EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHCM2019/0176

BETWEEN:

BY WAY OF CLAIM:

AMS HOLDINGS LIMITED

Claimant

and

AMSTEL INVESTMENT HOLDINGS LIMITED

Defendant

BY WAY OF ANCILLARY CLAIM:

(1) AMSTEL INVESTMENT HOLDINGS LIMITED
(2) CHRISTOPHER STUART MCKENZIE
(3) CAVENDISH MANAGEMENT ENTERPRISES LIMITED

Ancillary Claimants

and

(1) AMS HOLDINGS LIMITED
(2) CIRCLE CAPITAL LIMITED
(3) SUKRU EVRENGUN

Ancillary Defendants

Appearances:

Mr. Ben Woolgar, with Ms. Tameka Davis and Ms. Allana-J Joseph for the Claimant/Ancillary Defendants
Mr. Tom Roscoe, with Mr. Simon Hall for the Defendant/Ancillary Claimants

---

2022: November 7, 8, 9, 10, 15, 16, 17, 23, 24;
2023: June 5; November 2.

JUDGMENT

1. Introduction

1.1. Preliminary matters

[1] This is the Judgment after a plenary trial in these proceedings. On 5th June 2023 I handed down the result, which was as follows:

(1) The Fixed Date Claim succeeds. The Claimant is entitled to a declaration that the Notice of Compulsory Redemption of Shares in AMS Holdings Limited pursuant to section 176 of the BVI Business Companies Act 2004 ('BCA') and the written offer contained therein is valid.

(2) The Re-Amended Ancillary Claim does not succeed.

[2] The parties were left, in the first instance, to discuss and if possible agree on the method of valuation for the purposes of section 179(9) of the BCA, given that both sides already have the benefit of expert valuation reports.

[3] At the handing down hearing, the only other finding communicated by the Court was that

the Company AMS Holdings Limited was not a quasi-partnership, nor akin to a quasi-partnership.

[4] The time for any appeal was directed to run from the later of communication of the written finalised reasons, or of entry of the order upon judgment, that is, after determination of any consequential issues.

[5] I indicated that written reasons would follow; these are those reasons. Where bold, italicised and underlined text is used this indicates a finding by the Court.

1.2. This dispute

[6] This matter arises from a dispute between Mr. McKenzie and Mr. Evrengun in relation to a company incorporated in this jurisdiction ('the BVI') called AMS Holdings Limited ('the Company' or 'AMS'). The Company is, or was, the holding company for a group of companies which provide trust and corporate services in a number of jurisdictions, including an entity

regulated by the competent financial services authorities in this jurisdiction (the 'BVI'). Where I refer to the 'Group', it is to this that I am referring.

[7] The dispute is between these two gentlemen, but also, by extension, between corporate vehicles used by them. For convenience, the sides can be referred to as the McKenzie Parties (on the Claimants' side) and the Evrengun Parties (on the Defendants' side) respectively.

[8] Mr. McKenzie practices as a corporate/transactional lawyer with many years' experience. Mr. Evrengun is a businessman.

[9] I will begin with the salient pleaded points. But, since it is easy in this dispute to be overwhelmed with detail, I will conclude this preliminary section with a summary of the main 'battlelines' provided by both sides' learned Counsel .

1.3. The Fixed Date Claim

[10] The procedural history of this matter began with a Fixed Date Claim Form ('FDCF') dated 19th December 2019 issued by AMS, at the behest of Mr. Evrengun, against Amstel Investment Holdings Limited ('Amstel'). In this FDCF, AMS sought a declaration of validity in respect of a Notice of Compulsory Redemption of Shares ('the Redemption Notice') in respect of shares in AMS held by Amstel, as well as consequential orders for the value of those shares to be appraised and purchased from Amstel. In this regard, the Company invoked the provisions and mechanisms set forth in section 176 and 179(9) of BVI BCA.

[11] This FDCF was supported by a first Affidavit of Mr. Evrengun. In this Affidavit, Mr. Evrengun said, by way of salient points, that:

(1) He was the sole director of AMS (at the date of his first Affidavit);

(2) In July 2012, he acquired a majority shareholding of about 68% in AMS through his wholly owned company Circle Capital Limited ('Circle'), a BVI incorporated company;

(3) At that point, Mr. McKenzie already held 16.85% of the shares in AMS through his corporate vehicle Amstel;

(4) Mr. McKenzie, already a Director of AMS, was then engaged to take on an executive director role within the Company;

(5) While there was no written agreement between Mr. McKenzie and AMS, there was an informal arrangement between Mr. McKenzie's company, Cavendish Management Ltd ('Cavendish') by which it was agreed that AMS would pay to him a 'management fee' *via* Cavendish fixed at US$350,000 per annum;

(6) As a result of a number of agreed transactions, as at the end of 2014, 70% of the shares in AMS were held by Circle and the remaining 30% held by Amstel;

(7) Moreover, as part of the same series of transactions, it was agreed that AMS from thenceforward owed Amstel a sum of US$400,000 (the 'Amstel Loan');

(8) In or around late 2017, the relationship of trust and confidence between Mr. McKenzie and Mr. Evrengun broke down. It was agreed sometime in November 2017 that Mr. McKenzie would leave AMS and his shares would be purchased or redeemed, although at the time the precise mechanism for facilitating his departure from the AMS group of companies was not clear;

(9) On 19th December 2017, Mr. Evrengun sent Mr. McKenzie a proposal setting out the details for his departure as well as the mechanics of a possible share transaction;

(10) Mr. McKenzie responded on 21st December 2017 in a very hostile and threatening manner. That same day, Mr. Evrengun withdrew any and all offers made with regard to his departure as well as to his shareholding;

(11) However, in order to have an orderly handover of the various outstanding matters, Mr. Evrengun agreed to continue to pay Mr. McKenzie monthly compensation through his company Cavendish until 31st March 2018;

(12) By emails dated 12th January 2018 and 17th January 2018; Mr. McKenzie resigned as a director of AMS and relinquished his duties as Group Managing Director of Corporate and Trust for the group of companies of which AMS was the holding company;

(13) Protracted communications ensued between Mr. Evrengun and Mr. McKenzie concerning a fair valuation for Mr. McKenzie's shares with a view to his departure from AMS as a member;

(14) On 18th May 2018, Mr. McKenzie caused statutory demands to be served on AMS in relation to the Amstel Loan and receivables payable to Cavendish for outstanding management fees and rechargeable costs. The parties reached agreement that the outstanding sums would be settled by 2020 by the payment of monthly instalments of US$20,000. As pleaded in the Evrengun Parties' Re-Amended Defence at paragraph 38, and as reflected in Schedule 2 thereto, the outstanding sums have been settled in full;

(15) Otherwise, discussions in relation to the price at which Mr. McKenzie should be bought out were not yielding any agreement;

(16) In the interim, AMS continued with its strategic plan to build a global corporate and trust provider and were in advanced discussions with major lenders to convert loans into share capital. Mr. McKenzie was asked by Mr. Evrengun whether he wanted to convert the Amstel Loan into equity, but he refused;

(17) Mr. Evrengun made a final offer on 29th October 2018, to which Mr. McKenzie did not react with a counteroffer. Instead, Mr. McKenzie reiterated threats to place the Company into liquidation, on the basis that he saw no alternative because Mr. Evrengun 'obviously cannot be trusted';

(18) Matters finally came to head when, on 9th November 2018, Mr. Evrengun sent a lengthy email to Mr. McKenzie explaining the Company's position and indicating that any action against AMS would be frivolous and Mr. Evrengun/AMS would seek their costs and damages of such. Mr. McKenzie replied with an equally lengthy email, ending with the following assertion: '*the threat of costs is irrelevant as I can't lose'*;

(19) Some further correspondence about valuation ensued;

(20) But then, by a letter dated 17th May 2019 from BVI legal practitioners, Mr. McKenzie threatened to bring a number of claims against AMS and Mr. Evrengun and to commence liquidation proceedings against AMS in relation to the Amstel Loan. The letter alleged breaches of director's and other fiduciary and statutory duties and referred to, and relied on, a draft Shareholders Agreement ('SHA') which had not been agreed. The letter also threatened to write to the Director of Banks, Trust Companies and Company Managers at the BVI Financial Services Commission (the 'FSC') about perceived regulatory breaches, suggested that AMS Trustees, the BVI regulated entity within the group, was insolvent, and invited the FSC to meet with Mr. McKenzie to discuss *'the above in more details should you so wish'*. Mr. McKenzie also threatened to send similar letters to the relevant regulators in the Cayman Islands, the Netherlands and Singapore. Mr. Evrengun stated that it was clear to him that the true purpose of such letters was to exert further commercial pressure on AMS to make an 'improved cash offer' for Amstel's shares plus the settlement of Amstel's loan to the Company;

(21) As at 31st May 2019, AMS owed Circle the sum of $1,796,951 (including principal and accrued interest and expenses as of 31st December 2018) (the 'Circle Debt');

(22) As at the same date, 31st May 2019, a company called Corepoint Select Strategies Limited ('Corepoint'), for which Mr. Evrengun acted as sole director, was also owed by AMS a sum of US$3,646,250 (including principal and accrued expenses as of 31st December 2018) (the 'Corepoint Debt').

(23) On 30th May 2019, by written resolution of the sole director Mr. Evrengun, the authorized capital of AMS was increased from US$50,000 to US$500,000.00, divided into 500,000 shares with a par value of US$1.00 each. A notice of change in number of shares or authorized capital was also filed on 30th May 2019.

(24) Further, on 31st May 2019, AMS passed a written resolution of the sole director Mr. Evrengun to issue new shares in AMS to Corepoint and Circle (the 'New Shares') in exchange for the release by Corepoint and Circle of the Corepoint and Circle Debts and to do so at the fair market value of AMS, which as at 31st December 2018 was determined to be US$24.89 per share. Corepoint also directed AMS to issue Corepoint's portion of the New Shares to Circle, on the basis that Circle would hold those shares on terms agreed between Corepoint and Circle. On 31st May 2019, AMS's register of members was updated to reflect the issuance of 218,691 ordinary shares to Circle. The result was that Circle was then a holder of 94.4% of the shares in AMS, with Amstel then holding 5.6% of the issued shares of the Company;

(25) In correspondence between the parties' legal representatives, AMS explained in a letter dated 4th July 2019 that the decision to increase the Company's authorized share capital from US$50,000 to US$500,000 was done to improve AMS's financial position. Mr. McKenzie's legal representatives disputed the validity of the increase;

(26) Further communications about valuation ensued, with Mr. McKenzie's legal practitioners writing on 30th July 2019, setting out detailed proposals for the valuation process including, importantly, a requirement that '*the valuation of the Amstel Shares shall not be discounted by virtue of it being a minority shareholding* [sic] *and moreover shall not be valued, pro rata, less than the valuation placed on the Company/Group in 2012 and subsequently 2014, when the value of the Company/Group was deemed to be US$4,000,000.00';*

(27) On 8th August 2019, Circle, being the registered holder of more than ninety per cent of the votes of the issued shares in the Company, by written instrument, directed AMS to redeem all the shares held by Amstel as a minority shareholder pursuant to the provisions of section 176 of the BVI BCA. The Redemption Notice also provided that:

(i) subject to Amstel's right to dissent the shares were to be redeemed by the Company on 15th August 2019 (the 'Redemption Date'); and that

(ii) the aggregate redemption proceeds payable to Amstel for the shares would be US$19.91 per share;

(28) Amstel dissented on 14th August 2019. It did so on several bases, but predominantly disagreed that the US$19.91 represented fair value, and alleged lack of information and lack of access to the Company's documents and accounts, and that the redemption process was unfairly prejudicial and thus illegal.

(29) Further protracted correspondence ensued without fruit. Mr. Evrengun asserted that AMS has always been ready and willing to pay Amstel 'fair value' for its shareholding, however, the parties have been unable to agree a suitable process for valuing those shares and once the Amstel shares were redeemed, Amstel failed to appoint an appraiser for the purpose of determining fair value. The purpose of the Claim is therefore to seek a declaration that the redemption process is valid, to compel Amstel to appoint an appraiser pursuant to section 179 of the BCA and for consequential directions related to the appraisal process.

[12] The relief sought in the FDCF was in essence for recognition of the share redemption process and for orders that the 'fair value' of the McKenzie Parties' shares in AMS should be established, as at the date of the redemption (8th August 2019), by three appraisers – one to be appointed by each of the Evrengun and McKenzie Parties' respectively and a third to be appointed by the other two appraisers so appointed.

1.4. The Ancillary Claim

[13] Mr. McKenzie responded to the Claim by bringing an 'ancillary claim' in his own name, as well as in the names of Amstel and Cavendish, against AMS, Circle and Mr. Evrengun ('the Ancillary Claim').

[14] The Ancillary Claim was an unfair prejudice action brought pursuant to section 184I of the BCA. In their Ancillary Claim, the McKenzie Parties alleged that Mr. Evrengun had committed breaches of director and other fiduciary and statutory duties and/or breaches of a shareholders' agreement and had engaged in unfairly prejudicial conduct of the affairs of the Company,

acting by Mr. Evrengun. The McKenzie Parties ultimately relied upon a Re-Amended Ancillary Claim Form.

[15] This pleading ran to 105 paragraphs over some 30 pages.

[16] The McKenzie Parties prayed for the following substantive relief, on behalf of Amsel as the member of the Company (the following being taken from their Re-Amended Statement of Ancillary Claim):

(1) A declaration that the affairs of the Company are being and/or have been conducted in a manner which is unfairly prejudicial, unfairly discriminatory and/or oppressive to Amstel as a minority shareholder of the Company;

(2) A declaration that Amstel remains a 30% shareholder in the Company and/or an order requiring the Register of Members of the Company be rectified to reflect the same;

(3) An Order requiring Circle, Mr. Evrengun and the Company to acquire Amstel's shares in the Company at a fair value price that:

(a) takes into account the diminution in the value of Amstel's shares in the Company attributable to the Company's affairs being conducted in an oppressive and/or unfairly prejudicial manner;

(b) proceeds on the basis that Amstel is a 30% shareholder in the Company;

(c) discards two sets of debts referred to hereinafter as the 'Corepoint Debt' and 'Circle Debt' respectively;

(d) disregards and/or sets aside the disposition of the Company's assets to a company called 'AMCIN';

(e) does not apply a minority discount;

(f) applies (i) a current valuation date, alternatively (ii) a valuation date of 8th August 2019, alternatively (iii) a valuation date of 31st May 2019, alternatively (iv) a valuation date as at the time of Mr. McKenzie's departure from the Group on 17th January 2018;

(g) permits Amstel to make representations to the valuer(s) following the full disclosure of all information relevant to the value of Amstel's shares.

(4) An Order that the Company produce all accounting records of the Company and all of its underlying subsidiaries for the purposes of a forensic review and requiring the Company and/or Mr. Evrengun to answer any reasonable queries or questions raised by Amstel in respect of such records;

(5) Alternatively, compensation for the diminution in the value of Amstel's shares in the Company attributable to the Company's affairs being conducted in an oppressive and/or unfairly prejudicial manner;

(6) Such other Order as may be made pursuant to section 184I of the Act as the Court thinks fit;

(7) An account of the outstanding amount due to Amstel in relation to the Shareholder Loan, and judgment in such sum.

[17] At paragraphs 100 to 105 of the Re-Amended Statement of Ancillary Claim, the McKenzie Parties summarised their unfair prejudice claim in the following way. The thrust of their allegations, which were wide-ranging, can be gleaned from this summary:

> "100. … the affairs of the Company are being and/or have been conducted in a manner which is unfairly prejudicial, unfairly discriminatory and/or oppressive to Amstel as a minority shareholder of the Company.
>
> 101. In particular, by:
> a. Forcing Mr. McKenzie, Amstel's nominated director of the Company, to resign as a director, contrary to clause 4 and paragraph 13 of schedule 2 of the SHA;
> b. Failing to pay Mr. McKenzie his due salary and expenses;
> c. Failing to honour a Director Services Agreement that Mr. McKenzie had prepared as a standard agreement for all Group subsidiary directors and as per the terms of the SHA;
> d. Restructuring the share capital and/or converting improperly incurred debt into equity, so as to reduce Amstel's shareholding in the Company, contrary to clause 4 and paragraph 15 of schedule 2 of the SHA;
> e. Passing a written resolution to increase the authorised share capital from £50,000 to £500,000 [£: *sic*] with the intention of reducing Amstel's shareholding in the Company, contrary to clause 4 and paragraph 15 schedule 2 of the SHA;
> f. Taking out loans and incurring debt in the name of and on behalf of the Company without full and proper disclosure of the existence of and or terms and conditions of such loans to Mr. McKenzie and/or the Board of the Company as a duly appointed director of the Company; such loans are not in the best interests of the Company and/or are on a basis unfairly prejudicial to Amstel; contrary to clause 4 and paragraph 7 of schedule 2 of the SHA;
> g. Failing to properly declare conflicts of interest on various of the above loans taken out by and in the name of the Company, in particular the loans from Corepoint (and making secret profits thereon);
> h. Failing to provide accounts for the Company for the years 2013, 2014, 2015, 2016 and 2017 until November 2017;
> i. Failing to procure proper treatment of loans and other operating expenses taken out by the Company in that they have been on loaned to the Group Subsidiaries with no reciprocal intercompany receivables credited back to the

Company, thus reducing the net asset value of the Company to the detriment of Amstel;

j. Using operating expenses to mask the insolvency or doubtful solvency of the Group Subsidiaries, and therefore filing improper and inaccurate statutory/audited accounts with the FSC and other regulators;

k. Taking steps to run and manage the Company contrary to the legitimate expectations of Amstel and in a manner which is otherwise unfairly prejudicial and unfairly oppressive;

l. On 1 January 2021, apparently selling, transferring or otherwise disposing of the entirety of the Company's assets by transferring them to AMCIN Holdings BV and acting in the manner pleaded at paragraphs 89 to 99 above.

102. In addition, it is averred that there have been breaches of clause 4 and paragraphs 3, 6, 7, 9, 13 and 19 of the SHA.

103. Further and alternatively, Mr. Evrengun has acted in breach of his fiduciary duties owed to the Company thereby causing Amstel unfair prejudice.

104. The statutory and/or common law duties owed to the Company include:

a. The duty to act honestly, in good faith and in the best interests of the Company;

b. The duty to refrain from conduct that would be regarded as commercially unacceptable by reasonable and honest people;

c. The duty to exercise the care, diligence, and skill that a reasonable director would exercise when exercising powers or performing duties as a director;

d. The duty not to put himself in a position where his duty and his interest may conflict;

e. The duty to disclose any conflicts of interest, namely, to disclose to the board if he has an interest in any transaction entered into or to be entered into by the Company;

f. The duty not to exercise his powers for an improper purpose;

g. The duty not to act, or agree to the Company acting, in a manner that contravenes the Act or the Company's memorandum or articles;

h. To act in accordance with section 175 of the BVI Business Companies Act.

105. For the reason set out above, it is averred that Mr. Evrengun is in breach of the duties identified above. In particular, Mr. Evrengun repeatedly failed to declare his conflict of interest in relation to the loans and debt taken out and in the name of the Company (particularly in relation to Corepoint)."

[18] Reference to 'the SHA' is to the SHA mentioned above. This was a document prepared by Mr. McKenzie in draft as a deed which was communicated to Mr. Evrengun but, as was common ground, it was never executed. Mr. McKenzie contends the SHA was agreed by conduct and was thus binding and/or enforceable in law or equity. Whether or not the SHA is binding and enforceable is an important issue for determination in these proceedings.

[19] The 'Director Services Agreement' referred to in paragraph 101(c) was a draft agreement also prepared by Mr. McKenzie but which had not been communicated to Mr. Evrengun nor to AMS before Mr. McKenzie purported to rely upon it. This document was not executed by any of the Defendants. Whether or not the Directors Services Agreement is binding and enforceable was in issue in these proceedings, until Counsel for the McKenzie Parties conceded this issue during his opening submissions on day 2 of the trial. The allegation at paragraph 101(c) thus fell away.

[20] This concession, belated though it was, is to be welcomed, as reliance upon the 'Director Services Agreement' was bound to fail as a matter of basic contract law as well as on the facts. That said, it is a curious feature of this case that Mr. McKenzie, who is a senior legal practitioner of many years' legal professional experience, maintained such an obviously hopeless argument into the trial itself. As will be seen, this is not the only time Mr. McKenzie has taken an exaggerated position in relation to these proceedings.

[21] Another allegation that was abandoned during the McKenzie Parties' opening submissions on day 2 of the Trial was that set forth at paragraph 101(f): *'Using operating expenses to mask the insolvency or doubtful solvency of the Group Subsidiaries'*. This allegation was factually and evidentially unsustainable. It appears to have been suggested to Mr. McKenzie by an accountancy or insolvency professional who was helping Mr. McKenzie prepare his case. There is no evidence that Mr. McKenzie himself understood this highly tendentious and damaging allegation, or how, upon a moment's reflection, it could possibly work. There was moreover no evidence to support it. Yet Mr. McKenzie (also curiously) advanced and maintained this allegation right into the trial.

[22] In my judgment it is more likely than not that Mr. McKenzie included these claims (a) as part of his 'argumentative claim' strategy (on which more later); and (b) not understanding how untenable they really were. I think a lack of understanding on the part of Mr. McKenzie to be more likely than a vexatious or malicious intent. As to why they were dropped only after the trial had started, I think it more likely than not that it was his trial Counsel who persuaded him to do so.

1.5. The battlelines

[23] The above summaries suffice to frame the issues for determination at trial, albeit in a somewhat cumbersome way. The McKenzie Parties' learned Counsel, Mr. Roscoe, helpfully summarised the 'battlelines' as follows in his opening submissions:[1]

> "…this is a shareholder dispute concerning AMS Holdings which we will call 'the Company'. And Your Lordship will be aware that Mr. Evrengun is now and has been since January 2018, the sole director of the Company. And he was the 70 percent shareholder by his vehicle Circle until a purported debt for equity swap in May 2019 and the [ostensible effect] of that debt for equity swap was to increase his shareholding by Circle to 94.4 percent.
>
> My client, Mr. McKenzie, was before that disputed debt for equity swap, the 30 percent shareholder in the Company by his vehicle Amstel and Mr. McKenzie was also until January 2018 or February '18 when he resigned a director. And the purported debt for equity swap, if it was valid, reduced his shareholding from 30 percent, down to 5.6 percent.
>
> …
>
> Mr. Evrengun says that by May 2019 the Company had valid debts or owed valid debt to two Companies in which he was interested. The first is Circle, which on any view is him and the second is a Company called Corepoint. And Corepoint, as I will come on to explain, is a Company in which Mr. Evrengun was in any view interested, but the extent of that interest and control as to whether it was complete ownership control or something short of that is a matter in issue.
>
> But in any event he says that by May 2019 there were loans to these two Companies, due from the Company and he says that a debt for equity swap took place for a proper purpose and at a fair value to convert Circle and Corepoint's loans into equity. And the effect of that, as I have already indicated, was to reduce Mr. McKenzie's shareholding to below 10 percent to 5.6 percent.
>
> And Mr. Evrengun then says that in August 2019 steps were taken for compulsory redemption of Mr. McKenzie's shares under the squeeze-out provisions of Section 176 of the Business Companies Act.
>
> Mr. Evrengun says that that was a valid redemption process and that the result of it was that Mr. McKenzie's only rights are now to be paid fair value for the 5.6 percent shareholding to be assessed by appraisers in accordance with the statutory mechanisms.
>
> And so his fixed date claim was effectively seeking declaratory relief that that was the position.
>
> Mr. McKenzie, in response by his ancillary claim, which is now in substance being treated as the main claim, says that Mr. Evrengun has operated the Company in an unfairly prejudicial manner. And the key central conduct complained about is this. Mr.

[1] Transcript Day 1 page 145 line 5 to 20 and page 146 line 7 to 149 line 14.

McKenzie says that Mr. Evrengun has loaded the Company with purported debts to these Companies that Mr. Evrengun controls, this being Circle and Corepoint, in circumstances which were and which remain entirely opaque.

Mr. Evrengun then refused to give proper disclosure or explanations to Mr. McKenzie about those debts and why and how they arose when the two protagonists attempted to negotiate a parting of the ways in 2017 and 2018, even though the effect of these supposed debts was to reduce the value of Mr. McKenzie's shares very significantly and very significantly below the sorts of values the two parties had in mind as being the value of Mr. McKenzie's shares only a short time previously. Rather than engaging with Mr. McKenzie's reasonable queries about these debts and how they arose, what Mr. Evrengun did in May 2019 was to convert those Corepoint and Circle debts to equity at a figure which very substantially undervalued the Company. And the reason we say he did so was for the improper purpose of diluting Mr. McKenzie's interest in the Company to below that 10 percent squeeze-out level precisely so that he could therefore try to force Mr. McKenzie out, and then again, at an undervalue of the shares.

And then the final key conduct complained about is during the course of these proceedings, then causing the Company to transfer all of its operating subsidiaries, i.e, its assets, its value to the Dutch AMCIN Company. Again, a Company which Mr. Evrengun but [not] Mr. McKenzie is interested [in].

And so what Mr. McKenzie seeks by these proceedings is a remedy for unfair prejudice under Section 184I of the Business Companies Act.

And the appropriate remedy he says is that the Court should order that his shares be bought out at a current valuation which assumes that the unfairly prejudicial conduct has not occurred, i.e which still treats him as being a 30 percent shareholder and i.e, therefore, that the debt for equity swap had not occurred and that the AMCIN transaction hadn't happened. So that's the relief I will be seeking and say that the Court should be granting."

[24] Learned Counsel for the Evrengun Parties, Mr. Woolgar, identified the 'battlelines' similarly albeit somewhat more succinctly:[2]

"This is a case which has essentially two key but related themes. The first is whether the Corepoint and Circle debts were legitimate and in particular, whether they were disclosed to Mr. McKenzie at or around the time that they were incurred. It lies at the heart of our case that we say Mr. McKenzie knew about those debts and particularly the Corepoint debt all along, and that his denial of that now is a contrivance. Your Lordship, therefore, has to appreciate that this is a case where someone is telling the truth and someone is lying and in due course on the basis of cross-examination Your Lordship will have to make up your mind about that question.

The second related theme is whether the debt for equity swap was legitimate."

[2] Transcript Day 2, page 56 line 3 to line 17.

[25] The trial lasted for a total of 9 days. Both Mr. Evrengun and Mr. McKenzie gave oral evidence at the trial. Each side also called an accountant from reputable firms to give expert evidence on valuation of the shares in AMS. It is not necessary for the purposes of these reasons to give the names of these experts.

2. Backgroud

2.1. The Parties

[26] The Company was incorporated in 1995. It is or was the ultimate holding vehicle for a group of companies which mainly provided corporate services, including through regulated entities in this jurisdiction, as well as legal and insurance services.

[27] Mr. McKenzie is English. He is a solicitor. He qualified in England in 1987 and relocated to the BVI in 1990, when he was also admitted to practice as a solicitor of the Eastern Caribbean Supreme Court. He practises as a corporate and transactional lawyer. He appears not to have been a litigator, nor an insolvency lawyer. Mr. McKenzie became a partner in the firm of Messrs Smith-Hughes, Raworth & McKenzie in 1994 and three years later he became their Senior Partner. When that firm merged with the law firm of Messrs Maples and Calder in around 2004, Mr. McKenzie continued as a partner of that firm until 2013.

[28] Mr. McKenzie has at all material times been the sole director and sole shareholder of Amstel. This 'Amstel' is not to be confused with a certain well-renowned brand of beer with the same name, named after the eponymous river in the Netherlands. Cavendish is a wholly owned subsidiary of Amstel.

[29] Mr. Evrengun is originally from the Netherlands. He graduated from the University of Amsterdam with a Masters degree in Fiscal Law in 1985 and subsequently completed an executive management trainee program at ABN-AMRO Bank in Amsterdam. In 1988 he joined the Citco Group, where he worked for eleven years in managerial positions in both the trust and banking operations, in the Netherlands Antilles, Aruba, Netherlands, BVI and Switzerland. After leaving Citco in 1999, he established himself as an independent corporate finance consultant in Switzerland. He co-founded an entity called Circle Partners ('Circle Partners') in 2000. His business interests have spanned from investing in a Swiss airport hotel to a shopping mall in Grenada, West Indies, as well as in corporate and insurance services.

[30] Mr. Evrengun wholly owns Circle (i.e. Circle Capital Limited). Circle is not to be confused with Circle Partners.

2.2. The historical context

[31] The wider context of this dispute is important, because much turns on what had been Mr. Evrengun's predominant purpose when he proceeded to convert debt that he claimed AMS owed his corporate vehicles into equity. It is thus necessary to have regard to Mr. Evrengun's perspective of AMS, of its challenges, and of Mr. McKenzie's part in this picture.

[32] Mr. Evrengun left Citco in 1999 and started Circle Partners in around 2000. He did so with a Mr. Pieter Jan van de Pols and a Mr. Erik Kuijl. These three gentlemen all left Citco around the same time, after working at Citco for a considerable number of years. In time, Mr. Evrengun would hold 45% of shares in Circle Partners, Mr. Kuijl would also hold 45% and Mr. van der Pols would hold 10%. By December 2014, Circle Partners had about 70 employees in 7 jurisdictions (including the BVI), with approximately 250 funds and US$7 billion in assets under administration, and an annual turnover of approximately US$10 million. This information and these figures derive from a memorandum prepared by Circle Partners/AMS in December 2014 for the purposes of merger discussions with a company called Newhaven Limited.[3] In the same memorandum the annual turnover of the AMS Group was stated as being US$7.5 million. Nothing here turns on the accuracy of these figures. They do, nonetheless, give an idea of the relative financial size of both Circle Partners and AMS in relation to each other.

[33] Concerning AMS, in 1997 Mr. McKenzie became a 16.85% shareholder in AMS when it merged with a trust company owned by Messrs Smith-Hughes, Raworth & McKenzie, of which he was then the Senior Partner. He eventually held those shares through his company, Amstel. By around July 2014 Mr. McKenzie's shareholding interest in AMS had grown to, and stabilised at, 30%, whilst by that time Mr. Evrengun held 70% through Circle.

[34] Mr. McKenzie was appointed as a Director of AMS on 10th January 1998.

[3] Bundle D Vol. 1 part 2 pages 200 and following, on page 201.

[35] When Messrs Smith-Hughes, Raworth & McKenzie merged with the law firm Messrs Maples and Calder in 2007, Mr. McKenzie continued to have that shareholding. At that point (2007), he had no executive function in AMS. He practiced law as a partner at Messrs. Maples and Calder.

[36] Mr. Evrengun had no connection with AMS at that time. He and Mr. McKenzie had met and got to know each other, to a limited extent, in the 1990s.

[37] On 11th March 2010, Mr. Evrengun became the sole shareholder in a company called Corepoint Capital, of which he was also a director.

[38] A few days later, on 23rd March 2010, Mr. Evrengun incorporated another company, called Corepoint Select Strategies Limited (which we will be referring to as 'Corepoint' and which is not to be confused with Corepoint Capital). Mr. Evrengun was the sole holder of the class A management shares (which held the voting rights) of Corepoint. Corepoint Capital was appointed as the Investment Manager of Corepoint, and Mr. Evrengun was appointed a director of Corepoint.

[39] About two years later, in June 2012, Mr. Evrengun acquired, via Circle, a shareholding stake in AMS of approximately 68%, and in July 2012 Mr. Evrengun was appointed director of AMS. In essence, Mr. Evrengun bought a majority controlling stake in the Company, for a price of US$2,718,200 or thereabouts, reflecting a group value of not less than US$4 million. Mr. Evrengun did so by buying out certain other shareholders. Mr. McKenzie continued to hold his own shares. It had been Mr. McKenzie who had introduced Mr. Evrengun to the other shareholders who eventually sold their shares to him.

[40] After this takeover by Mr. Evrengun, AMS was held as to 67.955% by Circle, 16.85% by Amstel and 15.195% by a company called Sun Investments Limited ('Sun'), which was owned by one Mr. AB. Mr. AB was a Director of AMS, and he remained a Director following the takeover for another couple of years, until about July 2014, when Sun ceased to be a shareholder.

[41] Immediately prior to Mr. Evrengun's takeover, the cash in AMS, in an amount of approximately US$1 million, was distributed as a dividend to the then shareholders. Mr. McKenzie, through Amstel, also received a part of this distribution.

[42] From September 2012, discussions began between Mr. Evrengun and Mr. Mckenzie regarding Mr. McKenzie taking an active role in the Company.

[43] A meeting took place in the week commencing 7th January 2013, after which Mr. Evrengun emailed Mr. McKenzie on 13th January 2013 to set out what had been discussed.[4] In very broad terms, the email proposed that:

(1) Mr. McKenzie would hold the position of '*Group Managing Director Corporate and Trust'*, with an annual salary of US$350,000, and would be based in Cyprus '*but with global responsibility'*;

(2) Mr. McKenzie's shareholding (i.e., indirectly held *via* Amstel) would increase from 17.5% to 25%. It appears to be uncontroversial that this would represent compensation for his role in brokering Circle's acquisition of the Company, and for work he did in respect of AMS during the time he was on 'gardening leave' from Messrs Maples and Calder before officially starting to work for the Company;

(3) The parties would buy out Sun, of which Amstel would acquire 5% and Circle 10%, leaving Circle with 70% and Amstel with 30% of the shares in total;

(4) It was intended that, in the near future, Mr. Evrengun would contribute his shares in Circle into AMS, with a view to establishing full integration between the two businesses. Mr. Evrengun was upfront in stating that *'this will cause a dilution of the present shareholders in AMS'*. In other words, Mr. Evrengun was thereby informing Mr. McKenzie that his (Mr. McKenzie's) shareholding in AMS would be reduced by such an integration. Moreover, Mr. Evrengun was laying out from the very start of Mr. McKenzie's increased involvement in the business Mr. Evrengun's intentions to merge AMS with Circle;

(5) It was intended that there would be a restructure of the AMS/Circle organisation to set up an equity participation scheme for key employees (including Mr. McKenzie). Mr. Evrengun postulated that this could entail a dilution of the prior shareholdings in AMS,

[4] Bundle D Vol. 1 Part 1 pages 314 to 315.

suggesting that this might result in Mr. McKenzie's 30% shareholding being diluted to 15%.

[44] It is apposite to mention here that Mr. Evrengun would also have an executive role, as Group Managing Director, and that he would receive a salary or monetary compensation for doing so at US$300,000 per annum, i.e. slightly less than Mr. McKenzie would receive.

[45] Mr. McKenzie responded the following day seeking to 'clarify a couple of points'.[5] Among those points were:

(1) A proposal that '*We agree to enter into a shareholders agreement as soon as possible, containing the normal minority shareholder protection rights, drag/tag, rights of pre-emption / first refusal etc'*;

(2) That '*My salary would be structured in such a way as to make it tax free – i.e. we can take it in dividends if we want, or any other way which provides we don't pay tax.'*

[46] Mr. Evrengun reverted on 15th January 2013, broadly agreeing to Mr. McKenzie's points. In respect of the proposal for a shareholders' agreement, Mr. Evrengun simply stated 'Agreed'.

