IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVI HC (COM) 0037 OF 2015

BETWEEN:

CH TRUSTEES SA
(as Trustee of the Maple Leaf Trust)

Claimant

And

[1] OMEGA SERVICES GROUP LIMITED
[2] FALCON HOUSE UHV (BVI) LIMITED
[3] MECHIEL GEORG KOTZE AND IAN PAULUS VAN ZYL
(as Trustees of the DE WITT TRUST)
[4] CANNON BRIDGE HOLDINGS LIMITED

Defendants

Appearances:

Mr. Adam Solomon, Mr. Owen Prew, instructed by Messrs. Forbes Hare for the Claimant
Mr. Thomas Plewman, Q.C., instructed by Messrs. Appleby for the Defendants

---

2016: July 11,12,13,14;
November 22

JUDGMENT

[1] **Wallbank J [Ag]**: This is a claim for relief from alleged unfair prejudice to a member of a BVI registered corporation, Omega Services Group Limited ("OSGL") and for rectification of this company's register of members.

[2] The Omega group, as it can loosely be called, had been conceived by Mr. Alexander de Witt. I will refer to him as Mr. de Witt, to differentiate him from his brother Mr. Stephanus de Witt, who is also involved. Mr. de Witt was formerly the regional managing director of a well-known international security company. After some time he decided he could set up his own company providing similar services, in South Africa and further afield.

[3] He needed help to do so. After discussions with a colleague, Mr. Mechiel George Kotzé, and some exploratory talks with an Angolan general of his acquaintance who headed a consortium of potential investors ("the Angolan Consortium"), Mr. de Witt approached a number of others employed by his former company to join him. Among these were his brother Mr. Stephanus de Witt, Mr. Christoffel Roelofse, Mr. Stephanus du Toit, Mr. Jacobus de Kock and Mr. André Diedericks. Mr. de Witt entrusted establishment of the corporate structure to Mr. Kotzé.

[4] The structure adopted was simple as a concept, but proved complicated to administer. It was to be a group of entities, forming a brand. The divisions within the group were not always observed. For example, a single set of accounts was maintained for the group, at offices within South Africa, by one of the entities within the group, Omega Risk Solutions (Proprietary) Limited ("ORS"). The formal nature of the group structure and the entities within it were not always well understood by the stakeholders. The structure was that the security services would be provided

by a limited partnership registered in England, Omega International Associates LP ("OIA"). The business of OIA would be managed by a General Partner. This was OSGL. There was to be a limited partner in the partnership, a company incorporated in Jersey, Omega Services Limited ("OSL"). Mr. Kotzé's idea was that OSL would be entitled to receive the income of OIA, whilst OIA's management would be conducted through OSGL. Put differently, those who controlled OSGL would control the group. The assets of OIA are shares in various operating entities providing security services in Africa, the Middle East and parts of Asia.

[5] OSGL was incorporated in Niue on 9 April 2003. As provided by its first Memorandum of Association, at clause 7, the authorized capital was US$50,000 divided into 50,000 shares with a par value of US$1 each. By clause 12, it was provided that the company "*may by resolution of its members or of its directors, amend or modify any of the conditions contained*" in the Memorandum "*and increase or reduce the authorized capital of the Company in any way which may be permitted by law*".

[6] Two shares were issued in April 2003, to nominee holding companies within the Jersey based Basel International Group. The legal ownership was initially held by Mr. Kotzé within a trust structure.

[7] On 14 July 2006 OSGL migrated from Niue and continued in the Territory of the Virgin Islands pursuant to the BVI Business Companies Act 2004 ("the Act").

[8] The Memorandum of Association was reissued in materially the same terms.

[9] On 2 February 2007 the original two shares were transferred to two TVI domiciled nominee companies.

[10] Upon OSGL's continuation in the TVI, Articles of Association were also issued. These provided materially:

> "*2.1 Shares …may be issued …for such consideration and on such terms as the directors may by Resolution of Directors determine.*
>
> *2.3 A share may be issued for consideration in any form, including money, promissory notes, real property, personal property (including goodwill and know-how) or a contract for future services.*
>
> *2.7 A share is deemed to be issued when the name of the Shareholder is entered in the register of members.*
>
> *Forfeiture*
>
> *5.1 Shares that are not fully paid on issue are subject to the forfeiture provisions set forth in this Regulation and for this purpose Shares issued for a promissory note or a contract for future services are deemed to be not fully paid.*
>
> *5.2 A written notice of call specifying the date for payment to be made shall be served on the Shareholder who defaults in making payment in respect of the Shares.*
>
> *5.3 The written notice of call referred to in Sub-Regulation 5.2 shall name a further date not earlier than the expiration of 14 days from the date of service of the notice on or before which payment required by the notice is to be made and shall contain a statement that in the event of non-payment*

at or before the time named in the notice the shares, or any of them, in respect of which payment is not made will be liable to be forfeited.

5.4 Where a written notice of call has been issued pursuant to Sub-Regulation 5.3 and the requirements of the notice have not been complied with, the directors may, at any time before tender of payment, forfeit and cancel the Shares to which the notice relates."

[11] On 2 February 2007 the original two shares were transferred to two TVI domiciled nominee companies.

[12] At all material times, at least until 30 January 2015, the sole director of OSGL was another entity within the Basel International Group, BasCorp Services Limited. After a change of name, Basel International Group became known as the First Names Group. For convenience I will continue to refer to that director of OSGL simply as BasCorp. BasCorp was operated by company management professionals based in Geneva, Switzerland.

[13] So, what one had was a limited partnership with a registered office address in England, a limited partner with a registered office in Jersey, a general partner with a registered office in the TVI, a sole director of the general partner formally running the general partner in Switzerland, and the day to day business of the group being conducted from offices in South Africa by people based there.

[14] The group started doing business in around April or May 2003. Mr. de Witt had a prominent role. He was the Chief Executive Officer of the group from at least 5 December 2005, but from the start he took responsibility for the overall direction,

strategy and marketing. He relied upon Mr. Kotzé to organize the corporate structure.

[15] Mr. de Witt was paid a base salary upon commencement of R102,100 per month, which I apprehend was the equivalent of about US$13,500 at the time. The evidence does not show how much Mr. de Witt was awarded by way of bonuses.

[16] On 1 May 2003 Mr. Roelofse was appointed to another leading role, of Managing Director (Africa). Mr. Kotzé was the Chief Financial Officer of OIA from at least that date also.

[17] To fund the venture capital had to be raised. There is some disagreement between the parties about how this was done. It is clear however that the intended shareholders decided that such capital would comprise a mixture of share capital and borrowing. The borrowing would consist of money lent by one or more outside investors and by way of salary and bonus sacrifices, and cash advances, of the intended shareholders. To arrange this, the group's finance executive Ms. Corette Vermaak created a category in the detailed ledgers of ORS headed "Loans from Shareholders." She also created other book entry lines, including one headed "Staff Advance – Shareholding" and "Share Capital".

[18] At that point, of course, there were only the two nominee shareholders holding one share of US$1 par value each. The shareholders Ms. Vermaak had in mind were not those, but the individuals who would eventually become shareholders, through their respective trust structures. There was an understanding amongst the intended shareholders that most or all of them would not hold shares personally, but through trust or corporate structures. No issue arises from that aspect in these proceedings.

[19] Mr. Roelofse, on behalf of his trust vehicle the Claimant, says that the agreement between the original intended shareholders had been relatively straight-forward: in consideration for undertaking to provide operating capital to the operating entities each of them would receive a proportionate percentage share in the General Partner OSGL. It had been agreed, he says, that Mr. de Witt would provide US$150,000 for a 15% stake, Mr. Kotzé US$100,000 for 10% and the other intended shareholders US$70,000 each for a 7% stake. This would leave 30% of the share capital for an eventual outside investor. The percentages would subsequently change, but not the amount of each founder's financial contribution. Mr. de Witt's version differs in that he states that there had been an initial agreement that the other intended shareholders apart from himself and Mr. Kotzé would receive a share in the limited partner OSL, not OSGL. This difference has some significance, in that Mr. Roelofse maintains that he and the other eventual minority stakeholders were founder members of the group, whereas Mr. de Witt denies this. He says the only founding members were Mr. Kotzé and himself.

[20] The price for the respective shareholdings appears to have been agreed between the intended shareholders. There is no evidence that BasCorp as OSGL's director fixed the consideration by way of a director's resolution pursuant to article 2.1 of the Articles of Association.

[21] According to Ms. Vermaak and Mr. de Witt, there were only three stakeholders who provided start-up funding in cash for the group: Mr. de Witt, Mr. Kotzé and a consortium of Angolan investors. Mr. Roelofse disagrees and states that he and others had also contributed cash.

[22] Ms. Vermaak reflected in the group accounts that Mr. Roelofse and other intended shareholders, apart from Mr. de Witt and Mr. Kotzé, paid US$70,000 or the Rand

equivalent for their shareholding interests by 31 December 2004. This appears from a certificate dated 2 February 2006, prepared by Messrs. Wouter Nel & Kie/Co ("Wouter Nel"), Chartered Accountants, who were the auditors for ORS. Whilst Wouter Nel were not auditors of OSGL, it appears to be common ground that Ms. Vermaak provided them with the underlying information.

[23] Mr. Kotzé paid US$100,000 on 31 May 2003, which was deposited into a bank account of ORS.

[24] It is also not in dispute that the price for Mr. de Witt's initial shareholding was to be US$150,000 or its Rand equivalent.

