

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

**TERRITORY OF THE VIRGIN ISLANDS
BVIHCMAP2021/0016**

BETWEEN:

**[1] AMSTEL INVESTMENT HOLDINGS LIMITED
[2] CHRISTOPHER STUART MCKENZIE
[3] CAVENDISH MANAGEMENT ENTERPRISES LIMITED**

Ancillary Claim Claimants/Appellants

and

**[1] AMS HOLDINGS LIMITED
[2] CIRCLE CAPITAL LIMITED
[3] SUKRU EVRENGUN**

Ancillary Claim Defendants/Respondents

and

AMS HOLDINGS LIMITED

Claimant/Respondent

and

AMSTEL INVESTMENT HOLDINGS LIMITED

Defendant/Appellant

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Gertel Thom
The Hon. Mr. Gerard St. C Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Alex Hall Taylor QC for the Appellants/Ancillary Claimants
Ms. Tameka Davis and Ms. Allana-J Joseph for the Respondents/Ancillary
Defendants

2021: October 5;
November 8.

Interlocutory appeal — Summary judgment — Material issues of fact — Unfairly prejudicial conduct of a director — Improper purpose — Dilution of shares — Whether the learned judge erred by applying the wrong test in determining the summary judgment application — Whether judge erred in not granting summary judgment on the ancillary claim on the basis that the actions of the director were for an improper purpose and were therefore invalid

On 11th December 2019, AMS Holdings Limited (“AMS Holdings”) commenced, by fixed date claim form, a claim against its minority shareholder, Amstel Investment Holdings Limited (“Amstel”), a company wholly owned by Mr. Christopher Stuart McKenzie (“Mr. McKenzie”). By the claim, AMS Holdings sought, among other reliefs, a declaration that a Notice of Compulsory Redemption of Shares issued by it pursuant to section 176 of the BVI Business Companies Act 2004 (“the Act”), and the written offer contained therein, is valid (“the Claim” or “the section 176 Claim”). In response, Amstel, Mr. McKenzie, and Cavendish Enterprise Management Limited (“Cavendish”), a company wholly owned by Amstel, (collectively “the Ancillary Claimants” or “the appellants”) brought an ancillary claim against AMS Holdings, Circle Capital Limited (“Circle”) and Mr. Sukru Evrengun (“Mr. Evrengun”) (collectively “the Ancillary Defendants” or “the respondents”). Circle is a company wholly owned by Mr. Evrengun. By the Ancillary Claim, Amstel seeks certain relief pursuant to section 184I of the Act for alleged breaches of fiduciary and statutory duties by Mr. Evrengun as the sole director of AMS Holdings and/or breaches of a shareholders’ agreement, and for the unfairly prejudicial conduct of the affairs of AMS Holdings acting by and through Mr. Evrengun.

The various acts which the Ancillary Claimants contend were unfairly prejudicial to Amstel as a shareholder of AMS Holdings, include taking out certain loans and debts in the name of AMS Holdings without full and proper disclosure of their existence and/or the terms and conditions of such loans to the board of directors of AMS Holdings and, in particular, to Mr. McKenzie as a director of the company at that time. The other pleaded acts of unfairly prejudicial conduct include failing to declare conflicts of interests, a failure to provide accounts of the company, and, by resolutions of the sole director Mr. Evrengun, increasing the authorised share capital of the company, improperly converting loan debt into equity (debt for equity swap) and thereby diluting Amstel’s shareholding in AMS Holdings from 30 percent to approximately 5.6 percent putting it below the 10 percent threshold in section 176 of the Act necessary for a minority shareholder’s shares to be compulsorily redeemed by the company.

On 26th May 2021 the appellants (Amstel as defendant and ancillary claimant, and Mr. McKenzie and Cavendish as ancillary claimants) filed a notice of application for summary judgment on the basis that the actions of Mr. Evrengun, as the sole director of AMS Holdings, were done in breach of his duties as a director to act honestly and in the best interest of the company under section 120(1) of the Act, and for an improper purpose contrary to section

121 of the Act; and, accordingly, were invalid. The judge dismissed the application, concluding that there were material issues of fact which made it inappropriate to determine the matter on a summary judgment application.

The appellants being dissatisfied with the decision of the learned judge appealed on several grounds. The central issues for determination were: (i) whether the learned judge erred by applying the wrong test in determining the summary judgment application; and (ii) whether, on the basis of the so-called undisputed facts and on the authority of **Independent Asset Management Company Limited v Swiss Forfaiting Limited**, the judge erred in not granting summary judgment on the Ancillary Claim that the actions of Mr. Evrengun were for an improper purpose and were therefore invalid.

Held: dismissing the appeal and making the orders set out at paragraphs 48, 49 and 50 of this judgment, that:

1. The applicable test in this jurisdiction for determining proper purpose under section 121 of the BVI Business Companies Act 2004 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; **Extrasure Travel Insurances Ltd and another v Scattergood and another** [2002] EWHC 3093 (Ch.) followed.

2. The test to be applied in determining an application for summary judgment is whether there is a real as opposed to fanciful prospect of either the claim or the defence, as the case may be, succeeding. In applying this test, the court must do so having regard to the pleaded cases and to any evidence adduced before it at that stage of the proceedings. Certain categories or types of claims are not well-suited for determination by summary judgment. Claims grounded upon allegations of reprehensible conduct, including fraud or dishonesty, are ill-suited for determination by summary judgment as they are usually fact sensitive claims, relying on complex facts and involving significant questions of law and fact for determination.

Comodo Holdings Ltd v Renaissance Ventures Ltd. And another [2016] ECSCJ No. 78 followed.

3. In the instant matter, having regard to the pleaded issues and to the issues of fact which underpin any proper determination of the questions of improper purpose and unfairly prejudicial conduct, the learned judge was correct in concluding that this is not an appropriate case for ordering summary judgment. The Ancillary Claimants have pleaded allegations of breaches of fiduciary duties and statutory duties by Mr. Evrengun. They have pleaded that he acted in bad faith, dishonestly and for an improper purpose, and that he committed unfairly prejudicial, discriminatory, and oppressive conduct. These issues concern important questions of fact to be determined by the court having heard and seen the witnesses and with the benefit of cross-examination at a trial. Moreover, they also have some bearing on the court's proper determination of the substantial or dominant purpose for the restructuring of the share capital of AMS Holdings and the issuance of new shares in exchange for debt. It is for the court to decide the subjective motive or intention of the sole director when he made the decisions sought to be impugned in the Ancillary Claim, and to do so utilizing an objective approach to and assessment of all the relevant evidence, including Mr. Evrengun's explanation or evidence as to why he made the said decisions. Therefore, the judge was correct to approach the matter from the position of whether there were material issues of fact left to be determined and whether, in all the circumstances, it was appropriate to grant summary judgment.
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] ECSCJ No. 271 (delivered 24th November 2017) considered.