[47] In relation to compensation, it was ultimately agreed that Mr. McKenzie would receive US$350,000 per annum, paid as a 'management fee' to his company Cavendish.

[48] On or by 6th June 2013, Mr. Evrengun ceased to be a director of Corepoint.

[49] Mr. McKenzie started work for AMS at some point in early to mid-2013. There is a minor factual conflict, on which nothing presently turns, whether it was on 1st March 2013 or 1st August 2013 that Mr. McKenzie started work.

[50] Mr. McKenzie's work was mainly on the operational side of the business, whilst Mr. Evrengun would focus on the financial side of the business, as well as its insurance division. Mr. Evrengun was also involved in other aspects of the business more generally.

[5] Bundle D Vol. 1 Part 1 pages 313 to 314.

[51] Mr. McKenzie was initially located in Dubai, whilst Mr. Evrengun worked from elsewhere. I observe this here, because it is pertinent to note that these gentlemen worked largely in isolation from each other, in different locations.

[52] When Mr. Evrengun acquired his majority shareholding in the Company, the evidence is that the Company was not in an altogether flourishing state. Mr. Evrengun's plan for the Company was to use it as the vehicle for creating an international group of companies providing corporate, fiduciary and related services.

[53] It was always understood between Mr. Evrengun and Mr. McKenzie that the Company's group, or the 'AMS Group', would grow by acquiring new businesses. This was exactly what they proceeded to do, and Mr. Evrengun had already begun putting this strategy into effect before Mr. McKenzie started work in AMS in an executive role.

[54] Those acquisitions included:

(1) The purchase on 1st October 2012 of 100% of the shares in Sentinel Management LLC ('Sentinel') for the sum of US$830,000.

(2) The purchase on 2nd November 2012 of a portfolio of clients held by Superior Trust and Management Company Ltd ('Superior') for US$37,500.

(3) The acquisition of 100% of Circle Trust Services (BVI) Ltd ('CTS') from Circle Holdings Netherlands B.V. The total cost was US$700,000.

(4) The acquisition of a Cypriot trust company called Fidelius.

(5) The acquisition by a share purchase agreement dated 14th March 2014 of Nexman B.V. and Nexman Marketing B.V. for a consideration of EUR 1 million, of which half was paid in cash.

[55] Returning to the history of the relations between Mr. McKenzie, Mr. Evrengun and AMS, although Mr. McKenzie commenced working for AMS in 2013, he did so without an executed shareholders' agreement in place. No shareholders' agreement was ultimately executed between these gentlemen and/or their respective entities.

[56] We leave the general history of the matter here briefly to consider what happened – or more pertinently, what did not happen - in respect of a shareholders' agreement.

2.3. The Draft Shareholders' Agreement

[57] It is common ground that a draft shareholders' agreement (the SHA referred to earlier) was drawn up by Mr. McKenzie.

[58] His evidence was that he sent a first draft to Mr. Evrengun in the first week of February 2014 for his comments and discussion. This was some 13 months after their exchange in January 2013 in which Mr. McKenzie had said that he wanted one, to which Mr. Evrengun had agreed.

[59] It warrants observation that Mr. McKenzie did not copy Mr. AB in on his covering email to Mr. Evrengun. Nor did Mr. McKenzie's draft SHA include Mr. AB, or his corporate vehicle, Sun, as an intended party to the agreement. Mr. McKenzie had prepared the draft SHA to be a tripartite agreement between his vehicle, Amstel, Mr. Evrengun's vehicle, Circle, and the Company itself. At this point (February 2014), Mr. AB was still indirectly (through Sun) a shareholder in the Company, as well as a director.

[60] Mr. Evrengun acknowledged receipt of the draft SHA and suggested that they discuss it the following week in London.

[61] The draft SHA was not finalised then. The draft SHA next made an appearance some 4 months later, in June 2014, when Mr. Evrengun emailed Mr. McKenzie on 16th June 2014 suggesting that it be amended to reflect developments concerning the purchase of Mr. AB's shareholding in the Company. Mr. Evrengun remarked that he and Mr. McKenzie still needed to sign the document anyway.

[62] Mr. Evrengun suggested a further number of amendments to the draft SHA some 5 months later on 3rd November 2014, to address 'key man insurance' and life insurance for Mr. McKenzie. Mr. McKenzie replied the same day, querying whether 'key man insurance' should not also be extended to Mr. Evrengun, and explaining that he wanted something different in relation to life insurance to what Mr. Evrengun had proposed. No agreement was ultimately reached on these matters and the draft SHA was not amended to reflect them.

[63] The following day, on 4th November 2014, Mr. McKenzie emailed Mr. Evrengun a further draft for the SHA, saying:

> "As discussed, please see attached a [revised] draft of the Shareholders Agreement with updates given [Mr. AB's] sale. Please review and let me know if you have any comments."

[64] Mr. Evrengun did not respond with either an acceptance or rejection of the proposed terms, as Mr. McKenzie accepted in cross-examination.

[65] The draft SHA had a further outing some two and a half years later, on 20th July 2017. On that date, Mr. McKenzie emailed a Mr. Fergus Anstock – copying Mr. Evrengun – about a proposal (which ultimately did not proceed) for the Company to merge with Mr. Anstock's company, known as Newhaven. Mr. McKenzie proposed a shareholders agreement between Mr. Anstock, Mr. Evrengun and himself, saying:

> "The Shareholder Agreement between the 3 of us can be based on the Shareholder Agreement between Sukru and I with modifications (see attached)."

[66] Mr. Evrungun did not react to this to correct Mr. McKenzie that he and Mr. McKenzie in fact did not have a shareholders' agreement between them. Mr. McKenzie argues that this was because Mr. Evrengun had indeed already agreed to the terms of the draft SHA. Mr. Evrengun denies this.

[67] Mr. McKenzie next brought up the draft SHA some 3 months later, on 31st October 2017 in an email to Mr. Evrengun:

> "I also think we ought to sign the Shareholders Agreement we finalised in November 2014. (Attached is the latest mail on it with the final agreed version of the agreement.)"

[68] Mr. Evrengun responded on 7th November 2017. He did not mention the draft SHA. Mr. McKenzie contends that this indicated that Mr. Evrengun did not disagree with Mr. McKenzie's proposition that the draft SHA had already been agreed. Whilst Mr. Evrengun did not mention the draft SHA, he raised various matters indicating that he perceived Mr. McKenzie to be falling short of the performance that Mr. Evrengun had expected of him. Mr. Evrengun suggested that he and Mr. McKenzie should take some time to sit down and have an 'in depth discussion' about the issues he had raised, as Mr. Evrengun said that he was 'not sure how to take this forward'. This suggested that Mr. Evrengun wished to review his entire cooperation with Mr. McKenzie, clearly hinting that an appropriate decision might be to part ways, in which case there would be no need to execute the draft SHA anyway.

[69] Mr. McKenzie responded on 10th November 2017, in a message which expressed Mr. McKenzie's willingness to meet for discussions, but clearly demonstrated that the relationship between them was becoming increasingly fraught with tension and acrimony. In that message Mr. McKenzie insisted:

> "I also want to sign our Shareholder Agreement so we cannot be mistaken regarding our relationship going forward, irrespective of the Newhaven deal."

[70] Mr. Evrengun did not rise, nor respond, to this. At no point did he sign the draft SHA. Furthermore, at no point did he say that he agreed the terms. Indeed, he has said that he did not agree to them. This was some 2 months later, on 11th January 2018, when Mr. Evrengun asserted in an email:

> "For the avoidance of all doubt, since you have been raising this issue, the Shareholder's Agreement was never agreed, whether verbally, by telephone or other means. You provided a draft which was never discussed, and which for various reasons I would never have agreed to."

[71] Pausing here, it can categorically be stated that finalization of the draft SHA had been left uncompleted following Mr. McKenzie's email of 4th November 2014 to Mr. Evrengun. ***It was not correct that 'we' (i.e. Mr. McKenzie and Mr. Evrengun) 'finalised' the draft SHA in November 2014, as Mr. McKenzie had purported. It was also not correct that the version which Mr. McKenzie then sent was the 'final agreed version'.*** It can be seen with the benefit of hindsight that Mr. McKenzie was writing his email on 31st October 2017 in a context where his relationship with Mr. Evrengun had begun to deteriorate, such that Mr. McKenzie was clearly producing communications with an eye to them eventually being placed before a court of law. Moreover, it can also clearly be seen that Mr. McKenzie was rather crudely trying to create a narrative record that the draft SHA had been agreed. ***As a matter of fact, the draft SHA had not been agreed, nor had it been finalised***.

[72] Mr. McKenzie maintained a primary case that the draft SHA had been agreed by conduct. Mr. McKenzie also amended his pleadings to include a secondary case that the draft SHA reflected the understandings between the parties, and that Mr. Evrengun should be held to its terms by reason of equitable considerations.

[73] During Mr. McKenzie's oral evidence, he averred that 'we [i.e. he and Mr. Evrengun] honoured it. We got paid by it'.[6] He continued that 'we generally behaved and we had appointed the directors in accordance with the Shareholders' Agreement'.[7] When Mr. Woolgar pointed out to him that this could not be right, because he and Mr. Everngun had each appointed a director in 2012, long before even Mr. McKenzie claimed the draft SHA had been agreed, Mr. McKenzie changed his explanation to say that these appointments had been 'in line with the terms of the Shareholders' Agreement'.[8]

[74] We can round off this segment on the draft SHA by noting that Mr. McKenzie:

(1) advanced a factually incorrect, exaggerated, position in relation to the finalisation and agreement of the SHA; and

(2) put forward an impossible, and thus exaggerated, position that he and Mr. Evrengun had appointed directors 'in accordance with' the SHA, at a time when the SHA on no view yet existed. Mr. McKenzie's contention did not improve by changing the argument to say that these appointments had been 'in line with the terms of the Shareholders' Agreement', for the same reason. The most that might have been said (which the McKenzie Parties did not do) was that the terms of the draft SHA had been in line with parties' earlier understandings which led to their directorship appointments – i.e., to put the matter the other way round.[9] It stands to reason that appointments could not be 'in line with' something which did not yet exist at the time they were made. What this episode illustrates is that Mr. McKenzie was prepared to contort fundamentally hopeless arguments into being in order to advance his own case and his own interests in this matter.

2.4. Returning to the history

[75] We return to the history of the matter, with Mr. McKenzie having started working for the Company around mid-2013.

---

[6] Transcript day 3, page 202 line 25.
[7] Transcript day 3, page 203 lines 3 to 4.
[8] Transcript day 3, page 203 line 24 to page 204 line 1.
[9] This is not to be taken as a finding that there was indeed such conformity between the draft SHA and the parties' earlier understandings.

[76] He did so as an executive director of the Company. The other Directors were the principals of the shareholding entities – Mr. Evrengun and Mr. AB. The day-to-day management of the Company's affairs was shared between Mr. Evrengun and Mr. McKenzie. Mr. AB did not have an executive role in relation to the Company – but that does not mean he can be altogether ignored. Rather, his presence as both shareholder and Director begs questions concerning the effect, if any, the draft SHA could sensibly have had, as Mr. McKenzie maintains it did, in circumstances where Mr. AB was not a party to it, appears not even to have known about it, and clearly did not agree it. For a binding and enforceable shareholders' agreement to exist between only some of a company's shareholders, and not another or others who is/or ignorant of it, is rather unusual.

2.5. Funding for growing the business

[77] Mr. Evrengun's plan was to grow AMS's business by acquiring other corporate service providers and/or their client portfolios. This clearly needed to be funded. Equally clearly, after AMS had distributed its surplus cash to shareholders by way of a dividend as part of Mr. Evrengun's takeover, that cash was no longer available to be used for this (or any) purpose. AMS's own financial performance was insufficient to generate sufficient cash to finance such expansion. Indeed, it was periodically also insufficient to meet its own operating expenses, including Mr. McKenzie's own compensation.

[78] Beyond the inadequate earnings of the Group, the financial needs of the Company in its early years following Mr. Evrengun's takeover appear very largely to have been supplied by Mr. Evrengun, in the form of cash loans made to AMS through Corepoint, which Mr. Evrengun owned or controlled. Mr. McKenzie has professed ignorance about the majority of such lending and he has said that information concerning AMS's debt position has been kept from him by Mr. Evrengun. ***I am satisfied that neither of these two contentions was in fact the case.***

[79] I do accept that Mr. McKenzie left Mr. Evrengun to get on with organising and supplying the financing, while he (Mr. McKenzie) got on with the day-to-day management of the Company's affairs. Given their differences in location, they would speak often by telephone and meet as often as practicable.[10]

[10] Transcript day 2, page 126 lines 10 to 17.

[80] The documentary evidence suggests that Mr. McKenzie showed little interest in relation to the Company's financial affairs, except (a) at a broad general level, but (b), with considerable engagement and vim, in so far as it concerned making sure he would be paid his monthly compensation, or most of it.

[81] The difference in perspective and focus on the part of Mr. McKenzie and Mr. Evrengun respectively in relation to financial details can quintessentially be illustrated with reference to their respective recollection of a meeting held at Mr. Evrengun's residence in the south of France in July 2013 between Mr. Evrengun, his co-shareholders in Circle Partners (Mr. van der Pols and Mr. Kuijl) and Mr. McKenzie. Both sides accepted that the purpose of the meeting included to enable these gentlemen to get to know each other better and that a possible merger between AMS and Circle Partners was discussed.

[82] Mr. McKenzie's recollection in his oral evidence of the meeting was that:

> "…we sat most of the time around the pool drinking beer all afternoon."[11]

[83] Mr. Evrengun's recollection in his oral evidence was not so monothematic. He explained that:

> "…it was not just that we were just drinking beers at a pool, we were sitting in the back of the kitchen at a table discussing all the fees."[12]

[84] It is, in my respectful judgment, likely that the meeting included both socializing around the pool with beer as well as some financial discussions indoors around the kitchen table. The Court has no reason to disbelieve Mr. Evrengun in this regard. Indeed, some degree of financial discussions could be expected to occur during discussions about a possible merger. The evidence is also that Mr. McKenzie, Mr. van der Pols and Mr. Kuijl had to fly in for that meeting[13] such that it seems more likely than not that such time and expense was intended to be incurred for more than a social meeting. On a balance of probabilities, Mr. McKenzie most likely did not engage his mind and memory during that kitchen-table session. Indeed, Mr. McKenzie has shown that he has a blind spot when it comes to financial matters. Examples of this will become apparent. As he himself admitted in cross-examination, '[m]y accounting is not my best skills in the world but I am not stupid.'[14]

---

[11] Transcript day 2, page 165 lines 4 and 5.
[12] Transcript day 5, page 52, lines 21 to 24.
[13] Transcript day 2, page 164, lines 19 – 20 and Bundle D1 Vol.1 Part 1 page 475.
[14] Transcript day 3, page 144 line 11 to 12.

[85] Whilst Mr. McKenzie was largely content to leave the financial side of the business to Mr. Evrengun, that is not to say that Mr. McKenzie was disinterested in it. In an email dated 10th November 2017 from Mr. McKenzie to Mr. Evrengun, Mr. McKenzie showed that he must have been keeping an eye on the financial performance of the Group companies. He stated:

> "When I look at the mistakes made with the acquisitions, apart from CTS, none have been any good."[15]

[86] 'Any good' in the context must have been, or included, a reference to such companies' financial performance.

[87] Moreover, Mr. McKenzie was not merely an employee of AMS (if he was an employee at all), but a shareholder and director. Whereas a mere employee might be content purely to carry out his or her function and to leave off from asking questions where the money is coming from to keep the business afloat and/or to expand it and/or to pay his or her salary, that is much less likely with someone who has a personal interest in the value of a business as a shareholder and who is also a director, who has statutory and fiduciary duties in respect of his direction of the company. It is possible, but in my respectful judgment unlikely, that Mr. McKenzie engaged in the business on the level of a mere employee as described above. Mr. McKenzie's email dated 10th November 2017 supports this conclusion. It is precisely the sort of communication the Court would expect to see from a shareholder/director who does monitor the financial performance of a business. ***I find as a fact that Mr. McKenzie did so.***

[88] The Evrengun Parties have submitted that it was at this meeting in the south of France that Mr. Evrengun explained to Mr. McKenzie that money for the Company's business expansion would be provided through Mr. Evrengun's corporate vehicles, including Corepoint. There is no direct or documentary evidence for this. ***But, on a balance of probabilities, it is in my respectful judgment more likely than not that Mr. Evrengun did inform Mr. McKenzie at this meeting, or at some point early in their working relationship, that this was so.*** There is no direct or documentary evidence of Mr. McKenzie asking Mr. Evrengun where the money would come from to capitalise Mr. Evrengun's expansion plans for AMS, nor of Mr. Evrengun telling Mr. McKenzie, at least early in this process. Yet Mr. McKenzie clearly knew about these plans and went along with them. It would be extraordinary if a shareholder and director in Mr.

[15] Transcript day 2, page 185 line 6 to 25.

McKenzie's position, with an executive, and indeed Managing Director, function in relation to the Company's business, would be ignorant of, and disinterested in, the source of funding. I find that unlikely. It is more probable than not that Mr. Evrengun had told Mr. McKenzie early on in their working relationship where the money would be coming from, i.e., from Mr. Evrengun himself and/or from monies he had access to. ***In my respectful judgment, Mr. Evrengun did so.***

[89] That also explains why there was no documentary evidence of Mr. McKenzie querying where funding was coming from: ***I am persuaded that this is because he already knew***. This also puts paid to allegations by the McKenzie Parties that Mr. Evrengun had not declared his conflict of interest in respect of the Corepoint Loans to Mr. McKenzie.

[90] In relation to Mr. McKenzie's knowledge over time about the level of debt in the Company, it was Mr. McKenzie's case that he had no idea about the level of debt until he met with Mr. Evrengun in the Cayman Islands on 14th October 2017,[16] when he was told that the level of debt then stood at around US$3 million, to his purported complete shock and surprise.[17] In cross-examination of Mr. McKenzie, it was shown that he had had no reason to be 'shocked and surprised' at all.

2.6. The draft letter to the FSC in August 2013

[91] Learned Counsel for the Claimant, Mr. Woolgar, began his deconstruction of this part of Mr. McKenzie's case by showing that on 8th August 2013 (about a week after the meeting at Mr. Evrengun's residence in the south of France), Mr. Evrengun had sent Mr. McKenzie a draft letter to the FSC for Mr. McKenzie's review and comments, in which Mr. Evrengun wished to inform the FSC of a number of corporate acquisitions AMS was working on finalising, including their source of financing. Mr. McKenzie accepted that he must have read that draft letter. That draft letter indicated that at least US$1.45 million of borrowing was intended to be done by AMS,[18] with a major part (US$900,000) of the money being provided by Mr. Evrengun.[19] The

[16] Transcript day 2, page 166 lines 22 to 24.
[17] Transcript day 2, page 167 lines 2 to 8.
[18] Transcript day 2, page 177 lines 6 to 7.
[19] Bundle D1 Vol.1 Part 1 page 530.

internal financing indicated was US$475,000 and not more. The draft letter concluded substantively with the following statement:

> "Please be advised that at present no loan arrangements exist with any financial institutions or any other third party, other than the shareholders of AMS Holdings Ltd."

[92] The tenor of Mr. McKenzie's reaction was to say in his oral evidence that 'I was unaware of all the financings we are having to undertake to make the acquisitions'.[20] But the point is well taken, that Mr. McKenzie was from early August 2013 obviously and undoubtedly aware that such acquisitions did require significant borrowing.

[93] Moreover, Mr. McKenzie by then clearly knew that it was to be Mr. Evrengun, a fellow director and shareholder in AMS, who would be doing much of the lending. As Mr. Woolgar put to Mr. McKenzie, and Mr. McKenzie agreed, Mr. McKenzie did not try to stop Mr. Evrengun either lending money, or, for that matter, from selling his interest in one of his Circle entities (Circle Trust Services (BVI) Ltd. ('CTS BVI')) to AMS (for about US$1 million), which had been one of the proposed acquisitions Mr. Evrengun was informing the FSC of.[21] That said, Mr. McKenzie did sound a note of caution, stating:

> "I am a very cautious chap, so just nervous. I think consolidation after this round of acquisitions is the way to go!"[22]

[94] Mr. McKenzie did go on, the following month on 26th September 2013, to join Mr. Evrengun and Mr. AB in resolving that AMS should acquire 100% of the ownership interest in CTS BVI.[23] Although Mr. McKenzie subsequently tried to make out in these proceedings that he did not know that AMS had indeed acquired CTS BVI, the email dated 10th November 2017 from Mr. McKenzie to Mr. Evrengun (which we have already seen in a different context) proves that this was not the case. There, Mr. McKenzie remonstrated with Mr. Evrengun:

> "When I look at the mistakes made with the acquisitions, apart from CTS, none have been any good."[24]

[95] Mr. McKenzie accepted that 'CTS' here referred to CTS BVI and he also accepted that it had been acquired by AMS.[25]

---

[20] Transcript day 2, page 178 lines 2 to 4.
[21] Transcript day 2, page 179 lines 14 to 17.
[22] Transcript day 2, page 181 lines 10 to 12.
[23] Transcript day 2, pages 181 and 182 and Bundle D1 Vol.1 Part 1 page 541.
[24] Transcript day 2, page 185 line 6 to 25.
[25] Transcript day 2, page 186 lines 2 to 10.

[96] Little over a month after signing the Directors Resolution for acquisition of CTS BVI, on 4th November 2013, Mr. Evrengun sent Mr. McKenzie an email asking him to sign a loan agreement with Corepoint. We turn to this loan now. In doing so, we should bear in mind that, at this point in time, it was still early in Mr. McKenzie's tenure as an executive Director of AMS.

2.7. Corepoint loan 1

[97] In this first week of November 2013, Mr. Evrengun sent Mr. McKenzie for his approval a loan document in respect of an intended loan of US$1 million from Corepoint to AMS ('Corepoint Loan 1'). That document disclosed the terms of the loan to Mr. McKenzie. Mr. Evrengun explained that the funds were urgently required to fund the acquisition of CTS BVI (as to US$700,000), the repayment of a loan to Circle Capital of US$250,000 and the costs, partially, of AMS's new office. The loan would carry simple interest at 8% per annum and have a maturity date of 31st December 2014. Mr. McKenzie almost immediately signed the loan document as requested on behalf of the Company, as he accepts, on or about 4th or 5th November 2013.

[98] Mr. Evrengun signed Corepoint Loan 1 on behalf of Corepoint.

[99] In his covering email returning the signed loan agreement, Mr. McKenzie stated to Mr. Evrengun:

> "As requested, attached is the signed agreement.
> You need to take me through some of this, as I must admit I am getting nervous of how tight cash is going to become with everything we are trying to do at the moment and want to do going forward. One year to pay this loan off will add squeeze won't it?"[26]

[100] Mr. McKenzie explained in his cross-examination that he was not expressing concern about the level of debt being taken on by the business at that stage, but because his first monthly compensation (which he referred to as 'salary') payment had been due at the end of August 2013 but that AMS had been unable to 'finance it'.[27]

[26] Bundle D Vol. 1. Part 1 page 595.
[27] Transcript day 2, page 193 lines 2 to 8.

[101] Mr. McKenzie further stated in his cross-examination that he had thought that this loan had been 'an internal document, an internal arrangement between whatever, group subsidiaries.'[28] I am not satisfied that I should believe Mr. McKenzie on this point. That is because:

(1) he had been a Director of AMS since 10th January 1998, some 15 years earlier, and thus ought to have known the Company's business, corporate vehicles and assets, or at least he should have been in a position to check the position without difficulty;

(2) Corepoint was not a company within the Group and as such Mr. McKenzie would never have come across that company as a Group company before – at the very least Mr. McKenzie left it unclear why he even thought (as he purported to do) Corepoint was a Group company.

[102] There is no documentary evidence that Mr. Evrengun and Mr. McKenzie had a clarificatory discussion about this loan as Mr. McKenzie had requested. For Mr. McKenzie's part, his evidence (which I accept) was that he did not follow it up, since 'I had a zillion other things to do I'm afraid'.[29]

2.8. Corepoint loan 2

[103] Just under two months later, on 27th December 2013, Mr. Evrengun emailed Mr. McKenzie a copy of a second loan from Corepoint to the Company. This loan was to be in an amount of US$500,000, as of 1st January 2014 ('Corepoint Loan 2'). It was to bear the same interest rate of 8% and have the same maturity date of 31st December 2014. Mr. Evrengun explained that US$200,000 would be used to repay a loan he had made to the Company, and the balance (of US$300,000) '*for the transaction with Fidelius*'.[30] That was a reference to the acquisition of a business in Cyprus which the Company was acquiring. Mr. McKenzie accepted that he had been 'very much involved' in relation to this acquisition for which he 'did all the groundwork'.[31] Mr. McKenzie accepted in cross-examination that he knew the total cost for AMS to acquire Fidelius was about US$300,000 and that AMS did not have sufficient cash of its own on hand

[28] Transcript Day2, page 192 lines 4 to 13.
[29] Transcript day 2, page 194 line 25 and page 195 line 1
[30] Bundle D Vol. 1 Part 2 page 7.
[31] Transcript day 2, page 203 lines 18 to 24.

to pay for it.[32] He also accepted that he knew from this email that the US$300,000 needed for the purchase price was coming from a loan from Corepoint.[33]

[104] There is however no written record of a response to Mr. Evrengun's email of 27th December 2013 from Mr. McKenzie. Mr. McKenzie has, though, acknowledged he received the email of 27th December 2013 and that he did not reply to it. He has also acknowledged that he did not sign this loan agreement and stated that Mr. Evrengun did not 'chase' him to do so and that Mr. Evrengun did not follow up with him on it in any way whatsoever.

[105] This second loan document was ultimately signed by Mr. Evrengun on behalf of the Company and somebody else (a Mr. Payne, not Mr. Evrengun) on behalf of Corepoint. Nonetheless, it is clear that Mr. McKenzie was aware of this transaction, including the need to finance it from borrowed money.

2.9. Continuing cashflow shortfalls

[106] Mr. McKenzie averred in his First Affidavit that the 'next time I saw any documentation in relation to Corepoint was when I received the November 2017 Accounts which recorded that the Company owed Corepoint $2,725,000 plus interest at 8%'.[34] He claimed that he 'was not aware of any accounts for the year ending 2013 and did not see any accounts for the Company until November 2017 (quite simply because there weren't any).'[35] He also stated that:

> "…we used to meet at least once a year to go through the income and projected income figures for each subsidiary and agree budgets for the forthcoming year. None of the budgets or income/expenses for any operational subsidiary contained any figures which would identify any outstanding loans or interest payable on loans, so I am not sure why I would be aware of such loans or need to raise questions."

[107] Mr. McKenzie also stated in his First Affidavit:

> "58. It is worth remembering that the Company's accounts for the year ending 31 December 2014 (first received on 7 November 2017) show the Corepoint Debt at this date to be $2,725,000 principal plus $135,166.67 interest, so it had supposedly all been incurred some years back, but never ever mentioned or discussed, save for the correspondence Mr. Evrengun and I exchanged in 2013/2014 referred to above.

[32] Transcript day 2, page 203 line 25, page 204 lines 1 to 18.
[33] Transcript day 2, page 204 lines 19 to 24 and page 208 lines 3 to 10.
[34] At paragraph 26.
[35] At paragraph 50.

> 59. It is my firm view and belief that Mr. Evrengun took the opportunity to first mention the debt at this time (in the October 2017 meeting) because he had at that same meeting stated to me that the "full" accounts for the Company were almost completed and would shortly be sent to me. These accounts would of course be needed for the proposed Newhaven merger, but would also need to disclose the full extent of the Company's debt."

[108] Mr. Woolgar, by means of cross-examination of Mr. McKenzie, comprehensively demonstrated that this evidence was not correct. He demonstrated that Mr. McKenzie had had a steady flow of adequate financial information pertaining to the Company which included its debt position, thus, that if he was unaware of it, this was by his personal choice or neglect, and he should not be heard to complain that he did not know.

[109] Moreover, Mr. Woolgar established that whilst Mr. McKenzie had had access to the Company's debt position as it evolved over time, and indeed to the Company's finance team and internet 'Cloud' document storage system, Mr. McKenzie never objected or indicated disagreement to the borrowings at the time he received the information.

[110] A result of this is that Mr. McKenzie has not, and appears to have been unable, to come up with any evidence that the loans taken out by the Company were not in the best interests of the Company. Mr. McKenzie proffered in his cross-examination the following:

> "What really happened here was that Mr. Evrengun made a series of really bad deals. He borrowed money to cover it up and hoped that they would be repaid before we ever had to face and encounter them."[36]

[111] ***I am satisfied that that was not the case. Mr. Evrengun was open with Mr. McKenzie about the Company's debt position and did not conceal it from him.***

[112] The closest Mr. McKenzie otherwise gets with his allegation that the Company's borrowing was not in the best interests of the Company is to advance a case that the interest on the loans from Corepoint of 8% was 'very high'. As we will also see further below, this was not so and Mr. McKenzie's assertions in this regard were misconceived.

[36] Transcript day 3, page 102 lines 7 to 11.

[113] The allegation that the loans were not in the best interests of the Company was a wild and unsupported allegation which I have no hesitation in dismissing.

[114] Mr. Woolgar proceeded to show that Mr. McKenzie was aware that cashflow of the Group business continued to be tight into the summer of 2014. The correspondence between Mr. McKenzie and financial administrative staff of the group shows that payments to Mr. McKenzie had fallen behind schedule and that difficulties were being encountered in 'catching up' in May to September 2014.[37] This included a statement made by Mr. Evrengun to Mr. McKenzie by email of 25th August 2014 that '[a]s you are aware, we are quite tight on cash at the moment'.[38] Mr. McKenzie is shown to have recognised this, by prefacing a request for a payment on 20th August 2014 with the words '[i]f cashflow permits'[39] and, on 9th September 2014, Mr. McKenzie informed a financial administrative staff member that Mr. Evrengun 'has arranged some bridging finance' to enable a payment to him to be made.[40] Mr. McKenzie admitted in cross-examination that such 'bridging finance' would at least in the short term increase the amount of debt in the business.[41]

[115] A few days earlier, on 5th September 2014 Mr. McKenzie had sent this blunt grumble to the financial administrative staff member:

> "You have spent half the year telling me you were going to sort the arrears out and now I appreciate we may not have the cash but you at least owe me the decency of a response!"[42]

[116] This is a telling complaint. It evinces that:

(1) payments to Mr. McKenzie had fallen into arrears;

(2) assurances to Mr. McKenzie that this would be rectified had been made for around six months;

(3) Mr. McKenzie was aware that the group did not have the cash to make the payments; and

(4) lastly (but not least), Mr. McKenzie has a style of plain speech which lacks diplomatic finesse. Such a communication manner is of course, of itself, morally, ethically and

[37] Bundle D Vol.1 part 2 pages 152 to 159.
[38] Bundle D Vol.1 part 2 pages 152 to 153.
[39] Bundle D Vol.1 part 2 page 153.
[40] Bundle D Vol.1 part 2 page 161.
[41] Transcript day 2, page 222 lines 12 to 15.
[42] Bundle D Vol.1 part 2 page 162.

legally neutral. I highlight it, not as a criticism or an indicator of unreliability, but because it is a trait of Mr. McKenzie and one which, so it appears to me, led to his falling out with Mr. Evrengun, who has a diametrically opposite personality style.

[117] Mr. McKenzie went on to explain that his understanding of the reason for the lack of cash-flow, with a commensurate need to borrow, was the fact that the Company had invested in a 'customer relationship management system' which had proved to be inefficient and a drain on resources. As Mr. McKenzie put it, in (for him) typical plain language:

> "It was my contention that it was a defective CRM system that we had invested in, very unwisely, very badly, very expensive and it was sucking up all our liquid cash which created the need to make these borrowings."[43]

[118] Mr. Woolgar asked Mr. McKenzie whether he had been aware of this in 2014. Mr. McKenzie explained that he was not aware of the financial details, but that he had been aware of this as a reason why cash was tight. He explained:

> "I was -- what I was aware of, everybody within the finance team and the BVI teams mourning[44] and bitching about the fact that it was a drain on the cash flow and that the system was not working."

[119] ***I find as a fact that Mr. McKenzie had been aware in 2013 and 2014 of the cash-flow constraints and the need to supplement cash generated through borrowing.***

2.10. Corepoint loan 3

[120] On 13th and 19th March 2014, Corepoint lent sums (US$350,000 and US$250,000) totalling US$600,000 to the Company. These loans were documented retrospectively, in a loan document dated 31st March 2014 ('Corepoint Loan 3'). This was also signed by Mr. Payne for Corepoint and Mr. Evrengun for the Company. These loans were expressed to carry simple interest at 8% per annum and have a maturity date of 31st March 2015.

[43] Transcript day 2, page 223 lines 1 to 5.
[44] I heard that Mr. McKenzie said 'moaning'.

2.11. Corepoint loan 4

[121] On 1st August 2014 Corepoint lent US$250,000 to AMS, with a maturity date of 31st July 2015 and at a rate of interest of 8% per annum ('Corepoint Loan 4'). This was memorialised in a loan agreement signed by Mr. Evrengun for the Company and Mr. Payne for Corepoint.

[122] Mr. Evrengun sent draft loan agreements for Corepoint Loans 3 and 4 to Mr. McKenzie on 6th August 2014, asking him to co-sign them.[45]

[123] Mr. McKenzie responded on 11th August 2014 in the following terms:[46]

> "Referring to your mail below with attachment, in both agreements the wording and actual figures do not tally up/match, so they need to be corrected.
>
> Are we/have we actually borrowed these amounts – if so, for anything in particular? If not, we cannot keep borrowing at this rate, so I am sure we must get our cash flow more positive.
>
> Isn't 8% interest a bit steep, ie given it's a lot more than it would cost the company to borrow and more than you get on deposit as a saver?
>
> Can we also ask Caroline to assign $407,600k to me in Holdings [i.e. AMS] from your existing loans for the buy back of [Mr. AB's] shares? I worked this out on the following basis: - I was currently on 25%, so an additional 5% from [Mr. AB's] 15.19% (to make me 30%) leaves 10.19% going to you from [Mr. AB], multiplied by the original base value of the business at $4m. OK with you?"

[124] In passing it can be observed that Mr. McKenzie here displays an apparent lack of understanding of commercial loans, including differences between short-term and long-term commercial loans and secured and unsecured commercial loans and differences between private unsecured lending to financially struggling private companies and putting money in a savings account at an established and regulated financial institution. At the same time, Mr. McKenzie demonstrates an avid and close interest in financial arrangements that will benefit himself.

[45] Bundle D Vol. 1 Part 2 page 119.
[46] Bundle D Vol.1 Part 2 pages 118 and 119.

[125] These matters were subsequently discussed between Mr. Evrengun and Mr. McKenzie, as demonstrated by the fact that ultimately Mr. McKenzie's shareholding in AMS was indeed increased to 30%.

[126] In relation to the loans, though, Mr. Evrengun proceeded to have documents for Corepoint Loans 3 and 4 finalised and signed by Mr. Evrengun for the Company and Mr. Payne for Corepoint without involving Mr. McKenzie further. The versions signed were substantively similar to the drafts sent to Mr. McKenzie on 6th August 2014, including as to the principal and term.