Mr. de Witt's shareholder loan account – contradictory documentary evidence

[25] Mr. de Witt contributed R2million on 22 October 2003, by paying it into the ORS bank account. He claims this contribution had been incorrectly recorded in the books and records of the group, by being recorded in the books of OIA on 31 December 2003. How this payment should be treated has become a vexed issue. The February 2006 Wouter Nel certificate recorded that as at 31 October 2005 "*an amount of R975,000 must be deducted from the above loan being payment of $150,000 @ R6,50 for shareholding. (Balance of loan account will be R3,097,912.70 after this deduction)*." In layman's terms this was saying that OIA owed Mr. de Witt R4,072,912.70 as at 31 October 2005 and that once the R975,000 was deducted as payment for his eventual shareholding interest OIA would owe him R3,097,912.70.

[26] This position did not remain static. The Claimant alleges that by around October 2008 Mr. de Witt's shareholder loan account went from negative to positive,

meaning that he owed money to OIA rather than the other way. His indebtedness towards OIA grew subsequently. The Claimant contends that by the time the shares were issued in July 2009 it was no longer possible to make any deduction from Mr. de Witt's loan account. *Ergo*, contends the Claimant, Mr. de Witt did not pay for his shares. Mr. de Witt maintains that his initial cash contribution did pay for his shares and he contests this calculation.

[27] Wouter Nel produced a similar certificate dated 29 January 2007. This stated that the amounts still needed to be deducted for Mr. de Witt's shareholding, as at 31 August 2006, and that before such deduction approximately R4.4million was owing from OIA to Mr. de Witt. The reason why these certificates were produced is not readily apparent. What is clear, though, is that the information conveyed by the certificates was intended to carry weight, by the fact that Wouter Nel as a third party chartered accountant was "certifying" the information set out in those documents.

[28] On 9 February 2010 Mr. Smit wrote to Mr. de Witt informing him of the balance of his loan account as at 31 August 2009. Mr. de Witt responded in terms that matters regarding his personal finances made no sense to him and told Mr. Smit to "*hold back my loan account until we have done a formal exercise*".

[29] Another certificate was produced by Wouter Nel for the loan balance as at 31 August 2010. This again recorded that the same deductions still needed to be made as payment for Mr. de Witt's shareholding. The Claimant contends, not unnaturally, that this demonstrates that Mr. de Witt had not paid for his shares.

[30] The Claimant calls these documents "crushing evidence" that Mr. de Witt did not pay for his shares.

[31] However, few aspects of this matter are straight-forward. By a certificate dated 2 April 2009, that is, not long before the shares were issued to Mr. de Witt and others, Wouter Nel certified "*according to information supplied and certain explanations given to*" them, that various individuals, among them Mr. de Witt, were "*fully paid-up shareholders in the Omega International Group*". This certificate squarely contradicts the other certificates. Wouter Nel did not give evidence.

[32] On the same date as that contrary certificate, 2 April 2009, and probably just before Wouter Nel produced it, Mr. Smith wrote a letter to Wouter Nel, stating, simply and without peripheral comments: "*I hereby confirm that R975,000 and R400,000 were deducted from the loan account of J.A. de Witt for shareholding in Omega International Group*". Mr. Smit now says that he was forced to write that letter by Mr. de Witt, even though it was not true. Mr. Smit's letter does not say when the deduction was made.

[33] A couple of months earlier, on 26 February 2009, Mr. Kotzé sent an email to Mr. de Witt stating:

> "*Omega group: the fully paid up group primary capital is US$906,000. This was paid in full by cash injections and/or bonus/salary sacrifice at various ZAR/US$ exchange rates over a time period*."

[34] I pause here to note two details: the capital is expressed to be in U.S. Dollars, not Rand, and the various Wouter Nel certificates, over a four year period, always reflected the same exchange rate of US$1 – R6.50, with the underlying amount due in U.S. Dollars. Mr. Kotzé's email serves as a reminder that the exchange rate fluctuated. The Court has not been addressed on the reason(s) why the

Wouter Nel certificates treated it as a constant. Ms. Vermaak's evidence was also that exchange rate fluctuations were reflected in the book entries.

[35] Even earlier than this, in around February 2008, Mr. Kotzé stated in an email to Mr. de Witt that "*all allocated shares have been fully paid up and are in the process of being registered in the names of the nominated entities of the shareholders*."

[36] It has been said by the Claimant's side that Mr. Kotzé was never in a position to know the true accounting status of the group's finances, and thus he was not in a position to know whether or not all the shares had been fully paid up.

[37] Another source of contention is that Mr. de Witt took cash out of the group by way of loans to pay for various expenses, including personal expenses and those of his family and their various business efforts. Mr. de Witt admittedly did so, including during periods when the cash-flow of the group was under pressure. The Claimant complains that Mr. de Witt used the group, including OSGL, as his own bank and fiefdom by taking out money at will. Mr. de Witt disputes that his cash borrowing imperiled the solvency of the group but he agrees that the group always suffered from cash flow problems. The cash flow problems meant that on occasion the group could not make payroll.

The Angolan Consortium's contribution

[38] There is a dispute over whether money contributed by the eventual outside investor, an Angolan Consortium, was only by way of loan or a mixture of loan and payment for shares. Ms. Vermaak said in her witness statement that the Angolan Consortium paid in US$1million by way of a loan and a further US$300,000 by

way of a capital contribution for which the intention was that they would receive shares. She said that the loan portion of the Angolan Consortium's investment was paid back in kind by way of services rendered and was fully settled by June 2004. She said the balance of US$300,000 was treated in the same way as Mr. Kotzé's and Mr. de Witt's payments, i.e. as payment for a shareholding interest.

[39] Mr. Philippus Smit, the group's finance executive since October 2006 who took over from Ms. Vermaak, and a member of the accounts team before that from inception, says however that the Angolan Consortium was refunded its investment and never took up its shares.

[40] Mr. Roelofse's version is that the Angolan Consortium had made a loan to the group of US$2 million in 2003 and/or 2004. In 2005 or 2006, when US$1.7 million had already been repaid, a suggestion came about that the balance of approximately US$300,000 would be swapped for equity in the limited partner, OSL, for a 30% stake in OSL. Mr. Roelofse says this debt for equity swap did not take place, because a reconciliation of the outstanding balance between the parties showed that the Angolan Consortium owed money to the group. Mr. de Witt's explanation, given during his oral evidence, was that the first US$300,000 of the Angolan Consortium's contribution was to be treated as payment for their shareholding, and anything else that they paid in addition to that was to be treated as a loan. I will return to this disagreement later.

Mr. Diedericks' shareholding entitlement

[41] In July 2007 one of the original intended shareholders, Mr. Diedericks, passed away. The other intended shareholders agreed that they would each purchase a part of his intended stake in OSGL, and, regardless of strict obligation on their part

or questions of entitlement, a payment was commendably made to Mr. Diedericks' widow.

Incorporation of Falcon House

[42] On 10 June 2008 the Second Defendant ("Falcon House") was incorporated by First Names Group. Although Falcon House's constitutive documents are silent as to any specific purpose for this company, it is common ground that its object was to hold shares in group companies on behalf of the Angolan Consortium and/or other outside investors.

OSGL share issue

[43] No shares were issued to the present shareholders until around 31 July 2009, some six years after the business had started. Mr. de Witt's explanation for this is that it took a substantial period of time for the shareholdings in OSGL and OSL to be agreed and finalized, owing to delay in finalizing the group, in establishing the shareholders' nominated entities as well as the sale of shares between the stakeholders before they were in fact issued. Mr. Smit says that a reason for the delay in issuing shares was that the intended shareholders had not at first decided in which entity, OSGL or OSL, they would each hold their shares, and that Mr. de Witt and Mr. Kotzé kept changing the proportions of shares to which each would be entitled.

[44] At least up until 27 July 2005 it was being discussed that Mr. de Witt and Mr. Kotzé would, between them, be the sole shareholders in OSGL, to hold 60 and 40% respectively, with all others, including the Angolan Consortium, being shareholders in OSL.

[45] To hold his shares, Mr. de Witt caused the de Witt Trust to be established. He became its Protector. The Trustee was initially a professional trust company called Pinotage Trustees Sarl ("Pinotage"). Mr. Roelofse established the Maple Leaf Trust. This too had a professional trustee, CH Trustees SA. Mr. Stephanus de Witt formed the Ramrod Trust, of which he was the Protector. Mr. Kotzé used a company, Cannon Bridge Holdings Limited ("Cannon Bridge"), as his holding vehicle.

Issue of shares to Falcon House

[46] OSGL also issued 6 million shares to Falcon House in July 2009. This happened as follows. On 26 February 2009 Mr. Kotzé proposed that 6 million shares would be issued in OSL for a "proposed Mauritian company", and that shares that had been due to be issued to the Angolan Consortium should be housed in a separate entity and partly sold to a Saudi investment company. On 29 July 2009, BasCorp confirmed to Mr. Kotzé that Falcon House, a shelf company, had been allocated to receive 6 million shares in OSGL as BasCorp said Mr. Kotzé had instructed. Mr. Kotzé did give such instructions, on 29 July 2009. It is not clear from the correspondence why the original proposal for those shares to be in OSL came to be changed to OSGL.

[47] Mr. de Witt contended that the change from OSL to OSGL had been intentional. His explanation is that the Angolan Consortium had not cared which group entity their shareholding would be reflected in, and initially therefore they would be allocated shares in the same entity as all the stakeholders other than Mr. Kotzé and himself, OSL. However, Mr. de Witt had found a potential Saudi investor, who was interested in contributing cash by buying the shares allocated to the Angolan

Consortium, on condition that it would get a say in the management of the group, by way of a shareholding in OSGL. As a result, Falcon House was allocated shares in OSGL, not OSL.