5. 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.

6. It has not been demonstrated that the judge committed any error of law or of principle or that he took account of irrelevant facts or failed to have regard to relevant facts when reaching his decision on the summary judgment application or that his decision was plainly or blatantly wrong. Therefore, there is no basis upon which this Court ought to disturb the judge's decision.

Dufour and others v Helenair Corporation Ltd and others (1996) 52 WIR 18 followed.

JUDGMENT

- [1] **FARARA JA [AG]:** This is an appeal by Amstel Investment Holdings Limited ("Amstel") the defendant and the first-named ancillary claimant in the proceedings in the court below, Mr. Christopher Stuart McKenzie ("Mr. McKenzie") the second-named ancillary claimant, and Cavendish Management Enterprises Limited ("Cavendish") the third-named ancillary claimant, from the decision and order of a judge of the Commercial Court made 14th June 2021 ("the judgment"). By the judgment, the learned judge dismissed the appellants' application for summary judgment ("the summary judgment application") against AMS Holdings Limited ("AMS Holdings") the claimant and first-named ancillary defendant, Circle Capital Limited ("Circle") the second-named ancillary defendant, and Mr. Sukru Evrengun ("Mr. Evrengun") the third-named ancillary defendant. By their summary judgment application, the appellants sought an order dismissing the claim brought by AMS Holdings against Amstel, and judgment on liability with respect to paragraphs 1 and 2 of the prayer in the ancillary claim for unfairly prejudicial conduct.
- [2] In the notice of application for summary judgment filed 26th May 2021, Amstel, Mr. McKenzie, and Cavendish ("the appellants") also sought orders compelling

Circle, AMS Holdings and Mr. Evrengun to acquire the shares of Amstel in AMS Holdings at fair value price, on the basis that Amstel is a 30 percent shareholder in AMS Holdings; for rectification of the register of members of AMS Holdings to record Amstel as a 30 percent shareholder in AMS Holdings; the dismissal of AMS Holdings' fixed date claim form filed 11th December 2019; for a trial to determine the applicants' entitlement to any of the other reliefs sought in the remaining paragraphs and sub-paragraphs of the prayer to the ancillary claim; directions for such a trial; striking out of the ancillary defendants' defence to the ancillary claim; alternatively, an unless order for disclosure of documents; and for such further or other relief as the court thinks fit.

- [3] Having heard the parties on the summary judgment application only, the learned judge gave an *ex-tempore* decision on 14th June 2021 dismissing the application for summary judgment. It was common ground before this Court that, at the hearing on 14th June 2021, the learned judge dealt only with the application for summary judgment and with directions for the filing of expert evidence in the fields of accountancy and valuation. The other limbs of the appellants' notice of application were not dealt with at that time. However, the formal order of the court entered subsequently, inadvertently recorded at paragraph 1, that 'the Application is dismissed'. In the recital to the said order, the expression 'the Application' is defined to encompass not only the application for summary judgment, but also the other 'applications' in the notice of application, which had not been dealt with by the judge at that time. Accordingly, it was accepted that paragraph 1 of the order was incorrect as it ought only to refer to the application for summary judgment as being dismissed. As a follow-on from the error at paragraph 1, the order also incorrectly recorded at paragraph 2, that 'the Applicants shall pay the Respondents costs of the Application to be assessed if not agreed within 21 days'. The costs order ought only to have referenced the costs relating to the summary judgment application. These errors or 'slips' at paragraphs 1 and 2 of the order were, by order of this Court, corrected on 5th October 2021 pursuant to its powers under CPR 42.10 to correct clerical errors

or mistakes in a judgment or order as a result of an accidental slip or omission ('the slip rule').

- [4] The knock-on effect of correcting the errors in the order, was to render obsolete and unnecessary the appellants' application filed 3rd September 2021 to amend their notice of appeal to add a new ground challenging the terms of paragraphs 1 and 2 of the order. Accordingly, the appellants were, on 5th October 2021, granted permission to withdraw their notice of application for permission to amend their notice of appeal filed 30th July 2021.
- [5] Also on 5th October 2021, this Court, in the exercise of its discretion and mindful of the overriding objective to deal with cases justly and proportionately and of the requirements of **Practice Direction 62D**¹ with regard to the filing of skeleton arguments, granted the respondents' oral application, which was opposed by the appellants, to extend time to file their skeleton arguments in the appeal. Accordingly, the respondents' skeleton argument filed 30th September 2021 was deemed properly filed. The issue of costs relating to both applications (the appellants' application to amend their notice of appeal and the respondents' oral application to extend time to file their skeleton arguments) were reserved to be dealt with in this judgment upon a full hearing of the appeal.

The Parties and Circle and Corepoint Debts

- [6] AMS Holdings is a company incorporated in the Territory of the Virgin Islands (the "BVI"). AMS Holdings wholly owns AMS Trustees Limited ("AMS Trustees") which holds a Class 1 Trust Licence entitling it to carry-on trust business and company management business in the BVI. Accordingly, AMS Trustees is a licensed trust company under the Banks and Trust Companies Act and regulated by the Financial Services Commission in the BVI.

¹ No. 3 of 2014 (Re-Issue).