2.12. Corepoint loan 5

[127] On or about 15th December 2014 a further loan, of US$375,000, was made by Corepoint to AMS, with a maturity date of 31st December 2015 ('Corepoint Loan 5') and an interest rate of 8% per annum. This too was signed by Mr. Evrengun for the Company and Mr Payne for Corepoint.

[128] The total principal amount of Corepoint Loans 1 to 5 came to US$2,725,000.

[129] From December 2015 until December 2020, Mr. Evrengun was registered as the beneficial owner of both Corepoint Capital and Corepoint on the BVI's Beneficial Ownership Secure Search system.

[130] On or by 31st July 2017, Mr. Evrengun had been reappointed as a director of Corepoint.

2.13. The KPMG Report

[131] ***There can be no doubt that Mr. McKenzie had ample opportunity to know about the entirety of the five Corepoint Loan debts.***

[132] On 18th February 2015, Mr. McKenzie received from Mr. Kuijl a draft report dated 21st January 2015 prepared by KPMG for the purpose of discussions with a private equity firm called Sea

Equity, inviting Mr. McKenzie's questions, should he have had any.[47] This email had been copied to Mr. Evrengun. The idea was that Sea Equity might make an investment in an entity which would see the businesses of AMS and Circle combined.[48]

[133] Mr. Kuijl was described in the discussion documents for that proposed transaction as a co-founder of Circle Partners and Chief Financial Officer,[49] apparently for the proposed combined AMS/Circle entity.

[134] As Mr. McKenzie admitted in cross-examination, the purpose of this KPMG report was at least to start a discussion of the valuation of the AMS and Circle businesses.[50]

[135] Mr. McKenzie stated in his cross-examination evidence that he 'barely gave it a glance'[51] because he was 'too busy with a million other things'[52] and it looked 'too complicated'.[53]

[136] I accept this evidence of Mr. McKenzie, but it does not assist his case. As Mr. Woolgar went on to demonstrate, this draft KPMG report recorded a net debt figure for AMS of approximately US$2.8 million (the figure given in the draft report is US$2.833 million) in **three** places[54] - as would have been apparent to Mr. McKenzie had he read it. The net debt figure, including how KPMG had reached it, was prominently available to him and it had not been withheld from him.

[137] Furthermore, on 31st July 2015 Mr. Evrengun sent an email to Mr. Kuijl (at Circle) and Mr. McKenzie (at AMS) to communicate to them a proposed agenda for a further meeting to discuss a merger or combination of AMS and Circle. Mr. Evrengun included a summary overview of AMS's financial position. Whilst it did not state a net debt figure in direct terms (as the KPMG report had done), it did include interest expenses. Mr. Woolgar postulated that these equated to 8% per annum for borrowings of about US$2.4 million. Whilst Mr. McKenzie expressed the view that this required examining 'these accounts at a very close level' which

[47] Bundle D Vol. 1 Part 2 page 252 to 213.
[48] Transcript day 2, page 225 lines 16 to 18.
[49] Bundle D Vol. 1 Part 2 page 202.
[50] Transcript day 2, page 227 lines 22 to 24.
[51] Transcript day 2, page 228 line 23.
[52] Transcript day 2, page 229 lines 1 to 2.
[53] Transcript day 2, page 231 line 20.
[54] Transcript day 2, page 231 lines 14 to 15.

'was not [his] area'[55] he did accept that the document showed that AMS had significant debts on which interest was accruing.[56]

[138] Yet moreover, on 1st December 2016 Mr. Evrengun sent an email to one Mr. Anstock, of a group called Newhaven Group, enclosing financial statement spreadsheets for AMS for 2013 (advising him that this was still incomplete), 2014 and 2016 and a budget for 2016. Mr. McKenzie was copied in on this email. The purpose for doing so was to assist the Newhaven Group with regard to the value of AMS as part of possible merger talks.

[139] The attachments to this email showed figures for long term loans for AMS at US$2,417,586 for December 2013, rising to approximately US$3,847,000 for March 2014 and to approximately US$5,044,000 for August 2015.[57] For March 2016 the long term loan figure was shown to be US$4,873,000.[58]

[140] Despite admitting that the valuation of a business in which Mr. McKenzie had an interest was 'hugely important' to him,[59] Mr. McKenzie said that he had not looked at this document because he had 'a lot of other more important and pressing things to do'[60] and the attachment comprised 120 pages, and that he had 'merely' been copied in on this email.[61]

[141] Pausing here, this explanation again does not assist Mr. McKenzie, since it is clear that he had had the opportunity to read this financial information, as, manifestly, Mr. Evrengun had intended when he copied Mr. McKenzie in on it (otherwise there would have been no point copying Mr. McKenzie). Again, it was Mr. McKenzie's own personal choice not to read the financial information that had been sent to him and ***it was simply not the case that Mr. Evrengun had withheld it from him as Mr. McKenzie has complained in these proceedings***.

[55] Transcript day 3, page 56 lines 1 to 4.
[56] Transcript day 3, page 55 lines 23 to 25 and page 56 line 11.
[57] Transcript day 3, page 95 line 3 to page 96 line 2.
[58] Transcript day 3, page 96 line 16.
[59] Transcript day 3, page 92 lines 24 to 25.
[60] Transcript day 3, page 93 lines 7 to 8.
[61] Transcript day 3, page 92 lines 12 to 16.

[142] The flow of information concerning AMS's debt position did not stop there. On 12th February 2017 Mr. Evrengun sent a further email to Mr. Anstock, copied to Mr. McKenzie, with further figures. These included an assertion in a short financial statement attached that the level of debt in the AMS business was US$3.5 million.[62] Mr. McKenzie was ambivalent as to whether he had read this, saying that he should have picked up on this figure but had not.[63]

[143] Mr. Woolgar put it to Mr. McKenzie that he had only feigned shock and surprise upon being informed by Mr. Evrengun in the Cayman Islands in October 2017 that the level of AMS's debt stood in the region of US$3 million, when in reality Mr. McKenzie full-well knew the debt position. Mr. McKenzie denied this but accepted that he had been remiss in not reading materials sent to him.[64]

[144] I am not persuaded that Mr. McKenzie was shocked and surprised, but even if he was, this does not assist Mr. McKenzie's case. ***He had had every opportunity to follow the progress and status of AMS's debt position but, on his own case, he chose not to read the materials.*** He cannot lay responsibility for that at Mr. Evrengun's door. ***I am satisfied that Mr. Evrengun did not withhold financial information from Mr. McKenzie.***

[145] ***From the evidence which I have summarised above in some detail, there is no indication that any of the borrowing concerned was improper, or had any purpose other than to provide the AMS business with much needed cash in order to continue to operate.***

2.14. Mr. McKenzie's access to the AMS finance team

[146] Furthermore, in Mr. Woolgar's cross-examination of Mr. McKenzie, he established that Mr. McKenzie had had ready access to the Company's finance team, located in the BVI, if he wished to discuss financial matters, and he did so on a fairly regular basis upon his visits to the BVI.[65]

2.15. Mr. McKenzie's access to AMS's 'Cloud' document storage facility

[62] Transcript day 3, page 100 lines 6 to 7.
[63] Transcript day 3, page 99 line 6 to page 100 line 13.
[64] Transcript day 3, page 100 line 25 to page 102 line 24.
[65] Transcript day 3, page 13 lines 3 to 25.

[147] Mr. Woolgar also established that Mr. McKenzie understood that he had had access to the Company's 'Cloud' based record storage system, but that Mr. McKenzie never checked whether he had such access until November 2017.[66] At that point, Mr. McKenzie accepted that he had access to all materials stored there.[67]

2.16. Interest

[148] Concerning interest, we have already seen that on 11th August 2014 Mr. McKenzie had queried the rate of interest applied to the Corepoint Loans of 8% per annum as 'a bit steep'.

[149] In his First Affidavit, Mr. McKenzie averred that this rate was 'very high'.[68]

[150] Mr. Woolgar took Mr. McKenzie to a loan agreement between an AMS group company and a third party funder, called Forum Intermedium Fund. This agreement was dated 20th August 2015, and had been for a principal amount of Euros 450,000, for a period until 31st March 2016. Mr. McKenzie volunteered that he had been fully informed and briefed on this loan, and that he had been involved in it.[69]

[151] Mr. Woolgar then took Mr. McKenzie to the interest provision in the document. This materially stated that the loan would attract:

> "(a) the basic interest rate of 8 per cent, for Secured Loans; and
> (b) the additional margin of 1.50 per cent, for Unsecured Loans."[70]

[152] Whilst Mr. McKenzie did not directly answer a question from Mr. Woolgar, putting it to Mr. McKenzie that he had had no reason at the time to believe that this was not a market rate for borrowing of this type,[71] Mr. Woolgar established his point that here was approximately contemporaneous documentary evidence of a similar type of lending as was done with the

[66] Transcript day 3, page 15 lines 4 to 10.
[67] Transcript day 3, page 17 lines 14 to 17.
[68] At paragraph 32.
[69] Transcript day 3, page 59 lines 23 to 25 and page 60 line 1.
[70] Bundle D Vol. 1 Part 2 page 307.
[71] Transcript day 3, page 60 lines 19 to 21.

Corepoint Loans, but with a commercial lender, in which the annual rate of interest for unsecured loans was higher, at 9.5%.

[153] Moreover, on 16th September 2022, Mr. Evrengun sent an email to the principal of a firm called Rise Partners, asking them the following question:

> "I wanted to ask you a favor as I need some information from the past in connection with a shareholder dispute.
>
> When we were looking for financing in 2014-2015, we have had discussions with various parties, among others [P]. The interest rates that were discussed ranged between 10% at the lowest level to 15 and in certain cases even to 18% as I can remember. Could you please dig into your memory and confirm this. …"

[154] The principal responded by email some 11 days later on 27th September 2022. He said:

> "Rise Partners was retained by Circle Partners & AMS during 2014 to source debt or hybrid financing of circa USD 10 to 15 million for group acquisition purposes.
>
> Due to the metrics and sources/uses, this funding project was best suited to the private credit sector (at this time lending funds were early in their development of the sector as compared to today). As the quantum sought was small by debt fund standards, our focus was on direct lending funds and hybrid financing groups that could look at sub-25 million tickets.
>
> As we were seeking both a high EBITDA multiple and the debt quantum was small, this was reflected in pricing of the proposed deal. At best, a deal of this size would price at margin of 800-1000 over (usually around 900) and often include some "kicker" element and fees to get the funder overall returns into the low double digits. This deal was put to over 40 differing funding groups with the only possibilities pricing in the low to mid-teens.
>
> Among feedback from lenders/investors was that the EBITDA was below minimum for most funds."[72]

[155] Furthermore, on 26th November 2013, one of AMS's subsidiaries entered into a loan agreement with Mr. AB to borrow US$200,000 by way of a short-term loan. The agreed interest rate was also 8% per annum.[73]

[156] About 4 months later, on 19th March 2014, the same subsidiary borrowed a further US$250,000 from Mr. AB, again at 8% per annum.[74]

---

[72] Bundle D Vol. 1 Part 3 pages 471 to 469.
[73] Bundle D Vol. 1 part 2 pages 2 to 3.
[74] Bundle D Vol. 1 Part 2 pages 63 to 64.

[157] This reasonably contemporaneous evidence shows that the interest rate of 8% for the Corepoint Loans was not, in relative terms, 'very high', nor even 'a bit steep'.

[158] Moreover, I have no reason to disbelieve the comments by Rise Partners, despite possible weaknesses in their explanation, such as the possibility of having been produced by arrangement with the Evrengun Parties, or that it is not direct contemporaneous documentary evidence, not expert evidence, nor witness statement evidence. The figures they mention are in the same range that this Court regularly sees.

2.17. The breakdown in relationship and ensuing events

[159] The parties' evidence agreed that the relationship between Mr. McKenzie and Mr. Evrengun broke down around late 2017. The reasons for this do not matter for present purposes. Whilst Mr. Evrengun belatedly sought to put in evidence of some correspondence going to the (possible) reason(s) for the proximate cause of the breakdown, that evidence was excluded following legal argument. Be that as it may, the parties continued to have (in general) reasonably affable, albeit more formal, but increasingly frosty communications, with a distinct increase in temperature in early November 2017 (as we shall now see).

[160] As I have mentioned above, Mr. Evrengun and Mr. McKenzie met and had a discussion in the Cayman Islands in 2017. That discussion took place on or about Saturday 14th October 2017.

[161] As recorded by Mr. McKenzie in a subsequent email to Mr. Evrengun on 20th October 2017, the 'motive' for the meeting 'was to restructure our personal salary/compensation arrangements to improve our EBITA [earnings before interest, taxes, and amortization] thus make us look more valuable to any potential purchaser down the road. We would look to put this in place as of January 1, 2018'.[75]

[162] The immediate context for the desire to restructure salary/compensation was explained by Mr. Evrengun in his cross-examination.[76] In the preceding months the Company, predominantly

[75] Bundle D Vol. 1 Part 2 page 520.
[76] Transcript day 5, page 102 line 20 to page 103 line 3.

steered by Mr. Evrengun, had been attempting to achieve a merger between AMS and Newhaven, which was controlled by Mr. Anstock. Those discussions stalled. Mr. Evrengun had received an email from Mr. Anstock, in which Mr. Anstock had remarked that Mr. Evrengun and Mr. McKenzie had been paying themselves 'handsomely', thereby taking cash out of the Company. It was evident to Mr. Evrengun that this was a factor which demotivated Newhaven/Mr. Anstock from proceeding with the proposed merger.

[163] It also warrants to be recalled that the discussions in late 2014/early 2015 with Sea Equity, concerning a potential private equity investment by Sea Equity in a combined or merged AMS and Circle Partners, had not materialized. Thus, it was entirely to be expected that Mr. Evrengun and Mr. McKenzie should conduct some introspection as to what needed to be done to make the Company more attractive to external investors or potential partners.

[164] As Mr. McKenzie's email to Mr. Evrengun on 20th October 2017 shows, Mr. McKenzie had indeed introspected. The fruit of his cogitation was first to propose that he (Mr. McKenzie) would take a reduction in 'salary' from US$350,000 per annum to US$250,000, with an increase of interest on his shareholder loans (which would have to be paid in cash), thereby satisfying the optics of a reduced salary burden for the Company but giving him the same monetary result, albeit accounted for in a different way. This clever and creative suggestion more than amply supports Mr. McKenzie's contention that when it comes to financial matters he is not 'stupid'.

[165] He secondly proposed that Mr. Evrengun would take a pay cut from US$300,000 per year[77] down to US$125,000, on a hypothesis that Mr. Evrengun was only devoting 50% of his time to AMS. He did not propose that Mr. Evrengun should come out with the same financial result, as would be the case with Mr. McKenzie: he was proposing that Mr. Evrengun should take a simple pay cut, with no clawback through a less visible route.

[166] Mr. McKenzie added that he did not know the then current state of the Shareholder Loans, and asked for a schedule/spreadsheet, together with a breakdown.

[77] Bundle D Vol. 1 part 2 page 561 and Transcript day 2, page 90 lines 19 to 20.

[167] He then stated:

> "You also mentioned that we have debt in the Group to the value of approx. US$3 million. This was quite a surprise and shock to me. Can you please also send me a list of our debt and details of who we owe and a brief synopsis of what this debt relates to. I understand a large part of this debt is money you injected into the Group (via various entities) to finance the expansion of the Group, but now is a good time to understand exactly what and what we have used this for."

[168] As we have seen, had Mr. McKenzie been reading the financial information that had been sent to him, precisely in order for him to be able to read it, it should not have come as a 'surprise and shock' to him that the Group had debt of approximately US$3 million.

[169] This message also shows that Mr. McKenzie knew that the source of the lending was Mr. Evrengun.

[170] Mr. McKenzie concluded his message by saying:

> "I realise I have left most of the financing side of the business to you in the past whilst I have got on with the work, but with the pending merger etc. it's probably a good time to understand all of that now and be brought up to speed."

[171] This part of the message is confirmative of what had also been apparent to me, that Mr. Evrengun and Mr. McKenzie had each been working in relative isolation from each other.

[172] Mr. Evrengun did not immediately reply substantively, but in an otherwise holding message on 31st October 2017 he stated that 'I would say 90% of my time is spent on AMS'.

[173] It should be noted here, for chronological purposes, that also on or by 31st October 2017 Corepoint Capital became the sole shareholder of Corepoint.

[174] Mr. McKenzie followed up for a response on 31st October 2017.[78] He took the opportunity to add:

> "I also think we need to sign the Shareholders Agreement we finalized in November 2014 (attached is the latest mail on it with the final agreed version of the agreement)."

[175] As I have already explained elsewhere in this Judgment, that agreement had not been finalised and it had not been agreed.

[78] Bundle D Vol. 1 Part 2 pages 556 to 557.

[176] According to the chronological documentary record, the first week of November 2017 saw Mr. Evrengun pursuing the proposed Newhaven merger, and asking Mr. McKenzie for his comments on figures to be provided to Mr. Anstock/Newhaven. Mr. McKenzie did so, at the same time asking for other financial information concerning the Company generally.

[177] On 6th November 2017 Mr. Evrengun caused Mr. McKenzie to be sent the Company's accounts for 2014, 2015, 2016 and (to 6th November) 2017.[79] This showed (a) loans to Corepoint of US$2.725m[80] plus US$663,148.28 of interest[81]) and (b) a shareholder loan to Circle of US$363,415.32.[82] It also showed that the rate of interest applicable to the Corepoint Loans was 8%, which was the same as the rate applicable to a loan of US$500,000 from Mr. AB, whereas two other loans (from Elrico Tabac and Narbonne) where stated as being at 6%.[83]

[178] Then on 7th November 2017 Mr. Evrengun responded to Mr. McKenzie's email of 20th October 2017.[84] In this message Mr. Evrengun first (materially) explained that

> "- the $3 million loan is not related to me other than that I act as director and manager of the fund which has provided this loan. It has been built up over a period of time, financing acquisitions (CTS BVI, Newman, Sentinel) and cashflow financing (Cayman, Singapore, AMS Law as well as investment in iT systems."

[179] Mr. McKenzie was shown in cross-examination that he had been aware that the CTS BVI, Newman and Sentinel acquisitions had been financed through loans.[85] Equally, he was shown to have been aware of the matters which had required cash-flow financing.[86]

[180] Then Mr. Evrengun turned to the proposed salary reduction. He stated:

> "With regard to the salary reduction, I still have sort of mixed feelings".

[79] Bundle D Vol. 1 pages 530.
[80] Bundle D Vol. 1 page 532.
[81] Bundle D Vol. 1 page 532.
[82] Bundle D Vol.1 page 532.
[83] Bundle D Vol. 1 page
[84] Bundle D Vol.1 part 2 page 556.
[85] Transcript day 3, page 125 line 25 to page 127 line 7.
[86] Transcript day 3, page 127 line 13 to 19.

[181] Mr. Evrengun then revealed dissatisfaction at what he perceived to be Mr. McKenzie's underperformance, or falling short of his original expectations. He did so in candid but not disrespectful or animated terms:

> "As soon as we discuss salary, you refer to your salary level at Maples. But you also tell me you were generating 3-4 times your salary.
>
> We are now 3 ½ years down the line and I have not seen any effects on our group earnings, AMS Law is still just coping (remember that you told me that we should easily reach 500k in our first year, increasing easily to 1 million in the following years. Also on the corporate and trust side, we have not seen anything materialize, fiduciary income is still going down and on the corporate side I do not see any effects.
>
> You are now 3 years in Dubai, but apart from maintaining existing clients, we have not seen any material increase of business from this region.
>
> All in all I am not sure how we should take this forward and it would be good to take some time to sit down again and go over all these matters. Let's meet up in the coming weeks and take our time and have an in-depth discussion on this."

[182] Mr. McKenzie was much exercised by this. He took it personally.[87] Before responding at greater length, he sent a holding email on 7th November 2017[88] in which he impugned Mr. Evrengun's integrity by accusing him of changing his position and facts when it suited him, and, apparently sensing that Mr. Evrengun was not appreciative of his services, explained (in typically un-minced words) that he was at that moment engaged upon sorting out 'another BVI screw up' and added, in an obviously forced laconic tone, which blew his own trumpet at the same time: 'But hey, that's what I spend most of my time doing here and good job I do'.

[183] He penned a more lengthy reply, on 10th November 2017,[89] putting forward his quite different perspective, at times using a heighted tone, such as retorting that one of Mr. Evrengun's criticisms was 'utterly ridiculous'. The substance was to the effect that he had not been engaged to perform a business development role, and he put the lack in financial growth down to poor judgment and bad decisions by Mr. Evrengun.

[184] Mr. McKenzie included the following statement:

> "I also want to sign our Shareholder Agreement so we cannot be mistaken regarding our relationship going forward, irrespective of the Newhaven deal."

---

[87] Bundle D Vol. 1 Part 2 pages 560 to 562.
[88] Bundle D Vol. 1 part 2 page 562.
[89] Bundle D Vol. 1 Part 2 pages 560 to 562.

[185] Mr. McKenzie accepted Mr. Evrengun's assertion that the AMS Group's earnings had not increased since the time he had joined the Company's management. Mr. McKenzie put it this way: '[t]he bottom line has not increased and all we have done is incur debt'.

[186] Concerning the lack of bottom line improvement, Mr. McKenzie snapped back that 'there are a 100 different reasons for this and you know it'. Mr. McKenzie went on to blame Mr. Evrengun for what Mr. McKenzie perceived to be expensive failures in the AMS Group's affairs. He added: '…I don't really real feel that we are partners in this any more, it's much more like a dictatorship and I definitely didn't sign on for that. I am too old.'

[187] Upon the documentary evidence that was admitted before the Court, this exchange of correspondence marks what appears to have been a watershed moment in the relationship between Mr. Evrengun and Mr. McKenzie. If they had been descending gradually towards a breakdown, this exchange represents their stepping off a shelf into an abysmal vortex of disagreement from which they sadly did not recover.

[188] It is not this Court's task to decide who was right and who was wrong, or more right and more wrong, in relation to these personal perspectives. Equally, such a clash of personal perspectives typically foments only unfruitful wrangling, and this case is no different. Two comments, though, are apposite.

[189] The first is to note that, as I have observed, Mr. McKenzie accepted that the earnings of the Group had not increased, or at least not substantially, since he took on the role of an executive director. He confirmed this in cross-examination.[90] He agreed that the AMS business and AMS's net asset value had not become more valuable in the period since he had joined in 2013.[91] This is notable because Mr. McKenzie went on to adopt a position inconsistent with this in the context of valuation of his shares for a buyout.

[190] The second is the reference to being 'partners'. I mention this here as an aside. Mr. McKenzie's position on this was also inconsistent over time on this. His draft SHA, which he

[90] Transcript day 3, page 131 lines 5 to 18.
[91] Transcript day 3, page 133 lines 10 to 13 and lines 19 to 22.

himself had prepared, explicitly stated that he and Mr. Evrengun were not partners[92] – in other words, ordinary principles of shareholder majority power applied as between them. Yet even into his oral evidence Mr. McKenzie maintained that he and Mr. Evrengun had embarked upon their cooperation in relation to AMS as partners.[93] He tried to explain away his express stipulation in the draft SHA that they were not partners on the basis that this was a 'standard clause'. He explained:

> "We were shareholders in a company, and this is a standard clause in a shareholders' agreement."[94]

[191] What Mr. McKenzie appeared to be maintaining here was an obviously wrong contention that a 'standard clause' should not be treated as reflecting the agreed intentions of the parties. He tried to resolve his inconsistent position as follows:

> "It was, we acted and we went into the venture in the modus operandi of a partnership, but technically there was no common law partnership created, no."[95]

[192] Mr. McKenzie cannot be heard, on the one hand, to maintain that the draft SHA was agreed and binding, but, on the other hand, to reject the application of one of its express terms by maintaining that this was not something they had agreed, but should be disregarded as a 'standard clause'. He cannot, either, be heard to say that a clause should not be taken to apply because it is a 'standard clause'.

[193] On 19th December 2017 Mr. Evrengun emailed Mr. McKenzie a proposal for Mr. McKenzie to exit the business in an orderly way and to give up his shareholding.[96] The pertinent details were that:

(1) He would remain employed until 30th June 2018, working mainly on legal work;

(2) His shares would be bought out, valued at a multiple of turnover of 1.25 of 2017 turnover, less debts, along the 'same method as agreed with the Newhaven transaction';

(3) This value would need to be calculated, and Mr. McKenzie could either himself or appoint anyone he wished to check the calculations;

---

[92] At clause 9, transcript day 2, page 152 line 14 to 16.
[93] E.g. transcript day 2, page 138 line 4, page 140 lines 10 to 12, page 146 lines 7 to 8, lines 24 to 25, page 147 line 6.
[94] Transcript day 2, page 153 lines 3 to 4.
[95] Transcript day 2, page 153 lines 1 to 3.
[96] Bundle D Vol. 1 Part 2 pages 582 to 583.

(4) Mr. McKenzie would receive no less than a total of US$1,274,000, so that Mr. McKenzie would be in no worse a position than if he had sold his shares at the time Mr. Evrengun bought his shares from the other shareholders.

[194] Mr. McKenzie responded the same day.[97] He asked for a breakdown of debt and shareholder loans. He suggested that the same value for AMS as was being proposed for the Newhaven merger would be a starting point, minus agreed debt at approximately US$3 million. He admitted in cross-examination that he had mis-read this proposal as offering a **maximum** of US$1.274 million,[98] whereas it is patent that Mr. Evrengun had been offering a **minimum**.

[195] Mr. Evrengun replied further on 20th December 2017.[99] In this he proposed a buyout of Mr. McKenzie's 30% shareholding for a total of US$1,275,000. He provided a breakdown in a short table, as a proforma calculation with the amounts still to be verified as the Company's financial statements still needed adjustment. In sum, Mr. Evrengun applied a gross value to AMS at a little over US$10.6 million, by taking turnover of US$8.5 million and multiplying it by 1.25%. He then deducted liabilities totalling US$6.375 million to give a net value of US$4.25 million, of which Mr. McKenzie would take 30% at US$1.275 million.

[196] In this breakdown, Mr. Evrengun recorded that Mr. McKenzie's own shareholder loans stood at US$400,000 owing to Amstel and US$250,000 owing to Cavendish.

[197] Mr. Evrengun gave the totals owing for the Corepoint Loans as US$2.725 million as to principal and US$700,000 as to interest, together totalling US$3,425 million. He gave other lending from third parties at US$935,000.

[198] Mr. Evrengun included that there was a shareholder loan debt due to Circle standing at US$650,000.

[199] In his First Affidavit, Mr. McKenzie explained that he did not consider this proposal to represent fair value.[100] He said at paragraph 72:

---

[97] Bundle D Vol. 1 Part 2 pages 581 to 582.
[98] Transcript day 3, page 141 lines 10 to 16.
[99] Bundle D Vol. 1 Part 2 pages 579 to 580.
[100] Transcript day 3, page 134 line 24 to page 135 to line 8.

> "Upon receipt of this offer, the first thing that came to mind was that this only represented a $250,000 increase in the total value of the Company since 2012 when Mr. Evrengun (through Circle) first bought his shares in the Company, based on a minimum value of the Company at that time of $4,000,000."

[200] Mr. Woolgar, cross-examining Mr. McKenzie, was not slow to point out that only 6 weeks earlier Mr. McKenzie had acknowledged that the value of AMS had not gone up since 2013,[101] a diametrically opposite position on 'fair value'. Now, Mr. McKenzie considered that the 'fair value' of AMS should be more, even though he had acknowledged that its value had not gone up. There is an obvious inconsistency here, because it cannot sensibly be maintained that something which has not gone up in value should be treated as if it had.

[201] These exchanges brought the parties no closer together. Mr. Evrengun flew to London to meet with Mr. McKenzie to discuss these matters, but Mr. McKenzie declined to meet with him on account of having a dermatological procedure the same morning and that he had asked for more information and evidence but had not been supplied with it.[102]

[202] On 5th January 2018 Mr. Evrengun sent Mr. McKenzie a further email.[103] Mr. Evrengun wrote that in the context of he and Mr. McKenzie parting ways, he was inviting Mr. McKenzie to resign his directorships of AMS Group companies voluntarily by 10th January 2018, failing which Mr. Evrengun would use his majority shareholding to remove him. Mr. Evrengun mentioned that Mr. McKenzie's monthly compensation for his management function would also thereupon come to an end.

[203] Mr. McKenzie admitted in cross-examination that 'I knew I had no bargaining position'.[104] He accepted that Mr. Evrengun was entitled to use his majority shareholding to remove him as a Director, 'constitutionally'. Both these admissions are inconsistent with Mr. McKenzie's position that Mr. Evrengun had no right to do so because of the terms of the draft SHA.[105]

---

[101] Transcript day 3, page 135 line 1 to page 136 line 17.
[102] Transcript day 3, page 145 line 21 to page 146 line 6.
[103] Bundle D Vol. 1 Part 2 pages 593 to 594.
[104] Transcript day 3, page 146 lines 20 to 21.
[105] Transcript day 3, page 149 lines 15 to 17.

[204] Mr. McKenzie also accepted that it was clear to both him and Mr. Evrengun that their relationship had by then broken down completely.[106]

[205] On 12th January 2018 Mr. McKenzie sent Mr. Evrengun an email to say he was resigning as AMS Group Managing Director Corporate and Trust as of the same date.[107] He purported, though, that this was 'subject to the six month notice period in my Director Services Agreement'.

[206] He had alluded to the existence of such a 'Director Services Agreement' with a six month notice period in it in an earlier email dated 9th January 2018.[108] Mr. McKenzie accepted in cross-examination that this was the first time he had mentioned a Director Services Agreement.[109] He also accepted that he had never sent it to anyone apart from himself and that it had never been signed on behalf of the Company[110] nor by himself.[111] He accepted in his cross-examination that:

> "If the other side hadn't seen it and agreed it, then I can't reasonably expect anybody to be bound by it."[112]

[207] Mr. Woolgar questioned Mr. McKenzie how it came to be that Mr. McKenzie had nonetheless included a claim against Mr. Evrengun in his Ancillary Claim[113] for alleged failure to honour the Director's Services Agreement. Mr. Woolgar established that Mr. McKenzie had approved that head of claim. Mr. Woolgar put it to Mr. McKenzie that this was 'another dishonest claim in these proceedings'. Mr. McKenzie denied this and proffered that '…it was going to be an argumentative claim.'[114] This is a telling piece of evidence. Mr. McKenzie appears to have intended to argue any position, however tenuous, with as much force as he could muster in the hope of finding the Judge amenable thereto.

---

[106] Transcript day 3, page 150 lines 11 to 14.
[107] Bundle D Vol. 1 Part 2 page 609.
[108] Bundle D Vol.1 Part 2 page 589.
[109] Transcript day 3, page 153 line 25 to page 154 line 2.
[110] Transcript day 3, page 154 lines 5 to 10.
[111] Transcript day 3, page 154 line 25 to page 155 line 2.
[112] Transcript day 3, page 161 lines 19 to 21.
[113] At paragraph 103(c).
[114] Transcript day 3, pages 165 line 15 to page 167 line 6.

[208] In that email of 9th January 2018 Mr. McKenzie also intimated that as soon as his employment was terminated, he would serve a formal demand for all debt due to him, payable immediately.[115]

[209] Mr. Evrengun responded to that email on 11th January 2018, *inter alia* denying that the draft SHA had been agreed and stating that he was unaware of the purported Director Services Agreement. He called upon Mr. McKenzie to send him the latter, to resign his directorships, and informed him that time was of the essence to his response.[116] It was this message that Mr. McKenzie was responding to when he tendered his resignation the following day on 12th January 2018. Mr. Evrengun also reminded Mr. McKenzie that the latter's shareholder loan stood at US$400,000,[117] correcting an assertion that Mr. McKenzie had made a few days earlier, in an email on 5th January 2018,[118] that it was US$600,000.

[210] Remaining on the question of how much Mr. McKenzie had been owed, on 24th April 2018 Mr. McKenzie asked Mr. Evrengun to 'advise and confirm' why Mr. Evrengun thought that the debt stood at US$400,000 and not US$600,000.[119]

[211] Mr. Evrengun reverted on 28th April 2018 explaining that the US$400,000 figure was the value of a loan that had been transferred from Mr. Evrengun to Mr. McKenzie as part of the transaction whereby Mr. McKenzie's shareholding in AMS had been increased from 25% to 30%.[120]

[212] In that message of 28th April 2018, Mr. Evrengun also mentioned that the financial statements for AMS were as yet incomplete and were in the process of being finalised by a new accountant in the Netherlands, hoping that they would be completed by the end of May 2018.[121]

---

[115] Bundle D Vol.1 part 2 page 590.
[116] Bundle D Vol. 1 Part 2 pages 588 and 589.
[117] Bundle D Vol.1 Part 2 page 588.
[118] Bundle D Vol.1 Part 2 page 592.
[119] Bundle D Vol 1 Part 3 page 15.
[120] Bundle D Vol 1 Part 3 pages 14 and 15.
[121] Bundle D Vol 1 Part 3 page 15.

[213] Mr. McKenzie did not comment on Mr. Evrengun's explanation for the figure of US$400,000. On 3rd May 2018 Mr. McKenzie threatened:

> "...if we don't immediately reach an amicable agreement on the future repayment of my debt and the Amstel shareholder loans, I intend to forthwith make a formal and statutory demand which will become fully payable."[122]

[214] Mr. McKenzie admitted in cross-examination that a statutory demand would put enormous pressure upon the Company. He acknowledged that he knew the effect of a statutory demand and said this was a 'negotiating tactic'.[123]

[215] He acknowledged that he knew a statutory demand entailed the possibility of applying to the Court for appointment of a liquidator over the Company.[124] He saw the benefits of serving a statutory demand as being the following:

> "…to try and use the statutory demand to get a repayment program, number one. Number two, the appointment of a liquidator would have given me the ability to force disclosure of a lot of the documents that Sukru was then refusing to provide. And thirdly, it would have made me immediately a secured creditor. So that was the immediate benefits of going that route."[125]

[216] I pause here to observe that appointing a liquidator does not have the effect in law of giving the applicant an ability to force disclosure of documents to himself, and it certainly does not make such an applicant a secured creditor.

[217] Mr. McKenzie uttered another curious proposition in an email three days later on 6th May 2018.[126] The context was that he had been studying the Company's Profit and Loss and Balance Sheets which had been provided to him some 6 months earlier in November 2017, and he now had a number of questions of Mr. Evrengun, including about the Corepoint Loans. He asked Mr. Evrengun:

> "Before you took over AMS, it had a surplus of cash which was dividended out to the then existing shareholders on Completion. Therefore, I need to understand why we would need such a loan in the first place."

---

[122] Transcript day 3, page 173 line 23 to page 174 line 3.
[123] Transcript day 3, page 174 line 24 to page 175 line 2.
[124] Transcript day 3, page 177 lines 21 to 24.
[125] Transcript day 3, page 178 lines 10 to 17.
[126] Bundle D Volume 1 Part 3 page 20.