[48] This explanation is at odds with the position as represented by Mr. Kotzé in correspondence. In an email dated 26 June 2012 addressed to BasCorp, copied to Mr. de Witt, Mr. Kotzé stated:

> *"[G]oing through the shareholding of both [OSL] and [OSGL] with Alex de Witt I see that I inadvertently requested the [Falcon House] shareholding to be in [OSGL] and not [OSL] as it should be.*
>
> *I apologize for this but can we please change the shareholding (6,000,000) shares in [OSGL] to 6,000,000 shares held and registered in [OSL].*
>
> *It makes no difference to the total Group shareholding but they prefer to be shareholders in [OSL]. If need be both Alex and I will sign off on this.*
>
> *The rest of the shareholding can stay as it is*."

[49] This change was not made, despite BasCorp and lawyers acting for them subsequently pressing for instructions to process this change.

[50] The Claimant contends that it had not consented to Falcon House being issued shares in OSGL, as opposed to OSL. The Claimant argues that the act of issuing those shares to Falcon House constitutes unfair prejudice, in that it created a vehicle through which majority control could be asserted over minority

shareholders. They also argue that the refusal of Mr. Kotzé and Mr. de Witt to cause or permit their evident mistake to be remedied causes ongoing unfair prejudice. Mr. de Witt gave evidence in his oral testimony that the proposition to have OSGL and not OSL issue shares to Falcon House was put "*to all the people involved and they agreed to that, but at the same stage they then said that they wanted to be removed from the Limited Partnership to the General Partnership. And that was all agreed to*". Parsing this, there is clearly a difference between the parties whether or not all the intended shareholders consented to the issue of shares in OSGL to Falcon House. There is no dispute that

(a) all the intended shareholders should have been consulted and their consent obtained; and

(b) it was agreed between all the intended shareholders that their shareholding was to be in the managing partner, OSGL; and

(c) no formal vote was taken between the intended shareholders, because they were at that point not yet shareholders; and

(d) in furtherance of the informal agreement that all the intended shareholders would be issued shares in OSGL, Mr. Kotzé as the principal of the then holding structure caused this to be done.

[51] The Defendants have suggested in argument that it had in fact been intentional to have OSGL issue the 6 million shares to Falcon House. Unfortunately Mr. Kotzé was unable to attend the trial to give evidence as planned, because, it was explained, he had unfortunately become afflicted with dementia a week or so before the trial.

[52] Following a further issue of the share capital of OSGL in 2010, the current shareholding in OSGL is as follows. For ease of reference the principals (in a

colloquial sense) of the holding vehicles of the founding stakeholders are given in brackets:

36% (6 million shares) held by Falcon House
22.29% (3,620,000) held by the de Witt Trust (Mr. de Witt)
14.90% (2,420,000) held by Cannon Bridge (Mr. Kotzé)
12.93% (2,100,000) held by Maple Leaf Trust (Mr. Roelofse)
12.93% (2,100,000) held by Ramrod Trust (Mr. Stephanus de Witt)

[53] The current shareholding in Falcon House is as follows:

37.38% (1,875,000 shares) held by the de Witt Trust (Mr. de Witt)
23.36% (1,171,875 shares) held by Cannon Bridge (Mr. Kotzé)
19.63% (984,375 shares) held by Maple Leaf Trust (Mr. Roelofse)
19.63% (984,375 shares) held by Ramrod Trust (Mr. Stephanus de Witt)

The 14 July 2012 meeting and aftermath

[54] The next significant event took place in 2012. Mr. Roelofse and other members of the group's executive decided to call a shareholders' meeting. They were dissatisfied with the way Mr. de Witt was running the group. The Angolan Consortium had also apparently expressed dissatisfaction with the group.

[55] Mr. Roelofse summarized the Angolan Consortium's concerns in a circular internal message dated 11 July 2012 ahead of the meeting scheduled for 14 July 2012.

[56] In this he recorded that the Angolan Consortium "*owns 30% of OIA*", that they had made the original funds available for the commencement/formation of the group

and then paid US$300,000 for their shareholding. Mr. Roelofse summarised the Angolan Consortium's concerns, which included that they had never been issued share certificates, there was no shareholders' agreement, lack of communication, no dividends paid, no acknowledgement as shareholders when decisions were taken and that Omega's Angola branch had tendered against them for a prestigious contract. Mr. Roelofse indicated that the Angolan Consortium intended to send a delegation to the meeting.

[57] Mr. Roelofse has subsequently claimed that he had been misled by Mr. de Witt into understanding that the Angolan Consortium had paid for their shares, when in fact that was not the case. Mr. de Witt has maintained that they did pay for their shares.

[58] In the event, the meeting took place, with Mr. de Witt present, as well as a representative of the Angolan Consortium.

[59] The intended purpose behind this meeting is also in dispute. Mr. Roelofse says it was to discuss the financial performance of the group in an effort to save it from bankruptcy and to improve internal communications. Mr. de Witt says it was to oust him. Whatever the intended purpose, Mr. de Witt was ousted. The ousters produced a "Resolution of Shareholders" of OIA resolving that Mr. de Witt would be removed as CEO of OIA with immediate effect and as director of various operating companies. In his stead, they resolved that Mr. de Witt's brother, Mr. S. de Witt, would be appointed. They also resolved that Mr. Roelofse and three others would be appointed as Executive Directors of OIA. The "Resolution of Shareholders" noted that "*The existing and newly appointed Directors and Executives are hereby authorized to perform all necessary acts to carry out this resolution*."

[60] These purported resolutions were signed, as consented to, by, among others, Mr. S de Witt, Mr. Roelofse and the representative of the Angolan Consortium.

[61] Mr. de Witt immediately filed a Notice of Motion in the Northern Gauteng High Court, Pretoria. He sought to have the purported resolutions suspended and his positions restored, as well as access to his office from which he had been excluded. Mr. de Witt claimed, *inter alia*, that the meeting was invalid because OIA as a limited partnership does not have shareholders.

[62] However, the new executive succeeded in remaining in place, and is, in effect, the current group management.

[63] Shortly after this meeting, Mr. Roelofse, Mr. S de Witt, Mr. de Witt and Mr. Kotzé each took it upon themselves to record in the form of letters addressed to their respective trustees that their shareholdings in Falcon House were held by those trusts as nominees and on behalf of an Angolan Consortium. Those letters were dated 20 August 2012.

[64] The group, under the current management, preferred a criminal complaint against Mr. de Witt in November 2012, but this ended when the South African prosecuting authorities decided not to pursue it.

[65] On 24 July 2013 OIA and ORS filed a civil claim against Mr. de Witt in the North Gauteng High Court, seeking payment of over R5million in respect of OIA and over R4million for ORS together with interest and costs, on various grounds, including in connection with Mr. de Witt's operation of his loan account whilst CEO of the group. That suit is, I understand, still pending.

The call on the de Witt shares.

[66] In around November 2013, Mr. de Witt sought to instigate an extraordinary general meeting of shareholders of OSGL. The current management became concerned that Mr. de Witt and Mr. Kotzé wanted to exercise shareholder control and take over the running of the group. Another concern was that Mr. de Witt would try to have the legal proceedings dropped against him, thereby depriving the group of a money judgment against Mr. de Witt. The current managers therefore contacted BasCorp and ventilated a number of thoughts, including that Mr. de Witt appeared not to have paid for his shareholding and that he should be required to pay for his shareholding or else have his shareholding forfeited.

[67] Mr. Roelofse admitted in cross-examination that the purpose underlying the call on Mr. de Witt's shares was to set up a forfeiture to prevent the minority being outvoted at a meeting. Mr. Roelofse and other shareholders sought to stall the meeting until such time as Mr. de Witt's shares could be forfeited.

[68] BasCorp facilitated this plan, although it is not clear to what extent they did so knowingly. BasCorp sought to ascertain who the material shareholders were. They observed that they needed to be clear on this to be able to give proper notice of a meeting. One of their vaunted concerns was that there was an intended shareholder who had paid for his shares but that Mr. Kotzé had caused the shares due to him not to be issued. BasCorp also took legal advice in relation to the overall situation.

[69] On 12 February 2014, a firm of South African lawyers, Pagel Schulenburg Inc., purportedly representing the Angolan Consortium, wrote to BasCorp pressing for

the EGM to be held. Their letter suggests that they obtained information about the proposed EGM directly or indirectly from Mr. de Witt, although Mr. de Witt stated in oral testimony that he had had no contact with the Angolan Consortium after he was ousted in 2012. He could, of course, have had contact directly with this law firm, or via another. There was some suggestion advanced on behalf of the Claimant that they believed it was a competitor with whom Mr. de Witt allegedly had dealings, a Mr. le Roux, who was behind instructions to that firm. In this letter Pagel Schulenburg Inc. make it clear that they were aligning their interests entirely with those of Mr. de Witt, going so far as to call for the status quo before the "*meetings held in 2012*" to be re-established, in particular with the removal of Mr. du Toit. This letter contradicted the consent given by the representative of the Angolan Consortium to the decisions made on 14 July 2012. From its face it was not copied to anyone else.

[70] On 3 April 2014 BasCorp addressed a letter to Pinotage, as the trustee of the de Witt Trust. The letter was on OSGL letterhead, giving its address as the registered address in the TVI. In this letter BasCorp stated that the directors of OSGL had no evidence on record to show that the de Witt shares had been fully paid, that the shares were subject to forfeiture provisions and that shares issued for a promissory note or a contract for future services are not deemed to be fully paid. The letter continued:

> "*Therefore, we hereby give you written notice that the Shares currently held by you be fully paid and that payment for these shares should be received by 18 April 2014. In the event of non-payment at or before the date specified above, the Shares, or any of them, in respect of which payment was not made will be liable to be forfeited*."

[71] The letter did not state where the call was to be paid, nor the amount or currency. No similar letter was sent to Falcon House, who, the Claimant contends in these proceedings, had also not paid for its OSGL shares.