- [7] Amstel is a company incorporated in the BVI and wholly owned by Mr. McKenzie, the third-named appellant. It is and was at all material times a minority shareholder in AMS Holdings. As at the end of 2014, Amstel held a 30 percent interest in AMS Holdings, with the remaining 70 percent being held by Circle. Mr. McKenzie was at some point the Group Managing Director (Corporate and Trust) of the AMS Group, and a director of a number of its subsidiaries. However, at the time of commencement of these proceedings in the Commercial Court, Mr. Evrengun was the sole director of AMS Holdings.
- [8] Circle, is a company incorporated in the BVI and wholly owned by Mr. Evrengun. Circle is the majority shareholder of AMS Holdings. As of July 2012, it owned a 68.15 percent interest in AMS Holdings, which shareholding was subsequently increased to 70 percent by the time of the restructuring of the share capital of AMS Holdings on 30th May 2019, the subject of the ancillary claim.
- [9] It is averred by Circle and Mr. Evrengun in these proceedings, that as of 31st May 2019, AMS Holdings was indebted to Circle for a loan amounting approximately to US\$1.79 million (“the Circle Debt”). Corepoint Select Strategies Limited (“Corepoint”) is also a BVI registered company. Its ownership is somewhat unclear, but it is accepted that Mr. Evrengun is one of its shareholders. It is averred by Circle and Mr. Evrengun that, as of 31st May 2019, AMS Holdings was indebted to Corepoint in the sum of approximately US\$3.64 million (“the Corepoint Debt”). The legitimacy of both the Circle Debt and the Corepoint Debt are disputed by the ancillary claimants. Cavendish is a company wholly owned by Amstel and, in turn, indirectly owned by Mr. McKenzie. In the Ancillary Claim, Cavendish claims a sum in excess of US\$400,000.00 for “consultancy fees” said to have been incurred by Mr. McKenzie and due from AMS Holdings. However, AMS Holdings disputes this debt on the basis that these fees have already been paid in full. It is accepted that the Circle Debt and the Corepoint Debt, if legitimate, had and would have a significant impact on the valuation of the shares in AMS Holdings and, accordingly, the fair value price to be paid to Amstel for its shares in the company.

- [10] It is common ground that AMS Holdings was also indebted to Amstel in the sum of US\$400,000.00 ("the Amstel Debt"). This is said to have arisen as a result of the transfer of an amount of US\$400,000.00 from the Circle Debt to Amstel. However, the Amstel Debt has been paid in full by AMS Holdings.

The Claim, Increase in Authorised Capital, Exchange of Debt for Equity, Dilution of Amstel's Shareholding and Section 176 Redemption Notice

- [11] On 11th December 2019, AMS Holdings commenced, by fixed date claim form, a claim against its minority shareholder, Amstel. By the claim, AMS Holdings sought a declaration that a Notice of Compulsory Redemption of Shares issued by it pursuant to section 176 of the BVI **Business Companies Act 2004**² ("the Act") and the written offer contained therein, is valid; an order compelling Amstel to designate an appraiser in accordance with section 179(9) of the Act forthwith; an order requiring Amstel's designated appraiser and AMS Holdings' designated appraiser BDO LLP ("BDO") to agree a third appraiser within 14 days of Amstel having identified its appraiser; and that the three appraisers or a majority of them shall fix the fair value of the shares owned by Amstel in AMS Holdings as of the close of business on the date of the Redemption Notice (8th August 2019) excluding any appreciation or depreciation directly or indirectly induced by the action and the value is binding on the company and Amstel for all purposes ("the Claim" or "the section 176 Claim").
- [12] The section 176 Claim is supported by the affidavit of Mr. Evrengun filed 11th December 2021 with several documents exhibited and marked "Exhibit SE 1". At paragraphs 44 to 46 of this affidavit, Mr. Evrengun avers that by written resolution of the sole director of AMS Holdings dated 30th May 2019, the authorised capital of the company was increased from US\$50,000.00 to US\$500,000.00 shares with a par value of US\$1.00 each. It is also averred that by written resolution dated 31st May 2019 the sole director issued new shares to Corepoint and Circle 'in exchange for the release by [them] of the Corepoint and Circle Debt and to do so at the Fair

² Act No. 16 of 2004, Laws of the Virgin Islands.

Market Value of the Company which as at 31st December 2018 was determined (sic) to be US\$24.89 per share'. Mr. Evrengun also averred that Corepoint 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.

[13] Accordingly, by these two written resolutions of the sole director, Mr. Evrengun, the authorised share capital of AMS Holdings was increased and new shares were issued to Circle Capital and Corepoint Select in exchange for the Circle Debt and Corepoint Debt, with the shares issued in exchange for the Corepoint Debt being held by Circle Capital. The effect of this was to dilute Amstel's shareholding in AMS Holdings from 30 percent to approximately 5.6 percent. At paragraph 49 of his affidavit, Mr. Evrengun averred that the decision to increase the authorised share capital of AMS Holdings 'was done to improve the financial position of the Company thus allowing it to exchange the debt for equity. The [Financial Services Commission] was notified of the increase in the authorised share capital and its issuance to Circle'.

[14] On 8th August 2019, Circle, counting itself as the holder of more than 90 percent of the votes of the issued shares in AMS Holdings, directed AMS Holdings to redeem all the shares held by Amstel, as a minority shareholder holding less than 10 percent of the votes of the issued shares, pursuant to section 176 of the Act ("the Notice of Redemption of Shares"). By this notice, the Amstel shares were to be redeemed by 15th August 2019 at a redemption price of US\$19.91 per share. The Notice of Redemption of Shares also gave Amstel until 17th August 2019 to exercise its right of dissent.³ In fact, Amstel did exercise its right to dissent on 14th August 2019.⁴ It disagreed with the redemption price of US\$19.91 per share, and challenged the redemption process itself as being not 'legitimate prima facie', and as an example of unfair prejudice and therefore illegal.

³ See Mr. Evrengun's Affidavit filed 11th December 2021, paragraphs 55 and 56.

⁴ Supra No. 3, paragraph 57.