[218] As Mr. Woolgar put to Mr. McKenzie in cross-examination:

> "…the answer is surely, as you knew and as we talked about earlier, the cash had left the company on completion. So after Mr. Evrengun took over the company, the cash wasn't there any more."[127]

[219] Mr. McKenzie sought to explain that what he had meant was to query why the Company needed to borrow since it was in a healthy cash generating position when Mr. Evrengun had taken over.[128] But this explanation does not assist Mr. McKenzie. At its most basic, this is not how he put the question. The existence of a cash-surplus does not necessarily equate to a 'healthy cash generating position'. The question Mr. McKenzie asked suggests that either he was displaying exceptional naivete in forgetting that if the cash had been paid out it was no longer available to the Company to use, or he was forgetting that the Company had embarked upon a strategy of expansion and acquisitions for which it required to borrow money, and generally needed cash-flow financing. The most probable explanation for this question was (as with the next question) that it had been put into Mr. McKenzie's mouth by someone else whom he had consulted about accounting matters, but who clearly did not have Mr. McKenzie's prior knowledge of the Company's expansion activities and cashflow financing needs, and Mr. McKenzie had not applied his mind critically to the matter.

[220] Mr. McKenzie then queried why the Company had needed to borrow, when the 2014 Balance Sheet showed retained earning carried forward from 2013 of US$2.4 million. As Mr. Woolgar put to Mr. McKenzie, 'retained earnings don't necessarily represent cash that actually remains in a business, do they?'[129] Mr. McKenzie explained that this was a bit technical for him[130] and that he had been advised to ask this question by others that he had consulted.[131]

[221] Mr. McKenzie further observed:

> "As a more general comment, I assume that all operating expenses included in the AMS Holdings accounts have been re-charged out and are included in and form part of the inter-company loans back to Holdings from the subsidiaries."[132]

---

[127] Transcript day 3, page 184 lines 19 to 22.
[128] Transcript day 3, page 184 line 23 to page 185 line 2.
[129] Transcript day 3, page 185 lines 11 to 12.
[130] Transcript day 3, page 185 line 19.
[131] Transcript day 3, page 186 lines 5 to 6.
[132] Bundle D Vol 1 Part 3 page 21.

[222] In cross-examination Mr. McKenzie said he had asked this question 'so we didn't have debt in AMS Holdings'.[133] But he also admitted that this had been something he had been advised to ask by his accounting friends.[134] The implication is that Mr. McKenzie himself did not have any prior reason to think that anything improper had been done in this regard, and that he was simply repeating a line of inquiry that had been suggested to him.

[223] Mr. Evrengun did not answer immediately. Nor could he reasonably have been expected to do so, given the range and intricate nature of the questions posed.

2.18. The Statutory Demands and the Cross-Examination Trap

[224] In this segment, we continue with the history of the matter, in doing so, will recount how Mr. McKenzie fell into his first cross-examination trap.

[225] About 12 days later, on 18th May 2018, and before Mr. Evrengun answered Mr. McKenzie's plethora of questions, Mr. McKenzie served two Statutory Demands.[135] One was by Amstel addressed to AMS, demanding payment of US$400,000.[136]

[226] The other was by Cavendish 'and/or' Mr. McKenzie addressed to AMS, demanding payment of US$488,637.53. It was stated in this Statutory Demand that this was a debt 'as shown in the balance sheet of [AMS] as of 6th November 2017' for 'an accumulation of unpaid but accrued salary / commissions, expenses and other debts owed by' AMS to Cavendish and/or Mr. McKenzie.[137]

[227] Mr. Evrengun was clearly extremely disturbed by these Statutory Demands. He wrote a long email back to Mr. McKenzie on 25th May 2018 explaining (again) various aspects of the Company's financial position.[138] He observed:

> "I do not understand your questions. You have had all the access to the cloud drive of AMS Holdings and all financial information, loan information, acquisitions and contracts

[133] Transcript day 3, page 187 lines 5 to 6.
[134] Transcript day 3, page 187 lines 14 to 16.
[135] Transcript day 3, page 187 lines 20 to 22.
[136] Bundle G Part 2 pages 192 to 195.
[137] Bundle G Part 2 pages 196 to 199.
[138] Bundle D Vol. 1 Part 3 pages 18 to 20.

were at your fingertips. You never bothered to look at it and now you make a huge issue out of it."

[228] Mr. Evrengun continued:

> "As I have always stated, we have nothing to hide and are and have always been completely transparent, with all the information readily available at your fingertips, if you had cared to look."

[229] Mr. Evengun then set out to allay Mr. McKenzie's concerns. These included explaining that 'all expenses at Holding level are recharged to the underlying subsidiaries, based on number of people and percentage turnover of the total.' Mr. McKenzie accepted in cross-examination that Mr. Evrengun had hereby assuaged his concerns in this regard.[139]

[230] Mr. Evrengun continued, clearly sensing the mortal peril that Mr. McKenzie had been content to visit upon the Company:

> "As I stated before, because of your actions I have been forced to retain outside counsel. In order to safeguard the interest of the company, we are now discussing a so-called scheme of arrangement, which can be adopted by a majority of creditors and binding on all creditors. The idea is that the third party lenders will be repaid first in the coming 5 years and that the shareholder loans and current accounts will be repaid after this.
>
> If you are not willing to withdraw the statutory demands, I will be forced to safeguard the continuity of the company and to proceed with the scheme of arrangement. I will have to *[sic]* back to the lawyers by tomorrow in order to be in time with the time frame set by the Statutory Demand.
>
> So let me know as soon as possible, so I can hold off on the lawyers and in this regard I would be willing to arrange repayment of your current account over a 12-18 month period."

[231] We have seen that the US$488,637.53 demanded in the second demand was said to be a debt 'as shown in the balance sheet of [AMS] as of 6th November 2017'. That was a set of balance sheets and profit and loss statements for the years 2014, 2015 and 2016 and year to date for 2017 which Mr. Evrengun had asked the Circle Partners' Group Financial Controller to provide at the beginning of November 2017.[140] This figure of US$488,637.53 was to be found there on the first page. As Mr. Evrengun explained in an email of 5th January 2018,[141] he had noticed

[139] Transcript day 3, page 195 lines 6 to 14.
[140] Bundle D Vol. 1 Part 2 pages 530 to 554.
[141] Bundle D Vol. 1 part 2 page 591.

that ‘quite a few bookings were missing or not correctly classified’, thus, that ‘these Holdings financials needed to be reviewed carefully’.

[232] Under cross-examination by the Evrengun Parties’ learned Counsel Mr. Woolgar, Mr. McKenzie accepted that at that time he could not have been owed more than US$230,000 in respect of management fees.[142]

[233] He also accepted that this would imply that he had been owed about US$250,000 of expenses by the Company.[143]

[234] Mr. Woolgar then put to Mr. McKenzie that he must have known that that figure was implausibly high, to which Mr. McKenzie answered that he had suspected that this figure was too high.[144]

[235] Mr. Woolgar proceeded to show that on 20th December 2017, about 6 weeks after he had received the balance sheets and profit and loss statements provided by the Circle Partners Group Financial Controller, and some 5 months before he had served the Statutory Demands, Mr. Evrengun had sent Mr. McKenzie updated figures, which showed that the total amount owing to Cavendish stood considerably lower, at approximately US$250,000.[145]

[236] Mr. McKenzie also accepted in cross-examination that on 8th January 2018 Mr. Evrengun had sent him an email, in which Mr. Evrengun explained that US$150,000 had incorrectly been booked in favour of Cavendish, such that the US$488,637.53 figure also included that incorrectly booked amount.[146]

[237] Mr. Woolgar then went on to show that Mr. McKenzie himself had referred to the lower figure of US$250,000, and not US$488,637.53, as the debt owing to himself/Cavendish, in an email dated 3rd May 2018,[147] only about two weeks prior to making the Statutory Demands.

[142] Transcript day 2, page 114 lines 20 to 23.
[143] Transcript day 2, page 115 lines 5 to 8.
[144] Transcript day 2, page 115 lines 9 to 15.
[145] Transcript day 2, page 115 line 23 to page 116 line 16.
[146] Transcript day 2, page 117 lines 12 to 16.
[147] Transcript day 2, page 118 lines 10 to 18 and Bundle D Vol. 1 Part 3 page 14.

[238] Mr. Woolgar then took Mr. McKenzie to the 'Notes for creditor' on the standard form Statutory Demand used, showing Mr. McKenzie that it stated:

> "In either case the amount claimed must be limited to that which would have accrued due at the date of the demand."[148]

[239] Mr. Woolgar then established that Mr. McKenzie had checked the document over 'carefully' before signing and serving it. Mr. McKenzie agreed, saying 'I guess, yes.'[149]

[240] Mr. Woolgar then closed the lid on his cross-examination trap (for that is what it was) with this question:

> "Now you must have known from that bullet point and also from your knowledge more generally, that it wouldn't have been acceptable to put in this statutory demand, a sum that wasn't due and payable?"[150]

[241] Mr. McKenzie struggled to articulate a coherent response.[151] Having gathered his thoughts somewhat, he answered, but unfortunately for him, he immediately dug himself deeper with his response: he ventured that he had used the figure of US$488,637.53 because that was the only one he had solid evidence for.[152] But the problem with that position was that he had already been taken to documentary correspondence which made it clear that the US$488,637.53 was at least US$150,000 too high, and he himself had had used the lower figure of US$250,000 shortly beforehand on 3rd May 2018.

[242] This line of cross-examination was what Mr. Woolgar had opened his cross-examination of Mr. McKenzie with. It was an expertly and carefully laid path of propositions, which (in line with classic text-book cross-examination methodology) Mr. Woolgar knew and intended Mr. McKenzie would have no difficulty answering confidently. Mr. McKenzie splendidly and unwittingly complied, only realising the pit he had been led to fall into when he found himself, tongue-tied, at the bottom of it.

---

[148] Transcript day 2, page 121 lines 6 to 9.
[149] Transcript day 2, page 121 lines 19 to 21.
[150] Transcript day 2, page 121 lines 22 to 25.
[151] Transcript day 2, page 122 lines 1 to 8.
[152] Transcript day 2, page 122 lines 1 to 8.

[243] Mr. Woolgar was seeking to establish two separate but related points. The first was that Mr. McKenzie had signed and served that Statutory Demand dishonestly.[153] The pertinent exchange on this point went like this:

> "Q. This statutory demand was not served honestly, was it, Mr. McKenzie?
>
> A. It was served with the best evidence I had at the time and I didn't have any other evidence or phone numbers with which to serve the demand."

[244] Mr. McKenzie's answer here was simply not correct. He had had the subsequent correspondence which identified that the Cavendish debt was US$250,000, or at least US$150,000 lower than the figure he had used, and he had himself referred to the debt as being US$250,000, not the US$488,637.53. Mr. Woolgar indeed established that Mr. McKenzie had not honestly served the Statutory Demand, in the sense that Mr. McKenzie did not honestly believe that the debt figure stood as high as US$488,637.53. The Statutory Demand was for an exaggerated amount.

[245] The second, related, point that Mr. Woolgar desired to establish was that Mr. McKenzie was not a credible witness. That is clearly why Mr. Woolgar opened his cross-examination with this line of questioning. In doing so, Mr. Woolgar identified a trait of Mr. McKenzie which the events in question and the contemporaneous correspondence repeatedly evidence: Mr. McKenzie appears to have had a propensity to overstate matters, that is to say, to exaggerate. By overstating matters (such as the amount owed in this Statutory Demand) he was not telling the truth, the whole truth and nothing but the truth.

[246] In relation to the Statutory Demand, Mr. McKenzie stated that:

> "My intention was to get him to the table and force a repayment program."[154]

[247] In this regard Mr. McKenzie was successful. On 30th May 2018, as part of further correspondence, Mr. McKenzie proposed and Mr. Evrengun accepted that the debts due to Amstel and Cavendish/Mr. McKenzie would be paid off in monthly instalments of US$20,000, with the Statutory Demands not being enforced without Mr. McKenzie giving Mr. Evrengun not less than 21 days' notice.[155]

---

[153] Transcript day 2, page 123 lines 17 to 18.
[154] Transcript day 2, page 124 lines 1 to 3.
[155] Bundle D Volume 1 Part 3 page 24.

2.19. The increase in interest quid pro quo

[248] On the following day, 31st May 2018, Mr. Evrengun passed a resolution of the Company, amongst other things, to repay the indebtedness of Amstel and Cavendish, as recorded in the books of the Company in monthly instalments of US$20,000 until the total debt would be fully repaid, to increase interest on the Corepoint Loans from 8% to 10% and to increase interest on the Circle debts from 0% to 8%. [156] The McKenzie Parties have complained that this was a secret *quid pro quo* confected by Mr. Evrengun without informing Mr. McKenzie.

[249] That resolution explained the background to the matters resolved thus:

> "1 The Company was confronted on May 18, 2018 with a statutory demands for payment of the shareholders loan of Amstel Investment Holding Ltd. ("Amstel") as well as a statutory demand for the payment of the current account of Cavendish Management Ltd. ("Cavendish") with the Company.
>
> 2 Cavendish and Amstel and beneficially owned by Chris McKenzie, a former director of the Company.
>
> 3 The Company agreed with Amstel and Cavendish to repay their combined debt in monthly instalments of USD 20,000 until the total debt has been repaid.
>
> 4 It was further noted that in order for the other creditors, Corepoint Select Strategies Ltd. ("Corepoint") and Circle Capital Ltd. ("Circle") to accept the preferred position of Amstel and Cavendish and to effectively subordinate repayment of their debts until Amstel and Cavendish have been fully repaid, the Company agreed new interest agreements with both Corepoint and Circle, i,e. an increase of the Corepoint interest from 8% to 10% and for Circle from no interest to 8% interest p.a. effective as of January 1, 2018.
>
> 5 In connection with the previous discussed and agreed upon future restructuring to base the group holding in the Netherlands, it is noted that the accounting principles applied to the financial statements and (internal) reporting are already based on Dutch GAAP as per 2018 financial year to facilitate the above."

[250] It moreover noted:

> "6 The sole director [Mr. Evrengun] by his signature below confirms that he is a director and shareholder of Circle, who is a shareholder in and creditor of the Company as well as a director of Corepoint who is a creditor of the Company but otherwise confirms he has no conflicts of interest in relation to the Offers or the transactions contemplated by these resolutions."

[156] Bundle D Vol.1 Part 3 pages 33 to 34.

2.20. The 2017 AMS P & L Account and BS & the first mention of redemption, debt for equity swap, further mention of dilution

[251] On 23rd July 2018 Mr. Evrengun emailed Mr. McKenzie the consolidated Profit & Loss Account and Balance Sheet for AMS for 2017 which had by then been completed, as well as the Cavendish current account. In the same message, he asked:

> "Let me know whether you still want to sell your shares or would like to hold onto them. If you are interested to sell, I will have a valuation done by a third party and depending on this, I will make a decision to proceed or not."[157]

[252] Mr. McKenzie responded a few minutes later (i.e. before he could have had an opportunity to go through the information supplied with any care), saying 'I am sure there will be plenty of questions'.

[253] Mr. Woolgar put it to Mr. Mckenzie in cross-examination that:

> "It didn't matter to you what the accounts looked like or what they showed, you were going to be complaining about them, weren't you?"[158]

[254] Mr. McKenzie answered:

> "I was suspicious that they were prepared in a manner that suited him and I suspected that there would be issues."[159]

[255] With respect to Mr. McKenzie, in my respectful judgment I am persuaded that Mr. Woolgar was correct here. Mr. McKenzie had already made up his mind that he would not accept, nor be satisfied with, financial statements provided by Mr. Evrengun.

[256] Mr. McKenzie continued in his email of 23rd July 2018:

> "I do want to sell my AMS shares – the whole purpose of me leaving, so please get back to me with an offer."

[257] Further correspondence followed. It suffices to say that on 1st August 2018 Mr. McKenzie rejected the accounts provided by Mr. Evrengun, reiterated complaints about lack of information and requests for more information, rejected the idea of a valuation based on those

[157] Bundle D Volume 1 part 3 page 96.
[158] Transcript day 3, page 210 lines 20 to 22.
[159] Transcript day 3, page 210 lines 23 to 25.

accounts as a waste of time and money on the basis that it would be a biased valuation procured by Mr. Evrengun himself, and stipulated that he wanted a 'proper' sale price based on a 'fair' valuation which took into account the price Mr. Evrengun had originally bought his shares in the company for (which was on the basis of a then valuation of about US$ 4million), together with Mr. McKenzie's 5 years invested in the business, and the 'US$5 million invested in the business'.[160] Patently missing from this list of things that Mr. McKenzie wanted to see included in such a valuation was any reduction to take account of the Company's debt burden, which realistically would need to be included. Mr. McKenzie wanted to have the benefit of the business, plus a notional value to be attributed to his work for the Company in circumstances where he himself had admitted that its financial bottom line had not improved over this five-year period (and despite Mr. McKenzie already having been substantially compensated by a monthly cash 'salary' for his work), all without the effect of the Company's debt burdens, even though some of these, directly or indirectly had helped pay Mr. McKenzie's own salary.

[258] Mr. Evrengun responded at some length on 18th August 2018.[161] He answered Mr. McKenzie's questions, including those questions, which appeared to be set on an endless loop, as to the reasons for AMS's borrowing. Mr. Evrengun pointed out that whilst group turnover had almost doubled since 2012, costs had grown even more exponentially, as a result of which the value of the shares in AMS were, in 2018, was less than their value in 2012.

[259] In that email, Mr. Evrengun also addressed the method by which Mr. McKenzie might be bought out. He stated:

> "We think it is in the best interests of all parties involved that we come to a fair and realistic arrangement. We can than [*sic*] only do this via AMS Holdings Ltd., since I will not purchase these shares in private, this can then only be done in the form of a redemption of your shares and the redemption proceeds would then have to be repaid by the company over a prolonged period of time in order to make this feasible and that it does not jeopardize the continuity of the company and its subsidiaries.
>
> In order to determine whether such a transaction would be feasible, we will need to understand your expectations on price and term of repayment. This way we can see whether the company is willing and able to bear this additional burden without risking its continuity."

[160] Bundle D Vol. 1 Part 3 pages 92 to 93.
[161] Bundle D Vol. 1 Part 3 pages 90 to 91.

[260] This would appear to be the first occasion that the idea of a redemption of Mr. McKenzie's shares was floated. The ability of the Company to continue in existence was clearly a primordial concern of Mr. Evrengun.

[261] Correspondence between the parties ensued, in particular as to valuation. Mr. McKenzie suggested that Mr. Evrengun and he could simply sell their shares to a third party and thereby solve the problem.[162] Mr. McKenzie here accepted that the valuation needed to take account of the Company's legitimate debt burden, although, as Mr. Evrengun recognised, the parties were far apart on what such legitimate debt should be taken to be. Mr. McKenzie also suggested that the same valuation model as had been used with the proposed (but stalled) Newhaven merger could be used. In this regard, Mr. McKenzie had in mind that for that merger, it had been assumed that AMS's debt position was then (2016 – mid- 2017) approximately US$3 million. Mr. Evrengun provided Mr. McKenzie with figures based upon that model, but with an updated debt position of approximately US$6.7 million. This would value the shares in AMS at about US$2.8 million, of which Mr. McKenzie's shares would be worth US$1,251,810.03.[163] This is to be contrasted with calculations circulated by Mr. Evrengun in February 2017 for the Newhaven merger talks, which valued Mr. McKenzie's interest at US$2,437,500.

[262] In cross-examination Mr. McKenzie explained how he saw Mr. Evrengun's proposal:

> "What he is doing there is basically saying Chris, the valuation of your shares that I discussed with you in the Cayman Islands has now moved and there are other factors. So which was typical for Sukru's behaviour and, you know, he is changing the dynamics. And you know, what I am saying is if we are going to do a valuation on the numbers that we talked about and which you told me about in Cayman, then I am prepared to do a deal with you. But what he said here is I am going to start changing the dynamics and I am going to change the underlying basis by adding in more expenses."[164]

[263] On 3rd October 2018 Mr. McKenzie responded in a short message.[165] He accused Mr. Evrengun of not taking any settlement seriously and rather ominously added that he was looking at and considering his options. He added further:

> "It appears that you are happy to continue to load the business with debt and hence run it into the ground."

[162] Bundle D Vol.1 Part 3 page 89.
[163] Bundle D Vol.1 Part 3 page 86.
[164] Transcript day 3, page 226 line 21 to page 227 line 7.
[165] Bundle D Vol. 1 Part 3 page 85.

[264] I pause here to observe that against the background of Mr. McKenzie having only recently (on 18th May 2018) served Statutory Demands, which carried the inherent threat of winding up proceedings if they would not be met to Mr. McKenzie's satisfaction, it would have been plain to an objective and reasonably informed reader that Mr. McKenzie was here threatening to apply for the appointment of a liquidator on the basis that the Company was insolvent on either a cashflow or balance sheet basis or both.

[265] At the same time, Mr. McKenzie was sending out mixed signals: whilst apparently heading for winding up proceedings, Mr. McKenzie was content to continue receiving US$20,000 per month towards settlement of the debt he/Cavendish was owed by AMS. A moment's reflection would have at least raised the possibility that such payments might have to stop, or be reduced, upon the Company being placed in liquidation. There is no indication that Mr. McKenzie had applied his mind to this. It was, moreover, apparent from his oral evidence that Mr. McKenzie did not appreciate that the effect of a liquidation order is to end the life of a company. Mr. McKenzie maintained that a liquidation order for a company would not be 'healthy' for a company, but he would not accept Mr. Woolgar's prompting that it would be 'catastrophic'.[166]

[266] Returning to Mr. McKenzie's response of 3rd October 2018, Mr. McKenzie expressed general discontent with the state of their discussions, but without giving a clear indication of how he proposed to take matters forward.

[267] Thus, when Mr. Evrengun responded on 8th October 2018, it is understandable that he began by asking:

> "I do not understand where you are really going with this?"[167]

[268] Mr. Evrengun informed Mr. McKenzie that he had applied the 'Newhaven valuation model', 'with the actual numbers so that you know what you are actually proposing'. Mr. Evrengun continued, by observing that 'now you apparently are reneging on your earlier proposal, since it is apparently not to your liking'.

---

[166] Transcript Day 3, page 197 line 18 to page 198 line 3.
[167] Bundle D Vol. 1 Part 3 page 84.

[269] Then Mr. Evrengun explained:

> "With regard to a total sale of the business, I have told you on many occasions, what the background is of my acquisition is of AMS, that it is to use it as a platform to build a global corporate and trust provider. This process is still on going and I have no intention to sell at this moment."

[270] He continued, specifically dwelling upon the context of his business development plans, and, in contrast to the implied threat of liquidation and unclear messaging emanating from Mr. McKenzie:

> "In this regard, we are continuing our strategic plan. We are in advanced discussions with the major lenders to convert the loans into share capital. As you will understand this will lead to a dilution of the present shareholders. From my side, I will convert my shareholders' loans into equity as well, and you will have to indicate whether you plan to convert the remaining balance of your shareholders' loan into equity or whether you would like to keep it as debt, which is now being repaid on a monthly basis.
>
> Also in this connection, please be advised that, after your departure, the merger with Newhaven is on the table again. Furthermore, and as you are aware, we are in the process of setting up a share participation plan for key employees, which should be finalised before the end of this year. These two matters will further dilute the existing shareholders significantly, especially combined with the conversion of debt.
>
> In order to keep the matters moving, could you please advise not later than by the close of business in Luxembourg Monday October 15, 2018, first of all whether you are still interested in selling your shares? If not, could you then please advise whether you would like to convert your shareholders' loan into share capital, jointly with the main other creditors.
>
> I look forward to hearing from you, so we know which way to proceed."

[271] ***In light of Mr. McKenzie's remark that he was looking at and considering his options, after his primarily desired 'Newhaven valuation model', using updated debt figures, did not yield a result to his satisfaction, it was, in my respectful judgment, a fair and reasonable question for Mr. Evrengun to ask whether Mr. McKenzie still wanted to sell his shares, particularly when Mr. McKenzie was receiving regular monthly cash payments of US$20,000 per month.***

[272] Whilst Mr. Evrengun had given Mr. McKenzie advance notice of an eventual dilution at the time the latter was joining the Company in an executive role, this was the first time in connection with talks to part ways that the issue of eventual dilution was brought up. This had been brought up in circumstances where Mr. McKenzie appeared to be losing interest in selling his

shares, on grounds of dissatisfaction over price. Mr. Evrengun gave Mr. McKenzie a clear indication that if Mr. McKenzie remained a shareholder, he should know that his shareholding interest would probably be diluted in the near future by possibly three diluting events.

[273] ***It warrants observation here, that there is no sign in this communication that Mr. Evrengun had a strategy of dilution in mind in order to trigger the 'squeeze-out' provisions in section 176 of the BCA.*** It is the case, though, that Mr. Evrengun did not, here, explain why a debt for equity swap was being considered.

[274] Mr. McKenzie's response,[168] on 10th October 2023, was in the following terms. He stated that he did want to sell his shares, for a fair price; he did not want to convert his debt to equity; he was still interested in having the 'Newhaven valuation model' used for a valuation, but at the figures used for the Newhaven deal, not updated figures, or, as he put it, 'on numbers you are producing now and which you have spent all year playing with and manipulating'. He accused Mr. Evrengun of having made his proposals in bad faith and he threatened 'messy litigation' and that he might involve 'Regulators'. Mr. McKenzie concluded his email by withdrawing and rescinding his prior agreement not to present a Court Petition (for the appointment of a liquidator on grounds of failure to satisfy the Statutory Demands) upon 21 days' notice.

[275] Mr. McKenzie explained in cross-examination that:

> "It's clear what I'm saying there. If you go ahead with the debt for equity, then I'm going to enforce the statutory declaration."[169] (Mr. McKenzie must have meant Statutory Demand here.)

[276] He also confirmed in an email dated 19th October 2018[170] that:

> "I have now given you the said 21 days' notice by virtue of my last email.'

[277] That was a rather confusing statement, because what he had said in his previous email was that he was withdrawing his agreement to give 21 days' notice; in other words, that he felt at liberty to file a Court Petition for the appointment of a liquidator at any time. Now, inconsistently with this, Mr. McKenzie purported that he would be filing such a Petition upon the expiry of 21 days from 10th October 2018.

---

[168] Bundle D Vol. 1 Part 3 page 83.
[169] Transcript day 4, page 14 lines 3 to 5.
[170] Bundle D Vol.1 Part 3 page 100.

[278] In that email he also invited Mr. Evrengun to make him an offer to buy out his shares at any number he should want to propose, without having to explain how he arrived at it, and if it should be acceptable to Mr. McKenzie that would be the end of the matter.

2.21. The US$950,000 offer & Mr. McKenzie's response

[279] Mr. Evrengun replied on 29th October 2018[171] (which was a Monday). In this, he accused Mr. McKenzie of 'constantly chang[ing] the goal posts', decried the allegation of manipulating valuation figures as 'false', and offered US$950,000 for Mr. McKenzie's shares, to be repaid, together with the remaining shareholder loan debt, at US$25,000 per month, over 4.5 years. Mr. Evrengun stipulated that this offer would remain open until close of business on 3rd November 2018 (the following Saturday), failing which the Company would proceed with the restructuring plan, with a copy of the restructuring plan to be provided to Mr. McKenzie in due course.

[280] Mr. McKenzie responded the same day, not accepting the proposal.[172] His tone was sarcastic and, frankly, vicious:

> "But, no worries Sukru, I can see we are never going to get anywhere, so I plan to issue proceedings by the end of this week to put the company into liquidation by presenting a Petition to the BVI courts and appoint a Liquidator. I appreciate this will also affect my shareholder value, but I don't see any alternative.
>
> Please note that I will also be bound to advise the BVI FSC of the Petition and I will be notifying them of the perceived fraudulent and deceptive accounting practices and hopefully they will want to get involved given it is the holding company of regulated entities. I will be doing likewise to the Cayman and Dutch regulators.
>
> By all means prepare and file a Scheme of Arrangement in the interim. At least that will be put on the radar of the Regulators and I can get it made subject to the jurisdiction of the Court.
>
> Sorry it has come to this but you obviously cannot be trusted."

[171] Bundle D Vol.1 Part 3 page 105.
[172] Bundle D Vol.1 Part 3 page 104.

[281] Mr. Woolgar put it to Mr. McKenzie in cross-examination that:

> "You were threatened to appoint [*sic*] Mr. Evrengun and the company to the FSC because you were trying to pressure him into giving you a better offer, didn't you?[173]

[282] Mr. McKenzie agreed, saying:

> "I was trying to show what pressure points I had in response to his pressure points."[174]

[283] Mr. Woolgar continued:

> "It was a totally unjustified threat wasn't it, Mr. McKenzie?"[175]

[284] Mr. McKenzie did not disagree but simply answered:

> "In response to a very unfair offer."[176]

[285] What I took away from this exchange was that Mr. McKenzie's obvious threats to make Mr. Evrengun's life difficult (and extremely so) by accusing him of fraudulent and deceptive practices to regulators in the main jurisdictions in which Mr. Evrengun was operating was no more than a cynical pressure tactic.

[286] Further exchanges of correspondence ensued. On 30th October 2018[177] Mr. Evrengun sent Mr. McKenzie an email in which Mr. Evrengun stated:

> "As I have said over and over again, you had access to the cloud drive with all the financial information of AMS Holdings, including the 2013 financials, all the loan agreements etc. etc. I could not locate as yet the fully signed copy of the Narbonne loan, but I have it somewhere in my old emails and can provide this as necessary.
>
> Attached are all the loan agreements as well as the numbers for 2013. …"

[287] Mr. McKenzie contended that this was the first time he had had sight of the Corepoint Loan documents. Whilst it may have been the first time he had seen the finalized versions of Corepoint Loans 2 to 5, as shown earlier in this judgment, Mr. McKenzie had received drafts of Corepoint Loans 2 to 4 in materially the same or very similar terms, and he had subsequently

---

[173] Transcript day 4, page 20 lines 3 to 6.
[174] Transcript day 4, page 20 line 7 to 8.
[175] Transcript day 4, page 20 lines 9 to 10.
[176] Transcript day 4, page 20 line 11.
[177] Bundle D Vol. 1 Part 3 page 117.

received ample financial information to understand the status of all five Corepoint Loans, had he taken the time to look.

[288] Mr. McKenzie then repeatedly threatened to apply for the appointment of a liquidator over the Company, as shown, by way of illustration in emails from him to Mr. Evrengun on 5th November 2018,[178] 9th November 2018,[179] and 13th November 2018 (when he also threatened to bring unfair prejudice proceedings).[180] In the event, Mr. McKenzie did not apply to have a liquidator appointed over the Company, but Mr. Evrengun clearly had no means of knowing that Mr. McKenzie would not put his oft repeated threats into action.

2.22. The debt for equity swap

[289] On Friday 14th December 2018, Mr. Evrengun met with the AMS Group's auditors in the BVI, BDO BVI, to discuss the preparation of a valuation report for the shares in AMS for the purposes of the debt for equity swap that he had adverted to.[181]

[290] On 15th December 2018, the Company's Board passed a resolution. The first point therein stated was as follows:

> "It was noted that due to the financial position of the Company and in particular its equity to debt ratio, the Company intended to explore options to raise capital and/or reduce the debt obligations of the Company."

[291] This resolution appointed a certain leading BVI law firm as legal advisers and BDO BVI as financial advisers to assist with the debt-to-equity conversion. The resolution also provided for BDO BVI to conduct a valuation of the Company, to determine fair value for the conversion. Understandably, it took some time for BDO BVI to produce their report.

[292] Some five months later, on 17th May 2019 lawyers acting for Mr. McKenzie sent a letter before action[182] to Mr. Evrengun's lawyers.

---

[178] Bundle D Vol. 1 Part 3 page 152.
[179] Bundle D Vol. 1 Part 3 page 150.
[180] Bundle D Vol. 1 Part 3 page 148.
[181] Bundle D Vol. 1 part 3 page 175.
[182] Bundle E pages 1 to 3.

[293] Three days later, on 20th May 2019, BDO BVI provided their valuation report. They valued the Company at US$1,244,500, or US$24.89 per share.

[294] Pausing here, both sides' experts agree that BDO BVI had undervalued the Company's shares, by applying a minority discount which they should not have done. The Evrengun Parties' expert considered the fair value per share to have been US$29.97 (i.e., 20.4% more) as at 31st May 2019. The McKenzie Parties' expert considered the fair value to have been much more, at US$142.38 per share.[183]

[295] Ten days later, on 30th May 2019, Mr. Evrengun had a resolution passed to increase the Company's share capital from US$50,000 to US$500,000, with 500,000 shares at a par value of US$1 each,[184] as had been resolved on 15th December 2018, some 5 months before the McKenzie Parties' letter before action.

[296] The following day, 31st May 2019, Mr. Evrengun caused the Company to swap the Company's debt owed to Corepoint (in a sum of US$3,646,250) and to Circle (in a sum of US$1,797,951) for shares, such that these debts were released and new shares were issued to Corepoint and Circle. The number of new shares issues to Corepoint was 146,495 and 72,196 new shares were issued to Circle. The number of these shares had been calculated with reference to the BDO BVI valuation report.

[297] One of the operative resolutions recorded that:

> "…the Company had decided to explore options to raise capital and/or reduce the debt obligations of the Company and to engage [the leading BVI law firm] to provide legal advice and BDO BVI (***BDO***) to provide financial advice and to conduct a third party valuation of the Company.
>
> 2 It was further noted that the Company had received a valuation report from BDO in relation to the en-bloc fair market value (***FMV***) of the Company as at 31 December 2018. It was noted that BDO had determined that the FMV of the Company was US$1,244,500 which translated to US$24.89 per share) (the ***FMV Per Share***)."[185]

[183] Bundle C page 637.
[184] Bundle D Vol. 1 Part 3 page 228.
[185] Bundle D Vol. 1 Part 3 page 236.

[298] Furthermore:

> "The sole director [Mr. Evrengun] noted that for the reasons more particularly considered in the December Resolutions that the Releases and the issuance of the New Shares are in the best interests of the Company and represent an opportunity to significantly reduce the levels of debt, cost of such debt and interest payments currently incurred and being paid by the Company, by converting such debt to ordinary shares in the Company."[186]

[299] There was a further part to this transaction, whereby Corepoint's part of the new shares were in fact issued to Circle. The net result was that upon completion of this transaction, 253,691 shares in AMS were held by Circle and 15,000 shares were held by Amstel, as Mr. Evrengun informed the FSC by letter dated 2nd July 2019.[187]

[300] The effect of the debt-for-equity swap was to dilute Mr. McKenzie's interest in the Company to 5.6%.

[301] The McKenzie Parties adverted in their opening submissions for trial that the dilution occurred without any notice to Mr. McKenzie and without prior regulatory approval (a requirement because of licences held by the AMS Group).[188]

[302] By 28th June 2019, Mr. McKenzie had become aware, at least to some extent, of the debt for equity swap. He wrote to the head of the FSC, clearly seeking to impugn this transaction in the eyes of the regulator and insinuating that there had been 'possible accounting irregularities'.[189]

[303] On 15th July 2019, Circle made an offer to have the shares in the company valued by independent appraisers. The Evrengun Parties contend that this offer complied with the requirements of the English House of Lords case of **O'Neill v Phillips**[190] as a complete defence to the Ancillary claim.

---

[186] Bundle D Vol.1 Part 3 page 237.
[187] Bundle D Vol.1 Part 3 page 239.
[188] McKenzie Parties' Opening Skeleton Argument paragraph 7.
[189] Bundle D Vol. 1 Part 3 page 255.
[190] [1999] 1 WLR 1092.

2.23. The Redemption Notice

[304] Some two months after the debt for equity swap, on 8th August 2019, the Company issued a redemption notice[191] seeking compulsorily to redeem Mr. McKenzie's interest in the Company pursuant to section 176 of the BCA. The price mentioned in the Redemption Notice was US$19.91 per share.

[305] On 19th August 2019, Mr. McKenzie wrote again to the head of the FSC, asking him whether FSC approval had been given for AMS to issue new shares to Circle. Mr. McKenzie informed the head of the FSC that his company Amstel's shareholding in AMS had been 'illegally diluted' in breach of a shareholders' agreement between Amstel and Circle.[192] I understand this to be a reference to the draft SHA.

[306] Mr. McKenzie admitted in cross-examination that he was going to try to block the FSC from giving approval to the debt for equity swap if he had a chance to do so.[193] In the end Mr. McKenzie was not successful in this. As matters stood at trial, Mr. Evrengun continued to hold 94.4% of the shareholding interest in AMS through Circle Capital, and Mr. McKenzie continued to hold 5.6%.

2.24. The dissolution of Corepoint and the transfer of AMS's assets to AMCIN

[307] Around November 2020, Corepoint was dissolved.

[308] As at on or about 1st January 2021, all of the Company's assets were transferred to a Dutch company called AMCIN Holdings BV ('AMCIN'), apparently completing the transfer of the group's base to the Netherlands as the Company (by Mr. Evrengun) had intimated in its resolution dated 31st May 2018 (with the mention that the AMS Group's accounting principles had been changed to Dutch GAAP with this purpose in mind).

[191] Bundle D Vol. 1 Part 3 page 241.
[192] Bundle D Vol. 1 Part 3 page 254.
[193] Transcript day 4, page 34 lines 1 to 3.

[309] As pleaded in the Evrengun Parties' Defence,[194] and as I accept, AMCIN was incorporated on 5th June 2020 for the purpose of a reorganisation of the AMS Group, which would bring the base of the AMS Group onshore in the Netherlands. As also pleaded,[195] the need to restructure was a direct result of banks closing the bank accounts of the operating companies in the AMS Group because the Company was domiciled in the BVI. AMCIN is under the control and ownership of Mr. Evrengun in his capacity as majority shareholder.[196] I have no reason to disbelieve these matters and accept them.

3. DISCUSSION

3.1. The law – unfair prejudice

[310] The law in relation to unfair prejudice claims is not controversial between the parties. The Court has been referred back to its own Judgment in **CH Trustees SA v Omega Services Group Limited**[197] where the basic principles were summarized between paragraphs [95] and [124] (quoted here without footnotes):

> [95] Section 184I of the Act materially provides as follows:
>
> "184I.
> (1) A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section.
> (2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders (a) in the case of a shareholder, requiring the company or any other person to acquire the shareholder's shares; … (c) regulating the future conduct of the company's affairs; … (g) directing the rectification of the records of the company; (h) setting aside any decision made or action taken by the company or its directors in breach of this Act or the memorandum or articles of the company.
> (3) No order may be made against the company or any other person under this section unless the company or that person is a party to the proceedings in which the application is made."
>
> [96] …

[194] At paragraph 89.
[195] Defence, paragraph 88.
[196] Defence, paragraph 87.
[197] BVIHCM 2015/0037 (unreported, decided 22nd November 2016) (Wallbank J. (Ag.)).

[97] Section 184I is in materially similar terms to section 994 of the English Companies Act, 2006, Chapter 46. Section 184I is wider, to include relief against oppression and unfair discrimination. It is similar in this respect to company law provisions in other Commonwealth jurisdictions, including Antigua and Barbuda.

[98] By way of preliminary observation, the application of similar provisions has been aptly described by the Court of Appeal in New Zealand by Hammond J: [in **Latimer Holdings v Powell**, case CA 214/03 15th September 2004, [2005] 2 NZLR 328].

> "The law Evolution
> The oppression remedy originated in Britain in s210 of the Companies Act 1948 (UK), as an alternative to winding up on the just and equitable ground. The argument was that winding up was much too drastic a remedy to utilise in many cases, and that it would be desirable to give courts wider powers to intervene to set matters to right, whether by ordering one party to buy the other out or otherwise regulating the affairs of a company. (…) New Zealand adopted like reforms. (….) This section has counterparts (with some local variations) not only in the United Kingdom, but in many parts of the British Commonwealth, including Australia, and Canada, and in American States …."
>
> The development of the legal tests for oppression
>
> The most difficult issue in relation to this important new remedy in company law was always going to be what should be sufficient to ground oppression or unfair prejudice. The early British cases took a narrow line. The remedy was confined to cover only conduct which was "burdensome, harsh and wrongful" or showed "a lack of probity and fair dealing" (see for instance **Scottish Cooperative Wholesale Society Ltd v Meyer**). From those early beginnings, the section has been applied much more widely, both in Britain, and throughout the common law world. Categorisation is not always useful or even appropriate (because it can obscure the underlying principle), but by way of a general indication it can be said that a large number of the decided cases in the British Commonwealth fall broadly into three groups. First, there are the cases in which those in control of a company have, by some means or another, treated the company's assets as very much their own, to the detriment of other shareholders. Secondly (and in keeping with the jurisprudence under the older just and equitable ground), the oppression remedy has been used to deal with disputes within quasi-partnership companies. Then there is a third group of cases which have been primarily concerned with the abuse (in one way or another) of minority rights in the course of the restructuring or amalgamation of companies."

[99] The basic principles for application of the statutory remedy are well known and not in dispute. By way of very brief summary only, as laid out by Lewison J in **Re Neath Rugby Club Ltd (No. 2)** [2008] BCC 390 (in relation to the more restricted English equivalent), a petitioner must establish

1. The acts or omissions of which he complains consist of the management of the affairs of the company;

2. The conduct of those affairs has caused prejudice to his interests as a member of the company;

3. The prejudice is unfair.

[100] A petitioner must establish either that the "company's affairs" are being conducted in an unfairly prejudicial manner or that any actual or proposed "act or omission of the company" is or would be unfairly prejudicial. Both are directed to corporate behaviour.

[101] A petitioner will be unable to succeed if the matters of which he complains amount merely to acts or omissions of the directors which are neither an exercise of nor a failure to exercise, nor relate to, the powers conferred on them under the company's constitution as directors, or if they are merely acts or omissions on the part of other members in their capacity as such.

[102] A company's affairs "would encompass all matters which may come before its board of directors for consideration".

[103] Decisions of a board of directors, acting in its capacity as such, for example as to payment of directors' remuneration or dividends will amount to conduct of the company's affairs for the purposes of the section.

[104] The failure of directors to take steps to protect the company where they are aware that it has suffered damage can amount to conduct of the company's affairs, for example where there is a failure by directors to take steps to recover money stolen to their knowledge by one of the board this would almost certainly constitute the conduct of the company's affairs.

[105] Acts of members themselves in their capacity as members are not acts of the company, nor part of the conduct of the affairs of the company, so cannot, of themselves, found a petition [emphasis added].

[106] Exercise of voting rights is an exercise of private rights. But a resolution passed at a general meeting is an act of the company in the conduct of its affairs, which is capable of founding a petition if its result is unfairly prejudicial. There is a vital distinction between acts or conduct of the company and the acts or conducts of the shareholder in his private capacity which must be kept clear. The first type of act will found a petition, the second will not. The distinction is between actions by shareholders affecting other shareholders directly and actions by the company affecting shareholders.

[107] A single prejudicial act is sufficient to trigger the Court's discretion under the section.

[108] Where the court is concerned with proposed conduct, this must have gone beyond the mere discussion stage.

[109] The conduct complained of must be unfairly prejudicial to a member's interests in his capacity as member.

[110] The primary source of a member's interests is the constitution of the company. Breach of his rights thereunder will usually affect him in capacity as a member.

[111] Such rights would extend, at least in quasi-partnership cases to "outsider rights", such as the right to be a director or otherwise involved in the management of the business.

[112] Such rights are not limited to strict legal rights. Recognition of such rights is afforded a wide scope and the court will have regard to wider equitable considerations if the factual circumstances are appropriate to do so.

[113] Interests of members for purposes of the statutory unfair prejudice provisions have been held to include employment or office as director, participation in management and petitioner's interests as creditor of or provider of loan capital to the company.

[114] Members' interests also include the "real value of the Petitioner's shares".

Unfairly prejudicial conduct

[115] A petitioner must prove a causal link between the conduct complained of and unfair prejudice suffered by the member. Absent proof of prejudice, allegations of unfair prejudice will not succeed. Conduct must be prejudicial "in the sense of causing prejudice or harm to the relevant interest" but also be unfair.

Unfairness

[116] The words "unfairly prejudicial" are general words which should be applied flexibly to meet the circumstances of the particular case. But the "concept must be applied judicially and the content which it is given by the courts must be based on rational principles".

[117] Those rational principles were laid down by the House of Lords in **O'Neill v Phillips**.

[118] Unfairness for the purposes of s994 may be established where: a. There has been some breach of the terms on which it was agreed that the affairs of the company should be conducted, for example, a breach of the articles or of a collateral shareholders' agreement; or b. Equitable considerations arising at the time of the commencement of the relationship, or subsequently, make it unfair for those conducting the affairs of the company to rely on their strict legal powers under the company's constitution. The 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.

[119] Unfairness on the "breach of terms" ground includes where a director has acted in bad faith or for an illegitimate ulterior motive. In such a case the board would "step outside the terms of the bargain between the company and the shareholders".

> [120] Unfairness must be judged on an objective basis. As stated in **Re Guidezone Limited** "Unfairness (…) is not judged by reference to subjective notions of fairness, but rather by testing whether, applying established equitable principles, the majority has acted, or is proposing to act, in a manner which equity would regard as contrary to good faith. In the case of a quasi-partnership company, exclusion of the minority from participation in the management of the company contrary to the agreement or understanding on the basis of which the company was formed provides a clear example of conduct by the majority which equity regards as contrary to good faith."
>
> [121] Mismanagement can constitute unfairly prejudicial conduct if it amounts to serious misconduct.
>
> [122] There is no requirement for a petitioner to come to the court with clean hands. No statutory limitation periods apply to bar a petitioner's right or the relief, although time may alter the nature of a quasi-partnership.
>
> [123] What these principles broadly distil to is that a petition will be struck out or dismissed unless:
> (i) A petitioner can show that there has been a breach of his contractual rights; or
> (ii) He can show that there has been a breach of a quasi-partnership agreement; or
> (iii) He can show that the directors have exercised their powers for an ulterior purpose.
>
> [124] The leading English case on the then equivalent English Companies Act provision is **O'Neill v Phillips**. The judgment of Hoffmann LJ is often cited and both sides here rely upon it. Hoffmann LJ deliberately refers to persons who control a company. He does not restrict this to a board of directors *strictu sensu*."

3.2. Credibility of Witnesses of Fact

[311] The only witnesses of fact were Mr. McKenzie and Mr. Evrengun respectively.

[312] Both witnesses of fact presented the Court with challenges for assessment of their credibility, the degree to which the Court is able to rely upon their evidence, and upon their respective cases in general.

[313] As usually happens in a trial process, each side submitted that its own witness was honest and reliable, and that the other side's was dishonest and unreliable. It was no different here. The Court derives little assistance from such a one-dimensional approach. The Court also derives no assistance from the parties' own perceptions of the other side. As often transpires in unfair prejudice cases, the complainant demonises the individual(s) who is or are the subject of the complaint. It was no different in the present case, with Mr. McKenzie holding Mr. Evrengun to

be a slippery, manipulative, untrustworthy dictator. This, in my judgment, was an over-reaction on Mr. McKenzie's part, fed by his heightened feelings about Mr. Evrengun.

[314] The reality here was considerably more nuanced. In terms of credibility, Mr. McKenzie demonstrated plenty of reasons why the Court should be extremely wary of relying upon his evidence. With Mr. Evrengun, it was evident that some of his sayings must have been 'wrong', but it was impossible, or at least extremely difficult, to tell with any exactitude where that was so. Thus, he too could not be taken as an entirely reliable witness, although not necessarily a dishonest one.

[315] Where the Court had to sift between competing accounts, such as on the important issues of how much Mr. McKenzie was informed by Mr. Evrengun about the Company's debt position, I found Mr. Evrengun's version of events to be more likely, on a balance of probabilities, than the version propounded by Mr. McKenzie. That was so because (a) Mr. Evrengun's account had the ring of truth about it in the overall commercial context; (b) Mr. Evrengun did not come across as a dishonest witness overall; and (c) Mr. Evrengun's version of events accords what one would naturally expect in the type of business and company in question.

[316] Mr. McKenzie's evidence constantly challenged the Court to try to work out whether (a) Mr. McKenzie, as Group Managing Director and a senior legal practitioner, was really so wrapped up in day to day executive functions (as if he were a narrowly focussed junior functionary); and (b) really so illiterate in accounting matters; and (c) really so in need of numerical assistance; and (d) really so procrastinating (or disinterested) in reading financial updates; and (e) really so disinterested in knowing where the necessary cash for the Company's day to day survival was to come from, as the logical consequence of his version of events would indicate that he was. Ordinarily, one would think that he was not, for someone of his senior and experienced professional position. But then, on the other hand, Mr. McKenzie demonstrated a remarkable lack of basic legal and commercial knowledge in numerous aspects for a senior legal practitioner specialising in transactional and corporate work.

[317] I turn now, briefly, to look more closely at each of these witnesses.

3.3. Mr. McKenzie

[318] Mr. McKenzie came across as an affable, intelligent, articulate, straight-talking man. Mr. McKenzie clearly has a strong character. This demonstrated itself at times as obstinacy. An example of this is that Mr. McKenzie repeatedly challenged Mr. Evrengun in correspondence to confirm that he (Mr. Evrengun) had not charged the Company for the price of his purchase of the Company's shares. That was despite (a) Mr. McKenzie having no reason to believe Mr. Evrengun had done so; and (b) Mr. Evrengun repeatedly denying it. Undeterred, Mr. McKenzie continued to press the point. Mr. McKenzie is also someone who does not shy away from being, at times, abrasive in his communications. His contemporaneous correspondence with Mr. Evrengun and others is replete with examples of this.

[319] So far, none of the characteristics I have described in this paragraph above of themselves indicate any grounds for disbelieving Mr. McKenzie's evidence as a witness in these proceedings. So, what then was it that made me lose confidence in the reliability of Mr. McKenzie's evidence?

[320] The Evrengun Parties' learned Counsel described Mr. McKenzie as a witness as follows:

> "Mr McKenzie was an unreliable, and at times dishonest, witness. The Court should not accept his evidence, save where it consists of admissions against interest or is consistent with the contemporaneous documents. Examples of Mr McKenzie's evidence which were not credible include:
>
> (1) Mr McKenzie went so far as to suggest he did not know how much he was being paid at any given time.[198] In fact, he was being paid a consistent sum and must have realised what he was being paid.[199]
>
> (2) The Statutory Demand served on behalf of Cavendish on 14th May 2019 was dishonest, in the sense that Mr McKenzie knew that the amount being claimed was not payable.[200] He nevertheless served the Statutory Demand, knowing that its consequences included the potential appointment of a liquidator over AMS.[201] His defence of this was that the 488,000-odd figure he used was a figure he had 'solid evidence' of,[202] even though he himself suspected that the figure was wrong and had been told it was wrong twice subsequently.[203]

[198] Transcript Day 2, page 107 line 20 to page 108 line 10.
[199] Transcript Day 2, page 109 line 5 to page 111 line 6.
[200] Transcript Day 2, page 114 line 20 to page 117 line 4, page 118 lines 17 to 23.
[201] Transcript Day2, page 120 lines 2 to 7, page 121 line 6 to page 122 line 8.
[202] Transcript Day 2, page 122 lines 1-8.
[203] Transcript Day 2, page 122 line 9 to page 123 line 21.

(3) Mr McKenzie repeated the same claim in these proceedings, again dishonestly.[204] That willingness to sign his name to a dishonest claim should give the Court particular pause over accepting his evidence.

(4) Mr McKenzie's reliance, in both contemporaneous correspondence and these proceedings, on a 'Director's Service Agreement' which was never in fact signed or even sent to anyone other than himself on behalf of the Company. Mr McKenzie's own account of the reasons he considered the DSA to be binding involved him having lied to third parties that he had a signed DSA with the Company, when this was untrue. Mr McKenzie's attempt to dig himself out of this hole was, with respect, hopeless - he suggested in response to the Court's questions that he thought there was an opportunity for the Company to benefit from voluntarily accepting the DSA, but he made no mention of that contemporaneously. Mr McKenzie's attitude to the importance of honesty in these Court proceedings is summed up by the following exchange concerning his claim for breach of the DSA in the SOAC:[205]

> "Q: And claiming for a breach of that agreement knowing that it hadn't been binding is another dishonest claim in these proceedings?
>
> A: It is not a dishonest claim. It was going to be an argumentative claim…"

(5) A general tendency to come up with important evidence on the spur of the moment in cross-examination, having not mentioned it in his Affidavit. One example of this included his claim that there were express discussions between himself and Mr Evrengun about their having an 'equal say' in the management of the business.

(6) The absurd suggestion, which Mr McKenzie maintained, that the Company had never acquired CTS BVI. That was in spite of Mr McKenzie having signed a Board Resolution dated 28th September 2013, confirming the acquisition and referring to an SPA by which the acquisition had been agreed, and his only subsequent reference in correspondence in 2017 to CTS BVI having been a good acquisition. This evidence became increasingly desperate, in particular when Mr McKenzie refused to acknowledge whether he was a director of CTS BVI in spite of needing to resign as one in January 2018.

(7) The point on which it was most obvious that Mr McKenzie was lying for tactical advantage was his claim that he did not know how much debt the Company had until October 2017. In fact, it is plain from the underlying documents that Mr McKenzie was fully aware of the amount of that debt, or at least aware in general terms of the level of debt in the business. His only explanation for these documents was that he would not have read them at the time, which the Court is invited to conclude is false. Indeed, it was apparent that he was

[204] Statement of Ancillary Claim, paragraph.36; Transcript Day 2, page 124 line 21 to page 125 line 20.
[205] Transcript Day 3, page 167 lines 2-6.

anticipating questions regarding these documents and seeking to avoid admitting anything which might suggest he had read them.

(8) On 18th February 2015, Mr McKenzie was sent a report by KPMG into the value of the business (the 'KPMG Report') by Mr Kuijl. The email refers to '*our conversation of last week Friday*', so he and Mr McKenzie must have discussed the ongoing discussions about private equity investment in the business and the existence of the report. The document would have been important to Mr McKenzie, given that it concerned the relative shares that he, Mr Evrengun and the Circle Partners' co-owners would have in the merged business. The document itself showed that AMS had net debt in February 2015 of US$2,830,000 in several places. Mr McKenzie denied having read this document in February 2015, but was lying.

(9) On 31st July 2015, Mr Evrengun emailed Mr Kuijl and Mr McKenzie an agenda for a meeting Bratislava on 3-5 August 2015 about the proposed AMS-Circle Partners merger, and also an '*overview of the financials for your information.'* The agenda referred to an '*Update on the group refinancing and acquisition financing'*. The overview of the financials for AMS showed interest expenses in 2014 of US$192,924, and forecast interest expenses in 2015 of US$228,000 (plus interest in the first 6 months of 2015 of US$122,338). Mr McKenzie accepted, albeit in a somewhat unclear way, that by this point the prospect of the merger was both real and important to him. Those figures implied that, if the interest rate in the Company's debts was the same as that under the Corepoint loan, then the Company had net debt of US$2,400,000 in 2014 and US$2,850,000 in 2015. Mr McKenzie denied reading the financials at all or at least noticing this point, but (i) the document was a single page, and important, such that the Court should conclude that Mr McKenzie was lying about that, and (ii) in any event, the point would have come up under the discussion of the group's finances on the agenda.

(10) On 22nd November 2016, Mr Evrengun emailed Mr AB detailed financials for the Company, with a view to them being used for a valuation to be done preparatory to a merger with Newhaven. These were forwarded to Mr McKenzie on 1st December 2016. Given their importance to the impending merger with Newhaven, Mr McKenzie would have read them. This document showed the Company's 'Other long-term loans' rising from about US$2,400,000 in late 2013 to as high as US$5,000,000 by mid-2015. Mr McKenzie simply cleaved to the line that he had not read them.

(11) On 12th February 2017, Mr Evrengun emailed Mr Anstock, copying Mr McKenzie, some '*initial calculations'* of the relative values of the Company and Newhaven for the purposes of the merger. The calculations were embodied in a 1-page sheet, which showed the Company with a valuation of US$10,625,000, less US$3,500,000 of debt. This time, Mr McKenzie accepted that he would have read this document when sent to him. However, he attempted to avoid the obvious conclusion that he therefore knew about the level of net debt no later than February 2017, by saying that he 'should have' realised but did not – Mr McKenzie's evidence to this was erratic and implausible."

[321] Whilst I am inclined to see Mr. McKenzie's evidence in more mixed terms than in a one-dimensional light of 'truth versus lie', I accept his opponent's points, with their reasons, that Mr. McKenzie was not a credible witness, but one whose evidence in important aspects was erratic and implausible.

[322] In terms of my own analysis of Mr. McKenzie as a witness of fact, I was driven to conclude that the Court could put little reliance upon his evidence for a number of reasons. The first is that Mr. McKenzie demonstrated a propensity to exaggerate. We have seen this in relation to several aspects, including:

(1) his obdurately insistent (all the way until day 2 of the trial), but legally impossible, reliance upon the purported Director Service Agreement;

(2) his artificial and contrived portrayal of the SHA as finalised and agreed when it had not been;

(3) his Statutory Demand for US$488,637.53 served on 18th May 2018, which was at least US$150,000 too high, as he well knew;

(4) his purported shock and surprise at the level of debt in the Company, which even his Counsel accepted was 'overstated';

(5) his case, demonstrated by documentary evidence to be incredible, that Mr. Evrengun had not kept him informed as to the Company's borrowings and debt position.

[323] The problem with exaggeration is that it is a form of telling untruths. When a witness is asked whether he or she swears or affirms to tell 'the truth, the whole truth and nothing but the truth', this is not some baroque, ritualistic formula retained to embellish the 'Courtroom experience' or to instil awe. Each of the three elements comprised therein has a meaning, as does the whole. Exaggeration offends, specifically, against the third of these tenets, and generally, against the first two as well. So, for instance, Mr. McKenzie's Statutory Demand for US$488,637.53 was true to the extent that he honestly believed that he could make a Statutory Demand for around US$230,000, but the excess US$150,000 that he demanded was not 'nothing but the truth'.

[324] On a less philosophical level, exaggeration is like 'crying wolf' – if one does it often enough, people stop taking you seriously, or to put it differently, people stop believing you.

[325] Although Mr. McKenzie's propensity to exaggerate was amply demonstrated, and repeatedly so, the underlying reasons were harder to discern. At least in part it appears to have derived from a misguided assumption on the part of Mr. McKenzie that the Court is a haggling forum: Mr. McKenzie considered it perfectly legitimate to adopt untenably extreme positions with a view to coming out in the end with some negotiated middle result. A prime example, again, is service of the Statutory Demand I have just mentioned. Mr. McKenzie acknowledged that his aim was to use this to extract a financial settlement from Mr. Evrengun. Another strong example is Mr. McKenzie's admission that his claim 'was going to be an argumentative claim.'[206] This characteristic can be seen pervading Mr. McKenzie's case. It can and should be stated firmly that the function of a court is to decide who is right or who is wrong about a case. It does not help the court, and indeed wastes its time and scarce resources, to have to address extreme arguments when they are included for strategic or bargaining reasons, or to be 'argumentative'. Candid and timely (i.e., prompt) retractions or concessions are the hallmark of responsible litigation, not a sign of weakness.

[326] In addition to Mr. McKenzie's apparent misunderstanding as to the function of the Court and its processes, Mr. McKenzie demonstrated other difficulties which are also not straight-forward to understand. Mr. McKenzie is a senior legal practitioner in the transactional or non-contentious field. He has headed at least one highly regarded commercial law firm. Mr. McKenzie showed himself to be clever and adept at putting together a proposed variation to his compensation package, which would create the impression that he would be drawing a lower salary but give him the same financial result. This proposal was both quite sophisticated and complex, demanding a good understanding of various areas of corporate law and practice. But at the same time, Mr. McKenzie apparently did not know the basics of contract formation when it came to the purported Director Service Agreement and SHA. Nor, apparently, did Mr. McKenzie know the basic premise of insolvency proceedings that an order for the appointment of a liquidator over a company terminates or (to put it bluntly) 'kills' the company. He was prepared merely to acknowledge, in ambiguous terms, that the appointment of a liquidator was 'not healthy'[207] for a company. Like a natural person, an unhealthy company can recover; but one which has been condemned to die and has been judicially executed does not (in general) come back from the dead. He also claimed that if he succeeded in getting a liquidator

[206] Transcript day 3 pages 165 line 15 to page 167 line 6.
[207] Transcript Day 3, page 197 line 18 to page 198 line 3.

appointed over the Company, he would get disclosure of information from the inside of the company, and he would gain the status of a secured creditor. Both these notions are wide off the mark as a matter of law. Also, in respect of commercial lending, Mr. McKenzie appeared to be unaware that the interest rates a ***commercial borrower*** normally has to pay a lending institution are considerably higher than what a ***private lender*** would earn if he put his money on deposit. It is aspects such this which caused Mr. Evrengun to describe Mr. McKenzie with an unusually strong epithet (for Mr. Evrengun), as 'ignorant'.

[327] Yet, ignorance does not translate into dishonesty.

[328] A difficulty in this case, for the Court, is to decide where innocent ignorance on the part of Mr. McKenzie stops and exaggeration and/or other dissimulation takes over. An issue in point concerns what Mr. McKenzie was told by Mr. Evrengun concerning the Corepoint Debts. If Mr. McKenzie is to be believed, he was told very little, he was busy, indeed too busy, doing other things for the Company, to read financial information that was sent to him, and he claimed not to have the accounting skillset needed to understand them. As I have explained in an earlier section, I do not accept this portrayal. Mr. McKenzie showed in contemporaneous correspondence that he indeed kept a close eye on the financial performance of the AMS Group's operating companies, that he was sensitive to debt levels within the Company, and that he was on top of financial aspects especially when it came to ensure he would be paid. I am satisfied, on a balance of probabilities, that Mr. McKenzie was told much more than he now claims, and that he is not the accounting *ingenu* he claims to be.

[329] Another factor which I am satisfied applies here is the effect of self-interest. Mr. McKenzie appears to take a misguided position that where serving his self-interest is concerned, it is honest, and indeed fair game, for him to run even extreme arguments (such as his hopelessly impossible reliance upon the Director Service Agreement). Mr. McKenzie appears to be blinded by his self-interest to the point of being content to run even embarrassingly hopeless arguments.

[330] Whilst, therefore, it has remained difficult for me to gauge the degree of interplay and overlap between (a) innocent ignorance; (b) exaggeration and/or other dissimulation; (c) misunderstanding of the role of the courts (they are not a haggling forum); and (d) self-interest leading to self-delusion, the sum total conclusion is that, with the greatest of respect to Mr.

McKenzie, I did not find him to be a witness upon whom the Court could rely in these proceedings. *Nota bene*: I do not think I need decide the extent to which Mr. McKenzie was being 'dishonest'. It is enough to stop at reliability *versus* unreliability. I am persuaded that it would be dangerous to rely upon Mr. McKenzie's evidence and explanations, except where he might patently be right or where the underlying documentary evidence supported his contentions.

3.4. Mr. Evrengun

[331] Mr. Evrengun was a completely different witness from Mr. McKenzie. Mr. Evrengun too was affable, intelligent and articulate. Whilst Mr. McKenzie could be described as 'unpolished' (I do not mean this as a criticism or in a negative sense), Mr. Evrengun can be described in a single word: urbane. Mr. Evrengun presented well. He demonstrated a thorough and well-developed store of commercial and legal knowledge and experience. He was upfront in acknowledging his shortcomings in terms of careful completion in the actual execution of tasks – he is not a technician, nor a 'details-man'. Consequently, most of Mr. Evrengun's communications and his explanations in his oral evidence remained at the level of generalities. That is clearly where Mr. Evrengun feels most comfortable operating, and he has developed considerable success in doing so, not least because his manner inspires confidence in his listener.

[332] Mr. Evrengun demonstrated a quick-silver agility in his thinking which saw him pass with remarkable subtlety through the mine-field of cross-examination. Mr. Evrengun moreover managed to do so without coming across as 'slippery'. He would give an explanation, and it would come across as straight-forward, simple and believable.

[333] Whilst Mr. McKenzie fell into the first cross-examination trap laid for him by Mr. Woolgar (albeit to be fair to Mr McKenzie, it was an expertly laid one by Mr. Woolgar), Mr. Evrengun proved very difficult to catch out in an obvious untruth. This was not for want of skilful lines of cross-examination by Mr. Roscoe. Mr. Evrengun calmly and politely extricated himself from the traps Mr. Roscoe prepared for him. Try as Mr Roscoe might, with all his very considerable cross-examination abilities, he simply could not get a hold on Mr. Evrengun.

[334] This was problematic, because Mr. Evrengun's narratives would change, both in his contemporaneous correspondence and in his oral evidence, and there was a dearth of

underlying documentary material to be able to cross-check the consistency of his story over time.

[335] Mr. Roscoe submitted with considerable force that Mr. Evrengun's presentation of facts could not all be true. Mr. Roscoe submitted the following about Mr. Evrengun's credibility:

> "(11) Mr. Evrengun is obviously an intelligent man. He presents as charismatic and articulate. He is a highly sophisticated operator in the world off offshore corporate and fiduciary services. Regrettably, he is not a witness of truth in these proceedings, and the Court is invited to find:
>
> **a.** That aspects of his evidence were dishonest.
>
> **b.** He must have lied to at least one (and potentially all) of: (1) the FSC; (2) Mr. McKenzie; and (3) the Court.
>
> **c.** It can place no weight on such evidence in chief as he has been permitted to give or his oral evidence unless against his interests or supported by corroborating contemporaneous documents.
>
> **d.** Even then, documents he has produced are misleading, self-serving and must be treated with caution. Mr. Evrengun's own evidence was that '*things have not been properly documented, it's almost inherent to the business'*. At best, Mr. Evrengun adopted a *laissez-faire* attitude to documenting his dealings, but often Mr. Evrengun's *modus operandi* seems to have been to avoid leaving a paper-trail for his dealings.
>
> (12) Those are serious conclusions to draw, but are the only proper conclusions given:
>
> **a.** Mr. Evrengun confirmed, at the outset of his cross-examination, that he was confident that he had complied with his duty of disclosure following a search of all relevant electronic repositories of documents. As a sophisticated operator in the business that he is in and given the paucity of documents he has disclosed on the relevant transactions (or even documents or correspondence that referred to those transaction) that explanation is incredible.
>
> **b.** The matters recorded in the various documents that Mr. Evrengun has executed concerning Corepoint, what he has told the FSC, what has been recorded on the beneficial ownership register, what he has told Mr. McKenzie and what he has told the Court cannot all be true. The detail is returned to below, but the unavoidable conclusion is that he has been dishonest somewhere along the line. Quite where the truth lies remains unclear, and the blame for that lack of clarity lies with Mr. Evrengun.
>
> **c.** The transactions that Mr. Evrengun has been overseeing concerning the Company's corporate acquisitions and supposed borrowing are complicated, but not *that* complicated. The Court cannot accept that it is beyond Mr. Evrengun's (considerable) ability to give a clear explanation of these matters. Yet, there is no clarity in his evidence in chief. When pressed for clarity in cross-

examination he immediately dissembled and obfuscated, either seeking to change the subject and/or giving a rapid-fire series of inconsistent explanations. His tendency in cross-examination to seek to blame Mr. McKenzie for his own failures to identify conflicts of interest or document transactions was wholly unattractive.

d. Mr. Evrengun's inconsistent answers in a short timeframe were indicative of a witness who was not seeking to tell the truth but was trying to work out what the most helpful thing to say in any given context was. See, for example:

i. Mr. Evrengun's evidence that back-up disks of Corepoint data *'absolutely'* existed, '*were not there'* and '*I don't know, to be honest'*.[208]

ii. Mr. Evrengun's inability to give a coherent answer to the question as to whether there was in fact any agreement reached between Circle and Corepoint concerning the supposed restructuring of the Corepoint Debt (even after the Court's intervention). He first said there was a written agreement.[209] Then he said there was no agreement, only an intention (*'it was in my head'*),[210] before insisting again that there was an agreement.[211] In response to the Court's question, Mr. Evrengun then suggested that it was not just in his head, but was discussed with colleagues,[212] though there has been no disclosure of any such communications. After lunch, Mr. Evrengun categorised it as an oral agreement with himself,[213] before suggesting that it may have been an intention which got overtaken by events.[214]

iii. Mr. Evrengun apologised for not having disclosed a SPA for Circle Trust Services (BVI) Limited ('Circle BVI'),[215] before saying that he didn't think it had been signed,[216] before saying that he could not in fact recall if there was any SPA prepared[217] before saying that he thought it was the case (or at least plausible) that there was no written agreement at all.[218]

iv. Mr. Evrengun's clear answer was that he would not have told Mr. McKenzie who the third party was behind Corepoint had Mr. McKenzie asked at the time.[219] He then changed his mind to say the opposite.[220]

v. When it became clear that it was misleading for Mr. Evrengun to have given evidence saying that he was '*in advanced discussions with major*

[208] Transcript Day 4, page 55 lines 8 to 18.
[209] Transcript Day 4, page 113 lines 9 to 13.
[210] Transcript Day 4, page 114 lines 2 to 10.
[211] Transcript Day 4, page 114 lines 19 to 21.
[212] Transcript Day 4, page 117 lines 7 to 14.
[213] Transcript Day 4, page 121 lines 7 to 9.
[214] Transcript Day 4, page 121 lines 14 to 16.
[215] Transcript Day 4, page 138 lines 10 to 15.
[216] Transcript Day 4, page 138 lines 19 to 20.
[217] Transcript Day 4, page 139 lines 9 to 10.
[218] Transcript Day 4, page 139 lines 11 to 19.
[219] Transcript Day 5, page 67 lines 15 to 18.
[220] Transcript Day 5, page 68 lines 2 to 6.

lenders to convert loans into share capital' (because he could not have been discussing matters with himself), Mr. Evrengun sought to refer instead to discussions with AMS Management[221] and the underlying third-party investor in Corepoint.[222]

e. The overwhelming evidence, indeed the only reasonable conclusion, is that the debt-for-equity swap was a scheme Mr. Evrengun devised and put in place for the improper purpose of forcing Mr. McKenzie out – in circumstances where he realised a negotiated exit was going to be difficult given Mr. Evrengun's lack of desire or ability to answer Mr. McKenzie's entirely reasonable questions about the Group's financial position. Mr. Evrengun has given inconsistent explanations for the reasons he took these steps, which are returned to below. But the Court is asked to reject these attempts to explain the purpose of the transaction as untrue.

(13) Indeed, many of Mr. Evrengun's explanations of his dealings with the Company's assets and wider affairs have a something of a 'now you see it, now you don't' quality about them. They are reminiscent of the ancient cups-and-ball sleight of hand magic trick. If the clock is stopped at a particular moment in time, Mr. Evrengun is capable of giving an articulate and semi-plausible explanation of what the Company's financial affairs were and how and why it was they arose. But he never overturned any cups to show the true position. And, in the real world, as time passes, anyone trying to keep track of what explanation is true at any given point – or which ball is under which cup – is reasonably (and, no doubt, intentionally) left quite bewildered in trying to keep track of the position. Mr. Evrengun's own evidence in cross-examination was that: '*the problem is you have to see it in time'*.[223] In other words, explanations for how money is being used in the group seem to change depending on when the question is asked. There is no suggestion that the recipients of Mr. Evrengun's previous explanations (e.g., Mr. McKenzie or the FSC) were ever properly updated when the explanations 'changed'.

(14) This was seen quite clearly, as returned to below, with Mr. Woolgar's cross examination of Mr. McKenzie about Mr. Evrengun's various piecemeal explanations to Mr. McKenzie of where the money had gone from time-to-time. No criticism is intended of Mr. Woolgar for this perfectly proper piece of cross-examination. But under objective scrutiny, what it really serves to show is that there were from time-to-time plausible explanations of why the Company might have needed to borrow US$100,000s to finance acquisitions, office openings or short-term liquidity issues. What is entirely impossible to piece together, which was the point that Mr. McKenzie correctly emphasised in his cross examination, is how a supposedly cash-generative business which was ostensibly buying apparently cash-generative subsidiaries (even if from vendors in which Mr. Evrengun was interested) ultimately accumulated nearly *US$6m* of Corepoint and Circle Debts between c.2013 and 2018 – apparently without being any to service or pay down *any of it* during the period. "

[221] Transcript Day 5, page 178 lines 8 to 10.
[222] Transcript Day 5, page 178 lines 15 to 17.
[223] Transcript Day 5, page 76 lines 16 to 17.

[336] The general point, which I do accept, that comes across from the McKenzie's Parties' assessment (above) of Mr. Evrengun, is that Mr. Evrengun's stated position changed over time, and that some of the positions he adopted must have been wrong. The McKenzie Parties' side hasten to decry Mr. Evrengun as dishonest and manipulative.

[337] In my overall assessment, I am satisfied that would be going too far. It appeared to me that Mr. Evrengun was genuinely trying to give accurate explanations to the best of his recollection and knowledge of how the business worked. I accept that he changed his position a number of times, but the events in question took place 5 or 6 years ago and more, they have a complicated back-story and even more complicated sub-stories at the level of each of the numerous operating companies within the AMS Group, and it is not unnatural for memories to have become hazy.

[338] I am not persuaded that Mr. Evrengun has deliberately avoided giving disclosure to avoid exposing paper trails. The fact of the matter is that a business such as the AMS Group must have generated a huge amount of documentation, in numerous jurisdictions, such that it would have been impossible, from a practical perspective, to sift through and disclose all of it. That said, I accept that Mr. Evrengun's disclosure was lacking a number of important documents which must have existed. There might have been some deliberate nondisclosure. I cannot rule this out. However, I am not persuaded that Mr. Evrengun has been the manipulative malfeasant that the McKenzie Parties seek to portray him as.

[339] Moreover, the McKenzie Parties have not been able to point to any significant incident to say with any certainty that 'that must have been a lie'.

[340] It proved difficult here to determine whether what Mr. Evrengun gave by way of recollection and explanation was true (or correct) or false (whether as being incorrect, a lie, or incomplete, or an exaggeration).

[341] The McKenzie Parties sought to make much of the fact that Mr. Evrengun had stated in correspondence that he had been '*in advanced discussions with major lenders to convert loans into share capital'*, when he in fact represented both sides of such 'discussions'. The McKenzie Parties submitted that this was misleading. That is because it created the

impression that there had been some kind of meetings between representatives of each side to these transactions, when, in fact, at best there had only been thoughts crossing inside Mr. Evrengun's head. At one level, that statement was false, in that there had been no such discussions. Yet at another level, the law makes provision for fiction in the shape of separate corporate personality. Two or more separate legal persons can interact, even if represented by the same natural person. 'Discussions' need not necessarily be oral but can comprise any kind of exchange of ideas or information. One can even 'discuss' in one's own head – as in systematically working out the way to resolve a problem, for example, by weighing competing considerations. In this light, it is perfectly possible for Mr. Evrengun to have cogitated the question from the perspective both of the Company and the 'major lenders' that he also represented. At that level, his statement was merely an extension of the fiction permitted by law. I accept this may come across as strained, and that it is not the first thing one would think of when reading the statement in question, but the law would, in my respectful judgment, regard this as a permissible fiction. The bottom line is that this was not the 'smoking gun' of a lie that the McKenzie Parties have tried to make it out to be.

[342] The only area where I had particular reason to doubt the honesty of Mr. Evrengun's evidence was in relation to his case that there was another beneficial owner behind Corepoint, whose identity he could not reveal under Swiss law. The disclosed documentary evidence was completely silent on the existence of any such other beneficial owner. If there was some such person, one would expect there to exist at least some kind of documentary record for it, and thus to have been disclosed, even if identifying details are redacted. Moreover, official registers and other information indicated that Mr. Evrengun was the sole beneficial owner. This state of affairs was telling, and indeed persuasive, if not necessarily conclusive. But there was another important indicator. Normally, Mr. Evrengun would field and answer cross-examination questions in a collected manner. During cross-examination on this point however, Mr. Evrengun showed himself manifestly more nervous. Between questions he would constantly seize his water glass and drink deeply, even when (if I saw this correctly) the glass had become empty or almost empty. There could be many explanations for his sensitivity about this line of cross-examination of course, but it made me wary of accepting his evidence on this at face value. I make no finding whether or not there was indeed another beneficial owner.

[343] My point here is simply this: I could not tell if Mr. Evrengun was being dishonest with some of his evidence, and I accept that I may have been deceived by him. Nonetheless, his evidence

generally came across as plausible, without any obvious untruths. Thus, I have no firm grounds upon which to reject it in general. The McKenzie Parties submitted that with Mr. Evrengun's evidence '[q]uite where the truth lies remains unclear'. I would put it differently as: 'quite where the un-truth lies remains unclear'.

[344] The approach which this state of affairs recommends itself to the Court therefore is to accept Mr. Evrengun's evidence, but with caution, and in particular to cross-check it where possible with contemporaneous documentary evidence.

[345] It is perhaps appropriate to close this segment by observing that the McKenzie Parties posited a number of assumptions in their assessment of Mr. Evrengun which I quoted above. One key such assumption was that the operating companies that had been acquired during the AMS Group's expansion were 'apparently cash-generative subsidiaries'. Without more, I do not accept that this is what they were (there is little or no evidence for such a proposition, and indeed Mr. McKenzie himself commented that none, apart from one, were 'any good'). A moment's reflection raises the possibility that some of them had been sold precisely because they had not been 'any good' (or had otherwise reached the end of their line in some way) and Mr. Evrengun had seen the potential to rehabilitate and improve them.

3.5. The Main Issues

[346] The McKenzie Parties' Statement of Ancillary Claim pleads no fewer than twelve allegations of unfairly prejudicial and/or oppressive conduct, as well as a further allegation of breach of statutory duty by Mr Evrengun (alleged failure to declare a conflict of interest in relation to his lending to the Company). I will address in most detail the main issues which are determinative of the case.

3.6. Legitimacy of the Corepoint and Circle debts and Mr. McKenzie's knowledge about them

[347] There are two short points under this head. First, there is no evidence that the Corepoint and Circle Debts were anything other than legitimate and in the best interests of the Company. Secondly, there is no evidence that knowledge and information about them had been kept from Mr. McKenzie – the opposite is the case in fact.

[348] The McKenzie Parties say that Mr. Evrengun had loaded the Company with purported debts owed to companies that Mr. Evrengun controls, being Circle and Corepoint, in circumstances which were and which remain entirely opaque. I do not accept this part of the McKenzie Parties' case.

[349] The Evrengun Parties submit, and I accept, that the critical factual issue in relation to the debts is what Mr. McKenzie knew about them, and when. If Mr. McKenzie in fact had the knowledge the Evrengun Parties submit he did, then that is fatal to the entirety of the claims in relation to the Corepoint and Circle Debts. The Evrengun Parties' principal point is that Mr. McKenzie knew full well about the level of net debt in the Company at all material times.

[350] I accept that he did have such knowledge.

[351] The Evrengun Parties point to the following factors, which I accept:

(1) Mr. McKenzie accepted that he and Mr. Evrengun spoke frequently by phone and also discussed important matters in person, including (at least from 2014 onwards) as regards financial matters.

(2) The overall context was one in which Mr. McKenzie was, even in 2013-14, nervous about the Company's debt financing proposals. It is implausible that he would have had so little interest in the Company's net debt given his expressed concerns even at that time.

(3) Mr. McKenzie was aware at all material times that cash in the business was tight throughout the relevant period. Mr. McKenzie also accepted that he was aware that costs would increase once Mr. Evrengun bought the business, because of the nature of the commercial expansion strategy being pursued. Given that Mr. McKenzie was involved in a number of the acquisitions that the Company made during the relevant period, his professions of ignorance is unpersuasive and does not ring true.

(4) Mr. McKenzie had ready access to financial information about the Company, including its bookkeeping staff and its 'Cloud' document storage system.

(5) On 8th August 2013, Mr. Evrengun sent Mr. McKenzie an email attaching a draft letter to the FSC. A final version was sent to the FSC a few days later. Based on that letter alone, it would have been apparent to Mr. McKenzie that the Company would be

acquiring debt of at least US$1,450,000 to make those acquisitions (as at August 2013), as he himself accepted. The letter also explained that a significant tranche of this financing would be lent by Mr. Evrengun.

(6) On 4th November 2013, Mr. Evrengun emailed Mr. McKenzie to ask him to sign Corepoint Loan 1. The email referred to the loan being used partly to cover the acquisition of CTS BVI, partly to repay a loan to Circle Capital and $250,000 for the fit-out costs of a new office, the last of which would have been a further source of debt. It is common ground that Mr McKenzie signed Corepoint Loan 1.

(7) On 27th December 2013, Mr. Evrengun emailed Mr. McKenzie, asking him to 'co-sign' Corepoint Loan 2, explaining that 'These monies will be used to repay part ($200,000) of my loan and remainder for the transaction with Fidelius". Mr. McKenzie's evidence is that he was 'very much involved' in the acquisition of Fidelius. He also accepted that the price was in the order of US$250-300,000. There can be no doubt that Mr. McKenzie knew full well of the acquisition of Fidelius.

(8) Mr. McKenzie also accepted that he 'would have wondered at the time where the monies were coming from', because AMS did not have sufficient cash-in-hand to pay for the acquisition. Mr. McKenzie clearly must have understood that the acquisition was being paid for with debt. There is no evidence Mr. McKenzie objected to this loan.

(9) There were other transactions, or intended transactions (such as the acquisition of two Dutch businesses under the name of 'Nexman' in February 2014) which would have involved the raising of at least an additional US$695,000 of debt in the Company, which Mr. McKenzie also admitted being aware of.

(10) On 6th August 2014, Mr. Evrengun emailed Mr. McKenzie drafts of what became Corepoint Loans 3 and 4. Mr. McKenzie again did not object to these loans.

(11) On 25th October 2014, Mr. Evrengun emailed Mr. McKenzie to suggest that he, Mr. McKenzie and Mr. Kuijl discuss AMS's financial statements. It could not sensibly have been suggested that there was any attempt to conceal AMS's financial position from Mr McKenzie.

[352] As set out in some detail in the Background segment above, there were five Corepoint Loans in all. In that segment I explained how the evidence points to Mr. McKenzie not only being kept informed about the Company's debt position but having the essential information available to him. In that segment I made and explained the following findings in relation to the present issue:

(1) Mr. McKenzie was not ignorant about the majority of the Company's lending.

(2) Information concerning AMS's debt position had not been kept from him by Mr. Evrengun.

(3) Mr. Evrengun was open with Mr. McKenzie about the Company's debt position and did not conceal it from him.

(4) Mr. McKenzie appears to have left Mr. Evrengun to get on with organising and supplying the financing, while he (Mr. McKenzie) got on with the day-to-day management of the Company's affairs.

(5) Mr. McKenzie, as a Shareholder and Director of the Company, monitored the financial performance of the AMS Group business.

(6) It is more likely than not that Mr. Evrengun informed Mr. McKenzie at their meeting at Mr. Evrengun's home in the south of France in late July 2013, or at some point early in their working relationship, that money for the Company's business expansion would be provided through Mr. Evrengun's corporate vehicles, including Corepoint.

(7) Mr. McKenzie had been aware in 2013 and 2014 of the cash-flow constraints and the need to supplement cash generated through borrowing.

(8) There can be no doubt that Mr. McKenzie had had ample opportunity to know about the entirety of the five Corepoint Loan debts.

(9) Mr. McKenzie had had every opportunity to follow the progress and status of the Company's debt position but, on his own case, he chose not to read the materials. I am satisfied that Mr. Evrengun did not withhold financial information from Mr. McKenzie.

(10) There is no evidence that any of the borrowing concerned, whether by way of the Corepoint Loans or the Circle Debt, was improper or had any purpose other than to provide the AMS business with much needed cash in order to continue to operate.

(11) There was no pleaded allegation made by the McKenzie Parties that any 'really bad decisions' made by Mr. Evrengun amounted to unfair prejudicial conduct. Moreover, there was no evidence led by the McKenzie Parties that would enable to the Court to assess whether, indeed, there had been decisions taken by Mr. Evrengun that had been 'really bad'.

[353] The McKenzie Parties sought to make it an issue what Mr. AB as a Director of the Company had been told about the Corepoint Loans. This is, with respect, not something the Court needs to determine. Mr. AB has not brought any claim and there is no evidence he has any

complaint. Neither was he a witness in these proceedings. The issue is squarely what Mr. McKenzie was told and knew about them.

[354] Concerning the purpose of the Corepoint Loans, the Evrengun Parties' case is that the Corepoint Loans were necessary for the Company to make acquisitions which were critical to its business model. I accept this. I also accept that Mr. McKenzie knew about, and acquiesced, in this.

[355] This is reinforced in my view by the fact (as demonstrated by the evidence) that the Company and its business found themselves in a position where it could not readily borrow money in the open market at reasonably feasible (let alone attractive) terms and rates of interest. The Company and its business was a small to medium sized enterprise. If it was to pursue an expansion strategy therefore, without a sufficient income stream to fund this from day-to-day income, the money would have to be borrowed from somewhere. Mr. Evrengun, who was the instigator and driver of this expansion strategy, either had the money himself, or he had access to funds, or he presumed (correctly as it turned out) that he could prevail upon his friends and contacts to lend money on an *ad hoc* basis. Such a state was obviously precarious, but, conversely, it presented the possibility of greater flexibility in terms of deferred repayment, to the benefit of the Company. It is extremely unlikely, in my estimation, that a shareholder and Director in an executive position such as Mr. McKenzie would not have been aware of these matters and of the Company's source of financing.

[356] Concerning the Circle Debt, the McKenzie Parties sought to challenge the legitimacy of the amount(s) claimed by Mr. Evrengun as due to him (directly or indirectly) at a high level. Whereas it appears that Mr. McKenzie's initial intention had been to use these proceedings to have each element audited, and to have Mr. Evrengun justify each element, this did not happen. Cross-examination concerning the various elements of the Circle Debt was paltry. The key points that I took away from the rather scant treatment of the Circle Debt during the trial were that (a) the amount(s) were not seriously disputed for any articulated reason and (b) the McKenzie Parties had no evidence that any part of it had been artificially or improperly loaded onto the Company.

[357] The upshot of there findings concerning the Corpoint Loans and Circle Debt is that:

(1) There is no basis for discarding these debts as the McKenzie Parties contend for;

(2) There is no basis for the McKenzie Parties' allegation that they have suffered unfair prejudice on account of a failure on the part of the Evrengun Parties to give full and proper disclosure to Mr. McKenzie of the existence of loans or their terms and conditions;

(3) The McKenzie Parties' allegation that such loans were not in the best interests of the Company is not made out.

3.7. Whether the debt for equity swap was legitimate.

[358] The debt for equity swap took place on 31st May 2019. Having carefully considered the evidence of the circumstances, I have come to the conclusion that it was legitimate. I will now explain why.

[359] On 30th May 2019, by written resolution of the sole director Mr. Evrengun, the authorized capital of AMS was increased from US$50,000 to US$500,000.00, divided into 500,000 shares with a par value of US$1.00 each. A notice of change in number of shares or authorized capital was also filed on 30th May 2019. Then, on 31st May 2019, AMS passed a written resolution of the sole director Mr. Evrengun to issue new shares in AMS to Corepoint and Circle in exchange for the release by Corepoint and Circle of the Corepoint and Circle Debts, at the fair market value of AMS, which was determined to be US$24.89 per share as at 31st December 2018. Corepoint also directed AMS to issue Corepoint's portion of the new shares to Circle, on the basis that Circle would hold those shares on terms agreed between Corepoint and Circle. On 31st May 2019, AMS's register of members was updated to reflect the issuance of 218,691 ordinary shares to Circle. The result was that Circle was then a holder of 94.4% of the shares in AMS, with Amstel then holding 5.6% of the issued shares of the Company.

[360] The McKenzie Parties contend that the substantial purpose of the debt for equity swap was to dilute the Amstel Shareholding in order to force a redemption of Mr. McKenzie's shareholding as that had been reduced to less than the 10% level provided by section 176 of the BCA. That, submitted the McKenzie Parties, is an impermissible change which affected the balance of power between the parties, even if Mr. McKenzie was already a minority shareholder.

[361] The McKenzie Parties developed this submission as follows:

> "(1) The Court of Appeal in **Independent Asset Management Company Limited v Swiss Forfaiting Limited**[224] held:
>
> "…where there is a power struggle between different groups of shareholders, the directors should not issue additional shares in such a way as to affect the balance of power in the company or influence in any way the outcome of shareholders' resolutions, even if this results in additional capital or other benefits for the company. This restriction is not written into the company's articles and it is for this reason that equity imposes on the directors the additional requirement that the shares must be issued for a proper purpose. If the directors issue shares for an improper purpose, the issue is liable to be set aside. The fiduciary obligation to issue shares for a proper purpose was incorporated into section 121 of the [Business Companies] Act."
>
> (2) The Court of Appeal, at [21] of its judgement in the summary judgement application appeal in these proceedings, recited the analysis of **Swiss Forfaiting** by Jack J at first instance (which the Court of Appeal appears to have accepted as correct: see [45]):
>
> "It's a matter of fact whether there was an improper purpose or not…[and] unless there's some explanation given, then the [c]ourt is very likely and indeed may be obliged to find there was an improper purpose, but it's not a rule of law (sic). It's an inference of fact which will be drawn."
>
> (3) At [23], the Court went on to set out well-established principles concerning when powers are exercised for proper purposes:
>
> "…the court must apply a four step approach. It must identify (i) the power whose exercise is in question, (ii) the proper purpose for which that power was delegated to the directors, (iii) the substantial purpose for which the power was in fact exercised and decided, and (iv) whether that purpose was a proper purpose."
>
> (4) Further support, if needed, for the conclusion that the share issue and debt for equity swap – which had the effect of diluting the Amstel shareholding from 30% to 5.6% - was improper and unfairly prejudicial can be taken from **Re a company (No 005134 of 1986), e p. Harries (Re. DR Chemicals Limited)**.[225] That was a case with not dissimilar facts to the present. The learned judge there held:

[224] BVIHCMAP 2016/0034 (unreported, delivered 24th November 2017) at headnote, point 2 (Webster JA (Ag.)).
[225] [1989] BCLC 383.

> "I cannot conceive of a more blatant case of unfairly prejudicial conduct to a member than the unilateral and secret exercise by a director of the power of allotment so as to increase his own shareholding from 60% to 96% and to reduce the other member's holding thereby from 40% to 4%."

(5) Pausing there:

a. The 10% statutory redemption threshold is a threshold which affects the balance of power in the company. Once passed, it allows compulsory redemption under section 176.

b. The debt-for-equity equity swap was on the face of it improper, and a '*blatant case of unfairly prejudicial conduct*'.

c. The factual burden on providing a proper explanation lies squarely with Mr. Evrengun.

The effect of issuing shares for such an improper purpose is that the transaction is liable to be set aside."

[362] The McKenzie Parties contended that the debt for equity swap was preferring Mr. Evrengun's personal interests as the underlying beneficial owner of Circle to the Company's interests. They submitted that there is simply no evidence to support a conclusion that, to the extent the Circle and Corepoint Debts needed resolution, that needed to be done at this time and in this manner. If that had been the reason, there would have been no need for it to have been done in secret. The obvious inference, say the McKenzie Parties, is that the true reason for the swap and its timing was to force Mr. McKenzie out. They went on to submit that if the Court is satisfied that the share issue was made for an improper purpose, then it is liable to be set aside (under s.184I(2)(h) of the Act) – or in any case can be disregarded for the purposes of a buy-out order (under section 184I(2)(a) of the Act). The McKenzie Parties argue that the debt-for-equity swap should be set aside as it was for an improper purpose. They argue that the purported Redemption Notice, which followed some 5 weeks later on 8th August 2019, was therefore a nullity.

[363] The McKenzie Parties submitted moreover as follows:

> "As the Court is by now well aware, in May 2019 Mr. Evrengun caused the Corepoint and Circle Debts to be converted to equity. The effect of that debt-for-equity swap was to dilute Mr. McKenzie's interest below the 10% statutory redemption threshold.

That is *prima facie* improper and unfairly prejudicial. …

The Court must therefore look to Mr. Evrengun's explanation. A good explanation is required to avoid the obvious conclusion that this was the exercise of powers for the improper purpose of forcing a dilution of Mr. McKenzie's interest.

It seems that some *four* different explanations have variously been offered. That is not a good start for Mr. Evrengun's position.

The first (only pleaded explanation) is the vanilla statement that the debt-for-equity swap was done to improve the Company's financial position (e.g §74 of the Defence). But that 'explanation' simply asserts that which it seeks to demonstrate. It does not seek to explain how swapping soft, subordinated debt to companies Mr. Evrengun controls to equity – in a manner which does not raise any cash – has any material bearing on the Company's financial position.

A second explanation, which emerged in cross-examination, appears to be that the transaction had something to do with the decision to restructure the arrangements between Circle and Corepoint (in the context of Mr. Evrengun wanting to wind-up Corepoint's operations as a fund). To the extent that formed any part of the motivation, it was also obviously improper – because that was having regard to Corepoint's and Circle's interests, not the Company's.

A third explanation, not really in evidence but developed on Mr. Evrengun's behalf in opening submissions, was that the debt for equity swap was somehow in response to Mr. McKenzie's threats to put the Company into liquidation. That cannot be the true purpose, because it does not work on its own logic: swapping soft, subordinated loans which were *not* going to be called in (i.e., the Corepoint and Circle Debts) in a manner which raised no cash put the Company in no better position to meet Mr. McKenzie's debts.

A fourth explanation, seemingly dreamt up by Mr. Evrengun for the first time in his cross-examination, was that the debt-for-equity swap prevented the Company from being balance sheet insolvent. That evidence can safely be rejected. There is not one shred of evidence that Mr. Evrengun was in the slightest bit concerned about the risk of the Company being balance sheet insolvent at the time. The BDO valuation report dated 20th May 2019 proceeded on the basis the Company was solvent: '*There are no immediate liquidation or solvency concerns'*. Mr. Evrengun told Harneys that all the companies involved were solvent (and Mr. Evrengun's oral evidence to the effect that he was referring only to Corepoint and Circle here was obviously untrue.). Mr. Evrengun's expert, Mr. Bullmore, confirmed that the Group was solvent at material times in his oral evidence."

[364] The McKenzie Parties submitted that the debt for equity swap was a reaction to Mr. McKenzie's threat of 'litigation', and a scheme to try to 'cut him off at the knees' by forcing him out under the s.176 compulsory redemption process.

[365] The Evrengun Parties denied this. Their position was that in correspondence between the parties' legal representatives, AMS explained in a letter dated 4th July 2019 that the decision to increase the Company's authorized share capital from US$50,000 to US$500,000 was done to improve AMS's financial position.

[366] In a nutshell, the McKenzie Parties say the debt for equity swap was part of an improper scheme to force redemption of Mr. McKenzie's shares. The highpoint of their evidence in this regard is that Mr. Evrengun had informed his legal advisers that the redemption was the last part of the Company's financial reorganisation. The context of that statement had been that in July 2019 Mr. Evrengun was negotiating with that firm over the fees for dealing with the redemption part of it, in circumstances where the redemption part was taking place several weeks after the debt for equity swap, and the case handler that Mr. Evrengun had first dealt with then happened to be absent. The Court does not know the outcome of that exchange (whether that firm agreed to do the work within the ambit of the previously agreed fee arrangement or whether a separate fee was ultimately agreed).

[367] I accept that what Mr. Evrengun told that firm can be taken as contradicting his case that the debt for equity swap was not done in order to force redemption of Mr. McKenzie's shares. So, this may be an instance in which Mr. Evrengun has been shown to be making a self-serving statement which contradicts his own formal case. But, at the same time, that firm itself appears not to have been aware of the debt for equity swap and redemption being part of a single scheme, because that firm appears to have wished to charge separately for the redemption work.

[368] The most, or at least more, reliable evidence for the contemporaneous motivation for the debt for equity swap can more appropriately be gleaned from the contemporaneous correspondence and the pertinent chronology.

[369] Before I do so, it is apt that I should address the McKenzie Parties' reliance upon the Court of Appeal case in **Swiss Forfaiting**. [226]

[370] It is apparent to me that the McKenzie Parties dress their arguments in terms that the debt for equity swap changed the balance of power between the parties in order to shoehorn this case into the analysis of **Swiss Forfaiting**, and in particular into the ambit of the apparent prohibition summarised at point 2 of the Headnote, that '…where there is a power struggle between different

[226] BVIHCMAP 2016/0034 (unreported, delivered 24th November 2017) at headnote, point 2 (Webster JA (Ag.)).

groups of shareholders, the directors should not issue additional shares in such a way as to affect the balance of power in the company or influence in any way the outcome of shareholders' resolutions, even if this results in additional capital or other benefits for the company.'

[371] The facts of that case are, however, far removed from the present. There, a share issuance was done in circumstances where the directors were seeking to ensure that the new shareholder had effective control over the underlying asset and that their protagonist could not retake control and use his controlling power to thwart litigation by the company against one of his companies. The court at first instance had found that the share issuance had not been for an improper purpose. The Court of Appeal disagreed. The present case is not about a battle for control of AMS between the Evrengun Parties and the McKenzie Parties.

[372] A further observation to make is that on a careful reading of that case, it does not lay down the blanket prohibition that the McKenzie Parties contend for. Indeed, it is somewhat disheartening to see the McKenzie Parties relying upon their insufficiently nuanced interpretation of that case, when they had argued the same point, and lost, before the Court of Appeal in the context of a summary judgment application brought by the McKenzie Parties in these same proceedings. The Court of Appeal distinguished the present case from **Swiss Forfaiting**. The Digest entry for the Court of Appeal's decision, delivered on 8th November 2021, materially states as follows:

> "1. The applicable test in this jurisdiction for determining proper purpose under section 121 of the BVI BCA is the 'substantial or dominant purpose' test. In applying this test a court must consider four issues. These are: (i) the power whose exercise is in question, (ii) the proper purpose for which that power was delegated to the directors, (iii) the substantial purpose for which the power was in fact exercised, and (iv) whether that purpose was a proper purpose. The substantial or dominant purpose test points to how fact sensitive issues of 'purpose' are generally, and the importance of deciding such issues not purely on affidavit evidence, but after hearing the evidence of the witnesses, including the directors, and such evidence being tested by cross-examination at a trial.
>
> Section 121 of the Business Companies Act, Act No. 16 of 2004, Laws of the Virgin Islands applied; **Antow Holdings Limited v Best Nation Investments Limited and others** [2018] ECSCJ No. 253 (delivered 21st September 2018) followed; **Nam Tai Property Inc v IsZo Capital LP and another** [2021] ECSCJ No. 714 (delivered 4th October 2021) followed; 3 **Extrasure Travel Insurances Ltd and another v Scattergood and another** [2002] EWHC 3093 (Ch.) followed.
>
> 2. …
>
> 3. …
>
> 4. In the instant matter, the principle set out by this Court in **Independent Asset Management Company Limited v Swiss Forfaiting Limited** that where there is a

power struggle between different groups of shareholders, the directors should not issue additional shares in such a way as to affect the balance of power in the company or influence in any way the outcome of shareholders' resolutions, even where it results in additional capital or other benefits for the company, while important to the ultimate determination of the Ancillary Claim, is not of blanket application. There is no generally applicable rule that a decision of directors which may or does have as one of its effects the benefitting one group of shareholders of a company over another group, is or must be considered to be, without more, made for an improper purpose and therefore invalid. Each matter falls to be determined on its particular facts as to whether a decision which may or does have such an effect, was made for an improper purpose, in the sense that such effect was the substantial or dominant purpose.

Independent Asset Management Company Limited v Swiss Forfaiting Limited [2017] 5 ECSCJ No. 271 (delivered 24th November 2017) considered.

In the instant matter, there was no power struggle or balance of power issue between Mr. Evrengun and Mr. McKenzie within AMS Holdings. It is indisputable that at the time of the decision to restructure the share capital of the company and to swap debt for equity, Circle was the majority shareholder and Mr. Evrengun the sole director, and Amstel was the minority shareholder of AMS Holdings. The restructuring of the share capital of the company and issuance of shares in exchange for debt which had the effect of increasing the number and percentage of shares held in the company by Circle and the dilution of the percentage of shareholding held by Amstel, did not result in a change in the balance of power or control of the company either at the level of the board of directors or of the shareholders in general meeting.

Independent Asset Management Company Limited v Swiss Forfaiting Limited [2017] ECSCJ No. 271 (delivered 24th November 2017) distinguished."

[373] Whilst I accept that this Court of Appeal decision is not binding upon this Court (because that concerned an application for summary judgment, whereas now this Court is concerned with the plenary trial of the claim), I agree with the Court of Appeal's analysis and come to the same conclusion. The McKenzie Parties do not appear to have materially developed their submissions now, beyond what they had unsuccessfully argued before the Court of Appeal.

[374] In **Swiss Forfaiting**, the Court of Appeal applied the four-step test summarized there. At paragraph [28], the Court of Appeal stated that the first step of identifying the power being considered is simple; it was the power to issue shares. The same applies here, with the equally simple (and uncontroversial) additional power of converting the Company's debt for equity. At paragraph [29], the Court of Appeal identified the second step as ascertaining the reason for exercising the power. It stated: 'Shares are usually issued to raise capital for the company although shares may be issued for other purposes so long as the issue provides benefit to the company as a whole.' The reason for the debt for equity swap, or at any rate the stated reason, was to increase the Company's capital and reduce debt. At paragraph [30], the Court of Appeal

stated that the third step is to determine the 'substantial purpose' for issuing the shares. In **Swiss Forfaiting**, there was an unchallenged finding of the lower court that the substantial purpose was to transfer control of voting power.

[375] Pausing here, it is worth noting the 'reason for exercising the power' (i.e., in step two) may be different from 'the substantial purpose' (i.e. in step three).

[376] In paragraph [31] the Court of Appeal stated the final step as 'the one that the learned judge described as the one critical question in this case is whether the shares were issued for a proper purpose'. In the ensuing paragraphs the Court of Appeal did not seek to set out parameters for what would be a proper purpose. Rather, it explained, with reference to authorities, that 'an issue of shares purely for the purpose of creating voting power' has repeatedly been condemned as improper and an unconstitutional use of directors' fiduciary duties.[227] At paragraph [43], the Court of Appeal stated:

> "…the substantial purpose for the July issuance was to take control of the Fund from the appellant and hand it over to companies controlled by Mr. Invernizzi. This was an improper purpose within the meaning of section 121 of the BC Act and the case referred to above and it does not matter that the directors were influenced by other motives and reasons that may have been beneficial to the company as a whole or its remaining equity shareholder. However altruistic those motives and reasons may have been "[t]hat is not, in itself, enough.""

[377] The point, in that case, was simply that issuing shares with a substantial, or primary, or dominant (these terms are used interchangeably in that decision) purpose of transferring power was an improper purpose.

[378] Thus, it should also be seen that the Court has to conduct an inquiry, which has four consecutive steps. This is a factual inquiry. The Court cannot jump to a conclusion that a share issuance was improper, merely because it increased or decreased or transferred power between shareholders, if there was some kind of dispute or tension between the shareholders. There is no getting round the need to identify what was the substantial, or primary, or dominant purpose behind the issuance.

[379] The case of **Re a company (No 005134 of 1986), e p. Harries (Re. DR Chemicals Limited)**[228] does not take the analysis much further. The English High Court there approached the question

[227] At paragraph [33].
[228] [1989] BCLC 383.

whether a power transferring issuance was unfairly prejudicial without conducting the four-step test. However, on the facts and reasoning there recounted, it would appear that the court would have come to the same conclusion if the test had been applied, that the issuance there had been for the improper purpose of reducing the opponent's voting power inside the company.

[380] There is, though, a detail in that case which the McKenzie Parties snatched at. It was that the issuance there had been done secretly, behind the back of the disaffected shareholder, Mr. Harries, who was also a director of the company in question. The McKenzie Parties also accuse the Evrengun Parties of having done the debt for equity swap secretly, without informing Mr. McKenzie.

[381] I do not accept this contention. First, Mr. Evrengun had been open with Mr. McKenzie about his intention to carry out a debt for equity swap, and even asked Mr. McKenzie whether he wished to participate in it, on 8th October 2018. He refused, on 10th October 2018. Secondly, unlike Mr. Harries, Mr. McKenzie was no longer a director of the Company (since 12th January 2018) when the debt for equity swap was mooted by Mr. Evrengun in October 2018; thus, Mr. McKenzie was not required to be involved in the Board's deliberations for a decision on it.

[382] For present purposes, applying the four-step test, the controversial steps are the third and fourth steps, namely what the substantial, or dominant, or primary purpose was behind the debt for equity swap, and was that purpose was proper or improper.

[383] The McKenzie Parties contend that the purpose was to make Mr. McKenzie's shareholding drop below the 10% level such that the statutory redemption process would be triggered, forcing him out as a shareholder, and, as such, that this purpose was improper.

[384] The McKenzie Parties treat the first key date in their chronology behind this argument as 17th May 2019. That was the date the McKenzie Parties sent the Evrengun Parties a letter before action. The second key date for the McKenzie Parties is 20th May 2019, when, they say, the BDO valuation report 'landed' with Mr. Evrengun, 'apparently out of the blue'. They submit that '[I]t is an obvious inference that Mr. Evrengun had chased for its preparation in response to the 17th May 2019 letter before action'. The next key dates (for the McKenzie Parties) are 30th and 31st May 2019 respectively, when the documents for the share issue and debt for equity swap were signed. The McKenzie Parties nod lightly (too lightly, as I will explain below) towards earlier dates, in observing that 'Mr. Evrengun seems to have come up with the idea of a debt-for-equity swap in negotiations with Mr. McKenzie in October 2018. Some steps were taken to progress

the plan in December 2018 (e.g., making contact with BDO and [the leading BVI law firm which became his legal advisers on the transaction]).'

[385] The McKenzie Parties' core submission was that the debt for equity swap was a reaction to Mr. McKenzie's threat of 'litigation'. This is a seductive but fundamentally incorrect submission. On a high, superficial level, it is correct. It was indeed the case that the debt for equity swap was a reaction on Mr. Evrengun's part to threats of 'litigation' made by Mr. McKenzie. But we have to interrogate this by asking what type of 'litigation', and when those threats were made. Looking at the correspondence, it can be seen that the answers to these questions are: (1) threats to apply to the BVI courts for a liquidator to be appointed over AMS; and (2) these threats were made well before the 17th May 2019 letter before action (as well as in that letter before action itself). In other words, the debt for equity swap was not a reaction to the McKenzie's threats of 'litigation' contained solely in their 17th May 2019 letter before action. It was a reaction to Mr. McKenzie's threats to apply to the BVI courts seeking the appointment of a liquidator over the Company, i.e., to wind up the Company.

[386] In an earlier part of this Judgment I have set out in quite some detail the salient content of the correspondence over the relevant prior period. One can read there that there was a 'watershed' exchange of emails between Mr. Evrengun and Mr. McKenzie culminating in an email on 10th November 2017 which marked a point of irretrievable breakdown in their business relationship. On 3rd May 2018, Mr. McKenzie threatened to serve Statutory Demands. On 18th May 2018 he did so. On 25th May 2018 Mr. Evrengun indicated that he had taken legal advice and that he was thinking of having the Company adopt a 'scheme of arrangement'. By this, I understand him to be referring to a 'scheme of arrangement' as provided for by section 179A. of the BCA. He accurately summarized the key attributes of such a scheme. It was clear from that email that Mr. Evrengun thought and hoped that a 'scheme of arrangement' could be used to defeat a Statutory Demand. In the event, by 31st May 2018 he and Mr. McKenzie had agreed that the debts which had been the subject of the Statutory Demands would be paid off by way of monthly instalments of US$20,000 (which would see these debts paid off in 2020) and 'enforcement' of the Statutory Demands through an application to appoint a liquidator over the Company would be put on hold. In their negotiations which ensued, on 18th August 2018 Mr. Evrengun raised the possibility of a redemption in respect of Mr. McKenzie's shares, on the basis that he (Mr. Evrengun) would not be able to buy Mr. McKenzie out. Some time then passed. On 3rd October 2018 Mr. McKenzie revived threats. They could reasonably be understood as threatening to apply for the

appointment of a liquidator over the Company. It was five days later, on 8th October 2018, in response to this, that Mr. Evrengun indicated that 'we are in advanced discussions with the major lenders to convert the loans into share capital'. On 19th October 2018 Mr. McKenzie increased the pressure on Mr. Evrengun, by notifying Mr. Evrengun that he was going to revive his Statutory Demands. That could only be understood to mean that he would be applying to the BVI courts for the appointment of a liquidator if the Company did not satisfy the Statutory Demands. Then, on 29th October 2018, Mr. McKenzie reiterated that he was going to apply for the appointment of a liquidator over the Company. He made further, similar, threats on 5th, 9th and 13th November 2018. It was in the context of those threats to apply for the appointment of a liquidator that Mr. Evrengun went to see the Company's auditors, BDO, on 14th December 2018 to commission a valuation report for a debt for equity swap. Then, on 15th December 2018, the Company (obviously at Mr. Evrengun's instigation) resolved to appoint the leading BVI law firm previously mentioned as the legal advisors and BDO as the financial advisers in relation to the swap. The reason given there for the swap was stated at point 1 of the resolution's preamble, as quoted already above:

> "It was noted that due to the financial position of the Company and in particular its equity to debt ratio, the Company intended to explore options to raise capital and/or reduce the debt obligations of the Company."

[387] Obviously, an 'officially stated' motive or reason may not be the predominant, nor even any true, purpose at all. But it can be seen that the debt for equity swap was instigated as a reaction to Mr. McKenzie's repeated threats to apply to the BVI courts for the appointment of a liquidator over the Company.

[388] That begs the question: why or how would a debt for equity swap assist the Evrengun Parties in the event that Mr. McKenzie would make good on his threats to apply for the appointment of a liquidator? We will return to this shortly.

[389] Another question that arises is why or how would 'forcing Mr. McKenzie out under the s.176 compulsory redemption process' 'cut him off at the knees'. What, exactly, to 'cut [someone] off at the knees' is intended to be meant by the McKenzie Parties is unclear. If this is taken to mean to prevent Mr. McKenzie pursuing litigation against Mr. Evrengun, it can be said without hesitation that it could not directly have such an effect if the litigation were to be insolvency proceedings. Mr. McKenzie would be bringing insolvency proceedings as a creditor of the Company relying

upon his Statutory Demands, and, in that capacity, it would not matter if he remained a shareholder or not. At that level, this argument of the McKenzie Parties as to the ascribed motive for the debt for equity swap simply does not work.

[390] So, we return to the question why or how would a debt for equity swap assist the Evrengun Parties in the event that Mr. McKenzie would make good on his threats to apply for the appointment of a liquidator?

[391] The McKenzie Parties argued that this would not assist the Evrengun Parties, because swapping soft, subordinated loans which were *not* going to be called in (i.e., the Corepoint and Circle Debts) in a manner which raised no cash would put the Company in no better a position to meet Mr. McKenzie's debts.

[392] However, this is a superficial answer which misses at least the following:

(1) The point, and, in my respective judgment, the most important purpose for Mr. Evrengun, was to improve the Company's chances of avoiding a winding up order, or an immediate winding up order, if Mr. McKenzie should petition the BVI court for the appointment of a liquidator. In other words, it would improve the Company's chances of staying alive. Mr. Evrengun correctly viewed the service by Mr. McKenzie of Statutory Demands as inflicting an existential crisis upon the Company. Although Mr. McKenzie was a shareholder in the Company, Mr. McKenzie did not care about that, and indeed saw the winding up of the Company as in his own personal interests. Mr. Evrengun, on the other hand, did care. A lot. He was trying to improve the chances for the Company of avoiding a winding up order, either completely or to gain the Company time. It should be appreciated that where someone applies to the BVI courts for the appointment of a liquidator on the basis of an unsatisfied statutory demand, the appointment of a liquidator is not automatic. Section 157 of the Insolvency Act 2003 (as amended) provides the court with discretion either to set aside the statutory demand or to extend the time for compliance with it. Section 157(2) provides that:

> "The Court may set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused— (a) because of a defect in the demand, including a failure to comply with section 155(3); or (b) for some other reason."

Moreover, section 157(4) provides that:

> "(4) If, on hearing an application to set aside a statutory demand, the Court is satisfied that there are no grounds for setting aside the statutory demand, it may extend the time for compliance with the statutory demand."

(2) Furthermore, on a purely commercial level, it stands to reason that improving a company's debt to equity ratio, raising capital, and reducing debt makes the company more attractive to a prospective lender or investor if the company would need to source cash in short order to pay off debts that are the subject of a statutory demand. The point can be put simply: would you feel more comfortable lending your own money to someone who is already deeply in debt, which suggests possible difficulties in being repaid, or to someone who has managed largely to have cleared his debts? The answer is obvious. Lending to the latter presents, on the face of it, a lower commercial risk.

(3) Furthermore, it also stands to reason that a BVI court would be more likely to exercise its discretion either to set aside Mr. McKenzie's Statutory Demands, or to extend the Company's time for compliance, if it were to see that the Company is balance sheet solvent, particularly if the courts are also aware that (a) Mr. McKenzie is merely using the Statutory Demands to apply pressure on Mr. Evrengun and the Company to make a more attractive share buy-out offer; (b) that the debts comprised within the Statutory Demands were being paid off in monthly instalments without any (or any significant) interruption and would be fully met in the relatively near future (2020), such that the application to appoint a liquidator in fact and self-evidently has nothing to do with getting the debts paid; and (c) the Company otherwise presented as a growing viable business with a considerable number of employees and offices in numerous jurisdictions.

[393] I have no reason to believe that Mr. Evrengun was not aware of the Court's statutory discretion. On balance I believe it is more likely than not that he was aware of it. He had shown himself to have been well-informed (on taking legal advice or otherwise) about the legal details of BVI 'schemes of arrangement'. It is clear that he had given careful thought to the steps he could cause the Company to take to protect it from Mr. McKenzie's attacks, apparently upon taking legal advice. I would be extremely surprised if Mr. Evrengun had been unaware of the Court's discretion in this regard. In this regard, there is no reason to suppose that on such crucial existential matters Mr. Evrengun had been content to rely upon his own assumptions or informal,

ad hoc, advice from colleagues in the manner that Mr. McKenzie, for his own part, appears to have done.

[394] For the reasons given, I concluded in my respectful judgment that the purpose, or at least the substantial, or dominant, or primary, purpose, behind the debt for equity swap was to increase the capital of the company and reduce its debt, as indeed had been its stated reason, in order to put the Company in a better position to defend an application to the Court for the appointment of a liquidator under section 157 of the Insolvency Act 2003 (as amended).

[395] In my respectful judgment that was clearly of benefit to the Company and was a proper purpose.

[396] The McKenzie Parties went on to argue that even if Mr. Evrengun *did* subjectively have a good purpose for the debt-for-equity swap, it was *still* unfairly prejudicial because it plainly took place at a significant undervalue, relying on **Re Sunrise Radio**.[229]

[397] The McKenzie Parties argued that the transaction was at a significant undervalue is plain from, at least:

(1) First, the fact that both experts agree it was (at least) 20% too low for incorrectly applying a minority discount. It is no answer for Mr. Evrengun to insist that it was nevertheless in the right ballpark. It is in principle unfair for a shareholder to be diluted on the basis of a valuation which is wrong in principle, particularly where the majority shareholder is the one who benefits from the error in principle.

(2) Second, the Evrengun Parties' expert was bound to recognise in his cross-examination that he had made an error of arithmetic in reducing the multipliers (in a section of the analysis which gave 75% of the ultimate valuation). His stated approach was to apply a 10% discount to the median EBIDA multiple for the 'comparables' identified. Had he applied the 10% discount to the median multiple figure for May 2019 in the calculation exercise shown at Schedule 10, the multiple that should have been selected was 10.9x (not 10.5x). That would give an implied business enterprise value of US$7.216 million (not US$6.945 million), an increase of US$271,000. As this figure makes up a full 75% of his valuation, his ultimate valuation should therefore have been (on proper arithmetic)

[229] [2009] EWHC 2893 (Ch).

US$203,000 more as at 31st May 2019. The fair market worth of the common equity should therefore have been US$1.702 million (not US$1.499 million). That is US$34.04 per share (not $29.98 per share, as he had calculated). This is a 13+% error which has crept in just as a matter of arithmetic. The BDO figure was US$24.89 per share. On a proper application of the Evrengun Parties' expert's approach, even he considers the true value was c.37% more than the value BDO had come to. That is not even the right ballpark.

(3) Third, the fact that the valuation was five months out of date at the date of the equity swap. In the case of a growing company, which was out-performing forecast, the BDO valuation at a 31st December 2018 valuation date was on any view unreliable and an unfair basis to assess the proper value of a debt-for-equity swap on 31st May 2019. It was incumbent on management, if it were really trying to do things fairly, to obtain an updated valuation on up-to-date financials and forecasts. That was especially so where Mr. Evrengun must have known about the state of the Company's actual performance.

(4) Fourth, the various other *indicia* of value which showed that a US$1.244 million valuation of the *entire* share capital of the Company at that date was anomalously low (Mr. McKenzie's 30% pro rata interest, before any minority discount, therefore apparently being worth just c.US$373,000). There is no suggestion that BDO had this anomaly drawn to their attention, as was incumbent on management wishing to do things properly. In particular:

i. Mr. Evrengun bought in in 2012 at a US$4 million valuation. Mr. McKenzie increased his stake in 2014 at the same valuation.

ii. KMPG figures in the context of a proposed merger with Circle in 2015 indicated a fair market worth equity valuation of between c.US$5 and US$11 million.

iii. The Newhaven merger figures in 2016/17 indicated total equity value of US$8.125 million (with Mr. McKenzie's 30% worth US$2.437 million).

iv. Mr. Evrengun had made (at least indicative) offers to buy-out Mr. McKenzie for US$1.2 million, US$850,000 and US$950,000 between December 2017 and October 2018.

v. Another valuation (by 'HLG') with a valuation date of 31st December 2019 (i.e., 7 months after the debt for equity swap) gave an equity value of US$11.2 million.

[398] The Evrengun Parties addressed these contentions as follows.

> "It was also suggested to Mr Evrengun that the BDO valuation process was deliberately set up to undervalue the Company in some way. This is also a bad point. Mr Evrengun's reference to a "haircut" for the existing shareholders in his email to Mr Geluk was in fact a perfectly normal thing to say – in a debt-for-equity swap, any shareholder takes a "haircut" on their existing shares. BDO were an independent third party, and rightly there is no attack on their integrity. In that regard, it is instructive that their valuation is very similar to [the Evrengun Parties' expert's] for the May 2019 valuation date. Unless it is seriously intended to attack BDO's integrity, then that ought to be fatal to the line of questions Mr Evrengun was asked about whether he was seeking to engineer that BDO deliberately give a lower valuation. Mr Evrengun's explanation of the manner in which the forecasts which BDO put into their valuation was clear, and fair, reflecting the considerable uncertainty the industry faced in May 2019. In any event, BDO expressed their own independent corroboration of that uncertainty in the report itself."

[399] It can be seen from the above that the McKenzie Parties were studiously trying to avoid impugning BDO's integrity and competence and at the same time trying to fix responsibility upon Mr. Evrengun for effectively having misled BDO. I accept the Evrengun Parties' submission that BDO were an independent third party. BDO BVI is part of the BDO global international accounting network. BDO BVI was also the Company's auditor, so had a considerable degree of familiarity and institutional knowledge about its financial affairs. That of course does not mean that no error crept into their work – it may (or may not) have done. After all, to err is human. There is far too little documentary evidence available for the Court to be persuaded on a balance of probabilities that Mr. Evrengun engineered such an error. There is also no evidence that Mr. Evrengun, the alleged perpetrator of the unfairly prejudicial conduct complained of by the McKenzie Parties, knew that this was an error. If it was an error, it was an error by an external third party and not by those then in control of the Company.

[400] As to the McKenzie Parties' point that the BDO valuation, being as at 31st December 2018, was unreliable and unfair, this is met by the Evrengun Parties' submission that their expert reached a similar valuation for May 2019. I accept that the figures are defensible. I also accept that to the extent that the similar figures are thus defensible, there is no substantive unfairness arising from the fact that Mr. Evrengun proceeded to use a valuation as at 31st December 2018 for the debt for equity swap in May 2019.

[401] The McKenzie Parties sought to impugn the debt for equity swap from another angle, that it involved a criminal offence by Mr. Evrengun. They submitted that an improper element of the debt for equity swap was the fact that it was illegal under section 14(2) and 14(5)(b) of the Banks and Trust Companies Act 1990 (as amended). The McKenzie Parties accepted that such illegality does not render the transaction liable to be set aside as such, but they said that the fact that Mr. Evrengun has embarked upon illegal conduct further supports the conclusion that the affairs of the Company have been managed in an unfairly prejudicial manner:

[402] The McKenzie Parties developed their point like this:

(1) The Company's wholly owned subsidiary, AMS Trustees Limited, holds a Class 1 Trust Licence. It is therefore a 'licensee' under the Banks and Trust Companies Act (as amended) ('BTC Act'): *per* the definition in section 2.

(2) Section 14 of the BTC Act provides:

> "(1) A person owning or holding a significant interest or controlling interest in a licensee shall not sell, transfer, [merge,][230] charge or otherwise dispose of his or her interest in the licensee, or any part of his or her interest, unless the prior written approval of the Commission has been obtained.
>
> (2) A person shall not, whether directly or indirectly, acquire a significant interest in a licensee unless the prior written approval of the Commission has been obtained.
>
> …
>
> (5) The Commission shall not grant approval under subsection (1), (2) or (3) unless it is satisfied that following the acquisition or disposal-
>
> (a) the licensee will continue to meet the criteria for licensing specified in section 4(4); and
>
> (b) any person who will acquire a significant interest in the licensee satisfies the Commission's fit and proper person criteria prescribed."

(3) Section 2 defines 'significant interest':

> "significant interest", in respect of a licensee, means a holding or interest in the licensee or in any holding company of the licensee held or owned by a person, either alone or with any other person and whether legally or equitably, that entitles or enables the person, directly or indirectly-
>
> (a) to control 10% or more of the voting rights of the licensee;
>
> (b) to a share of 10% or more in any distribution made by the licensee; or

[230] Added by s. 8 of the BTC (Amendment) Act, 2018.

(c) to a share of 10% or more in any distribution of the surplus assets of the licensee…."

(4) Before the debt for equity swap, each of Circle and Amstel had a significant interest in AMS Trustees Ltd via their 70/30 shareholdings in the Company.

(5) By the Debt for Equity swap:

i. The Corepoint Debt was converted into 146,495 shares in the Company.

ii. That is a significant interest: it is more than 10% in the Holding Company of the licensee (it is about 29.2%).

iii. Whilst those shares were in fact issued to Circle, that can only have been at Corepoint's election. Mr. Evrengun's own evidence is that '*Corepoint also directed AMS Holdings to issue the New Shares which had been due to it as a result of the debt to equity swap to Circle and that Circle would hold those shares on terms agreed between Corepoint and Circle'.*

iv. It is difficult to see how Corepoint is not thereby to be treated as having indirectly acquired a significant increase in AMS Trustee Limited for the purposes of s.14(2). It could not direct shares to be issued to Circle unless it had, for a time, some interest in the shares itself.

(6) It is also difficult to see how Circle, in increasing its interest from 70% to 94.4% in the Company – but subject to some side-arrangement with Corepoint in respect of 29.2% of the shares in the Company – is not to be treated as merging or otherwise disposing of a significant interest in AMS Trustee for the purposes of section 14(1). On a pro-rata allocation, 70% of Corepoint's 146,495 shares (102,546 – or 20.5% of the shares in the Company) would have remained with Circle if the debt for equity swap had not occurred.

(7) Section 14(7) makes breach of section 14(1)-(2) a criminal offence. Section 14(8) gives the FSC power to direct (amongst other things) the rescission of the transaction. The illegality does therefore give reason to set aside the transaction *per se*.

(8) The culmination of this plan was the notice to Amstel to seek to redeem its shares at an undervalue. In view of the conclusions the Court is being asked to reach about the share

issue and then debt for equity swap, it follows that the McKenzie Parties' position is that the redemption process under section 176 of the Act is invalid and a nullity (alternatively, should be treated as such for the purposes of the McKenzie Parties' relief under section 184I).

[403] The Evrengun Parties countered these submissions by saying that regardless of whether FSC approval was in fact required in law, this was an unheralded allegation of criminality which ought not to have been raised – in any event, Mr. Evrengun explained in his evidence (on day 6 of the trial) that this allegation was unfounded.

[404] The way I viewed this is as follows. This line of attack consisted of a suggestion of criminality, and a highly technical one at that, on the part of the Evrengun Parties. By it, the McKenzie Parties were trying to use another ground upon which the debt for equity swap could be set aside. Whilst the point had been prefigured to a certain extent in pleadings and evidence, the matter as a whole had developed in such a way that criminality was not a central plank of the McKenzie Parties' case. Indeed, it came across (to me at least) as a subsidiary and indeed non-determinative point. During his evidence Mr. Evrengun understandably took umbrage, and indeed offence, at this allegation, telling the McKenzie Parties' learned Counsel that he was making a 'very serious allegation', that he was 'flabbergasted' at even the suggestion of such criminality, which he considered to be 'really outrageous'. He stated:

> 'I am in the financial industry for over 30 years. I've conducted my business immaculately and we are still doing that. And now, for you to say this, I will not engage in this discussion.'

[405] That response was, in my respectful judgment, entirely in order.

[406] Mr. Evrengun went on to explain that there had been a 'common understanding' both with his corporate legal advisers and his litigation legal advisers that there was no reason to think that FSC approval was required.

[407] It appears from the contemporaneous correspondence that the FSC had indeed taken a view that its approval was required, and this aspect was ultimately resolved. The lack of prior approval appears to have been a misunderstanding resulting from of one of the lawyers in the leading BVI law firm that Mr. Evrengun had instructed as legal advisers in respect of the debt for equity swap and redemption not being aware of the application of such a requirement. It

was not an error committed by Mr. Evrengun himself, although, of course, in law the responsibility for such an error is ascribed to him. Mr. Evrengun's own intentions had been made abundantly clear. He had written to his transaction legal advisers on 3rd December 2018:

> "… It is the intention that the company will convert certain debt, i.e. a shareholders' loan from my company and a third party loan into equity. We wish to do this, so the [sic] say in a more catholic way than the pope would be doing, so that we follow any and all rules and regulations and that afterwards, it cannot be stated that we made a mistake or overlooked something."

[408] Mr. Evrengun there explained what he meant by intending to do the debt for equity swap 'in a more catholic way than the pope would be doing': that the transaction would be impeccable and unimpeachable.

[409] In such circumstances, it would be unfair and unjust to set aside the debt for equity swap on the grounds of such alleged illegality. The McKenzie Parties correctly note that set aside does not follow automatically from such illegality. If there was such illegality, it had been regularized once it had been spotted, and not directly caused by Mr. Evrengun. I will not, therefore, set aside the debt for equity swap in these circumstances.

.

3.8. The increase in interest.

[410] As narrated above, on 31st May 2018, Mr. Evrengun passed a resolution of the Company, resolving, amongst other things, to repay the indebtedness of Amstel and Cavendish, as recorded in the books of the Company, in monthly instalments of US$20,000 until the total debt would be fully repaid and to increase interest on the Corepoint Loans from 8% to 10% and to increase interest on the Circle debts from 0% to 8%, with retroactive effect as of 1st January 2018. [231] The McKenzie Parties have complained that this was a secret *quid pro quo* confected by Mr. Evrengun without informing Mr. McKenzie.

[411] The McKenzie Parties complain that no agreement with Corepoint or Circle in respect of interest has been disclosed. Nor has any correspondence which indicated that any third-party at either Corepoint or Circle was applying any commercial pressure for these interest increases.

[231] Bundle D Vol.1 Part 3 pages 33 to 34.

[412] The McKenzie Parties submit that Mr. Evrengun appears to have decided unilaterally to cause the Company to incur enhanced liabilities to Corepoint and Circle, whilst in a position of obvious conflict.

[413] They invite the Court to conclude that the unilateral increase in the interest for the Corepoint Debts was a further breach by Mr. Evrengun of his duties as director and this conduct by Mr. Evrengun amounted to unfairly prejudicial conduct.

[414] The Evrengun Parties submitted that increasing the interest on the Corepoint Debts was a perfectly reasonable response to Mr. McKenzie's pressure to be repaid, since he was effectively gaining priority over Corepoint and Circle, or put another way, Corepoint and Circle were being subordinated to Amstel.

[415] I am persuaded that the Evrengun Parties' submissions here are correct. In terms of the increase in interest rates being 'secret', it should be recalled that Mr. McKenzie ceased to be a Director on or about 12th January 2018, thus there was no reason why the Board (i.e., Mr. Evrengun), in May 2018, should have involved Mr. McKenzie in this decision. In terms of the increase being a 'perfectly reasonable response', I agree. From the Company's perspective, it was not unreasonable to be made to owe increased interest, and in one respect, interest on a loan where it previously had owed none, where the new interest was (as I find it was) at a commercially reasonable and indeed entirely unexceptional rate. This was neither unfair nor prejudicial towards Mr. McKenzie. I can well understand that Mr. Evrengun, in his capacity as lender or representative of the lender, should become under-enthusiastic to continue lending, or to delay collection of repayment, without some benefit, in circumstances where a party such as Mr. McKenzie, who had not put a single cent of cash into the business, and who Mr. Evrengun perceived to have contributed no improvement to the Company's financial bottom line and no significant new business, should make himself difficult and thereby obtain priority repayment in monthly cash instalments of his shareholder loans. It would be in the best interests of the Company to keep the Evrengun source of funding open.

[416] These events can be understood another way. Mr. McKenzie appears to have been entitled as a matter of law to demand repayment of his shareholder loans. That is uncontested. The reason he had not was because there had been some kind of informal understanding between him and Mr. Evrengun, and between them, the Company, that he would not call for payment at least until some eventual time in the future, no doubt because both gentlemen were aware that the

Company's cashflow was too tight to accommodate this. By standing on his entitlement and formally demanding repayment when he did, Mr. McKenzie was insisting upon his own commercial and legal rights; as far as Mr. McKenzie was concerned the time for according the Company informal latitude on repayment was over. It lies ill in Mr. McKenzie's mouth to complain that Mr. Evrengun should, as a result of Mr. McKenzie's own decision and actions, also treat the time for according the company informal latitude to be over. What is sauce for the goose is, after all, sauce for the gander. From the Company's perspective, it cannot sensibly be said to be contrary to its best interests for the Company to have to pay 2% points more of interest when that is still well within ordinary commercial bounds, or to have to start paying interest where previously, on account apparently of the same informal latitude accorded to the Company, no interest had previously been charged. With these increases, the Company would simply be required to do what companies normally do when they borrow; that this, to pay a commercial rate of interest. And, even then, the Company was still being accorded the latitude of not immediately having to pay off the lending in question, it being subrogated to Mr. McKenzie's debt, which was being given priority. It is easy to fall into the error of seeing a company member's interest in the company as something self-contained and somehow sacrosanct, encompassed as it is by many legal safeguards. But the banal reality, in contrast, should never be forgotten: that companies are merely vehicles for commerce; commerce is a two-way street of risk and reward; a member of a company is (generally) not forced to be or to stay a member of a company (however difficult it might be to sell an interest in a private company); and a member of a company cannot be heard to complain when the company he is a member of is merely made to embrace commercial reality or something closer to it.

[417] Concerning the retroactive interest, this is also unobjectionable in the context of this case. The start date (1st January 2018) coincides with the final breakdown in the relationship between Mr. Evrengun and Mr. McKenzie. That can more precisely be placed on or shortly after 20th December 2017, with Mr. McKenzie's refusal to meet with Mr. Evrengun in London, followed by Mr. Evrengun inviting him on 5th January 2018 to resign his directorships. It was in an email of 9th January 2018 that Mr. McKenzie intimated that as soon as his employment was terminated, he would serve a formal demand for all debt due to him, payable immediately. In terms of the time for informal latitude being over, it is clear that both Mr. McKenzie and Mr. Evrengun decided to fall back onto their strict legal rights at or around the beginning of January 2018. It is in my respectful judgment justifiable for Mr. Evrengun to require the Company to pay interest on debt at a reasonable commercial rate from the beginning of January 2018.

[418] A further point arises in relation to the increase in interest rates. The McKenzie Parties argued that this represented the first part of Mr. Evrengun's alleged scheme to force out Mr. McKenzie, by allowing Mr. Evrengun to increase the debt burden on the Company in his favour, so as to benefit himself and reduce the value of Mr. McKenzie's interests on any subsequent buy-out or redemption of Mr. McKenzie's interests.

[419] As a matter of chronology, in my judgment, this is not borne out by the evidence. Mr. McKenzie served his Statutory Demands on 18th May 2018. On 25th May 2018 Mr. Evrengun candidly shared with Mr. McKenzie that he (Mr. Evrengun) was discussing with lawyers to put in place a 'scheme of arrangement'. A mere 6 days later, on 31st May 2018, Mr. Evrengun had a resolution passed by which, *inter alia*, the interest was increased. It was on 8th October 2018, over 4 months later, that Mr. Evrengun notified Mr. McKenzie that the Company was intending to adopt a different (indeed completely different) course from that of a 'scheme of arrangement', namely the debt for equity swap. While an increase in the Company's debt toward Mr. Evrengun would patently further his interests if such debt would be swapped for equity, the same is not necessarily the case with a scheme of arrangement between a majority of lenders and the Company. It appears to me that the increase in interest was a reaction to the settlement of Mr. McKenzie's Statutory Demands by monthly instalment payments to address the immediate commercial imbalance caused thereby. I may be wrong, but I do not think Mr. Evrengun was the far-sighted, calculating, masterly manipulator that Mr. McKenzie would have him be. Again, I may be wrong, but I think Mr. Evrengun's candour in laying out his intentions for the Company before Mr. McKenzie makes it unlikely that he was pursuing a different direction below the surface. That would have required an uncommon aptitude for manipulation which is, in my view, having seen Mr. Evrengun as a witness and having read many of his communications, unlikely.

3.9. The draft Shareholders Agreement

[420] As explained in an earlier segment of this Judgment, I found as a matter of fact that the draft SHA had not been agreed, nor had it been finalized.

[421] Nonetheless, the McKenzie Parties argued that it should still be treated as governing the parties' conduct. The McKenzie Parties submit that an estoppel by convention arose which prevented the Evrengun parties acting inconsistently with the terms of the draft SHA. Alternatively, the

McKenzie Parties argued that the arrangements set out in the draft SHA gave rise to rights, expectations or obligations otherwise enforceable in equity. The McKenzie Parties say that it is plain from the evidence that the agreement for Mr. McKenzie to devote his time and energy to the AMS Group, and indeed to restructure the Group in the way that took place in 2014 to ensure the 70/30 split, was on the basis of an understanding that there would be some equality of arms between the two sides in the manner proposed in the draft SHA. Mr. Evrengun did not have free reign as majority shareholder, they said. Whilst the Company was not strictly *formed* on that basis, it was restructured and re-purposed on that basis, argued the McKenzie Parties and they contended that Mr. McKenzie agreed to work for the Company on that basis, and equity should not allow the Evrengun Parties to ride roughshod over that understanding: **Re Guidezone Ltd**.[232] Where a 'gentleman's agreement' exists which has not been reduced to a contractually binding agreement, that may give rise to a legitimate expectation to found an unfair prejudice petition: **VB Football Assets v Blackpool Football Club (Properties) Ltd**.[233] See, also, [118b.] of this Court's judgment in **CH Trustees SA v Omega Services Group Limited**[234] which summarises that role of equitable considerations. The best evidence of the 'gentleman's agreement' that existed here is the SHA, say the McKenzie Parties, even if it was left unsigned, certainly at least as to the core understandings between the parties.

[422] The McKenzie Parties argued that a third means of framing the issue is perhaps similar to treating the Company as akin to a quasi-partnership. That is a proper way to analyse the relationship, they argued. There was trust and confidence between the parties, and they are now wanting to part ways because that has broken down. They observed that Mr. Evrengun accepts the relationship of trust and confidence at §19 of his first affidavit. Moreover, the McKenzie Parties argued that it is plain from the way that negotiations have proceeded since the relationship broke down that both sides recognised that it would be unfair to leave the minority's investment locked in once excluded from management: see Lord Wilberforce's speech in **Re Westbourne Galleries**.[235] The McKenzie Parties said the fact that a draft SHA may not have been formally agreed is not inconsistent with this having been a quasi-partnership, and the whole point of the draft SHA (even if, on this hypothesis, not agreed) was to give similar protections to those as would have been in existence in a partnership. Whilst the agreement, if agreed, would have

[232] [2001] BCC 692 at [175].
[233] [2017] EWHC 2767 (Ch) [92], []93], [320] and [321].
[234] BVIHCM 2015/0037 (unreported, decided 22nd November 2016) (Wallbank J. (Ag.)).
[235] [1973] AC 360.

displaced any partnership (see the no partnership clause 9), a quasi-partnership should be found to have run until then, they contended.

[423] The Evrengun Parties countered these submissions with the following points:

> "Lord Hoffmann made clear in O'Neill that a "legitimate expectation" was not by itself sufficient to ground a claim of unfair prejudice – such an expectation is relevant only when equitable principles would make it unfair for a party to exercise its rights under the articles: O'Neill at 1102. As explained by Lewison J in Dashfield v Davidson [2008] BCC 662 at [65]: However, it is clear from Lord Hoffmann's application of these principles to the facts of the case that a promise binding in equity is more than a reasonable and legitimate expectation. Mr O'Neill had a reasonable and legitimate expectation that he would be allotted more shares, in the sense that it reasonably appeared likely to happen. But Mr Phillips gave no promise to that effect. So there was no equity binding Mr Phillips' conscience and s.459 should not be used to impose on someone an obligation to which he had never agreed …
>
> Traditional equitable principles will not hold the majority to an agreement, promise or understanding not enforceable in law unless the minority has acted in reliance on it: Re Guidezone Ltd [2001] BCC 692 at [175]. As Jonathan Parker J pointed out in that passage, whilst the reliance requirement will be readily fulfilled if the promise is made at the time the company is formed, the same will not be true of promises made subsequently.
>
> Similarly, in Re Edwardian Group Ltd [2018] EWHC 1715 (Ch), Fancourt J said at [127] that: [T]here must be something in the nature of the 'special underlying obligation' or the circumstances in which it arises that makes it enforceable in equity at the suit of the petitioner. An unenforceable agreement or understanding will not suffice: there must be something that makes it unconscionable for those controlling the company to disregard the agreement or understanding, and that will generally be found where there is mutuality between the shareholders as to the benefit and burden of the obligation, or some detrimental reliance or change of position that makes it inequitable to deny the obligation. … . In that case, although it was found that there was an understanding pursuant to which HS (the younger brother) would be given an opportunity by JS (the elder brother) to prove himself fit for a management role in the company, there was no mutuality about the understanding and so it was held at [213] that there was no quasi-partnership.
>
> In general, the Court should be reluctant to give relief in respect of an incomplete agreement in a commercial context, because it would inhibit the efficient pursuit of commercial negotiations: Crossco No.4 v Jolan [2012] 1 P.& C.R 16 at [133] per Arden LJ and Hollington at §7-38. O'Neill itself is of course a case where it was found that the negotiations did not give rise to a sufficiently clear promise for the Court to enforce.
>
> The McKenzie Parties place reliance on the reference to a "gentleman's agreement" in VB Football Assets v Blackpool Football Club (Properties) Ltd [2017] EWHC 2767 (Ch). Marcus Smith J held that, whilst the parties had entered into detailed agreements, they had elected not to reduce one aspect of that agreement to writing because it would have had adverse tax consequences [321]. However, the Judge

found in that case that the parties had agreed there would be a "quasi-partnership" [92]-[94]. VB Football therefore does not water down the traditional requirement that the non-contractual understanding be enforceable under some traditional equitable principle requiring reliance and/or mutuality.