[72] The letter was stamped for receipt on 4 April 2014.

[73] Neither Pinotage nor Mr. de Witt responded to that letter. BasCorp forfeited Mr. de Witt's shares on 24 April 2014.

[74] Prior to this, however, on 17 April 2014, one day before the deadline, Mr. de Witt made a statement in South Africa. I am not certain whether this was communicated to BasCorp. In this statement, Mr. de Witt gave an account of what he said was the group's capitalization arrangement. Although ambiguously worded, this account represented that shares would be allocated immediately upon inception of the group to each intended shareholder, with each subsequently being required to make a financial contribution by way of a loan to OIA in proportion to his shareholding. Quite how the shareholding would then become paid for is unclear from Mr. de Witt's statement, as it blurs the distinction between a loan made to the group which the group would have to repay, and payment by a prospective shareholder for shares that would be issued to him. However what is clear, says the Claimant, is that Mr. de Witt knew that the price was R975,000 and R400,000 respectively for his two tranches of shares.

[75] Following the resolution of forfeiture, and despite confirmation that the register of members had been updated, the registered agent of OSGL failed to update the register of members, such that the de Witt Trust remained as a registered shareholder after the forfeiture resolution had been passed and the share certificates cancelled.

[76] Sometime in around May 2014 there was a personnel change within BasCorp. If BasCorp had previously been leaning towards the current management, now it began to lean the other way in favour of Mr. de Witt and Mr. Kotzé. On 27 August 2014 BasCorp's new case handler sent the group's executive a letter stating that the forfeiture procedure could have suffered from various defects and that the resolution had not been transmitted to the registered agent in the BVI, or recorded in the register of members, hence it had never been given legal effect. BasCorp caused the resolution to be rescinded, effectively restoring Mr. de Witt's shareholding.

[77] From 25 August 2014, OSGL's affairs have been conducted on the basis that Mr. de Witt's shares confer voting rights in OSGL.

[78] Mr. Roelofse says the effect of the rescission was to return the group to the control of Mr. de Witt along with the ongoing support of Mr. Kotzé. He says this was an act specifically prejudicial to the Claimant's interests in OSGL.

[79] In support of this contention, the Claimant points to a financial overview of the group dated 28 November 2014 prepared by Mr. Smit. In this, Mr. Smit states that the group's finances had been significantly improved since Mr. de Witt's removal. He states that capital and reserves had increased from US$1.4 million to US$10.6million, cash on hand more than doubled, there were no more overdue accounts in the group and a bank overdraft facility was no longer utilized.

The 2015 Resolutions

[80] The matter did not stop there however. On 17 February 2015 Mr. Roelofse received a set of resolutions dated 30 January 2015 (the "January 2015 Resolutions") through BasCorp.

[81] Taken in order, these resolutions were as follows:

1. A written resolution of a majority of shareholders of Falcon House, being the de Witt Trust signed for by Mr. de Witt as the Trust's authorized agent and Cannon Bridge signed for by Mr. Kotzé. This resolved to appoint Mr. Kotzé and a Mr. Ian Paulus van Zyl (both by then trustees of the de Witt Trust) as additional directors of Falcon House, with Mr. Kotzé designed as the Chairman of the Board of Directors and Treasurer of the company and Mr. van Zyl as company secretary.

2. A written resolution of a majority of shareholders of OSGL, by Falcon House signed for by Mr. Kotzé, by the de Witt Trust signed for by Mr. de Witt and by Cannon Bridge, signed for by Mr. Kotzé. This resolved to appoint Mr. Kotzé and Mr. Ian Paulus van Zyl as additional directors of OSGL, with Mr. Kotzé designed as the Chairman of the Board of Directors and Treasurer of the company and Mr. van Zyl as company secretary.

3. A written resolution of directors of OSGL, by Mr. Kotzé and Mr. van Zyl, but not by BasCorp. This resolved to appoint Mr. Kotzé as an officer of OSGL and Chairman of its Board of Directors and Treasurer, and Mr. van Zyl as an officer of OSGL and Company Secretary of OSGL. It also resolved to remove

as agents of OSGL all appointed agents and to revoke all agents' powers with immediate effect.

[82] No mention is made in the Resolutions of the wishes or instructions of the Angolan Consortium.

The 4 March 2015 resolution

[83] The January 2015 Resolutions were followed by a visit to the group's premises in Pretoria on 4 March 2015 by Mr. van Zyl and his attorney. Mr. van Zyl produced a resolution dated 4 March 2015 ("the 4 March Resolution"). This was expressed to be made "on behalf of [OIA] by [OSGL]". It resolved, *inter alia*, that all the current management, including Mr. Roelofse, were suspended from their duties with immediate effect pending investigation and possible disciplinary proceedings to be initiated against them by OIA.

[84] On 10 April 2015 Mr. van Zyl, as Company Secretary of OSGL, for and on behalf of OIA, gave written notice of dismissal to the current management, including Mr. Roelofse. More specifically, Mr. Roelofse was terminated as Chief Operating Officer of OIA. He was required to vacate his office, return all equipment, documents and information. The grounds given were that the recipients had failed or refused to comply with notices of suspension, constituting gross misconduct warranting summary dismissal.

[85] The overall effect of the January 2015 and 4 March Resolutions was to transfer control of the group back to Mr. de Witt and Mr. Kotzé, and to remove Mr. Roelofse (and the other minority stakeholders) from all day to day involvement in the management of the group as a whole, including of OSGL.

[86] Mr. Roelofse says this will allow Mr. de Witt to discontinue the civil proceedings being pursued against him by members of the group, something which is directly prejudicial to the Claimant's interests as a shareholder in OSGL, because this would deny the possibility of a recovery of substantial damages from Mr. de Witt which would boost OSGL's overall value. The Claimant tells the Court in its pleadings that when Mr. de Witt and Mr. Kotzé sought to convene an extraordinary meeting of shareholders of OSGL on or about 25 November 2013 through their trust/corporate vehicles the third and fourth defendants, their proposed agenda provided for the passing of a draft resolution in terms that all legal action against Mr. de Witt should cease. The Defendants admit this, but in his oral evidence at trial Mr. de Witt asserted that he now wants the action brought against him to continue. He claims to be confident that he will prevail.

[87] The Claimant also considers that its interests as a shareholder are prejudiced by the group reverting to Mr. de Witt's and Mr. Kotzé's control, as the group had gone from near insolvency under Mr. de Witt's control to growing profitability under the current management.

[88] Mr. Roelofse contends that the past and present conduct of the affairs of OSGL has been conducted in a manner prejudicial to the Claimant, in particular by:

a. The purported rescission by OSGL of the forfeiture of the de Witt Trust shares;
b. The issue by OSGL of the Falcon House shares
c. The failure of OSGL to cancel the Falcon House shares.

[89] These allegations of prejudicial conduct are broadly pleaded, and not limited by these three particular heads of alleged prejudice.

[90] The Claimant contends that as a consequence of the alleged unfairly prejudicial conduct, the Claimant's proper proportion of shares in OSGL has been diminished from 31% to 12.93% and the Claimant's ability to participate in the management of the group has accordingly been wholly eliminated.

[91] The Claimant further contends that the failure by OSGL to call for payment of consideration in respect of the de Witt shares until 3 April 2014, and the failure of OSGL ever to call for payment of consideration in respect of the Falcon House shares, in circumstances where all the other members of OSGL have given requisite consideration, has deprived OSGL of capital, thereby causing unfair prejudice to the interests of the Claimant and unfairly discriminating against the Claimant as a paid up member of OSGL.

[92] The relief sought by the Claimant is however rather narrowly pleaded. The Claimant asks for:

i. an order pursuant to section 184I of the Act, setting aside the resolution dated 25 August 2014 by which OSGL purported to rescind the forfeiture of Mr. de Witt's shares;
ii. an order pursuant to section 43 of the Act, rectifying OSGL's register of members to record the cancellation of Mr. de Witt's shares on 24 April 2014;
iii. alternatively, an order pursuant to section 184I of the Act requiring OSGL to cancel Mr. de Witt's shares and amend the register of members of OSGL accordingly;
iv. an order pursuant to section 184I of the Act requiring OSGL to cancel the Falcon House shares and amend the register of members of OSGL accordingly;

v. a declaration that the shareholders' resolutions of OSGL by which Mr. Kotzé and Mr. Van Zyl were appointed directors of OSGL are invalid and void and that all resolutions of the directors of OSGL passed by them are invalid and void;

vi. an order pursuant to section 184I of the Act requiring OSGL to remove the names of Mr. Kotzé and Mr. Van Zyl from its register of directors;

vii. a declaration that the 4 March Resolutions and the 10 April dismissal notices are invalid and void as the resolutions appointing Messrs. Kotzé and Van Zyl are also invalid and void, and

viii. an order that the Third and Fourth Defendants pay the costs of these proceedings.

[93] The Claimant's Claim Form and Statement of Claim does not ask for such other relief as the Court deems just or fit. Nor does it ask for the Claimant's shares to be bought out for a reasonable price.

[94] The Defendants did not plead a counterclaim.

Discussion

[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] Section 43 of the Act provides:

*"**43.** (1) If -*

(a) information that is required to be entered in the register of members under section 41 is omitted from the register or inaccurately entered in the register; or

(b) there is unreasonable delay in entering the information in the register;

a member of the company, or any person who is aggrieved by the omission, inaccuracy or delay, may apply to the Court for an order that the register be rectified, and the Court may either refuse the application, with or without costs to be paid by the applicant, or order the rectification of the register, and may direct the company to pay all costs of the application and any damages the applicant may have sustained.

(2) The Court may, in any proceedings under subsection (1), determine any question relating to the right of a person who is a party to the proceedings to have his name entered in or omitted from the register of members, whether the question arises between

(a) two or more members or alleged members; or

(b) between members or alleged members and the company;

and generally the Court may, in the proceedings, determine any question that may be necessary or expedient to be determined for the rectification of the register of members."

[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 Zealandby Hammond J: [1]

[1]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 37 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 Co-operative Wholesale Society Ltd v Meyer****).*[2] *From those early beginnings, the section has been applied much more widely, both in Britain, and throughout the common law world.*

[2] Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324 at 342 and 364.

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[3] (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

[3] Re Neath Rugby Club Ltd (No. 2) [2008] BCC 390

the company" is or would be unfairly prejudicial. Both are directed to corporate behavior.[4]

[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.[5]

[102] A company's affairs "*would encompass all matters which may come before its board of directors for consideration*".[6]

[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[7].

[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.[8]

---

[4] Re Legal Costs Negotiators Ltd [1999] 2BCLC 171, 199i – 200a
[5] E.g. Re Blackwood Hodge plc [1997] 2BCLC 650
[6] Re Neath Rugby Club Ltd (No. 2) [2008] BCC 390
[7] E.g. Re a Company (No. 4415 of 1996) [1997] 1BCLC 479 at 489c
[8] Scottish Co-Operative Wholesale Society Ltd v Meyer [1959] AC 324

[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[9] [emphasis added].

[106] Exercise of voting rights is an exercise of private rights.[10] 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.[11] 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.[12]

[107] A single prejudicial act is sufficient to trigger the Court's discretion[13] under the section.

[108] Where the court is concerned with proposed conduct, this must have gone beyond the mere discussion stage.[14]

[109] The conduct complained of must be unfairly prejudicial to a member's interests in his capacity as member.[15]

---

[9] Unisoft Group Ltd (No. 3) [1994] 1BCLC 609
[10] Unisoft Group Ltd (No. 3) [1994] 1BCLC 609
[11] Unisoft Group Ltd (No. 3) [1994] 1BCLC 609
[12] Unisoft Group Ltd (No. 3) [1994] 1BCLC 609
[13] Lloyd v Casey [2002] 1BCLC 454
[14] Re Gorwyn Holdings Ltd (1985) 1 BCC 99 at 479
[15] O'Neill v Phillips [1999] 2BCLC 1, 14h -15c

[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.[16]

[112] Such rights are not limited to strict legal rights.[17] 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.[18]

[113] Interests of members for purposes of the statutory unfair prejudice provisions have been held to include employment or office as director[19], participation in management[20] and petitioner's interests as creditor of or provider of loan capital to the company.[21]

[114] Members' interests also include the "real value of the Petitioner's shares".[22]

Unfairly prejudicial conduct

[115] A petitioner must prove a causal link between the conduct complained of and unfair prejudice suffered by the member.[23] Absent proof of prejudice, allegations

---

[16] cf Re a Company (No.00477 of 1986) [1986] BCLC 376, 378h
[17] Re a Company (No.00477 of 1986) [1986] BCLC 376, 378i
[18] O'Neill v Phillips [1999] 2BCLC 1, 15b-c
[19] Re a Company (No.00477 of 1986) [1986] BCLC 376)
[20] R &H Electric Ltd v Haden Bill Electrical Ltd, Re Haden Bill Electrical Ltd [1995] 2BCLC 280, In re a Company (No.003160 of 1986) [1986] BCLC 391
[21] R &H Electric Ltd v Haden Bill Electrical Ltd, Re Haden Bill Electrical Ltd [1995] 2BCLC 280
[22] Re a Company (No. 00314 of 1989) [ex p. Estate Acquisitions and Developments Ltd] [1990] BCLC 80

of unfair prejudice will not succeed.[24] Conduct must be prejudicial "in the sense of causing prejudice or harm to the relevant interest" but also be unfair.[25]

Unfairness

[116] The words "unfairly prejudicial" are general words which should be applied flexibly to meet the circumstances of the particular case.[26] But the "*concept must be applied judicially and the content which it is given by the courts must be based on rational principles*".[27]

[117] Those rational principles were laid down by the House of Lords in **O'Neill v Phillips.** [28]

[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

[23] Re Blackwood Hodge plc [1997] 2BCLC 650
[24] Irvine v Irvine (No. 1) [2007] 1 BCLC 349, 439 at para 339
[25] Re Saul D Harrison & Sons plc [1995] 1BCLC 14
[26] Re Saul D Harrison & Sons plc [1995] 1 BCLC 14
[27] O'Neill v Phillips [1999] 1BCLC 14
[28] [1999] 1BCLC 14

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*".[29]

[120] Unfairness must be judged on an objective basis[30]. As stated in **Re Guidezone Limited**[31]

> "*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.[32]

---

[29] Re Saul D Harrison & Sons plc [1995] 1 BCLC 14
[30] Re Saul D Harrison & Sons plc [1995] 1 BCLC 14; Re Guidezone Limited [2002] 2 BCLC 321
[31] [2002] 2 BCLC 321
[32] Re Macro (Ipswich) Limited [1994] 2 BCLC 354

[122] There is no requirement for a petitioner to come to the court with clean hands.[33] No statutory limitation periods apply to bar a petitioner's right or the relief, although time may alter the nature of a quasi-partnership.[34]

[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.**[35] 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*.

The call on the de Witt shares

[125] At this juncture it is convenient to consider whether BasCorp's decision as director of OSGL to rescind the resolution forfeiting the de Witt shares amounted to unfairly prejudicial conduct of the affairs of the company OSGL.

---

[33] Joffe, Minority Shareholders, Law, Practice and Procedure, 3rd Ed. Para. 5.202
[34] Joffe, Minority Shareholders, Law, Practice and Procedure, 3rd Ed. Para. 5.207
[35] O'Neill v Phillips [1999] HL 1092

[126] In my view it does not. This is because the call on the de Witt shares was defective as a matter of law.

[127] As learned Queen's Counsel for the Defendants submitted, the law requires the procedure for a call and forfeiture to be perfectly compliant with legal requirements, failing which the forfeiture has no effect. As set out in **Johnson v Lyttle's Iron Agency**:[36]

> [James LJ] "*It was the established rule of the Court of Chancery and of the Courts of Common Law that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest*."
>
> [Mellish LJ] "*I am of the same opinion. I think it is clear that a forfeiture of shares is, to all intents and purposes, the same thing as any other forfeiture which deprives a man of his property (…) I think that if the notice departs in any respect from the statutory form, it is impossible for us to go into the question of how much it departs. It is a bad notice, and the subsequent resolution, which is founded upon it, is invalid*."

[128] Furthermore, in **In re Cawley & Co,**[37] Lord Esher, MR stated:

> "*I do not wish it to be supposed that my decision in this case rests only on the articles. I take it to be of the very essence of a call that the time and place of payment should be determined*".

[36] (1877) 5 ChD 687, CA at 694
[37] In re Cawley & Co (1889) Ch 209 at 236, CA

[129] Lord Esher, MR, did not add that the amount needed to be stated as a matter of law. Time and place of payment were the irreducible minimum requirements. In that case, the focus of the court's enquiry had been whether the particular call had complied with the articles. That was on the basis that the articles showed what had to be done upon making a call. The court concluded that the call should have specified the amount, the place where it should have been paid, and the deadline. Lord Esher, MR's dicta took the analysis beyond construction of the articles and expressed what he considered to be a proposition of law.

[130] In the present case the call did not specify the amount that needed to be paid, nor the place.

[131] It is correct that OSGL's articles did not say that a call had to include these details. Counsel for the Claimant submitted the call was perfectly compliant with OSGL's Articles, and so it was. He also argued that Mr. de Witt knew full well how much needed to be paid.

[132] It is however not good enough to look at the Articles in isolation. They must be interpreted in accordance with the law. As between the law, be it common law or statute, and the Articles, there is a hermeneutic of continuity. There is a common law requirement that the call should state the place for payment and it did not. It could be said that it must have been obvious to Mr. de Witt where the de Witt Trust should make payment, but that is not so. The call was made by BasCorp, from Switzerland, on OSGL's TVI letterhead. It was a formal step. Mr. de Witt had been out of the group for almost two years. Organizational changes might have occurred in the intervening period. Had he been minded to pay (which of course

he was not, but that is irrelevant for the validity or otherwise of the call), it is unclear from the call where he should have done so.

[133] That is enough to render the call bad in law and thus invalid.

[134] The omission of the amount was also in my view fatal. The point about perfect technical compliance is not perfection for its own sake but to have the highest degree of certainty that a person's rights are being respected. Counsel for the Claimant contended that Mr. de Witt knew how much he had to pay for his shares, because in response to the call he made a statement giving the amount in Rand. There are a number of problems with this. First, the Rand amounts given by Mr. de Witt had been those used by Wouter Nel in its certificates. Wouter Nel's certificates did not treat the Rand exchange rate with the U.S. Dollar as fluctuating. It could well be that the Rand figure quoted by Mr. de Witt in his 2014 statement would come nowhere near the US$150,000 that had originally been agreed to be the price several years earlier. Then the shares issued were, on their face, of no par value. There had been no resolution of the board of directors fixing the consideration for their issuance. Of course, the **Duomatic** principle[38] might be taken to cure that omission, but from a lay shareholder's point of view, unless he was told unambiguously how much he had to pay, a *bona fide* uncertainty might remain. In this case, I have no hesitation in finding that without stating the currency and amount of payment and the place of payment, the call was invalid. Thus the ensuing forfeiture resolution was also invalid. There is no need to consider the effect of the decision to rescind that resolution because it is as if the call and forfeiture never happened.