The Ancillary Claim

- [15] On 27th January 2021, the appellants brought an ancillary claim against AMS Holdings, Circle and Mr. Evrengun (“the Ancillary Defendants”). By the ancillary claim, Amstel is seeking relief pursuant to section 184I of the Act for alleged breaches of fiduciary and statutory duties by Mr. Evrengun as the sole director and/or breaches of a shareholders’ agreement, and for the unfairly prejudicial conduct of the affairs of AMS Holdings acting by and through Mr. Evrengun (“the Ancillary Claim” or “the Unfair Prejudice Claim” or “the section 184I Claim”). At paragraph 2 of the Ancillary Claim, the various acts which the Ancillary Claimants say were unfairly prejudicial to Amstel as a shareholder of AMS Holdings are set out. These include taking out certain loans and debts (the Circle and Corepoint Debts) in the name of AMS Holdings without full and proper disclosure of their existence and/or the terms and conditions of such loans to the board of directors of AMS Holdings and, in particular, to Mr. McKenzie as a director of the company. The other pleadings of unfairly prejudicial conduct include failing to declare conflicts of interests, a failure to provide accounts of the company, restructuring the share capital of the company (the increase in the authorised capital) and converting improperly incurred debt into equity (debt for equity swap) so as to dilute the shareholding of Amstel, doing so without the approval of the Financial Services Commission in breach of sections 14(2) and 14(5) of the Banks and Trust Companies Act 1990, and issuing a Notice of Compulsory Redemption of Shares in the company to Amstel on 8th August 2019 when Circle (an Evrengun company) did not own 90 percent of the voting shares in AMS Holdings.
- [16] The reliefs being sought by the Ancillary Claimants include a declaration that the affairs of AMS Holdings 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; a declaration that Amstel remains a 30 percent shareholder in AMS Holdings; and for rectification of the register of members to reflect this 30 percentage ownership. The Ancillary Claim also sought an order of the court requiring Circle to acquire the shares of Amstel (at the pre-dilution 30%) at a fair

value price; an order requiring AMS Holdings to produce all accounting records of the company and its underlying subsidiaries for forensic review; alternatively, compensation for the diminution in value of Amstel's shares in the company attributable to the company's affairs being conducted in an oppressive and/or unfairly prejudicial manner; and such other order pursuant to section 184I of the Act as the court thinks fit. Filed with the ancillary claim form was a statement of ancillary claim. The Ancillary Claim was also supported by the affidavit of Mr. McKenzie sworn 27th January 2020. A defence to the Ancillary Claim ("the Ancillary Defence") was filed by the respondents on 21st April 2020.

Dismissal of Summary Judgment Application

- [17] The appellants' notice of application for summary judgment (and for other orders and relief) filed originally on 4th March 2021 (amended 26th May 2021) was supported by the Third Affidavit of Mr. McKenzie filed 4th March 2021. The application was opposed and the respondents relied on the Twelfth Affidavit of Mr. Evrengun filed 30th April 2021 in opposition thereto. In reply, the appellants filed on 26th May 2021 the Fourth Affidavit of Mr. McKenzie. The appellants argued that the resolutions of Mr. Evrengun, as the sole director of AMS Holdings, increasing the authorised share capital of the company and the next day issuing new shares to Circle and Corepoint in exchange for the release of the alleged Circle Debt and Corepoint Debt, with the resulting dilution in the percentage shareholding of Amstel from 30 percent to 5.6 percent, was done in breach of Mr. Evrengun's duties as a director to act honestly and in the best interest of the company under section 120(1) of the Act, and for an improper purpose contrary to section 121 of the Act; and, accordingly, were invalid.
- [18] In dismissing the application for summary judgment, the learned judge, while accepting that should the court make an order for summary judgment it would have the effect of reducing or narrowing the issues remaining for trial, concluded that 'the fact that there are so many factual issues means, in my judgment, that it's not appropriate to determine a summary judgment application when there are material

issues of fact'.⁵ The learned judge also considered it as 'perfectly right' that the circumstances in which the dilution of Amstel's shareholding occurred are 'highly suspicious'.⁶

[19] The judge considered the decision of this Court in **Independent Asset Management Company Limited v Swiss Forfaiting Limited**,⁷ upon which counsel for the appellants placed much reliance in his submissions before the judge. In particular, reliance was placed on this passage from the judgment of Webster JA at paragraph 25 (having referred to the dicta of Lord Sumption in **Eclairs Group Ltd v JKC Oil & Gas plc and others**)⁸ -

'In the situation described by Lord Sumption, 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.'

[20] In the judge's considered opinion this extract from **Swiss Forfaiting** was not intended to and did not lay down an absolute rule that any decision of directors which has the effect, or an effect, of favouring one group of shareholders of a company over another group, is or must be considered to be, without more, for an improper purpose and therefore invalid.

[21] In the learned judge's opinion, what this Court was saying in **Swiss Forfaiting** is that:

"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

⁵ See page 25 lines 11-14 of the Transcript of Proceedings.

⁶ See page 25 lines 15-17 of the Transcript of Proceedings.

⁷ [2017] ECSCJ No. 271 (delivered 24th November 2017).

⁸ [2015] UKSC 71 at para. 37.

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."

As to Mr. Evrengun's explanation proffered on why he made those decisions as a director, the judge mused:

"Now it may be that Mr. Evrengun's explanation that there were large amounts of money owed to Corepoint and Circle, and that it was necessary to resolve the financial misery of the group by carrying out the share dilution that may or may not be something which is accepted, but it in principle affords an explanation for why the dilution of shares took place. And when one looks at the matter in the round, in my judgment, this is a case where the [c]ourt needs to be determining all matters."

[22] The learned judge also felt strongly that, on case management grounds, 'the way to deal with this case is to determine all factual matters in the round without hiving off particular issues to be determined by way of summary judgment ...'. He therefore concluded and determined the summary judgment application in these terms-

"So on those two bases, the first that there are factual issues which aren't appropriate for determination on a summary judgment application, and, secondly, on case management grounds, that the matters ought to be dealt with at trial rather than divided up in the way which is sought by the Applicants.

For those reasons, in my judgment, it's appropriate to refuse the application for summary judgment."

[23] At this juncture, I observe that it is well-established that the applicable test in this jurisdiction for determining proper purpose is the 'substantial or dominant purpose' test as confirmed by Pereira CJ in **Antow Holdings Limited v Best Nation Investments Limited and others**⁹ and followed recently in **Nam Tai Property Inc v IsZo Capital LP and another**.¹⁰ In **Antow** this court approved the application of a four step approach formulated by Mr. Jonathan Crow QC in **Extrasure Travel Insurances Ltd and another v Scattergood and another**.¹¹ Accordingly, in determining what was the proper purpose the court must apply a four step approach. It must identify (i) the power whose exercise is in question, (ii) the proper purpose

⁹ [2018] ECSCJ No. 253 (delivered 21st September 2018).

¹⁰ [2021] ECSCJ No. 714 (delivered 4th October 2021).

¹¹ [2002] EWHC 3093 (Ch.) at paragraph 92.

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. Further, I merely observe that were the 'but for' test espoused obiter by Lord Sumption in **Eclairs** to become the test in this jurisdiction for determining proper purpose, the applicability of which hinges on the concept or principle of 'causation', where the directors were moved by more than one or multiple causes one of which was clearly improper, the question must then be asked whether the decision sought to be impugned would nevertheless have been made if the directors had not been moved by the improper purpose or motive. In my view, both the 'substantial or dominant purpose' test and the 'but for' test espoused obiter by Lord Sumption, point 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.

The Appeal

- [24] The appellants in their notice of appeal rely on seven grounds of appeal. Essentially, they complain that the learned judge treated the summary judgment application largely as a case management decision; failed to consider and apply the correct summary judgment test; and failed to determine whether the respondents had a real prospect of succeeding on the issues of liability for which summary judgment was sought. The gravamen of the appellants' appeal is that the judge erred in law in that he failed to apply the law as determined in **Swiss Forfeiting**. Had he correctly applied the law in that decision, he would have found, on the undisputed facts, that the decisions and resolutions made by the sole director, Mr. Evrengun, leading to the dilution of the shareholding of Amstel in AMS Holdings, were made at a time when there was a power struggle or dispute between the majority and minority shareholders, had the effect of preferring or benefitting the majority over the minority, and was therefore for an improper purpose and unfairly prejudicial to Amstel as a minority shareholder. Accordingly, the share restructuring and issuance of new shares in exchange for debt is liable to be set aside, and there was no need

to further investigate these matters as any defence to them would have no real prospect of succeeding at trial. The appellants' case, in a nutshell, is that the principle espoused in **Swiss Forfeiting** was clearly applicable to the instant matter on the undisputed facts, and determinative as to purpose and motive.

Appellants Submissions

- [25] Mr. Taylor QC, learned counsel for the appellants, submitted that this appeal is not just about the exercise by a judge of judicial discretion. It concerns fundamentally an error or errors of law made by the learned judge. Firstly, the judge erred in not approaching the matter on the basis of the summary judgment test, but instead incorrectly treated the application for summary judgment as a case management decision. Secondly, the judge erred in law by not asking himself the correct question, that is, whether the dilution of Amstel's shareholding in AMS Holdings consequent upon the decision to swap loan debt for equity, could have been for a proper purpose, in the face of certain undisputed facts. These undisputed facts included the fact that Mr. McKenzie and Mr. Evrengun had, on the evidence, reached a point where they could not get along in AMS Holdings, and Mr. McKenzie wanted his shareholding to be bought out at fair value. However, as the evidence and correspondence disclose, these two gentlemen could not agree on what was a fair value price to be paid for Amstel's shares in AMS Holdings. Specifically, they disagreed on whether the Circle Debt and Corepoint Debt were legitimate debts of AMS Holdings, which ought properly to be taken into account in determining the fair market value of the shares in AMS Holdings. This dispute was in the end not resolved, and the parties essentially had reached an impasse which was not resolved by the subsequent engagement of BDO to assess the value of the shares.
- [26] This led ultimately to a letter of claim before action being issued by the solicitors for Amstel and Mr. McKenzie in May 2019 alleging, inter alia, unfair prejudice. This was followed within 2 weeks by Mr. Evrengun, as sole director, adopting the written resolutions of 30th and 31st May 2019 to increase the authorised share capital of AMS Holdings from US\$50,000.00 shares to US\$500,000.00, and to allot new

shares to both Circle (Mr. Evrengun's company) and to Corepoint (another Evrengun company) in exchange for the Circle Debt and Corepoint Debt, both of which debts were disputed by Amstel and Mr. McKenzie.

[27] Counsel for the appellants contended that the obvious purpose of these resolutions by the sole director Mr. Evrengun was to increase the percentage holding of his company, Circle, in AMS Holdings from 70 percent to over 90 percent, effectively diluting the shareholding of Amstel in the company from 30 percent to 5.8 percent, that is, below the 10 percent threshold in section 176 for a minority shareholder's shares to be compulsorily redeemed by the company. Furthermore, it is argued, these decisions were made and steps taken with the ultimate motive and goal of positioning Circle to be able to issue, under section 176 of the Act, a written notice for the compulsory redemption of Amstel's shares in AMS Holdings, effectively triggering the compulsory redeeming by the company of those shares under section 176(2). The direct consequence of this was to bring into play the provisions of section 179 of the Act relative to Amstel's rights and entitlement as a dissenter to the payment of fair value for its shares, and for such assessment to be determined taking into account the disputed Circle Debt and Corepoint Debt having been paid in full by the debt for equity swap. This led inexorably to AMS Holdings bringing the Claim for the buy-out of Amstel's shares at essentially an undervalue.

[28] While accepting that there are a lot of disputed facts between the parties in relation to other aspects of the Ancillary Claim, counsel for the appellants argued that none of these disputed facts concern the summary judgment application. Accordingly, the appellants submit that when the learned judge observed in rendering his decision that there were many factual issues, he failed to distinguish between the facts relevant to the summary judgment application dealing with proper purpose and unfair prejudice, and those facts relevant to other related issues. Accordingly, the entering of summary judgment on the appellants' pleaded case of improper purpose in circumstances where the law is clear, would have been determinative of their

claim of unfair prejudice, resulting in all the allegations and counter-allegations between the two main protagonists, Mr. Evrengun and Mr. McKenzie, falling away.

[29] As to the Ancillary Claimants' pleaded case of improper purpose, Mr. Taylor QC pointed to paragraphs 10, 10(k), 78, 88, 89, 92 and 93 of the Ancillary Statement of Claim. At paragraph 10, the Ancillary Claimants seek relief under section 184I of the Act with respect to Mr. Evrengun's breaches 'of director and other fiduciary and statutory duties'. At paragraph 10(k) they plead the restructuring of the share capital of AMS Holdings and converting improperly incurred debt into equity so as to dilute the shareholding of Amstel, as one such breach. Further, at paragraph 10(o), the Ancillary Claimants plead breaches of various statutory duties contained in the Act, including breaches of section 120 (fiduciary duties) and section 121 (proper purpose). At paragraph 78 there is an allegation of an 'unlawful and improper' attempt to dilute Amstel's shares in AMS Holdings; at paragraph 88 a pleading that the Redemption Notice issued on 8th August 2019 by AMS Holdings was invalid and/or illegal and that the statutory valuation method set out in section 179 of the Act is inapplicable to Amstel's shares in AMS Holdings. The unfair prejudice claim and breach by Mr. Evrengun of his duties as a director of AMS Holdings, are dealt with at paragraphs 92 and 93, and include, at paragraph 93(f), the duty not to exercise his powers for an improper purpose. In my view, it is clear from what the Ancillary Claimants have pleaded in these various paragraphs of the Ancillary Statement of Claim that their case for relief under section 184I based on unfair prejudice is grounded, in part, on a claim of improper purpose in breach of section 121 of the Act. Indeed, the learned judge in considering and determining the summary judgment application, seems to have proceeded on the basis that there was no issue of the Ancillary Claimants having not pleaded a proper case of improper purpose.

[30] The crux of the appellants' case before us on the summary judgment application is based on whether the learned judge, on the so-called undisputed facts, was bound to conclude, based upon the jurisprudence in **Swiss Forfaiting**, that the Ancillary

Defendants (the respondents) have no real (as oppose to fanciful) prospect of successfully disputing that the resolutions made by Mr. Evrengun were for an improper purpose, and accordingly judgment ought to have been entered by the judge for the Ancillary Claimants on their unfair prejudice claim, and for relief pursuant to section 184I of the Act. On this core issue, counsel for the appellants submitted that even though Amstel was a minority shareholder in AMS Holdings and there was, in the true sense no 'power struggle' between competing shareholders or groups of shareholders for control of the company, the resolutions sought to be impugned effectively altered the 'voting balance' in AMS Holdings by making Amstel an even smaller (percentage wise) shareholder, and consequentially vulnerable to having its shares compulsorily redeemed, and for a price less than true market value. These resolutions also had the effect of positioning Mr. Evrengun and his company Circle, to initiate the process under sections 176 and 179 to effect the redemption of Amstel's said shares. Mr. Taylor QC submitted that when the actions of Mr. Evrengun are looked at in this way, it is clear, applying the principle in **Swiss Forfeiting**, that the decisions to restructure the share capital of AMS Holdings and to issue new shares to Circle in exchange and in full discharge of the Circle and Corepoint Debts were made for an improper purpose and are therefore invalid and amount to a clear case of unfair prejudice necessitating an order for summary judgment on the Ancillary Claim. In brief, counsel submits, Mr. Evrengun acted to favour Circle and himself, to disadvantage Amstel and Mr. McKenzie, and not to benefit AMS Holdings, in altering the balance of interest in the company by altering the voting balance. In doing so he preferred his interest over that of the company and unfairly prejudiced Mr. McKenzie and Amstel's interest in the company. In his submission, there can be no answer from the Ancillary Defendants to this on the undisputed facts.

- [31] Mr. Taylor QC also submitted that the judge erred in his approach to the explanation proffered by Mr. Evrengun as an answer to the Ancillary Claimants' assertion of improper purpose and breach of duty under sections 121 and 120 of the Act. The question is not whether the explanation is valid or not, but whether the improper

motive was to affect the balance of power in the company or to influence in any way the outcome of shareholders' resolutions, even if it results in additional capital or benefits to the company.¹² The explanation or motive of a director for making the decision sought to be impugned could be a noble one, but that is not the real question or issue for the court to consider. The fact is Mr. Evrengun predetermined the dispute over how fair value of the shares was to be calculated. In that respect, he was the sole arbiter of whether his own companies' (Circle and Corepoint) debts were legitimate or not and whether they ought to have been factored into a proper assessment of the fair value price for Amstel's shares in AMS Holdings.

- [32] Finally, Mr. Taylor QC argued that from the transcript it is clear that the judge, in error, approached his determination of the application for summary judgment purely as a case management issue, and did not apply the well-established test for summary judgment, that is, whether there was a real prospect (as opposed to a fanciful one) of the Ancillary Defendants defending the Ancillary Claim of improper purpose and consequential unfairly prejudicial conduct. Had he applied the correct test, he would have concluded that there was no realistic prospect of them defending paragraphs 1 and 2 of the Ancillary Claim, and ought to have entered summary judgment on these claims in favour of the Ancillary Claimants.

Respondents' Submissions

- [33] Ms. Davis, learned counsel for the respondents, took issue with the appellants' criticisms of the judge's approach to and determination of the application for summary judgment. In opposing the appeal, the respondents contended that the judge was correct in determining that, on the materials before him, he could not conclude that the share dilution was for an improper purpose such as to lead to an order for summary judgment on that issue and on the Ancillary Claim for unfairly prejudicial treatment.

¹² Supra No. 7.

[34] The respondents submitted that the learned judge correctly, in his decision on the summary judgment application, did not consider the instant matter to be dealing with a 'balance of power' or a shift in the balance of power in AMS Holdings, as was the case in **Swiss Forfeiting**. Moreover, they submit, **Swiss Forfeiting**, which was only relied on by the appellants at the hearing of the application, is distinguishable from the instant matter on several bases. In that case, there was, on the facts and as found by the first instance judge and upheld by the Court of Appeal, clearly a shift in the balance of power brought about by the passage of a resolution by the directors approving the issuance of 500 class A shares, the effect of which was to reduce the appellant's voting power from complete control of 100 percent to a minority position of 16.67 percent. In that appeal, this Court overturned the judge's finding of no improper purpose in breach of section 121 of the Act, and declared that the share issuance was for an improper purpose. By contrast, in the instant matter, Circle (Mr. Evrengun) was, at the material time, the majority (70%) shareholder of AMS Holdings with Amstel (Mr. McKenzie) holding a minority (30%) interest. Accordingly, the share restructuring and swap of debt for equity, effected by written resolutions of the sole director Mr. Evrengun in May 2019, did not affect or result in a shift in control of the company.

[35] The respondents also submitted that, on the facts of the instant matter, there was no 'power struggle' within AMS Holdings between Mr. Evrengun and Mr. McKenzie, since Mr. Evrengun, at all material times, held a significant majority interest in the company and, in any event, Mr. McKenzie wanted out of the company by the purchase of his shares held through Amstel. The only issue between them was the method by which the fair value of those shares ought to be calculated, and whether the Circle Debt and Corepoint Debt ought to be factored into that assessment. Counsel also stressed that, on the facts, Amstel was offered new shares in the company in exchange for the Amstel Debt, which offer was refused by Mr. McKenzie. They also emphasised that the concept of swapping debt for equity was not a new one, AMS Holdings having as of December 2018 resolved to do just

that, a matter which Mr. McKenzie would have been aware of, but had refused to participate in.

[36] It is also the respondents' submission that Amstel has not properly pleaded a case of improper purpose in its Ancillary Claim. Specifically in relation to paragraph 83, the respondents submit that no breach of section 121 duty was pleaded and, in any event, even if improper purpose was properly pleaded, the judge was correct to consider the respondents' Ancillary Defence and the explanations proffered by Mr. Evrengun for approving the restructuring and share issuance. As to Mr. Evrengun's explanations, counsel for the respondents pointed to Mr. McKenzie's earlier threat to liquidate AMS Holdings using the Amstel Debt and the service by Amstel of a statutory demand on AMS Holdings, as a possible reason why, when negotiations over the method for calculating fair market value of Amstel's shares had reached an impasse, AMS Holdings, acting through its director, resolved to restructure the share capital of the company and swap debt for equity. All this came, they say, at a point when the AMS Group was poised to effect a merger, and Mr. Evrengun took the view that a debt for equity swap was in the best interest of AMS Holdings. BDO, an independent and reputable international accounting firm, was then engaged to determine what was the fair value price for the shares, and the law firm of Harney's was engaged to advise on the way forward. However, after the redemption notice had been served on Amstel, they refused to engage in the prescribed statutory process for ascertaining what is a fair value price for the Amstel shares. Instead, their response was to file the Ancillary Claim.

[37] The respondents also observed that the appellants did not apply for summary judgment until quite some time (approximately 11 months) after the filing of the Ancillary Defence, and well after the learned judge had in February 2020 determined, in the exercise of his case management powers, accepting the appellants' contention that everything ought to be considered in the round, that having regard to the issues and overlapping of facts, it would be inappropriate to have separate trials of the Claim and Ancillary Claim. The judge did refer to this

earlier case management decision when giving his ruling on the summary judgment application.

- [38] The respondents also submitted, and it is common ground that, in determining the issue of proper purpose a court must apply the four-step test formulated by Mr. Jonathan Crow QC sitting as a deputy judge of the High Court in England in **Extrasure Travel Insurances Ltd and another v Scattergood and another**.¹³ This four step test was approved and followed by this Court in **Swiss Forfaiting**, and in **Antow Holdings Limited**. Therefore, the court must identify the (i) power whose exercise is in question, (ii) proper purpose for which that power was delegated to the directors, (iii) substantial purpose for which the power was in fact exercised; and decide (iv) whether that purpose was a proper purpose. Ms. Davis submitted that in the instant matter, steps 1 and 2 have been satisfied by the respondents on their pleaded case. This much is uncontroversial. As to step 3, she submits, there is clearly an issue of fact on which the court would need to hear evidence, including evidence from the director as to his motive or purpose, before this step can be properly decided. Accordingly, this matter has not yet gotten to step 3, and the court cannot properly begin to determine step 4 unless and until a determination of step 3 has been made. The essence of the judge's decision is that the court was not able to conclude on step 3 (the substantial purpose for which the director acted), and this and other issues, including step 4, ought properly to be determined at trial. The judge could not at this stage in the proceedings conclude on what was the purpose or dominant purpose for the dilution, and hence whether that purpose was an improper one or not. Moreover, the respondents submit, the share issuance in exchange for debt could not and did not change the balance of power within AMS Holdings or on the board of the company.

- [39] The respondents also submitted, that a dilution in the shareholding of a minority only gives rise to an unfair prejudice claim and not to a claim for an improper purpose based upon a shift in the balance of power within the members of the company or

¹³ [2002] EWHC 3093 (Ch.) at paragraph 92.

at the board level. Furthermore, in this matter, there had been an offer made to Mr. McKenzie for the purchase of Amstel's shares as he wanted out of AMS Holdings altogether, a settlement in principle had been reached to buy-out those shares, and the only issue was how fair market value was to be assessed. In these circumstances, it would have been entirely inappropriate for the judge to have granted summary judgment.

[40] As to whether the learned judge applied the correct test for determining a summary judgment application, the respondents submitted that he was, in essence, applying the principles set out in **Comodo Holdings Ltd v Renaissance Ventures Ltd. and another**,¹⁴ that is, whether there is a 'real' as opposed to merely 'fanciful' prospect of success. In that decision, this Court equated 'fanciful' as being 'entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all documents or other material on which it is based'. Counsel for the respondents submitted that the learned judge applied these principles and this test and came to a correct determination that this was not a matter suitable for final disposition by way of summary judgment. Counsel also stressed, on the learning from **Comodo**, that the Ancillary Claim, being an unfair prejudice claim, which are notoriously fact sensitive and complex, are claims in which allegations of reprehensible or dishonest conduct on the part of the directors are usually made. This is no different in the instant matter as Mr. Evrengun has been accused in the Ancillary Claim of reprehensible conduct and of having acted dishonestly in breach of his duties as director under section 120(1) of the Act and of acting for an improper purpose under section 121. Accordingly, as the authorities stipulate, it is most unsuitable and inappropriate for these issues to be determined by way of summary judgment.

[41] Accordingly, the respondents submitted that this is an appeal from an exercise of discretion by the judge in the court below, and the appellants have not satisfied the high threshold set out by Sir Vincent Floissac CJ in **Dufour and others v Helenair**

¹⁴ [2016] ECSCJ No. 78 at paragraph 83.

Corporation Ltd and others¹⁵ for this Court to overturn the judge's decision as first instance. The respondents submitted, in the round, that the appellants have failed to demonstrate that the learned judge committed any error of principle or of law or that he took into account irrelevant matters or failed to take into account relevant matters or that his decision on the summary judgment application was plainly or blatantly wrong.¹⁶

Discussion and Conclusion

[42] In my judgment, the submissions by the respondents on this appeal are to be preferred. This is, in my opinion, not an appropriate case for the grant of summary judgment having regard to the pleaded issues and to the issues of fact which underpin any proper determination of the issue of proper purpose and unfairly prejudicial conduct.

