

## **Mrs Swarandeeep Birdi v Specsavers Optical Group and others**

### What was the case about?

After a fully contested hearing in the Companies Court, over 19 days from 23 October 2014 to 19 November 2014 before Mr Justice Nugee, Judgment was handed down on 13 October 2015.

The litigation concerned the Specsavers store in Dartford, Kent which was agreed to be operated as a joint venture through a store company, Dartford Specsavers Ltd. The store company was owned jointly by the Petitioner, Ms Swarandeeep Birdi, one Mr Nimesh Patel (whose shares were later acquired by Mr Kam Singh) and Specsavers Optical Group Ltd, a company resident in Guernsey under the terms of a shareholders agreement dated 17 July 2000.

### Issue 1

In late 2006 it was discovered that Mr Patel had been stealing from the store this fact being established by video evidence. Specsavers and Ms Birdi agreed that Mr Patel should be suspended from his employment with the store pending a full investigation. Ms Birdi complained that Specsavers then departed from that agreed course by doing a deal with Mr Patel to buy his shares in the store company at a discount to their market value.

#### **Mr Justice Nugee found that:**

- (1) Specsavers had “a plan [which] was to confront Mr Patel with the evidence and then, assuming he confessed, use this tried and tested method to seek to exit him from the store, offering him a deal whereby he need not face disciplinary proceedings nor be dismissed, nor indeed reported to the police.; and that this would entail him selling his shares to SOG at a price determined by SOG to be fair value..”**
- (2) By so doing, Specsavers “put itself in a position of conflict of interest and made no serious attempt to avoid or manage that conflict, and that it was therefore in breach of duty now found in s.175(1) of the [Companies] Act.....Far from avoiding such a situation, Specsavers unilaterally created it....In the present case Specsavers used the information that Mr McAlindon had sufficient evidence to prove Mr Patel’s thefts, and the opportunity that gave them, to acquire Mr Patel’s shares cheaply for itself”.**
- (3) Although Specsavers was thus in breach of its duties, “overall this caused no loss to Dartford, or prejudice to Ms Birdi”.**

### Issue 2

Ms Birdi alleged that because of her complaints over the unauthorised deal which Specsavers had done with Mr Patel, Specsavers then conspired to drive her out of the business and thereafter conducted itself maliciously towards her. She alleged that it did this principally by inducing Mr Patel to make allegations of misconduct against her which led to her being suspended from the business. She alleged that during her enforced absence from the business on suspension, Specsavers allowed its U.K. subsidiary, Specsavers Optical Services Ltd, to charge the Dartford Store Company the sum of £86,000 which it had no right to do.

#### **Mr Justice Nugee found that:**

- (1) *“there was no plan or plot or conspiracy to get rid of Ms Birdi”.*
- (2) *“although the investigation, suspension and disciplinary process applied to Ms Birdi were not duly authorised, they would have been had formal Board Meetings been held, and in those circumstances the failure to hold them in breach of the Shareholders Agreement does not constitute unfairly prejudicial conduct”.*
- (3) The provision in the Shareholders Agreement for the store company to pay Specsavers a Management Fee (of 6.5% of gross turnover) *“in return for the services and support supplied by [Specsavers]”* did not preclude Specsavers from agreeing with the store company to provide additional services at a cost.
- (4) *“There was inevitably an inherent conflict of interest in the arrangements. It was in Specsavers interest to charge more for the services that it or SOS [its subsidiary] provided; it was in Dartford’s.... interest to be charged less”.*
- (5) *“Specsavers acted in breach of s.177... in entering into transactions with Dartford....which it was interested in without having disclosed the nature and extent of the arrangements to Ms Birdi”.*
- (6) This led to an identifiable overcharge to Dartford in the sum of £8,400 and *“there is a real risk”* that there may have been more.

### Issue 3

Ms Birdi also complained that in her absence on suspension, Specsavers increased staff salaries and introduced an over-generous new bonus structure in circumstances where Specsavers made its money from turnover and not profit which were thereby diluted. She argued that such decisions were reserved to the holders of the A shares in the store company (the “A Directors”, including herself) and that, even though Specsavers (who was the owner of the B shares) had acquired Mr Patel’s A shares (pursuant to the unauthorised deal it had done with Mr Patel), it was not, under the terms of the joint-venture, entitled to exercise the rights attaching to those shares. She argued further that Specsavers had not in any case entered its name in the register of members as the holder of the A shares that it had acquired from Mr Patel and so it was not an A Shareholder or A Director at the time it took these decisions.

**Mr Justice Nugee found that:**

- (1) Under the terms of the shareholders agreement, Specsavers was an A Director because it had acquired Mr Patel’s A shares.
- (2) The date on which it was entered into the register of members as the owner of those A shares was not relevant since the store company had “agreed to treat Specsavers as if it was the shareholder, and entitled to be registered, from that date”.
- (3) Under the terms of her Service Contract with the Dartford store, Ms Birdi’s suspension from her employment had the effect of suspending her from her office as a director of the company.
- (4) On this basis the decisions on the salary increases and the bonus scheme were not for Ms Birdi to make but for Specsavers.
- (5) *“I am quite prepared to find that Specsavers was careless with Ms Birdi’s money: the bonus scheme was ill thought-through and badly designed and cost Dartford and hence Ms Birdi a significant amount of money. But none of this substantiates the charge of malice, and I find that Specsavers did not act maliciously but in the misguided belief that this would benefit and motivate the staff but pay for itself”.*

**(6) Therefore no unfair prejudice has been established on this issue.**

Issue 4

Ms Birdi complained that Specsavers then sold the shares which it had acquired from Mr Patel to one Mr Kam Singh in June 2008 at a discount to its market value and then maliciously put him on a salary which was in excess of what the post reasonably demanded.

**Mr Justice Nugee rejected the argument that the decision on Mr Singh's salary was taken for improper motives or constituted unfairly prejudicial conduct.**

Issue 5

Ms Birdi complained that the following decisions were taken by Specsavers and Mr Singh maliciously and with an improper and unlawful desire to remove her from the business, namely (i) a Board Resolution of 23 February 2010 to authorise disciplinary proceedings against her in respect of her refusal to comply with a resolution which required her to devote four days in each week to the conduct of eye tests; (ii) a decision on 8 June 2010 to carry out an investigation into the state of the working relationship between Mr Singh and Ms Birdi; (iii) a decision on or about 20 August 2010 to institute disciplinary proceedings against her; and (iv) a decision on 21 December 2010 to terminate her employment.

**Mr Justice Nugee ruled that these allegations were not made out.**

Issue 6

Ms Birdi's case was that under the terms of the shareholders agreement, the A shareholders (now herself and Mr Singh) were supposed to share in the profits of the Dartford store equally and the agreement provided for all profits to be applied in making distributions to the maximum extent possible to the A shareholders in equal shares. As part of this agreement if one A shareholder partook of profits in any way, an equalising distribution would be made to the other.

She complained that Specsavers had failed to pay an equalisation dividend of £8,705.61 which had been outstanding since Mr Patel's departure.

Also she alleged that since her dismissal on 21 December 2010 Specsavers and Mr Singh had stopped paying dividends and had instead been rewarding Mr Singh with increased remuneration to exclude her from participation in the profits.

**Mr Justice Nugee found that:**

- (1) Specsavers acted in breach of its duties in failing properly to investigate whether Ms Birdi was entitled to be equalised in respect of the £8705.61.**
- (2) Specsavers appreciated that the effect of paying extra money to Mr Singh as increases in salary and employment bonuses, rather than as distributions of profit, was to preclude Ms Birdi from claiming that she was entitled to an equal distribution.**
- (3) However, these decisions could not be said to be flawed because, in making these decisions, Specsavers' dominant motive was to act in what it considered to be in the best**

interests of the Dartford store *“given the fact that he was running the store single-handedly”*.

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