

# *Song & Zhao v Smith & Ors* [2026] EWCA Civ 719

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## **Brief summary**

1. When two people embark upon a joint business venture via a company, and one of them unilaterally withdraws their participation, is the other in breach of their fiduciary duties to the company if they pursue business opportunities of the same type as those undertaken by the joint business venture, without accounting to the company for any profits made by them? If so, is that conduct which unfairly prejudices the other person in their capacity as a member of the company?

## **The Decision**

2. Lord Justice Zacaroli gave judgment in the Court of Appeal (the “**Court**”) from the dismissal of a s.994 petition by HHJ Jarman KC, sitting as a High Court Judge (the “**Judge**”).
3. The petitioners held 50% of the shares in Kestral Group Limited (“**KGL**”). The first two respondents, Mr and Mrs Smith, held the other 50%.
4. KGL was a holding company in respect of a group of companies (the “**Group**”). The petitioners and respondents operated the Group’s business pursuant to an informal joint venture agreement.
5. Mr Song and Mr Smith fell out sometime after forming the Group.
6. After his falling out with Mr Song, Mr Smith set up companies which allegedly diverted business away from the Group. This was alleged to be a breach of Mr Smith’s fiduciary duties, and to have been unfairly prejudicial to the petitioners.

7. The Judge had determined that there was no breach, on the basis that by the time Mr Smith had set up the companies, the joint venture had been determined by words and conduct. The Judge went on to say that even had there been a breach of director's duties by Mr Smith, it did not automatically give rise to unfair prejudice (the Judge cited *O'Donnell v Shanahan* [2009] EWCA Civ 751).
8. On appeal before the Court, it was found that the termination of the joint venture had no impact on the existence of Mr Smith's fiduciary duties. Those duties were simply owed to the companies within the Group.
9. However, the Court found that the breach of duty did not automatically give rise to unfair prejudice. On one hand, the fact that a joint venture had terminated does not entitle one party to take for himself the assets of the venture. On the other hand, if one party unilaterally chooses to walk away from the venture then they cannot complain of unfairness if the other party subsequently takes up a business opportunity which would otherwise have been taken up as part of the venture.
10. The Court stated that identifying the dividing line between existing assets and future opportunities is "*fact sensitive and not necessarily straightforward*".
11. Illustrating the fact-sensitive nature of the question, the Court reached different conclusions in respect of different building projects. The prospect of profiting from the first project was a "maturing opportunity" at the time of the breakdown of the relationship between Mr Smith and Mr Song, and the site was already owned by the Group. The project was not merely a "future opportunity".
12. By contrast, the second project had not been part of the Group's assets when the relationship between Mr Smith and Mr Song broke down. At most, it "*may have been on the Group's radar as a potential future project*". Therefore it represented a future opportunity and exploitation of it by Mr Smith was not unfairly prejudicial.
13. On a separate point, the unequal drawing of salaries post-breakdown was ruled not to be unfairly prejudicial, on the basis that the joint venture had by then come to an end.
14. An offer by Mr Smith to buy Mr Song's shares was ruled not to solve the unfair prejudice, because part of that prejudice related to alleged misappropriation of funds and wrongful diversion of business. Those forms of unfair prejudice are not cured by

a reasonable offer to purchase shares (the Court cited *North Holdings Ltd v Southern Tropic Ltd* [1999] 2 BCLC 625).

15. The respondents raised further points relating to the finances of the Group companies and the value of the petitioners' shares, namely:
  - a. The Group was insolvent and therefore the shares were worthless.
  - b. The first project generated no profits.
  - c. In the alternative any profits it did generate were less than the amount of an outstanding director's loan owed to Mr Smith.
16. Citing Arden LJ in *Re Tobian Properties Ltd* [2012] EWCA Civ 998, the Court noted that insofar as the unfairly prejudicial conduct complained of relates to the value of shares, a petitioner in respect of an insolvent company (whose shares are, without more, valueless) must show that his shares would have had a value but for the wrongdoing of the respondents.
17. As to the latter two arguments, if the project generated no profits or if the profits generated were less than the amount of Mr Smith's director's loan, there was no unfair prejudice.
18. Taking into account the legal costs already incurred by the parties on this issue, the Court considered that an appropriate way forward was for there to be a further hearing to determine whether the petitioners had a real prospect of establishing prejudice given the three issues outlined above.

## Analysis

19. The Court of Appeal balanced the strict approach taken by the law to breaches of director's duties and the making of unauthorised profits with a more pragmatic and nuanced analysis of whether and when conduct will be unfairly prejudicial.
20. Former business partners cannot, by way of a s.994 petition, force one another to refrain from taking up genuinely new business opportunities. However, where a corporate vehicle is used to advance the joint venture, director's duties will still apply. The existing asset/future opportunity distinction drawn by the Court may protect a

director from a s.994 petition but will not necessarily protect them from a claim for breach of duty by, for example, a liquidator.

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