[43] The test to be applied in determining an application for summary judgment is so well established as to be trite. The test is whether there is a real as opposed to fanciful prospect of either the claim or the defence (as the case may be) succeeding. In applying this test, the court must do so having regard to the pleaded cases and to any evidence adduced before it at that stage of the proceedings. What is also pellucid, is that certain categories or types of claims are not well-suited for determination by summary judgment. The authorities recognise that claims grounded upon allegations of reprehensible conduct, including fraud or dishonesty, are ill-suited for determination by summary judgment as they are usually fact sensitive, relying on complex facts and involving significant questions of law and fact for determination. These types of cases are inappropriate for final disposal by way of summary judgment applications.¹⁷

¹⁵ (1996) 52 WIR 188.

¹⁶ See also *Hadmor Productions Ltd and others v Hamilton and another* [1983] 1 AC 191.

¹⁷ See *Comodo Holdings Ltd v Renaissance Ventures Ltd. and another* [2016] ECSCJ No. 78 at paragraph 86.

[44] In my judgment, the instant matter is just such a case. Here the Ancillary Claimants have pleaded allegations of breaches of fiduciary and statutory duties by the sole director of AMS Holdings, Mr. Evrengun; of him having acted in bad faith, dishonestly and for an improper purpose; and that his actions and decisions amount to unfairly prejudicial, discriminatory and oppressive conduct. These issues, or most of them, are questions of fact to be determined having heard and seen the witnesses and with the benefit to the court of the illuminating light of forensic cross-examination at a trial. They also have some bearing on the court's proper determination of what was the purpose or dominant purpose for the restructuring of the share capital of AMS Holdings and the issuance of new shares in a swap for debt arrangement, which issuance had, as a consequence, the effect of diluting the percentage shareholding of Amstel from 30 percent to 5.6 percent. It is for the trial court to decide the subjective motive or intention of the director utilising an objective approach to and assessment of all the relevant evidence, including the sole director's explanation or evidence as to why he made the decisions which are sought to be impugned by the Ancillary Claimants in these proceedings.

[45] In this regard, while the principle emanating from the decision of this Court in **Swiss Forfeiting** is of importance to a proper determination of the issue of proper purpose in these proceedings, in my judgment that principle is not and was not intended to be of blanket application in the way in which the appellants have contended. There is no generally applicable rule that a decision of directors which may or does have as one of its effects the benefitting of 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. I accept that there are important distinctions to be made between the instant matter and the factual position in **Swiss Forfeiting** which underpinned this Court's statement of principle at paragraph 25 of that judgment. Suffice it to be said that in **Swiss Forfeiting**, the facts led to the obvious finding by the judge, as endorsed by this Court, that the resolution of the directors sought to be impugned clearly affected the 'balance of power' within the company, such that the 100 percent shareholder's interest was reduced to the minority position of 16.67

percent by the issuance of the new shares. In the instant matter, there was no power struggle or balance of power issue within AMS Holdings on the facts. There was, in reality, no power struggle between the two main protagonists, Mr. Evrengun and Mr. McKenzie. The latter wanted out and to have his shares held through Amstel bought out, but at what he considered to be fair value. There seemed to have been an acceptance or tacit agreement in principle that Mr. McKenzie's interest would be bought out, but the dispute between them rests, to a large extent, on how fair value ought to be calculated. On whether the Circle and Corepoint Debts ought properly to be factored into any such calculation, the Ancillary Claimants contended that they ought not to be, and that Mr. McKenzie's interest in AMS Holdings ought to be bought out at the pre-dilution stage of 30 percent, and not the resulting 5.6 percent. These are all issues before the lower court for its determination and, as the judge observed, the circumstances under which the dilution of Amstel's shareholding occurred are highly suspicious. However, this does not lead, inextricably, to a conclusion that the explanation or purpose offered by Mr. Evrengun, cannot be found to be a proper one.

- [46] In my view, the judge was correct to approach the matter from the position of whether there were material issues of fact left to be determined and whether, in all the circumstances, it was appropriate to grant summary judgment. In approaching the matter in the way he did, the learned judge was, in my view, doing so cognisant of the test for summary judgment, that is, whether there was any real as opposed to fanciful prospect of the Ancillary Defendants defending the Ancillary Claim for improper purpose and unfairly prejudicial conduct. There are clearly issues of fact which go to the genuineness of the explanation or explanations pleaded or given by Mr. Evrengun as to why, in the exercise of his delegated powers as a director of AMS Holdings, he approved the restructuring and issuance of new shares in exchange for debt. In my judgment, it would have been inappropriate and incorrect, in a matter such as this, for the judge to have determined the issue of improper purpose at this stage of the proceedings and by way of the summary judgment process, in the face of these explanations, the opposing position of the Ancillary

Claimants as pleaded, and the allegations of reprehensible conduct made against Mr. Evrengun when he so acted.

- [47] Accordingly, in my view, there is no basis upon which this Court ought to disturb the judge's decision. I am not satisfied that the judge committed any error of law or of principle or that he took account of irrelevant matters or failed to have regard to relevant facts when reasoning to his decision on the summary judgment application. It has not been demonstrated to this Court's satisfaction that the learned judge's decision was plainly or blatantly wrong. Accordingly, I would decline to set it aside and would dismiss the appeal.

Orders

- [48] For the reasons set out above, I would dismiss the appeal, set aside the costs order made in the court below and order the appellants to pay the respondents' costs in the court below in relation to the summary judgment application and in the appeal, the appeal costs to be assessed at no more than two-thirds of the costs in the court below, if not agreed within 21 days. In the assessment of the respondents' costs in the appeal, the cost of producing the respondents' additional bundle of documents filed 30th September 2021 and 1st October 2021 is to be excluded.
- [49] On the appellants' application to amend the notice of appeal to address the issues arising from the admitted errors in paragraphs 1 and 2 of the order of the court below, I would make no order as to costs.

[50] On the respondents' oral application to extend time for filing their skeleton argument in the appeal, which application was granted, I would order that the appellants' costs of that application be borne by the respondents, such costs to be assessed if not agreed within 21 days.

I concur
Davidson Kelvin Baptiste
Justice of Appeal

I concur
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar