished routinely by it as part of its ordinary business and it was being paid the fees which had been agreed to be due for them. Any suggestion that the Innoflate brand was somehow being tarnished by association with the Company because of the Davidsons' share dealings or other behaviour (about which those outside the corporate circle knew and must be reckoned to have cared nothing) would not have been taken seriously. When this litigation commenced in May 2022, an application for interim interdict against the abrupt removal of services was indeed made, in the face of which the respondents undertook to maintain them, and renewed that undertaking from time to time as and when required, without the matter ever having to be ruled upon by the court. If the emptiness of the threat was obvious to the respondents, it must have been equally clear to the Davidsons. Indeed, so far as the evidence disclosed, they took no steps to ascertain whether alternative sources of the services being provided by Pinz could be secured until June 2022, after the current litigation had commenced, and even then at a fairly abstract level, by way of general suggestions which were not taken further when the respondents expressed relatively mild dissatisfaction about them. Had the threats to withdraw services been taken seriously by the Davidsons, they would undoubtedly have taken steps to protect the Company's interests in that regard more definitely and vigorously at the time. Such steps could have been taken by them, whether in conjunction with or, if need be, independently of Mr Margach and Mr Anderson, at any time. However, once the action was raised, both sides proceeded on the basis that the affairs of the Company were then under the ultimate supervision of the court and that their dispute was going to be resolved by it, rather than by their own efforts. That was a realistic attitude for them to take. The threat to

withdraw services made in March 2022 and ostensibly maintained thereafter was seen by all concerned as nothing more than sable-rattling. The events of March 2022 made it clear that the truce which had held since the previous October was over, but had no wider significance for present purposes. In particular, I do not accept that in March 2022, or at any other point in time, those representing the Pinz interest set out deliberately to destablise or devalue the Company. Insofar as they may be regarded as having launched any form of attack, their consistent target was the Davidsons themselves, not the Company.

[248] The only immediate result of what occurred in March 2022 was that each side made offers to buy out, or be bought out by, the other at prices or mechanisms which were never going to be acceptable. It became quite clear that if the hostilities were going to end, that would require external intervention, and this litigation eventually commenced in May.

[249] In March and April 2022 the question of whether or not the Company's accounts could be drawn on the basis that it was a going concern began to emerge, although it was not eventually resolved until October. This episode began because Mr McQuade, being aware that the threat to remove the Pinz services had been made and was supposed to take effect from 20 April 2022, persuaded himself that in those circumstances there might be material doubt as to whether the Company could continue to trade for the next 12 months. With Mr Margach's permission, he referred that question to Mr Dunbar for external advice. What followed could well, in hindsight, be interpreted as a deliberate attempt to manufacture an apparent existential crisis for the Company, enlisting the assistance (witting or otherwise) of the Pinz accountants, Johnston Carmichael, to that end. An extensive and impressive attempt to analyse and present matters in that light was made by counsel on behalf of the petitioners. However, given the nature of the characters involved, I have without much difficulty formed the view that the whole episode falls to be regarded as one

of bumble and blunder rather than anything more sinister. Mr Dunbar may have been somewhat inclined to oblige his client Pinz rather than anyone else, but whatever his faults (which included a lack of circumspection and an unfortunately infelicitous mode of expression), was not someone prepared knowingly and thoroughly to compromise his professional integrity. Mr McQuade was well aware of the mood music in the Pinz community, that the Davidsons were a thorn in the side of the group that it would be well rid of, and would, I think, have been inclined to do what he reasonably could to ingratiate himself with Mr Margach in that regard. He may have been a little over-enthusiastic in seizing upon and reacting to the careless statements being made by Mr Dunbar, but ultimately I accept that, from his accountant's point of view and way of thinking, he genuinely thought that the going concern issue was a real one which needed to be taken seriously, and acted accordingly. He and Mr Dunbar rather fed off each other in that respect. I do not believe that either Mr Margach or Mr Anderson had any real grasp of the nuances of the going concern issue; as usual, they had a successful corporate group to run, they took advice from appropriate professionals as and when it seemed to be required, and they acted upon the advice received. It is difficult to see how they can be faulted for that. Equally, the actions of the Davidsons in relation to the going concern issue are not beyond criticism. Whether they thought there was a genuine problem or not, they were asked to attend a meeting with the Company's accountants to discuss and resolve any issue with the draft accounts and simply ignored that invitation, in any variation, for a lengthy period. In those circumstances it takes considerable chutzpah now to maintain that the going concern episode was an example of their exclusion from the management of the Company.

[250] 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. It appeared to be common ground in the litigation that neither side intended or wanted that lapse to happen, and when it did, Mr Davidson became engaged for the first time in seeking to resolve the issue, and the respondents in turn put their undertaking not to remove the Pinz services onto a more long-term footing. The whole sequence of events illustrates that the core problem facing the Company lies in the failed personal relationship amongst the corporators rather than elsewhere.

[251] Another similar example can be found in the electricity issue. During the course of the proof, each side alleged that the other had put Dobbies up to raising that matter and demanding payment from the Company. Ultimately it came to be accepted that the simple truth was that Dobbies had belatedly realised that it had been paying for the Company's considerable consumption of electricity for many months and, naturally enough, was not prepared to continue to do so. The electricity issue remains relevant only in relation to the valuation of the Company, but the fact that each side was quite prepared to make unfounded allegations about it well illustrates the state of suspicion and mistrust into which the parties' relationship had fallen by at least the latter quarter of 2022 and thereafter.

[252] In summary, I do not consider that any of the matters complained of by the petitioners amounts, objectively viewed, to the conduct of the Company's affairs in a manner that has unfairly prejudiced their interests as its members, with the possible exception of the events in October 2022 which settled the future arrangements between the Company and Pinz in respect of the provision to the former of the latter's brand and services, to which I now turn for a more detailed examination.

Events of October 2022

[253] The essential submission for the petitioners in relation to the negotiation which took place in October 2022 about the charging arrangements between the Company and Pinz was that Mr Margach and Mr Anderson were in breach of their fiduciary duties as directors of the Company in advancing the interests of Pinz over those of the Company, or at least in attempting to reconcile the conflicting interests which it was their duty faithfully and separately to advance. I do not consider, however, that matters can be viewed in quite such simplistic terms. It was quite plain to all that, in the negotiation (including in making, for the first time, a threat abruptly to withdraw the services of Pinz), Mr Margach and Mr Anderson were acting in their capacity as directors of Pinz, and were presenting the position of Pinz to the Davidsons (and in particular Mr Davidson), who alone represented the interests of the Company. There was no question of Mr Margach and Mr Anderson wearing two hats in the negotiation, or taking part in any decision-making on behalf of the Company as to whether to accept or how to react to the terms offered by Pinz; that was left entirely to the Davidsons. Nor was there any question of concealment of any material fact from the Davidsons. The fact that the Company was going to be dealing consistently with Pinz as an ordinary incident of the carrying on of its business, and that Mr Margach and Mr Anderson would be representing the interests of Pinz as and when its interests and those of the Company might conflict, were matters that were baked into the Company's business model from the outset. Indeed I have already described that circumstance as the core instability with which the Company has had throughout its life to contend.

[254] Article 14 of the Company's Articles of Association (being the model articles provided for by Schedule 1 to the Companies (Model Articles) Regulations 2008 (SI 2008/3229) provides as follows:

> "14.— Conflicts of interest
>
> (1) If a proposed decision of the directors is concerned with an actual or proposed transaction or arrangement with the company in which a director is interested, that director is not to be counted as participating in the decision-making process for quorum or voting purposes."

I also note that the general statutory restatement of the common law rules and principles concerning the duties of directors set out in sections 171 to 177 of the Companies Act 2006 provides (in section 175(3)) that the duty to avoid conflicts of interest "does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company".

[255] Although (typically for the Company and with the tacit agreement of all the corporators) no particular process was followed and no paperwork completed, what actually happened in the course of the October 2022 negotiation does not seem to me to have been at odds with the requirements of the relevant statutory provision, nor of the terms of the relative Article.

[256] Even if there had been a technical breach of fiduciary duty of some kind on the part of Mr Margach and Mr Anderson in relation to what transpired in the course of October 2022, that in itself would not necessarily have sufficed to bring the petitioners' case home. I am mindful of what was said by the English Court of Appeal, speaking through Arden LJ, in *Annacott Holdings* at [22], to the effect that breaches of fiduciary duties will "generally indicate that unfair prejudice has occurred". For my own part, I would prefer simply to say that while there may be a correlation (perhaps a strong correlation) between the situation of a company whose affairs are being conducted in breach of the fiduciary duties incumbent on its directors and the existence of unfairly prejudicial conduct of those affairs, a conclusion that the latter is present is far from a necessary consequence of the existence of the former (cf *Rock (Nominees) Ltd* at [79]).

[257] Equally, the conclusion that Mr Margach and Mr Anderson did not act in breach of their fiduciary duties to the Company in October 2022 does not necessarily result in a conclusion that the affairs of the Company were not then being conducted in a manner unfairly prejudicial to the petitioners. The Company's situation may bear certain comparisons to that in issue in *Meyer* v *Scottish Co-operative Wholesale Society*, in which Lord President Cooper observed (1954 SC 381 at 391) that the legislation then analogous to what is now section 994 of the 2006 Act:

> "warrants the Court in looking at the business realities of a situation and does not confine them to a narrow legalistic view. 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."

That view was endorsed on appeal in the House of Lords. In the present case, then, might it properly be regarded as unfairly prejudicial conduct of the Company's affairs should Pinz, in what in strict legal terms were the conduct of its own affairs, fail to deal fairly with the Company, which it at least regarded as its sole franchisee, and in which the Davidsons held with it a joint and equal interest? The analogy between the respective situations of the company in *Meyer* and the Company here is by no means an exact one; most obviously, the Company is not a subsidiary of Pinz, and the Davidsons do not hold a minority share. However, it may be observed that the Company was formed in good faith with a business plan that made its success or failure to a very large extent dependent on the continuing benevolence of Pinz, and that all concerned with the Company's formation took the continuance of that benevolence for granted. I consider that those features, in particular, are sufficient to carry the analogy with the company in issue in *Meyer*. It may also be correctly observed that the legislative background is, in point of form at least, now rather different

from how it stood in the 1950s, and that the authoritative exposition of the underlying principles informing the proper application of the current statutory provisions set out in *O'Neill* v *Phillips* then lay many decades in the future. Nonetheless, the notion that the current legislation reflects in the corporate field one of the traditional roles of equity, namely the restraint of the "exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith" (*O'Neill* at [1999] WLR 1098H) strongly suggests that the rationale of *Meyer* continues to apply in this context, in appropriate cases.

[258] I consider that this is such a case. The Company, although perhaps not a classic quasi-partnership given the shortness (and shallowness) of the pre-existing relationship amongst the individuals behind the initial corporators, was nonetheless formed on the basis of the trust and confidence which those individuals conceived to exist amongst themselves at the time. The Pinz and Davidson interests each took 50% of the share capital of the Company. Neither would have done so unless each had come (directly or indirectly) to entertain the view that the other possessed the relevant skills to contribute meaningfully to its business and was a trustworthy business partner. Each proceeded on the basis that all of the individuals concerned were going to work together (albeit in differing capacities) in good faith in order to direct and achieve the success of the Company and the wider business relationship which they hoped and expected to develop amongst them. None saw the need to resort to any degree of formality in recording their arrangements or the operation of the Company. The directors of the Company were entitled in terms of Article 26(5) of the Company's Articles of Association to refuse to register the transfer of any share, providing a considerable measure of restriction on the introduction of strangers to the body corporate.

At its outset, at least, the Company was a quasi-partnership within the meaning of *Ebrahimi*; cf *Strahan* at [23].

[259] I accept that the relationship of trust and confidence in which the parties embarked upon their corporate relationship had ceased to exist by October 2022 (cf *Fowler* v *Gruber* at [136] – [137]). That had essentially occurred because of the decision of Mr Margach and Mr Anderson, and through them Pinz, to withdraw from the wider business plan which originally existed and to sack Mrs Davidson from her job at Pinz, although it is important to note that it was not suggested by the petitioners that any of that amounted in itself to an example of the unfairly prejudicial conduct of the Company's affairs. There is no evidence to suggest that the breakdown occurred as a result of any fault on the part of either of the Davidsons. After the breakdown had occurred, they did contribute to making matters even worse, as by the attempt to sell their shares to the Company's business rival and their effective withdrawal from any sort of routine participation in necessary corporate decision-making, but these were actions taken in reaction to a breakdown in trust and confidence which had already occurred, not the cause of that breakdown. In these circumstances – again, not dissimilar to those in *Meyer*, where the parent company changed its plans and came to see its subsidiary with an independent minority interest as a burden to be unloaded – I do not consider that Pinz was, at least for the purposes of section 994 of the 2006 Act, entitled to rid itself *brevi manu* of the obligation which was inherently implicit in its original business relationship with the Company, and in October 2022 continued to be obliged to deal with it fairly.

[260] The question thus comes to be whether it has been demonstrated that what occurred in October 2022 was relevantly unfair. The principal ground of complaint in this regard was the claim that the amounts of the franchise fee and management charge demanded by Pinz

grossly exceeded a market rate for the services and facilities being provided. However, the evidence before the court does not support that claim. The respondents' position (advanced by Mr McGee as well as by Mr Margach and Mr Anderson) was that Pinz had been informed in seminars organised under the auspices of Scottish Enterprise that the fee which it demanded for the provision of what it called its franchise services fell within the reasonable range of fees which could be demanded in that connection. Mr Davidson's evidence was that he did not agree, based on his general business experience, that the charge was reasonable. However, all of the evidence in this connection was extremely vague in character and raises more questions than it answers, for example whether the very particular arrangements between Pinz and the Company fall properly to be regarded as an example of franchising at all, and whether the fact that the supposed franchisor had a half share in the putative franchisee alters the fairness of the amount of the sum properly chargeable as a franchise fee. The matter was also visited in the petitioners' expert evidence on the value of the Company given by Mr Geale. He at least seemed to have some independent perspective on the range of franchising fees, but the burden of his evidence was that the amount requested 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). He made the point, which I accept, that ultimately the amount of a franchise fee in any given situation will depend on the outcome of a commercial negotiation taking place in a particular market and against the background of the relative strengths and weaknesses of the parties involved. He had apparently seen the Company's initial business plan to which I have already referred, and which seems to have referred to a fee for the services to be provided by Pinz at a significantly lesser rate (5%) than that demanded in the October 2022 negotiation. However, in the absence of the plan from the evidence before the court, and knowledge of

what exactly it was referring to, I am unable (not simply as a result of the best evidence rule, but because what was said and in what context remains entirely opaque) to place any evidential weight on that. Essentially the same conclusion falls to be reached, for the same reasons, in relation to the separate management charge demanded by Pinz. Doubts were expressed, again primarily by Mr Geale, about what exactly Pinz was providing in return for those charges, and as an abstract proposition they certainly appeared to represent a substantial imposition upon the Company, but in the absence of any detailed analysis of what was provided and what the market rates might have been for equivalent services, a conclusion that what was demanded was excessive could not amount to anything more than speculation, and ultimately the parties' respective valuation experts appeared to differ more on how the management charge might properly be calculated rather than on what it might in practical terms amount to.

[261] Slightly different considerations apply to the manner in which the October 2022 negotiation was conducted on behalf of Pinz, as opposed to the content of the terms which it proposed. There seems to be little doubt that a robust, even aggressive, approach was taken by Mr Margach, and it was accepted that Mr Anderson went so far as to threaten in the course of the negotiation to go to the Company's premises, seemingly without delay, and personally remove the Innoflate signage if agreement was not reached. As this was the first time that a threat had been made to remove the brand and services being provided by Pinz to the Company, it would have had greater force than on the later occasions when it was repeated as, by then, a somewhat weary trope. On the other hand, Mr Davidson expressed the view in his evidence that, after a few months of trade, the Company was not dependent to any significant extent on access to the Innoflate brand in order to operate successfully and it follows that the effect of the threat on him may not have been quite as dramatic as

Mr Anderson may have thought it would be. Abrupt removal of the brand would have been seen by the Davidsons as a very substantial inconvenience, but would not have been regarded as a death knell for the Company. One also has to bear in mind that Mr Davidson is an experienced and capable businessman, and was well able to act vigorously in the interests of the Company. I accept that when he suggested the terms which were agreed to by Pinz, he rightly did not conceive himself to have an entirely free hand to negotiate as he might have wished on behalf of the Company, but the same could be said of many commercial negotiations, in a variety of circumstances. The arrangements which were agreed, and the background against which that agreement was reached, were evidently not sufficiently intolerable to cause the Davidsons to resort quickly to legal action; that did not come after until the further provocations of March 2023. On the whole, and bearing in mind that the situation was already far removed from what might be regarded as any paradigmatic example of unfairly prejudicial conduct of the Company's affairs, I conclude that the events of October 2022 also fail, by a small but decisive margin, to qualify in law as such conduct.

[262] In the absence of any demonstration of the unfairly prejudicial conduct of the Company's affairs by the respondents, the order for the purchase of the petitioners' shares sought by them cannot be granted. In these circumstances, it is unnecessary for me to express any detailed views on how I would have valued those shares had such an order been appropriate. In deference to the arguments which were carefully presented to me in that regard, however, it may be helpful if I indicate in general terms how I regarded the valuation evidence and the legal issues which arose.

[263] There was no dispute that the appropriate method of valuation was on the earnings basis, taking an estimate of future maintainable earnings and multiplying this by a suitable

price-earnings multiple. In relation to turnover, it is undoubtable that the period during which the Company has been trading is shorter than one would ordinarily hope for in order to draw firm conclusions as to what is likely to occur in the future. That circumstance makes it more appropriate, in my view, to stick as closely as possible to the actual trading figures, excluding periods which can objectively be identified as outliers for specifically-identifiable reasons, and refraining from "adjusting" those figures in supposed reaction to external factors in ways which risk representing little more than a projection of the valuer's own subjective views onto the hard facts. It follows that in general terms I prefer Mr Geale's approach to the assessment of sustainable turnover over the more impressionistic tack taken by Mr Gouw. Of the supposedly depressing factors identified by Mr Gouw (the cost of living crisis, warmer weather, delay in the installation of air-conditioning and new local competition) it seems to me that only the latter would be viewed by a hypothetical buyer of the business as something to be taken into account as a depressing feature in assessing the longer-term prospects for turnover; the others are merely normal and relatively transient incidents of the conduct of such a business as is carried on by the Company. I would have assessed the turnover of the business for the purposes of the valuation exercise at £900,000.

[264] The gross profit percentage was agreed at 87%.

[265] In relation to overheads, I would have assessed salaries as 29.4% of sales, and property costs at the agreed level of £93,000. Electricity costs remain to be calculated as part of the exercise currently being carried out by the Company and Dobbies, and I consider it reasonable to estimate that that exercise will produce a recurrent cost of £55,000 per annum exclusive of VAT. Other overheads also retain an element of imponderability in the range of approximately £50,000 to £60,000 and I consider that a mid-range estimate of £55,000 is also appropriate in that regard.

[266] Turning to management charges, it appears to me that the Company falls to be valued "as is", that is to say as coming with an established arrangement involving a management charge of 20% of EBITDA. There was a good deal of discussion, both in evidence and in argument, about whether a purchaser might take a different view as to the likely cost in the longer term of providing the management services currently provided by Pinz, but that seemed to me to miss the point that what is notionally for sale for the purpose of the exercise is the Company as it stands, and that what any hypothetical prospective purchaser might do in order to alter it falls, at least in this case, into the realms of speculation rather than valuation. The same applies to franchise fees, which I would have assessed at 12% of revenue for the purposes of the exercise. Of course, had the levels of management charge and franchise fee been found to be examples of the unfairly prejudicial conduct of the Company's affairs, then a different approach would have to have been taken, although it would have been difficult to determine in such circumstances what an appropriate level of franchise fee would have been. I have not made any allowance for the excess profit charge agreed as part of the October 2022 arrangements, since I doubt that the Company's EBITDA will reach an amount sufficient to trigger any such payment.

[267] A price-earnings multiple of 4.5 was agreed.

[268] I would not have discounted the value of the petitioners' 50% share. I have already concluded that, at its inception, the Company was a quasi-partnership. Although it had ceased to be so by the time of the events complained of as amounting to the unfairly prejudicial conduct of its affairs, that was not as a result of anything done by the petitioners, and it would have been unfair, in those circumstances and in the particular context of section 994, to devalue their interest in consequence of things done to them rather than by them.

Petitioners' true remedy

[269] The petitioners are not left without a remedy for the situation in which they find themselves. In *Lau* v *Chu*, the Judicial Committee of the Privy Council, speaking through Lord Briggs JSC, observed at [14] – [15] that:

> "14 A just and equitable winding up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap. First, a winding up may be ordered to resolve what may conveniently be labelled a functional deadlock. This is where an inability of members to co-operate in the management of the company's affairs leads to an inability of the company to function at board or shareholder level …
>
> 15 Secondly, where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding up, essentially on the same grounds as would justify the dissolution of a true partnership …"

[270] Reference may also be made in the Scottish context to *Jesner* v *Jarrad*, per the Lord Justice Clerk (Ross) at 1993 SC 45A-B and Lord Morison at 48F-G. The situation disclosed by the facts in the present case would appear amply to meet both tests for the making of an order for the just and equitable winding-up of the Company. Whether viewed at the micro level at which it has been necessary to analyse events in order to determine the proper disposal of the unfair prejudice allegations, or more simply at a macro level, posing generally the question of how and why it is that the Company stands now in the state in which it does, it cannot sensibly be denied that the picture which emerges is one of an irretrievable breakdown in trust and confidence amongst the members which has led to functional deadlock, to the detriment of all.

Disposal

[271] Although the prayer of the petition will fall to be refused, I shall appoint the case to call By Order so that parties may consider whether it would be convenient to present a Note within the present process seeking the winding-up of the Company on the just and equitable ground, thus avoiding the need for any further procedure in that regard, as well as to deal with questions of expenses and any ancillary matters which may require to be addressed.