[38] Deriving from **Re Duomatic Ltd** [1969] 2 Ch 365

The issue by OSGL of the Falcon House shares

[135] The Claimant fares no better with its contention that it suffered unfair prejudice by reason of the issue by OSGL of shares in favour of Falcon House.

[136] The Claimant is right that it was unconscionable and unfair for Mr. de Witt and Mr. Kotzé to procure Falcon House's vote to support a resolution suspending Mr. Roelofse and altering the board of directors to be able to dismiss and exclude him from management. This was unfair because both Mr. de Witt and Mr. Kotzé contended before this trial that Falcon House should have been holding shares in OSL, not OSGL. It repels against all sense of propriety for Mr. de Witt and Mr. Kotzé then to use Falcon House's voting power in the affairs of OSGL when on their own case Falcon House should not have had such power. It was also unfair because the ostensible principals behind Falcon House, the Angolan Consortium, had not been consulted.

[137] However, I cannot ignore that the Claimant and Mr. Roelofse had been content to ride on the consent of the Angolan Consortium to resolutions made at the purported meeting of shareholders of OIA on 14 July 2012 (whatever may be the validity or otherwise thereof). The Angolan Consortium could only have provided that consent as the underlying beneficial owner of shares in Falcon House, which in turn held shares in OSGL. Fully aware that Falcon House held its shares in OSGL, the Claimant and Mr. Roelofse signed off on a letter only about a week after that meeting stating that the Claimant held its shares in Falcon House as nominee and on behalf of the Angolan Consortium. The Claimant and Mr. Roelofse must be taken to have been content with that state of affairs. The problem was not that Falcon House was issued shares in OSGL. That was not

unfair, in light of the Claimant's and Mr. Roelofse's acceptance of it. The problem rather was what was done with that block of shares by Mr. de Witt and Mr. Kotzé.

[138] Ultimately, though, none of this matters. This is because Mr. de Witt and Mr. Kotzé had enough votes in the de Witt Trust and Cannon Bridge to have carried shareholder resolutions of OSGL to change the board without the support of Falcon House. In a legal sense, Mr. de Witt's and Mr. Kotzé's unfair conduct in causing Falcon House to vote shares in OSGL which they admitted it should not have held, and without the authorization of the Angolan Consortium, did not cause the Claimant prejudice.

The failure of OSGL to cancel the Falcon House shares

[139] The Claimant contends it has suffered unfair prejudice by reason of the fact that OSGL, through BasCorp, did not cancel the shares issued to Falcon House or forfeit them for non-payment of the consideration for their issuance.

[140] This head fails for the same reason, namely that Mr. de Witt and Mr. Kotzé between them controlled sufficient shares to carry a majority vote of shareholders in OSGL without the need for Falcon House's support.

[141] On another level, I cannot tell whether BasCorp should have cancelled those shares on grounds that the Angolan Consortium had not paid for their shares. I am unable to determine on the evidence before me whether or not the Angolan Consortium should properly be taken to have paid for its shares. It is strange that no documents whatsoever recording the Angolan Consortium's understanding of that aspect have been disclosed in these proceedings. There must have been some kind of paper record. Then there is the fact that only extracts of the ledgers

have been laid before the court. Also, Ms. Vermaak's maintenance of the accounts left much to be desired. Her oral evidence on numerous points changed over the course of her testimony and none of the other witnesses had been sufficiently involved in the financial record keeping of the group in its early phase to cast sufficient light on the subject. I am not prepared to make a finding of fact on whether the Angolan Consortium paid for their shares on the evidence before me.

[142] This uncertainty could have been avoided had BasCorp ensured compliance with the requirements of section 98 of the Act, that:

> ***"98.*** *(1) A company shall keep records that*
> *(a) are sufficient to show and explain the company's transactions"*

[143] Not only is such failure an offence, pursuant to sub-section (2) of section 98, and a breach of statutory duties of a director, but all the controversy over whether Mr. de Witt and the Angolan Consortium had paid for their shares would have been avoided, with huge cost savings all round, if the requisite financial records had been kept. This failure on the part of BasCorp was seriously prejudicial to the interests of all the shareholders, including the majority, and unfairly so. It surprises me that neither side has advanced this as a ground for relief, but so be it. This failure also begs the question what BasCorp in fact did do as a director, and whether it properly earned its fee. Those are potentially questions for another time and possibly another place. It appears BasCorp was little or no more than a nominee director, and even underperformed that function. The real management of OSGL and the rest of the group was carried out in South Africa by the executive, including the principals of the shareholders.

Mr. de Witt's conduct as CEO

[144] The Claimant does not base a prayer for relief from unfair prejudice directly upon Mr. de Witt's conduct as CEO of the group. The Claimant complains, as part of its background story, that Mr. de Witt depleted the group's funds, to the detriment of OSGL, by drawing money out at will by way of so-called loans, in good times and bad. The Claimant also complains that Mr. de Witt's management brought the group close to insolvency. There is little evidence before the court to enable me to gauge with any degree of certainty what effect upon the group's finances and the value of the shares on OSGL Mr. de Witt's borrowings had. Moreover, the allegations of mismanagement are still pending determination before the Courts of South Africa. I can and will not therefore treat these as grounds for exercising the court's section 184I jurisdiction. If, however, that jurisdiction is triggered on other grounds, as I will hold that it is, then these aspects of Mr. de Witt's conduct do become relevant. Their relevance would then pertain to the nature of relief that would be appropriate in all the circumstances and in the interests of all the shareholders. There is sufficient evidence before the court which points ineluctably to the fact that Mr. de Witt's so-called borrowings did negatively impact upon the group's financial position, and also that his direction of the group dangerously lacked monetary discipline. Even though Mr. de Witt would not be directly in control any more, but acting through and with the willing assistance of others (Mr. Kotzé and Mr. van Zyl) there can be no real doubt that his intention is to regain *de facto* control. It is appropriate for all shareholders to be preserved from the risks of a repetition, not to mention the debilitating aggravation and insecurity which treating the group, including OSGL, as a personal bank and fiefdom inevitably engenders in those who suffer it.

A "quasi-partnership" and/or breach of "legitimate expectation"

[145] In **O'Neill v Phillips** Hoffmann LJ addressed the circumstances where there exist rights correlative to a company's constitution:[39]

> "*In **In re Saul D. Harrison & Sons Plc** [1995] 1BCLC 14, 19, I used the term "legitimate expectation", borrowed from public law, as a label for the "correlative right" to which a relationship between company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them by the articles to the prejudice of another member. I gave as an example the standard case in which shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. In such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms. The aggrieved member could be said to have had a "legitimate expectation" that he would be able to participate in the management or withdraw from the company.*
>
> *…*
>
> *In saying that it was "correlative" to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint. The concept of a legitimate expectation should not be allowed to lead a life of*

[39] Pages 1098 D to 1102 F of the Weekly Law Reports version

its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application."

[146] These observations were developing earlier dicta of Hoffmann LJ in **Re Saul Harrison**[40] in the English Court of Appeal, at page 490:

"*Thus the personal relationship between a shareholder and those who control the company may entitle him to say that it would in certain circumstances be unfair for them to exercise a power conferred by the articles upon the board or the company in general meeting. I have in the past ventured to borrow from public law the term "legitimate expectation" to describe the correlative "right" in the shareholder to which such a relationship may give rise. It often arises out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form, … But in* ***Re Westbourne Galleries*** *Lord Wilberforce went on to say:*

"It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that the 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…"

[40] [1994] BCC 475

Thus in the absence of "something more", there is no basis for a legitimate expectation that the board and the company in general meeting will not exercise whatever powers they are given by the articles of association."

[147] In the present case the Defendants cite this passage and submit that here too there is "nothing more". With respect, having read the documentary evidence, listened to and seen the witnesses, I disagree. Seen in the round, the venture appears to me to have commenced and continued as a "quasi-partnership" between the shareholders' principals, or at least to have been premised on a number of informal agreements or understandings. These agreements or understandings included an expectation that those principals, or some of them, including Mr. Roelofse, would be involved in the management of the group. This expectation was infringed when he was dismissed and excluded from the management of the group.

[148] It was not just Mr. de Witt and Mr. Kotzé who assumed the risk of the venture at the start. The principals of the other eventual shareholders also accepted risk – that the venture might fail, that they would indirectly lose their capital contributions and that they would lose their livelihoods. Given the intended corporate structure, whereby the limited partnership OIA was to be held by companies limited by shares, the other eventual shareholders were in no different a position from Mr. de Witt and Mr. Kotzé. Their risk was in fact greater than that of Mr. de Witt, in that the other eventual shareholders had already paid their capital contributions, and they would be immediately prejudiced if the shares lost value, whereas if Mr. de Witt had not yet paid for his shares he would simply become liable to pay upon a call being made.

[149] Mr. de Witt asserted that only he and Mr. Kotzé were prepared to assume unlimited risk. This suggests a partnership in which the partners are liable for the debts of the partnership to the full extent of their personal fortune. Mr. de Witt testified further, that right from the outset, Mr. Kotzé said to him that the two of them would be the partners in the general partner. The use of partnership language to describe the interpersonal relationships is striking.

[150] I am not persuaded that only Mr. de Witt and Mr. Kotzé were to be the "partners" in OSGL (*sic*). The eventual shareholders in addition to Mr. de Witt and Mr. Kotzé all joined the venture prior to its commencement. It probably was the case, as Mr. de Witt testified, that setting up this business had been his idea and that he and Mr. Kotzé had had the original discussions, and then Mr. de Witt had discussions with the Angolan Consortium. Then they were joined by the other eventual individual shareholders. A series of discussion meetings and sessions ensued between them.

[151] With the greatest respect to Mr. de Witt, I accept that the other eventual individual shareholders were also founder members. Each was to play a role in organizing and managing the venture or contributing know-how and expertise, as key personnel. Mr. de Witt and Mr. Kotzé were unable to do all the necessary organizational and management work on their own. At the very least Mr. Roelofse and his chosen shareholding vehicle were to have the ability to participate in the management of the group[41], not just OSGL. That was a unanimously held understanding between all the founding members before they were issued shares in OSGL. The extent of their ability to influence decisions was to be delimited by their voting power as shareholders of OSGL. Practically speaking, to have the

[41] Cf Amended Statement of Claim, paragraph 37.

ability to participate in the management of this group meant that such a person would have to be involved in its day-to-day operations. That was the only way the Claimant, through Mr. Roelofse, could have visibility over OGSL's and the group's affairs. This is so because the group had many operating branches or subsidiaries. It is right, in my view, to speak in this case of there being a legitimate expectation on the Claimant's part that Mr. Roelofse should not be excluded from the management of the group absent good reason, and then on reasonable terms.

[152] Moreover, each of the eventual shareholders was to contribute capital. Each of the other shareholders was initially to have the prospect of a share in profits of the venture through a shareholding in OSL, in addition to receiving salary and bonuses.

[153] That assumed, of course, that OSGL as the general partner of OIA would act fairly in generating and upstreaming profits to OSL. By 2009, however, trust between the other shareholders and Mr. de Witt and Kotzé had become strained. Mr. de Witt had *de facto* overall control of the venture. His style of management was such that the business grew, but internal financial discipline was lacking. On top of that, Mr. de Witt drew money at will from the business, including for his personal and family members, formally as loans. It is a truism that there is a world of difference between cash in hand and an unsecured promise to pay money, despite Learned Counsel for the Defendants' deft arguments to the contrary. Cash can be used to pay for goods and services, a private unsecured promissory note cannot. Mr. de Witt is aware of that. This is why he took cash out of the business.

[154] By 2009, also, it had become clear to the other shareholders that if they were to take their shareholding in OSL they would have no say in management of OIA

whatsoever. It is clear to me that they had not entered this venture, and risked their livelihoods and capital contributions, on the basis that their investment would be at the mercy and pleasure of Mr. de Witt and subordinated to his appetite for cash. Rather, they decided to join the venture on the basis that they would be involved in its management, and effectively at that. They therefore stood on being made shareholders in OSGL, which managed OIA. That would have been pointless if their minority shareholding status would mean that they could simply be out-voted and removed at will by a majority. They cannot have intended that. Something more was indeed intended. Those eventual minority shareholders intended their interest to reflect the initial basis for their joining the venture. Each was to have a key role in the organization and an effective say in the running of the business. That is why the eventual minority shareholders wanted to be shareholders in OSGL. OSGL was the vehicle for managing the business of OIA. None was to be a "sleeping" stakeholder, or a mere employee. If they were to be that, it would have made no difference if they were shareholders in OSL. Even though their views in the running of the business could be overruled by factions that might muster a majority vote, the initial key personnel were to be included in the management of the business and not to be excluded without being given an opportunity to remove their capital upon reasonable terms. I find as a fact that there was an agreement, albeit informal, to this effect, which pre-existed the adoption of the Memorandum and Articles of OSGL, and which subsisted alongside them. I derive support for this conclusion from the fact that:

(i) no new shareholders joined the company at any stage. Two of the initial key persons dropped out (Mr. Diedericks and Mr. de Kock), and their share allocations were bought by the other eventual shareholders; and

(ii) these key persons players worked together on the basis of informal agreements and understandings for about six years before shares were issued to them;

(iii) the shares carried equal voting rights – Mr. de Witt and Mr. Kotzé did not have enhanced voting rights, to put them at a more privileged level than the other shareholders;

(iv) by contrast with the shareholders, not all persons who came over from their previous employer became shareholders. For example, Ms. Vermaak. She also had a loan account in the books of the group. She says that there had been some discussion of her also being made a shareholder but she was not. Similarly, Mr. Smit had come over and he was never made a shareholder. Both held important leadership roles but they were never more than simply employees.

[155] Here, in excluding Mr. Roelofse, the majority did not offer any terms for withdrawing capital from the company. Quite the opposite. All those dismissed were threatened with investigation and legal proceedings.

[156] I therefore find that the exclusion of Mr. Roelofse from the management of the group was an act which infringed the understandings and agreements underlying the constitution of the group, including OSGGL, and was unfairly prejudicial to the interests of the Claimant.

[157] The exclusion of the minority shareholders' principals has all the appearance of a "tit for tat" strike for Mr. de Witt's ousting. As stated by Hoffmann LJ in **O'Neill v Philipps:**[42]

> "*Usually…the majority shareholder will want to put an end to the association. In such a case, it will almost always be unfair for the minority shareholder to be excluded without an offer to buy his shares or make some other fair arrangement. …But the unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer.*"

[158] The same can be said here. It is the case that Mr. Roelofse does not want to sell his shares. He wants to continue fulfilling his role in the management of the company. To all appearance on the evidence before the court, Mr. Roelofse has been doing so successfully for the benefit of the group and shareholders as a whole. That includes for the benefit of Mr. de Witt and Mr. Kotzé.

[159] This is clearly a situation where the trust and confidence between Mr. de Witt and Mr. Kotzé on the one hand and Mr. Roelofse, and with him the other minority shareholders' principals, has broken down. Apart from the unfairly prejudicial conduct of excluding Mr. Roelofse and other members of the executive without reasonable terms, there have been numerous acts by Mr. de Witt and Mr. Kotzé of which equity cannot approve, even if of themselves, or in law, they do not amount to sufficient grounds for maintaining a petition. Those acts have been described above. The minority shareholders cannot escape criticism either. I am thinking here in particular of the manner, apparently irregular, in which purported resolutions were made to exclude Mr. de Witt from running the group in July 2012.

---

[42] At 1 WLR [1999] 1107 B - C

The end, however understandable, does not justify the means. All this said, clearly some kind of parting of ways is required in the interests of all, otherwise it could foreseeably be appropriate to wind up OSGL on the just and equitable ground.

[160] Once unfair prejudice has been established, I am obliged to consider the whole range of possible remedies and choose the one which in the court's assessment of the current state of relations between the parties is most likely to remedy the unfair prejudice and deal fairly with the situation which had occurred.[43]

[161] The court has a very wide discretion to do what is considered fair and equitable in all the circumstances of the case, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company.[44]

[162] The balance of the considerations tips, in my view, in favour of requiring OSGL to re-acquire the de Witt and Cannon Bridge (Kotzé) shares at fair market value. The predominant reasons are that the incumbent executives are running the group with greater monetary discipline, with better financial results, than when the group was led by Mr. de Witt. Further, it is highly likely that the practice would resume of Mr. de Witt drawing out cash "loans" at will if Mr. de Witt indirectly or directly resumes control, and other practices which made the group struggle to pay its debts.

[163] To establish a fair market value for the de Witt and Cannon Bridge shares, there will have to be an independent professional valuation. This will have to involve an

[43] Grace v Biagoli [2006] 2 BCLC 70
[44] Re Bird Precision Bellows Ltd [1986] Ch 458

audit for the valuer to reach an informed professional opinion whether or not the Angolan Consortium paid for the shares in OSGL issued to Falcon House. I shall direct that the valuer's opinion shall be final and binding, absent manifest error.

[164] Also for the purposes of the valuation a determination is required whether Mr. de Witt paid for his shares. The evidence is that there is no contemporaneous documentary evidence which records the purpose of Mr. de Witt's cash contributions to the group. Unfortunately Mr. de Witt's views on what he intended those payments to represent have changed over time. I set most store by Mr. de Witt's spontaneous and voluntary explanation in April 2014 that they were a loan than his later contention before this court that they constituted payment for his shareholding. I do so even though Mr. de Witt wished to withdraw from that earlier statement on grounds that he had been under great pressure and subject to difficult circumstances at the time. Consistency is of course never sufficient to establish the truth of a matter, but inconsistent versions mean that not all of them can objectively be true. I also find it hard to believe that Ms. Vermaak was so remiss in the fulfillment of her accounting function that she omitted to adjust the books for several years in a row to show that Mr. de Witt had paid for his shares if he had done so. I believe her evidence that she made entries in the books in the manner that she contemporaneously understood reflected the underlying intentions. Therefore, the consideration for reacquisition by OSGL of Mr. de Witt's shares should take into account that Mr. de Witt has not yet paid for his shares. The price to be paid for them is US$150,000, or its equivalent in Rand as at the date of the commencement of this amended claim on 8 February 2016. That consideration will also have to take into account and be reduced by any loan repayments due to the group by Mr. de Witt. Lest it be said that such an order ignores legal divisions within the group and the separate corporate personality between Mr. de Witt and the de Witt Trust, the reality of the situation is that the

group maintained only a single set of accounts, itself ignoring the divisions within the group, and that the group's accounts treated Mr. de Witt as the shareholder who had a shareholder loan account.

[165] Concerning the valuation date for a reacquisition, the starting point is the general proposition held in **Re London School of Economics Ltd**[45] that "*prima facie an interest in a going concern ought to be valued as the date on which it is ordered to be sold*." However, I must bear in mind the circumstances that have led to an order for sale to be made. In particular here, these include that Mr. de Witt and Mr. Kotzé have effected a number of formal acts, which in themselves they were entitled to do, to change the Board of Directors of OSGL, which then enabled them to cause Mr. Roelofse to be dismissed and excluded from the management of OSGL and the group without an offer of reasonable compensation. The specific unfairly prejudicial act which triggered this court's discretion was done on 10 April 2015. The Claimant did not seek to move this court to maintain the status quo so as to prevent further prejudicial acts. It commenced these proceedings in 2015 but it was on 8 February 2016 that it filed the Amended Claim Form on the basis of which these proceedings moved forward. This is the date when it may be said that formal steps were taken by the Claimant which could lead to an order for a buy-out of any of the parties' shares[46]. I consider this the appropriate valuation date. This date formally marks the Claimant's protest at the unfairly prejudicial conduct carried out. It is a date which maintains an even balance between the parties and it cuts both ways. On the one hand, Mr. de Witt and Mr. Kotzé, through their holding vehicles, will have the benefit of an increase in value of their shares due to better performance of OSGL and the group since Mr. de Witt's removal to the

[45] [1986] Ch 211
[46] Cf. AXAHCV2004/0013 Lynwood S. Bell v Malcolm Hope-Ross et al. at para. [50]

moment when the present cause of action crystalized with the filing of the Amended Claim Form. On the other hand, I cannot rule out the possibility that the Board of Directors, as reconstituted by Mr. de Witt and Mr. Kotzé's efforts to regain control of OSGL for Mr. de Witt, may do other acts which are unfairly prejudicial to the other shareholders. Mr. de Witt and Mr. Kotzé's nominated directors and/or officers of OSGL, being Mr. Kotzé himself and Mr. van Zyl, are also the Trustees of Mr. de Witt's Trust. That obviously puts them within a hair's breadth of a conflict of interest which would be difficult for them to avoid. I do not discount the possibility that they may deal with assets, directly or indirectly, of OSGL which might reduce its value, to the benefit of Mr. de Witt. An example would be if they were to cause OSGL to discontinue proceedings against Mr. de Witt to recover monies lent to him, despite Mr. de Witt's protestation that he wants those proceedings to continue. They might seek to justify such a step as being in the interests of OSGL and there could be scope for further disputation on that. However any such potential further steps would remove the parties even further from being on an equal footing. The most equal footing would, I find, be achieved by fixing the valuation date as at the commencement of this amended claim. This means that whatever steps the current Board of Directors of OSGL may, **for whatever reason**, have taken since that date that might alter the value of the shares in OSGL should be ignored for the purposes of the valuation. If it is that OSGL has since 8 February 2016 caused the claim against Mr. de Witt to be discontinued, or the debt otherwise waived or forgiven, that will have no impact upon the valuation. The valuation must take into account the debt for the purposes of valuing the shares in OSGL and the amount payable to or by Mr. de Witt and/or his holding vehicle upon the reacquisition or sale and purchase of his shares.

[166] Further or alternatively, the Claimant shall purchase, and the Third and/or Fourth Defendants shall sell to the Claimant or to its order the de Witt and/or Cannon Bridge shares, on the same terms as to price as would apply to reacquisition by OSGL of the shares.

[167] To prevent this court's orders from being rendered nugatory, it is appropriate to direct that the voting rights pertaining to the de Witt and Cannon Bridge shares stand suspended with immediate effect pending completion of the reacquisition or purchase by the Claimant.

[168] Further, to undo the effect of the unfairly prejudicial removal of Mr. Roelofse and other members of the incumbent executive by the notices of dismissal dated 10 April 2015 by Mr. van Zyl, as Company Secretary of OSGL, it is appropriate to set aside those notices in their entirety.

[169] Further, to give effect to the expressed intention that the shares issued to Falcon House should not have been shares in OSGL, it is appropriate to order pursuant to section 43, alternatively section 184I of the Act, that Falcon House shall be removed with immediate effect from OSGL's register of members. Pending the rectification of OSGL's register of members, the voting rights pertaining to Falcon House's shares in OSGL should also be suspended. Nothing will prevent Falcon House from taking such steps as it may be advised to take, upon the instructions duly given by its underlying beneficial owners (if any), to obtain that it must be issued shares in OSL.

[170] Further, it is appropriate that the shareholders hereafter entitled to vote at a meeting of shareholders, that is, excluding the Second, Third and Fourth Defendants, should review the composition of the Board of Directors of OSGL and

exercise their say, if they so wish, in respect of removal of Mr. Kotzé and Mr. van Zyl, from OSGL's register of directors. I will therefore direct the current registered directors of OSGL forthwith to call a meeting pursuant to Article 7 of the Articles of Association of OSGL for purposes of, or including of, removing the incumbent Directors. Pending such meeting, the written resolution of directors of OSGL dated 30 January 2015, purporting inter alia to remove as agents of OSGL all appointed agents and to revoke all agents' powers, and the written resolution by OSGL dated 4 March 2015, purporting to suspend the current management from their duties should be stayed. I stay them, and do not set them aside, to leave the choice open to the Board as may legitimately be constituted following such meeting to adopt these resolutions, in whole, or part, or upon further terms.

[171] The following will therefore be terms of the order upon judgment:

1. OSGL shall re-acquire the de Witt and Cannon Bridge (Kotzé) shares;

2. OSGL shall compensate the Third and Fourth Defendants for the reacquisition of their shares in OSGL at fair market value of those shares.

3. Further or alternatively, the Claimant shall purchase, and the Third and/or Fourth Defendants shall sell to the Claimant or to its order the de Witt and/or Cannon Bridge shares respectively, on the same terms as to price upon reacquisition by OSGL of the shares.

4. The valuation date for the said shares shall be 8 February 2016.

5. The said shares shall be valued by an independent professional valuer.

6. Absent agreement between the parties as to the identity of the said valuer, the parties shall be at liberty to apply to this Court for the Court to direct the appointment of an identified valuer.

7. The valuation of the said shares shall be adjusted to take into account amounts, if any, owing by the Third and Fourth Defendants, and/or Mr. de Witt and Mr. Kotzé, to OSGL or vice-versa.

8. The valuer's opinion shall be final and binding, absent manifest error.

9. The voting rights pertaining to the Third and Fourth Defendant's shares in the First Defendant are hereby suspended with immediate effect pending completion of the reacquisition of the said shares by the First Defendant or purchase by the Claimant.

10. The notices of dismissal dated 10 April 2015 by Mr. van Zyl, as Company Secretary of the First Defendant, are hereby set aside.

11. The First Defendant shall forthwith cause the Second Defendant to be removed with immediate effect from the First Defendant's register of members.

12. Pending the rectification of the First Defendant's register of members, the voting rights pertaining to the Second Defendant's shares in the First Defendant are hereby suspended.

13. The current registered directors of the First Defendant shall forthwith call a meeting of shareholders pursuant to Article 7 of the Articles of Association

of the First Defendant for the purposes of, or including of, removing the incumbent Directors.

14. If, within 14 days of the date of this judgment none of the current registered directors of the First Defendant call such a meeting of shareholders, the current registered directors shall be deemed to have been removed as at 9 a.m. on the fifteenth day. Thereupon, the Claimant, or some other fit and proper person as shall be nominated by it, shall be deemed to have been appointed by the outgoing directors to fill the vacancy pursuant to Article 8.7 of the First Defendant's Articles of Association. The director so appointed to fill such vacancy shall forthwith call the said meeting of shareholders.

15. Pending the said meeting of shareholders, the First Defendant by its current registered directors shall not deal with, or dispose of, any asset or property of the First Defendant of whatever nature, including causes of action, whether directly or indirectly held, except in the ordinary course of business of the First Defendant. Such ordinary course of business shall not include lending further monies to Mr. de Witt, Mr. Kotzé or the Third and Fourth Defendants or forgiveness of any debts owed by them.

16. Pending the said meeting of shareholders, the First Defendant by its current registered directors shall not renew, in whole or part, the dismissals purported to be effected by the Notices of Dismissal dated 10 April 2015.

17. Pending the said meeting, the written resolution of directors of OSGL dated 30 January 2015, purporting to remove as agents of OSGL all

appointed agents and to revoke all agents' powers, and the written resolution by OSGL dated 4 March 2015, purporting to suspend the current management from their duties, are hereby stayed.

18. The Third and Fourth Defendants shall jointly and severally pay costs of these proceedings to the Claimant, limited to 50% of the Claimant's reasonably recoverable costs, to be assessed if not agreed within 60 days. The 50% reduction reflects the fact that the Claimant did not succeed on its primary case but on different grounds.

[172] I thank learned Counsel for both sides for their assistance, and in particular for their helpful written closing submissions filed in August and September.

Commercial Court Judge
November 22 2016

Note

Upon delivery of this judgment on 22 November 2016 I directed the following provisions to be included in the order upon judgment. The purpose of this was to ensure that the remedies will be most effective. Learned Counsel for the parties brought to the court's attention that various legal steps were in train between the parties in South Africa as part of their ongoing disputes. A court hearing in South Africa is due to take place on 23 November 2016. Mr Andrew Willins of Messrs Appleby, on behalf of the Second to Fourth Defendants, strongly sought to persuade me not to hand down the judgment immediately but to circulate the judgment in draft and to hear further submissions and evidence on the

relief to be granted. I am not aware of any prior case management direction that the trial of the present matter should be bifurcated. I did not consider that there is any need for this. A plenary trial has already taken place. The parties made two rounds of written submissions after the trial which also addressed questions of relief. I became concerned that the parties should formally have this court's judgment prior to any hearing in South Africa on 23 November 2016. My concern was heighted by the Second to Fourth Defendants' apparent strong resistance to this. I therefore decided that I should proceed to deliver the judgment today. If any adjustment should be required to the terms of the order upon judgment the parties should have an opportunity to apply to vary the terms. Thus I orally ordered and directed that the order upon judgment shall contain the following further provisions:

(a) Both sides have liberty to apply by 4 p.m. on Tuesday 6 December 2016 to vary the terms of the order upon judgment.

(b) The parties have permission to appeal if so required.

(c) For the avoidance of doubt, none of the provisions of this judgment are stayed.

Commercial Court Judge

November 22 2016