[424] The Evrengun Parties furthermore contend that the McKenzie Parties' case as to estoppel by convention is bad in law. They contend that it is trite to say that an estoppel cannot operate as a sword (that is, to establish substantive rights on which a claim may be brought) rather than a shield. The McKenzie Parties' case ignores that an estoppel by convention cannot bring the SHA into being as a matter of law. Nor have any of the elements of an estoppel by convention, such as detrimental reliance, been pleaded. If there was no SHA, then a large number of the allegations of unfair prejudice will fail, they argued, because they are pleaded only as constituting breaches of the SHA rather than as otherwise constituting unfairly prejudicial conduct.

[425] As to whether or not there had been a quasi-partnership between Mr. McKenzie and Mr. Evrengun, the Evrengun Parties submitted that the principles in relation to quasi-partnership are as follows:

(1) In order for equitable principles to be applied to the parties' relationship, the elements required are the same as those identified in relation to winding up on the just and equitable ground in Lord Wilberforce's speech in **Ebrahimi v Westbourne Galleries**[236]– see Joffe on Minority Shareholders: Law, Practice & Procedure (6th edn., Oxford University Press 2018) ('Joffe') at §6.91. The famous passage from that speech is as follows:

> "Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can 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… , 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."

[236] [1973] AC 360.

(2) It is not necessary for each of the elements identified by Lord Wilberforce to be present, and each case will turn on its own facts: Joffe at §6.94, and this Court's application of the passage from **Westbourne Galleries** in **Soemarli Lie v Ng Min Hong & Ors**[237] at [254]-[255].

(3) As to the 'personal relationship' factor, it is important to bear in mind that not every working relationship will justify equitable intervention. However, the typical examples are family companies, or partnership businesses which are then incorporated into limited companies: Joffe at §6.99. It is also possible for a relationship of quasi-partnership to cease to be one at a later date, because of supervening events – for instance, because of the destruction of the relationship of trust and confidence by one of the partners, or a petitioner accepting his exclusion without disposing of his shares: Joffe at §6.102.

(4) The circumstances in which an unenforceable agreement can found relief under s.184I. Discussing the equivalent jurisdiction in England, Judge David Cook said in **Khoushkhou v Cooper**[238] at [24] that:

> "…in principle, such an agreement might be made at the time of or after he became a member, and need not be an agreement that would be separately enforceable as a matter of law. Thus, for instance, it would not necessarily be a bar to the equitable jurisdiction if the agreement made lacked the certainty to be enforceable as a contract. But in my judgment this does not mean that any assurance however vague can be treated as sufficient; the members must have reached a sufficient degree of agreement that it can be said that there has been a breach of good faith in departing from it."

(5) In **Cha Yang v Staray Capital Limited**,[239] Bannister J held that no significance attached to the protagonists' description of themselves as 'partners', because this is such a common expression in business usage.

[426] On quasi-partnership, the Evrengun Parties case is, in summary, as follows:

(1) no quasi-partnership is pleaded, and therefore no such case is open to the McKenzie Parties;

(2) if it is, then there was no quasi-partnership at the outset or at any time thereafter, and

[237] BVIHC(Com) 2020/0147 (unreported, delivered 25th October 2021) (Wallbank J. (Ag.)).
[238] [2014] EWHC 1087 (Ch).
[239] BVICH (Com) 2011/0138 (unreported, delivered 13th February 2013).

(3) if there was a quasi-partnership, it ceased to exist in or around October 2017 as a result of Mr McKenzie's conduct.

[427] Developing these points, the Evrengun Parties submitted the following:

(1) It is not entirely clear whether the McKenzie Parties are also running a 'quasi-partnership' case. They appear to have introduced this on the basis that 'the arrangements…gave rise to rights, expectations or obligations otherwise enforceable in equity', which is said to be 'akin to a quasi-partnership.' No such case is pleaded, notwithstanding that the Statement of Ancillary Claim was amended only very shortly before trial to add a case of estoppel by convention. In the circumstances, no such case is open to the McKenzie Parties, whether it is put on the basis of quasi-partnership or not. The first former description of this case ('otherwise enforceable in equity') is not a free-standing or separate principle, but only a description of the quasi-partnership principles.

(2) If such a case is open to the McKenzie Parties at all, then there was no quasi-partnership from the outset, because:

a. Of Lord Wilberforce's three factors in Westbourne Galleries:

i. The business was not formed based on 'mutual association'. As noted above, not every close working relationship can found a quasi-partnership. This was a Company in which the responsibilities were clearly delineated, with Mr. McKenzie working on operational matters and Mr. Evrengun handling the financial side of things. Both men received regular remuneration for their roles. It was a conventional structure which did not resemble a partnership.

ii. There was an agreement that the shareholders would participate in the conduct of the business. However (i) this must be seen through the lens described in the preceding paragraph, namely that both men also received remuneration akin to employment or consultancy payments, and (ii) the presence of only one factor is not necessarily sufficient to constitute a quasi-partnership.

(3) There was no restriction on Mr. McKenzie transferring his shares. There would have been such a restriction under the draft SHA, although even then the drag/tag and Right of First Refusal mechanisms were such that Mr. McKenzie would still have been free to leave the business but would have had to offer them to Mr. Evrengun first.

(4) Contrary to Mr. McKenzie's evidence, there was no 'equal say' principle in the governance of the Company – as set out above, Mr. McKenzie's evidence in that regard was a fiction. On the contrary, it was always understood that Mr. Evrengun had ultimate decision-making ability in the Company. Mr. McKenzie never sought to invoke the alleged 'equal say' principle to prevent transactions he was uncomfortable with, such as the acquisition of CTS BVI. This is a strong pointer in favour of the understanding being that the Company would be governed according to its Articles and the BCA in the ordinary way, based on the respective shareholdings.

(5) The draft SHA also contained a 'No Partnership' clause. Mr. McKenzie accepted in evidence that this meant there was (at least) 'no common law partnership created, no.' Whilst that is not conclusive, it is a good indicator that, on the McKenzie Parties' own case which would have it that the draft SHA reflected the parties' understandings, the parties did not intend for there to be a relationship resembling a partnership between them.

(6) In any event, even if there was a quasi-partnership until October 2017, Mr. McKenzie's subsequent conduct destroyed it. In this regard, it is important to bear in mind that there are a number of cases where the Court has held that a company has ceased to be a quasi-partnership where the relationship of trust and confidence has broken down and/or one party has ceased to be an active participant in the business: **Re D.R. Chemicals Ltd**[240] per Peter Gibson J, and also Briggs J's discussion in **Sikorski v Sikorski**[241] of business relationships being terminable on reasonable notice.

(7) By the time of Mr McKenzie's resignation and/or the Debt-for-Equity Swap, no equitable constraints applied to the relationship. Mr. McKenzie's destruction of the relationship included:

a. Mr. McKenzie's acceptance in evidence that he was 'angry' with Mr. Evrengun by late 2017 onwards. He subsequently accepted that, by January 2018, the 'relationship ha[d] broken down completely' and that 'no purpose would have been served' by his continuing as a director.

b. His threats to serve a Statutory Demand on the Company, commencing in January 2018.

[240] (1989) 5 BCC 39.
[241] [2012] EWHC 1613 (Ch).

c. Demanding repayment of the Amstel shareholder loan in the amount of US$600,000, knowing that the true figure was in fact $400,000 (or, at best, $407,000).

d. Making accusations of impropriety against Mr. Evrengun in relation to the accounting at the Company and the subsidiaries but refusing to appoint an expert to look into those matters or responding to Mr. Evrengun's reasonable suggestions as to how he might otherwise get insight into the Company's accounts (the accusations included matters which Mr. McKenzie accepted that he did not himself understand). Strikingly, when asked to explain how he thought Mr. Evrengun had moved his personal debt onto the Company's balance sheet, Mr. McKenzie was not able to answer that question meaningfully. That refusal was underscored by Mr. McKenzie's failure to even present his questions to the AMS Group's financial controller in October 2018, as requested by Mr Evrengun.

e. Crafting his correspondence in anticipation of a dispute with Mr. Evrengun.

f. In his email of 20th October 2017, accusing Mr. Evrengun out of the blue of transferring his personal debt in connection with the acquisition of the Company onto its own balance sheet. In a subsequent email of 7th November 2017, Mr. McKenzie then refused to accept Mr. Evrengun's assurance that this is not what he had done. Mr. Evrengun was understandably upset by this allegation, which he fairly described as 'ignorant'.

g. Seeking to rely on the draft SHA, which had not in fact been agreed.

h. Refusing to discuss a valuation of his shares at a reasonable valuation, perhaps best summed up when Mr. McKenzie told the Court that he considered that 'morally' the increase in the Company's costs affected the value of his shares, and Mr. Evrengun ought to 'accept responsibility for his failures and you know, and make me a fair offer.' The reality, and the whole tenor of Mr. McKenzie's evidence, was that he was unwilling to settle for anything less than his chosen price.

[428] Having considered these arguments and heard the parties' respective Counsel argue them orally at quite some length, I am persuaded that the Evrengun Parties's submissions on these points are to be preferred.

[429] As to whether an estoppel by convention arose, the McKenzie Parties' learned Counsel went to considerable effort to portray the terms of the SHA as being deployed as a shield and not a sword. The Evrengun Parties' learned Counsel countered this by saying that it is of course always possible to rearrange words to make the SHA appear to be a shield when, in fact, the McKenzie Parties wish to use it as a sword for prosecuting their claims.

[430] That is indeed how the McKenzie Parties are relying upon the draft SHA; i.e. they wish to use the draft SHA as a sword (an offensive weapon) as opposed to as a shield (a defensive blocking measure). What they are trying to do is to say: 'Mr. Evrengun, you acted in a manner contrary to the terms of the draft SHA so we are now suing you to get relief from your harmful conduct.' The McKenzie Parties are using the draft SHA as a vehicle for their claims. Consequently, it is not permissible for them to rely upon the doctrine of estoppel by convention. If there may occasionally be a fine line between using a 'convention' as a sword or a shield (since it is indeed possible in the material world to use a shield, primarily intended for passive use, as an offensive weapon), the McKenzie Parties fall on the wrong side of any such line. That is because there was no 'convention' to begin with and they are trying to use the doctrine to bring into being terms of conduct which they can then use to attack the Evrengun Parties with.

[431] I also accept the Evrengun Parties' point that none of the elements of an estoppel by convention have been pleaded. Thus, the McKenzie Parties had not clearly set out in what way(s) they purported to have relied upon the draft SHA to their detriment.

[432] This is an important omission and not just on grounds of procedural justice. On a purely factual plane, all the conduct of Mr. McKenzie (as the minority shareholder) throughout the history of the matter can be construed as being governed on the basis of the standard constitutional terms applicable to ordinary minority shareholders in BVI companies and on the basis of the understandings (whether they were informal, semi-formal or formal) that Mr. McKenzie had reached with Mr. Evrengun as to the basis for Mr. McKenzie's day-to-day executive involvement in the management of the Company and for his increased shareholding in the

Company. Those understanding had been reached, and acted upon, considerably prior to the draft SHA was produced. That, itself, is evidentially fatal to the McKenzie Parties' attempt to invoke estoppel by convention.

[433] But their position is weakened even further because the McKenzie Parties can point to no identifiable instances whatsoever where Mr. McKenzie in fact relied (to his detriment or otherwise) upon the terms of the draft SHA. Nor is there anything that makes it unconscionable for those controlling the company, i.e., the Evrengun Parties, to disregard the terms of the draft SHA, since the parties' relationship was fully and adequately governed by other standard provisions and earlier understandings. These factors are completely fatal to the McKenzie Parties' estoppel by convention argument.

[434] The McKenzie Parties' argument that the relationship between Mr. McKenzie and Mr. Evrengun gave rise to rights, expectations or obligations otherwise enforceable in equity as reflected in the draft SHA fairs no better. The draft SHA is, of course, itself not an enforceable agreement. But what defeats this argument entirely is that these parties' understandings were otherwise already entirely covered by their prior understandings and agreements and the standard terms of participation in a BVI company as a shareholder. The terms of the draft SHA went beyond those and were left unused.

[435] In relation to quasi-partnership, I accept all the Evrengun Parties' submissions in this regard. I am persuaded that none existed.

[436] In my respectful judgment, the association between Mr. Evrengun and Mr. McKenzie was a purely commercial one. I reach that conclusion for the following reasons.

(1) Their association was not formed on the basis of a personal relationship involving mutual confidence, nor a pre-existing partnership. Mr. Evrengun and Mr. McKenzie had only met a few times and had built up only a shallow acquaintance prior to Mr. Evrengun acquiring the majority shareholding in the Company. At that time, Mr. McKenzie was not a majority shareholder in the Company – he was a minority shareholder and director but not in any executive role in relation to the Company. All that happened was that Mr. Evrengun recognised that Mr. McKenzie appeared to have the necessary contacts that would afford Mr. Evrengun a way into the Company to purchase a majority shareholding, and then that in theory Mr. McKenzie had the

qualifications and skillset to be a potentially useful Managing Director. Mr. Evrengun, in my respectful judgment, saw in Mr. McKenzie no more than someone, already attached to the Company, who could provide a number of useful services. Mr. Evrengun did not buy his shareholding in the Company because Mr. McKenzie was a member and director, nor because he was already in business with Mr. McKenzie or particularly wanted or needed to work with Mr. McKenzie in the future. Mr. Evrengun bought his shareholding in the Company because of what the Company was and what he thought it could become. Mr. McKenzie's connection with the Company was accidental. Usefully accidental, perhaps, at the time, but accidental, nonetheless. There is nothing to indicate that Mr. Evrengun ever intended to give up, or otherwise to modify, his majority voting power to remove Mr. McKenzie from Board and executive positions should matters come to that. Indeed, it would be surprising if Mr. Evrengun should have done so. Mr. McKenzie was not well known to Mr. Evrengun, and Mr. Evrengun was going to, and did, spend a lot of his own money to buy his majority shareholding. It would have been fundamentally unattractive to someone in Mr. Evrengun's position to make such a considerable investment and at the same time to entrench into the Company someone who was effectively a stranger and an unknown quality to him. There is no evidence that any such entrenchment was demanded by Mr. McKenzie, nor offered by Mr. Evrengun, nor that especial deference to Mr. McKenzie's position in relation to the Company was going to be a prerequisite of their association.

(2) Nor was their association continued on the basis of a quasi-partnership. Indeed, their association was short-lived. Their working together appears to have led to mutual enlightenment as to their respective characters, and weaknesses. Mr. McKenzie and Mr. Evrengun got to know each other, and, at some point mutual irritation came to trump tolerance. Whilst Mr. Evrengun was, in the earlier days, prepared to treat Mr. McKenzie as a 'key man', as shown, for example, by suggesting 'key man insurance' for him, and was prepared to contemplate a shareholders' agreement between them, Mr. Evrengun did not progress preparation and conclusion of the draft SHA and he went so far as to query the future of their working relationship. Whatever assumptions of confidence and trust there had been between them, such assumptions became progressively dispelled until they were non-existent.

(3) I say assumptions of confidence and trust because it does not make sense to speak of actual confidence and trust between persons who were effectively strangers. A

highpoint in the McKenzie Parties' contentions for a quasi-partnership was that Mr. Evrengun had given evidence that there had been a relationship of confidence and trust between them. Frankly, in my respectful judgment, it would be a mistake to read too much into that. The expression 'a relationship of confidence and trust' is not a term of art. Nor is it a hard-edged concept. Nor is it some magic formula which brings a quasi-partnership into being. After all, even a regular employee is engaged by a company or organization on the basis of some degree of confidence and trust. It would be extremely uncommon for a company or organization to employ someone in whom it had no trust nor confidence whatsoever. So much must be obvious. What is also obvious is that the risk and potential reward of engaging a relative stranger is reflected in a company's or organization's ability to terminate the engagement on the one hand, and on the other hand to compensate that staff member on a 'pay as you work' (e.g., monthly 'salary') basis.

(4) Whether or not there is a sufficient relationship of confidence and trust to evidence a quasi-partnership is a question of fact and degree. Here, Mr. McKenzie was paid on a monthly cash basis for his services to the Company and its Group, akin, in reality, to being paid a salary. His compensation was not dependent upon the performance of the business, as where there is a partnership and the partners draw upon the profits of the business, or where members of a company are content to take, in reality (i.e., irrespective of how payments might be characterized for tax or other purposes by those concerned), only dividends. Here, also, Mr. McKenzie's position as director had always been subject to the exercise of Mr. Evrengun's majority voting rights, and when Mr. Evrengun reminded Mr. McKenzie of this when he invited Mr. McKenzie to resign his directorships, Mr. McKenzie ultimately deferred to this. Mr. McKenzie acknowledged in his evidence that he knew he was in a weak position. If, on the other hand, Mr. McKenzie felt sufficiently certain that Mr. Evrengun could not properly use his majority voting rights to terminate his directorships and therewith his paid executive functions, there is no sign of such certitude. Mr. McKenzie did not apply to the court to enjoin Mr. Evrengun from doing so on the basis of the draft SHA or at all. There is no documentary evidence, nor evidence by way of conduct, that any such restriction on the use of Mr. Evrengun's voting powers had been agreed.

(5) There is moreover no evidence of an agreement or understanding that Mr. McKenzie would have a right to participate in the conduct of the business irrespective of Mr. Evrengun's wishes. Indeed, there is no reason why there should have been: Mr.

McKenzie had been no more than a minority shareholder with no day-to-day executive involvement in the Company before Mr. Evrengun bought his shareholding. Had Mr. McKenzie previously been a majority shareholder, or a day-to-day executive Director, or otherwise a driving force behind the company the position might be different.

(6) Moreover, there was no restriction upon a transfer of Mr. McKenzie's interest in the Company.

(7) These factors were of course only indicatively identified in **Ebrahimi v Westbourne Galleries**[242] but their absence here is indicative that the association between Mr. McKenzie and Mr. Evrengun had only been purely commercial. I have no hesitation finding that this was the case.

[437] Thus, I am persuaded that no quasi-partnership arose here, and moreover, that there was nothing 'akin to a quasi-partnership' here either.

[438] This finding has an impact upon the issue whether or not a minority discount should be applied for valuation purposes. But in the present segment of this Judgment, it goes to the question whether the McKenzie Parties can sustain claims on the basis of breach of the draft SHA. In my respectful judgment they cannot. All those heads that are stated as being based upon breach of the draft SHA, or as being contrary to the draft SHA, must therefore fail.

3.10. Director Services Agreement

[439] The McKenzie Parties frame one head of claim as '[f]ailing to honour a Director Services Agreement that Mr. McKenzie had prepared as a standard agreement for all Group subsidiary directors'. As mentioned above, the 'Director Services Agreement' was a document that Mr. McKenzie had prepared but had not communicated in any shape or form to Mr. Evrengun before Mr. McKenzie purported to rely upon it. The McKenzie Parties withdrew this head of claim, which was a legal impossibility because none of the requisite elements for a binding and enforceable contract were present. No determination of this head of claim is thus required.

[242] [1973] AC 360.

3.11. Failure to produce accounts

[440] The McKenzie Parties claimed that the affairs of the Company have been conducted in a manner which is unfairly prejudicial, unfairly discriminatory and/or oppressive to Amstel as a minority shareholder of the Company on account of a failure to provide accounts for the Company for the years 2013, 2014, 2015, 2016 and 2017 until November 2017.

[441] Although this allegation was framed as a head of claim in its own right, at trial, the McKenzie Parties sought to rely upon this to support their case that Mr. Evrengun had behaved unreasonably in his negotiations with Mr. McKenzie and had demonstrated a lack of transparency about the debt position of the Company, and how it arose.

[442] The Evrengun Parties argued that:

(1) As is well-known, a BVI incorporated company has no obligation to produce accounts (still less audited ones). The obligation is to keep sufficient records to explain the company's transactions and enable the financial position to be determined with reasonable accuracy, under s.98(2) of the BVI BCA. There is no allegation that this provision was breached, still less any substantiation thereof.

(2) This allegation must fail for (at least) two further reasons:

(a) Mr McKenzie does not allege that he asked for accounts to be produced or delivered to him at all, and certainly not prior to 2017. It is not clear how he can complain that accounts were therefore not produced.

(b) Whether the underlying records were sufficient is a matter which could only be proved by expert evidence. No such evidence has been adduced. The Court is in no position to make any determination about the merits of these allegations.

(3) Then, there is a jumble of allegations made about the treatment of various items in the accounts which were eventually prepared. In particular, it is alleged that (i) the failure to procure proper treatment of loans and operating expenses taken out by the Company reduced the net asset value of the Company, and (ii) operating expenses were used to mask the insolvency of the AMS Group subsidiaries. These are detailed matters of appropriate accounting. No evidence has been led of accounting practice, but as noted above, the McKenzie Parties' own expert agrees that this did not reduce

the value of the Company. In the absence of any evidence on this, it is not a claim which can succeed.

.

[443] I agree, and it appears that the McKenzie Parties' learned Counsel saw the force in these points by, in essence, downgrading this head to a supporting role for their main allegations concerning alleged lack of transparency. As a head of claim in its own right, it is unsustainable for the reasons given by the Evrengun Parties. The McKenzie Parties are not entitled to complain that Mr. Evrengun failed to do something he (and through him the Company) had no obligation to do.

3.12. Failing to pay Mr. McKenzie his due salary and expenses.

[444] One of the McKenzie Parties' heads of claim was based upon an alleged failure to pay Mr. McKenzie his due salary and expenses.

[445] This head was not pursued as a main issue or with any vigour during the trial. The Evrengun Parties nonetheless met this allegation comprehensively with the following submissions, which I accept:

> "The Ancillary Claimants allege that Mr McKenzie was not paid his "due salary and expenses". It may be that this is said to form part of the "Cavendish Debt", which is described as "unpaid salary, commission and expenses". If so, then that sum has been settled in full.
>
> However, if a further claim to salary is made, then any claim must fail:
>
> (1) It is accepted that Cavendish was entitled to a Management Fee of USD 350,000 per annum. The debate appears to be only as to whether Mr McKenzie was personally entitled to a salary, rather than Cavendish being entitled to such a Fee.
> (2) Whilst the parties occasionally used the word 'salary' to describe the relationship, it is clear that this was not what was intended in substance. Mr McKenzie's principal desire was for the payment to be tax-free, as his email in January 2013 discussing making his "salary" tax-free made clear.
> (3) Mr McKenzie wrote on 28 August 2013 that "…I propose to use my own management company [Cavendish]to contract with AMS for the payment of my annual salary ($350k) and then I will have an [sic] Directors Service/Employment contract with Cavendish to show the UK Revenue if necessary." As was clear from that email, Mr McKenzie proposed that his compensation should be structured as a payment to Cavendish. Consistent with that position, unpaid sums each month were booked in Cavendish's account with the Company as a debt owed to Cavendish.

(4) Moreover, no payroll taxes or social security were ever paid on Mr McKenzie's compensation, as would have been required if he were an employee.
(5) In any event, a claim for unpaid salary does not relate to the "affairs of the company" and cannot therefore be brought in an action under s.184I of the Business Companies Act."

3.13. Alleged failure to procure proper treatment of loans

[446] The McKenzie Parties alleged that the Evrengun Parties failed to procure proper treatment of loans and other operating expenses taken out by the Company in that they have been on loaned to the Group Subsidiaries with no reciprocal intercompany receivables credited back to the Company, thus reducing the net asset value of the Company to the detriment of Amstel.

[447] The McKenzie Parties' own expert on financial and valuation issues agreed that such an alleged failure did not reduce the value of the Company. It is thus an allegation which their own expert considers is baseless. This allegation thus fails.

3.14. Alleged masking of insolvency

[448] The McKenzie Parties alleged that the Evrengun Parties had used operating expenses to mask the insolvency or doubtful solvency of the Group Subsidiaries, and filing improper and inaccurate statutory/audited accounts with the FSC and other regulators. This, self-evidently, was an allegation of the utmost gravity. It is also highly pejorative, with the potential to be extremely, and indeed fatally, damaging to Mr. Evrengun's reputation. Yet this was an allegation which Mr. McKenzie seems to have included, and persisted in including, upon the suggestion of one of his professional colleagues that he would informally consult in relation to this matter. That colleague appears to have had no direct knowledge of the matter. Mr. McKenzie himself appears not to have understood any of the mechanics (such as they might have been) of the alleged masking of insolvency. It seems that Mr. McKenzie blindly pressed this allegation up to trial. No evidence was led to support it and was not one that could be made out. It was doomed from the start to fail.

3.15. Whether the AMCIN transaction was legitimate.

[449] The McKenzie Parties complain about the steps taken by the Evrengun Parties (in early 2021) allegedly to strip the Company of all of its operating subsidiaries, without any prior notice to the McKenzie Parties (i.e., the transfer of the Company's assets to AMCIN).

[450] The McKenzie Parties contend that on 1st January 2021, without notice to the McKenzie Parties, the Company apparently transferred all of its underlying operating companies to a Dutch company, AMCIN, in exchange for one year's turnover of each of the subsidiaries – or approximately US$9.5 million. AMCIN is a company in which Mr. Evrengun owns an approximate 89% interest. The McKenzie Parties infer that the true reason for the transfer was to try to frustrate enforcement of relief that would be granted to them in these proceedings. The McKenzie Parties rely upon this conduct as additional unfairly prejudicial conduct.

[451] The McKenzie Parties observe that Mr. Evrengun had represented to the Cayman authorities that AMCIN would assume the liability to pay Amstel the fair price for its shares. If such assumption has occurred, they say, the terms of it have not been disclosed. They say that the McKenzie Parties, and the Court, remain largely in the dark about this disposal of assets to AMCIN, the reasons it occurred or its terms. Indeed, there is scant evidence that it has in fact occurred. Extraordinarily, save for a 19th January 2021 resolution signed by one subsidiary (AMD Trustees (HK) Limited) recording the transfer of that company for US$32,000, no agreements or resolutions or any similar documents have been disclosed by the Evrengun Parties recording the terms of this purported transaction. The only other material information the Evrengun Parties (or the Court) has been told about this transaction is that it was in consideration of one year's turnover of the underlying companies: or about US$9.5 million. On the basis that no-one has ever suggested that a single multiple of the AMS Group's turnover was an adequate value (a multiple of at least 1.25 has always been common ground), this appears to have been a disposition at an undervalue, argue the McKenzie Parties. Nonetheless, the McKenzie Parties say that the truth of the matter is that Mr. Evrengun has gutted the Company of all of its assets, apparently leaving it with only an approximate US$600,000 receivable from AMCIN as its only asset.

[452] They argued that, on any view, this was unfairly prejudicial conduct:

(1) It was a transaction entered into at an undervalue, which preferred Mr. Evrengun's interests to those of the Company or its shareholder.

(2) It was a transaction entered into for an improper purpose. The only purpose pleaded (§89 of the Re-Amended Defence) is to deal with '*the bank account closures pleaded at paragraph 87(d) above'*. There is no §87(d). But, moreover, there is no document disclosed which shows any bank threating to close any account of the Company's, let alone that the AMCIN restructuring was required in response.

(3) It was a breach of section 175 of the BCA.

(4) It was in breach of the draft SHA.

[453] The McKenzie Parties further submit that for the purpose of fixing the relief and appropriate valuation of a share buy-out, the AMCIN transactions should be treated as if they had not occurred.

[454] The Evrengun Parties explained the AMCIN transaction thus:

(1) AMCIN Holdings BV ("AMCIN") was incorporated on 5th June 2020 – Mr. Evrengun is its majority shareholder.

(2) The context for the creation of AMCIN was two-fold. First, a number of major banks (including HSBC, Credit Suisse and Barclays) had closed the accounts of AMS Group operating companies in the BVI. Second, it had long been intended to merge Circle Partners and the AMS Group (since as long ago as 2015).

(3) In early 2020, it was contemplated that the subsidiaries in the AMS Group would be transferred to AMCIN, in preparation for the merger. This ultimately took place on 1st January 2021, following receipt of the necessary regulatory approvals.

(4) The purchase price for the transfer was equal to the entire turnover for 2019 of the subsidiaries in the AMS Group. This was converted into a receivable in the accounts of AMCIN, in the amount of USD 9,500,000.

(5) Having obtained legal advice to this effect, the Company did not notify Amstel of the intended transfer because, having given notice of its election to dissent from the Notice of Redemption, Amstel ceased to have any rights as a member of the Company.

(6) Whilst various points are made about this lack of notification, the reality is that the Company had no obligation to do so, and in any event it has had no impact on the Company's ability to pay any claim if ordered to do so.

[455] As I have indicated earlier in this judgment, I accept the Evrengun Parties' narrative in respect of the AMCIN transaction. I am persuaded that that is more likely than the McKenzie Parties' theory. The contemporaneous correspondence reflects an intention from the beginning of Mr. Evrengun's involvement with the Company to amalgamate it with one of the Dutch companies he was also involved with. Then there was a change of accounting principles for the Company's financial statements to Dutch GAAP – a change which appears to have been adopted before even Mr. McKenzie served his statutory demands in May 2018. That can sensibly only have been intended to prefigure transferring the business of the Company and/or its Group onshore to the Netherlands. I am persuaded that there were a number of commercial and regulatory factors in play which led to this transaction. In contrast, the McKenzie Parties' theory is one-dimensional, ascribing Mr. Evrengun's motives for it purely to wishing to frustrate Mr. McKenzie's claims. Although Mr. McKenzie's claims loomed large on Mr. Evrengun's horizon, there were more things going on in Mr. Evrengun's world and mind than dealing with Mr. McKenzie.

[456] Moreover, in circumstances where, as I have found, the debt for equity swap was legitimate, the AMCIN transaction became irrelevant, coming, as it did, after the date the Company decided to redeem Mr. McKenzie's shares. That is because section 179(9) of the BCA stipulates that the fair value of the shares owned by a dissenting member is to be appraised and fixed, absent agreement:

> "as of the close of business on the day prior to the date on which the vote of members authorising the action was taken or the date on which written consent of members without a meeting was obtained, excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value is binding on the company and the dissenting member for all purposes".

[457] The result is that the AMCIN transaction can safely be disregarded.

3.16. O'Neill v Phillips offer

[458] The Evrengun Parties argued that they had offered to buy out Mr. McKenzie's shareholding in a letter dated 15th July 2019. The Evrengun Parties relied upon this as a so-called **O'Neill v Phillips**[243] 'offer' to defeat the McKenzie Parties' unfair prejudice claim. I am not persuaded that the Evrengun Parties did make such an offer. Despite their learned Counsel's valiant efforts to compress the facts into the required criteria, they did not fit in various respects. The fatal flaw was that, as the McKenzie Parties pointed out, the 'offer' was not an offer at all - only 11 days later (on 26th July 2019) the Evrengun Parties' legal representatives (Messrs Conyers) confirmed that Mr. Evrengun was in fact not making an offer to purchase Mr. McKenzie's shares and would be unable to make any offer until after a valuation had occurred. Such an offer is no offer at all and, as the McKenzie Parties argued, is an irrelevance.

3.17. Consequential matters

[459] It is common ground that a buy-out of Amstel's shares in the Company should be ordered. The basis for this is that the Ancillary Claim of the McKenzie Parties fails and, since, the Court has upheld the debt for equity swap, the Evrengun Parties claim under section 179 of the BCA succeeds.

[460] As that is the result, the valuation envisaged by that section should follow. The value, including the appropriate valuation date and whether a minority discount should be applied, are matters within the appraisers' mandate: **Olive Group Capital Ltd v Gavin Mark Mayhew**.[244] The Court can decide whether a minority discount may apply, but not whether it should.

[461] To be clear, the valuation should not treat Amstel as restored to a position as a 30% shareholder, i.e. the valuation should proceed on the basis that Amstel is a 5.6% shareholder. Moreover, the Corepoint and Circle Debts must be reflected and included in any valuation, because the McKenzie Parties' attempt to have them disregarded fails. They were legitimate and not unfairly prejudicial.

---

[243] [1999] 1 WLR 1092.
[244] BVIHCMAP 2016/0002 (unreported, delivered 7th November 2016).

[462] As to whether there should be a minority discount:

(1) In a quasi-partnership case, the general rule is that there should be no discount: **CVC Opportunity Equity Partners Ltd v Demarco Almeida**.[245]

(2) However, the Court retains a discretion to order a minority discount, for instance where a shareholder has 'made a constructive election to sever his connection with the company and thus to sell his shares': **Re Bird Precision Bellows**.[246]

(3) In a non-quasi-partnership case, it is difficult to conceive of circumstances where a minority discount will not be appropriate: **Strahan v Wilcock**.[247] **Strahan** would appear to remain good law.

[463] The Evrengun Parties' primary position is that there is no quasi-partnership in this case, and so a minority discount is appropriate. The parties are agreed that, if there is to be such a discount, it should be of 20%.

[464] As I have indicated earlier, there was no quasi-partnership here. A minority discount may be appropriate, but whether a minority discount should be applied in the present case is properly an issue for the appraisers.

[465] As also indicated earlier, the parties have been encouraged to attempt agreement on the appraisal method, given that both sides have valuation experts who have already done a considerable amount of work on valuation issues.

[466] I have refrained from commenting upon their evidence and from indicating which of their respective analyses I am more taken with. In part that is because I think it opportune to leave it to the parties to try to use their respective experts as appraisers, if possible, without undermining either side more than the other – in other words, to preserve both sides on a relatively equal footing.

[467] That said, I am afraid that in my respectful view, both sides' experts could be viewed as partial towards their respective instructing parties. I was also of the impression that each adopted a valuation method, with data inputs, which curiously led to precisely the valuation levels that

[245] [2002] BCC 684 at [41].
[246] [1984] Ch 419 at 430.
[247] [2006] BCC 320 at [17].

their instructing parties would like to see. This is perhaps being unfair on these two experts, and the main reason I have taken care not to name them in this Judgment. These observations on my part do not mean that they should not be used for the section 179 appraisal process.

[468] A further hearing will be required for further submissions on consequential matters, including as to costs.

[469] I close with a note of regret that this decision and written reasons have taken considerably longer to produce than desired. Unfair prejudice actions often involve a host of hard-fought allegations, generating much documentary evidence which needs to be carefully analysed and many authorities to be perused – many of them long – and this case has been no different. Indeed, the McKenzie Parties added unpleaded points onto an already full host of specific, and even more, general allegations. The more points are taken, the more work the Judge has to do to consider and decide them, and the more time this takes. The trial Judge must prepare the decision at the same time as dealing with other cases. Those require to be pre-read, heard, determined and the draft orders reviewed, edited, and endorsed. These may also require the judge to produce written judgments, which, for various reasons, might need to be prioritized. I say this merely to describe the reality. The particular context in which this Judgment has been produced is that, since the Court's decision was reserved on 24th November 2022, until the draft of this Judgment was circulated on 2nd November 2023, I have at the same time conducted 297 hearings, delivered 101 judgments, of which 6 have been written judgments, and have determined 68 paper applications.

[470] I take this opportunity to thank both sides' learned Counsel for their assistance with this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar