

Claim under Sections 349(1) and 350 of the Companies (Guernsey) Law, 2008; whether dilution of shareholding in company by Board of Directors unfairly prejudicial; whether directors had breached their duties; whether there existed a quasi-partnership; derivative action brought by the Plaintiff; claims dismissed.

[2024]GRC081

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)
Civil No. 2394**

Between:

ROBERT ARCHIBALD GILCHRIST SINCLAIR

Plaintiff

-AND-

(1) IAN CHARLES DOMAILLE

First Defendant

-and-

(2) DEBORAH JOAN GUILLOU

Second Defendant

-and-

(3) MARK JONATHAN BRIGHT

Third Defendant

-and-

(4) ARTEMIS HOLDINGS LIMITED

Fourth Defendant

Dates of hearing: 13th, 14th, 15th, 16th and 17th May, 2024

Judgment handed down: 29th November, 2024

**Before: Fionnuala A Connolly, Judge of the Royal Court and Jurats
Stephen Jones OBE, Jonathan Hooley and Felicity Quevâtre**

Counsel for the Plaintiff: Advocate R Breckon

Counsel for Defendants: Advocate S Brehaut

Cases, texts & legislation referred to:

The Royal Court (Reform) (Guernsey) Law 2008

The Royal Court Civil Procedure Rules, 2007

The Companies (Guernsey) Law 2008

The Companies Act 2006

Jackson v Dear & Ors (Guernsey judgment 10/2013)

Prodefin Trading Limited v Midland Resources Holding Limited and Ors (Royal Court Judgment 7/2017)

Carlyle Capital Corporation Limited v Conway & Ors [Guernsey Judgment 38/2017]

Fountain Street Developments Limited [2018] GJ 42/2018

CLO Holdco Limited and Highland Clo Funding Limited [2023] GRC061

Ebrahimi v Westbourne Galleries Ltd [1973] AC 360

Howard Smith v Ampol Petroleum Ltd & Others [1974] 1 AC 821

Re Noble & Sons (Clothing) Ltd [1983] BCLC 273

O’Neill v Philips [1999] 1 WLR 1092

Sunrise Radio Limited, Legal Costs Negotiators Ltd Properties Ltd [1999] 2 BCLC 171 CA

Sunrise Radio Limited [2009] EWHC 2893 (Ch)

Mumtaz Properties Ltd [2011] EWCA Civ 610

Coroin Limited (No 2) [2012] EWHC 2343 (Ch) and [2013] EWCA Civ 781

Apex Global Management Limited v Fi Call Limited [2015] EWHC 3269

Interactive Technology Corporation Limited v Ferster [2016] EWHC 2898

Dingless and Dingless v Dingless and others [2019] EWHC 1664 (Ch)

Ntzegekoutanis v Kiminionis [2023] EWCA Civ 1480

Isaac v Tan & Anor [2022] EWHC 2023 (Ch)

Hollington on Shareholders’ Rights (10th ed.) at 6-10.

J U D G M E N T

Introduction

1. The Plaintiff, Mr Robert Sinclair, is a beneficial owner and shareholder of Artemis Holdings Limited (“AHL”), the Fourth Defendant. The First Defendant, Mr Ian Domaille, is the other beneficial owner and shareholder of the Fourth Defendant. He has been a Director of AHL since 6 November 2007. The Second Defendant, Ms Deborah Guillou, has been a Director of AHL since 1 July 2021. The Third Defendant of which company, Mr Mark Bright, has been a Director (independent non-executive) of AHL since 2 August 2021. AHL was registered in Guernsey under company registration number 47989 on 6 November 2007.
2. The Plaintiff brings this claim under Sections 349(1) and 350 of the Companies (Guernsey) Law, 2008 (“the Companies Law”). The issue giving rise to these proceedings relates to a resolution of the Board of Directors of AHL made in August 2021 to dilute the Plaintiff’s shareholding in AHL. The effect of the dilution was that 975k shares were issued to the First Defendant at a price of £ 0.26 per share and as result, the Plaintiff’s shareholding was reduced from 49.27% to 24.94% of AHL and the First Defendant’s shareholding was increased from 50.73% to 75.06%. The Plaintiff contends that the dilution was unfairly prejudicial. Further, although it is not pleaded in the Cause, the Plaintiff brings a derivative action.
3. The Plaintiff relied on his witness statement dated 1 July 2022. On behalf of the Defendants, witness statements were filed by Mr Domaille dated 8 July 2022, Ms Guillou dated 8 July 2022 and Mr Bright dated 8 July 2022. All of the witnesses gave oral evidence and they adopted their statements as their evidence in chief. The Plaintiff relied on expert evidence from Mr Paul Smethurst, Chartered Accountant and a former Forensic and Investigations partner with Menzies LLP. The Defendants relied on expert evidence from Ms Kirsty Wheadon, Director at Grant Thornton Limited, Guernsey and a Fellow of the Institute of Chartered Accountants in England and Wales. Both Mr Smethurst and Ms Wheadon gave oral evidence.
4. The Court had the benefit of skeleton arguments from both parties. During the course of the hearing, in addition to the documents already filed, additional documents were furnished to the Court. The hearing took place between 13 to 17 May 2024. Preliminary matters and the openings of both Advocates were heard on the first day, the evidence was heard over 3 days

and the closing speeches were delivered by both Advocates on behalf of the parties on the final day. The preliminary matters are set out at paragraphs 10 – 13 below.

5. Further to Section 14(2) of the Royal Court (Reform) (Guernsey) Law 2008, the Presiding Judge did not sum up to the Jurats in open Court, but instead retired with the Jurats. This is the reasoned Judgment of the Court as required under Section 16(1) of the 2008 Law. When they retired, the Presiding Judge reminded the Jurats of their respective roles. The Presiding Judge is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats were directed to take account of all the evidence presented to the Court; the evidence on behalf of the Plaintiff and on behalf of the Defendants, both written and oral, and the documents produced to the Court. It was for the Jurats, and not the Presiding Judge, to decide what evidence they accepted and what evidence they rejected or of which they are unsure. Although the Presiding Judge reminded the Jurats of aspects of the evidence, she directed them that if she appeared to have a view of the evidence, or of the facts, with which they did not agree, the Jurats were to reject her view. The Jurats were directed to take account of the arguments and speeches they had heard, although they were not bound to accept them. The Jurats were further directed that they were entitled to draw inferences, that is to come to common-sense conclusions based on the evidence that they accept, but that they may not speculate about what other evidence there might have been or allow themselves to be drawn into speculation.
6. The Presiding Judge directed the Jurats that the standard of proof is the civil standard of the balance of probabilities and that to establish something on the balance of probabilities means to prove that something is more likely so, than not so.
7. The Court has given careful consideration to all of the evidence and the submissions. In this judgment, the findings of fact are the unanimous findings of the Jurats.
8. The Court is grateful to both Counsel for their written and oral submissions.

Procedural Background and Preliminary Matters

9. The action was placed Inscribe on 5 November 2021. The Amended Cause was filed on 1 April 2022. Amended Defences were filed on 25 February 2022. They contained Exceptions de Fond. The Plaintiff's reply to the Exceptions de Fond was filed on 11 February 2022.
10. The preliminary matters that were decided on by the Presiding Judge prior to the Openings by the parties on the first day of trial were as follows.
11. First, the Presiding Judge granted an application by consent that the file in this case shall remain sealed, that any written judgment of the Court to be published shall be redacted of all identifying personal client information and that any reporting of any such information shall be prohibited. Accordingly, any reference to clients of the Fourth Defendant in this judgment shall be redacted.
12. Second, by application dated 3 May 2024, the Plaintiff sought an Order for a direction that the Defendants are prohibited from relying upon (i) the report of Ms Wheadon (their expert for trial) dated 10 April 2024 and (ii) Ms Wheadon's comments within the Experts' Joint Report dated 1 May 2024 to the extent that such reports rely upon documentation which have not been disclosed by the Defendants. The application was supported by an affidavit of Ms Samantha Jayne Harris of Ferbrache & Farrell sworn on 10 May 2024. It is sufficient to say after considering the issue, the Presiding Judge concluded that she was satisfied the Defendants' failure to disclose the relevant information relating to the Joint Expert Report was due to an oversight and that the matter could be dealt with pragmatically bearing in mind the overriding

objective of the Royal Court Civil Procedure Rules, 2007. The Presiding Judge directed that the outstanding documentation be provided at the earliest opportunity on that date to the Plaintiff's expert.

13. Third, the Plaintiff sought to admit in evidence before the Jurats a medical report from Dr Nicholas C King of the Healthcare Group, St Martin's Health Centre, the Plaintiff's General Practitioner, dated 3 May 2024. The Plaintiff did not seek special measures in the trial but frequent breaks. The Defendants objected to this application and observed that the Plaintiff had not elected to lodge medical evidence in the trial. The Presiding Judge decided that the letter would not be provided to the Jurats but they would be advised that Mr Sinclair would be afforded additional breaks as and when required, as well as additional time to answer questions and that Counsel for the Defendants would adjust cross-examination to ensure Mr Sinclair would not be placed under any unnecessary stress and would allow sufficient time for his answers to be made. The Presiding Judge stated that the Plaintiff was at liberty to remake this application at any stage during the trial but that should he chose to do so, the Court would expect independent medical evidence in support of that application. The Jurats were accordingly advised by the Presiding Judge of her decision on this particular application prior to the Opening speeches by Counsel on 13 May 2024. It was agreed that Mr Sinclair would be allowed a short five-minute break at thirty minute intervals.

Factual Background

14. Helpfully, the parties are agreed on the facts set out below.
15. AHL was registered in Guernsey under company registration number 47989 on 6 November 2007. The Plaintiff and the First Defendant were appointed as directors of AHL on 23 July 2008.
16. AHL is the 100% shareholder (through its direct holding of 25,999 shares and the holding of 1 share by the Plaintiff under a Declaration of Trust for the Company) of Artemis Trustees Limited ('ATL') which is registered in Guernsey under company registration number 38106 on 16 March 2001. AHL is the 100% shareholder of Artemis Société Avec Responsabilité Limitée, registered in Guernsey under company registration number 38779 on 25 September 2001. ATL and its three subsidiaries are regulated by the Guernsey Financial Services Commission.
17. On 16 July 2019, the Plaintiff ceased to be a director of AHL.
18. Until 27 August 2021, AHL had an authorised share capital of £10,000 divided into 1,000,000 ordinary shares of £ 0.01 each, all of which had been issued.
19. On 1 July 2021, the Second Defendant was appointed as a Director of AHL.
20. On 5 August 2021, the Third Defendant was appointed as a Director of the AHL.
21. From 23 June 2011 to 26 August 2021, the Plaintiff and the First Defendant were the remaining shareholders of the Company with the Plaintiff holding 49.27% of the Company's issued share capital and the First Defendant holding 50.73% of the Company's issued share capital.
22. On 27 August 2021, the Second and Third Defendants resolved to issue 975,000 further shares to the First Defendant at a valuation of £ 0.26 per share ('the share issue'). The Defendants state that the First Defendant had recused himself from the board meeting.

23. The First Defendant paid consideration of £0.01 per share, being a total of £9,750 that consideration having been settled by way of a loan in the full amount of £9,750 from the Company to the First Defendant.
24. The effect of the issue of 975,000 further shares was to dilute the Plaintiff's shareholding from 49.27% to 24.94%.
25. The Defendants (via their legal representatives) provided written undertakings to the Plaintiff in respect of the Share issue in open correspondence dated 15 September 2021.
26. The parties provided to the Court an agreed Chronology of Guernsey Financial Services Commission ("GFSC") Enforcement Proceedings. This document was furnished to assist the Court by way of background pertaining to enforcement action commenced by the GFSC against persons, including Mr Domaille and Mr Sinclair and against Artemis Trustees Limited. The key points arising from that Chronology are these:
 - a. In December 2018, the GFSC conducted a Full Risk Assessment of Artemis Trustees Limited.
 - b. On 4 September 2019, a final response letter was sent by the GFSC following the full risk assessment.
 - c. A Draft Enforcement Notice and Report dated 26 July 2021 referenced allegations of breaches of legislation by ATL in general and against Mr Sinclair and Mr Domaille and two other individuals.
 - d. A final enforcement notice was issued dated 20 December 2021.
 - e. Mr Sinclair settled with the GFSC at the initial stage resulting in a 30% discount on the sanctions to be imposed on him.
 - f. A GFSC Public Statement dated 21 January 2022 set out that Mr Sinclair was subject to the following sanctions: a discretionary financial penalty of £196,000, a prohibition from holding the position of controller (subject to a limited exception permitting Mr Sinclair to pursue Civil Action Number 2394 in the Royal Court of Guernsey), director, partner, manager, money laundering reporting officer and money laundering compliance officer for a period of 5.6 years; and disappplied the exemption, prohibiting unlicensed individuals from holding more than six separate company directorships for a period of 5.6 years.
 - g. ATL settled with the GFSC resulting in a 10% discount on the sanctions to be imposed on it. The GFSC imposed a discretionary financial penalty on ATL of £450,000 on 24 June 2022.
 - h. By decision made on 29 July 2022, a GFSC Senior Decision Maker ("SDM") imposed discretionary financial penalties on Mr Domaille in the sum of £280,000 and on two other persons. A prohibition order was made prohibiting Mr Domaille from holding the position of Controller, Director, Partner, Manager, MLRO and MLCO for a period of 8 years. Prohibition orders were imposed on two other persons.
 - i. Appeals against the decision of the SDM were allowed on 18 April 2023. Leave to appeal was refused to the GFSC on 19 June 2023. Following a renewed application, leave to appeal was granted on 28 July 2023. The appeal was substantially allowed and the matter was remitted back to the GFSC to appoint a Senior Decision Maker for a decision on sanctions to be retaken in accordance with the Court of Appeal judgment. On 11 March 2024, an application for leave to appeal was lodged with the Privy Council.

The Evidence

27. Before he gave his oral evidence, the Presiding Judge advised Mr Sinclair that he would be afforded breaks, as and when required, and that he would be allowed a five minute break at thirty minute intervals during cross-examination. The Presiding Judge advised Mr Sinclair to let the Court know should he require a break within the thirty minute period. Mr Sinclair adopted his witness statement dated 18 July 2022, as his evidence in chief. He corrected his witness statement to reflect that he retired from Artemis Trustees Limited (“ATL”) in June 2019.
28. Mr Sinclair said that along with Mr Domaille and six others, he had established the Artemis business in 2001. The business was structured such that they were all equal partners in the Artemis business and would manage the business as partners. He said that the agreements governing the business were structured accordingly. Mr Sinclair said that in 2001, Artemis Chartered Accountants was established to hold 60% of the issued share capital of ATL equally for the four partners. The remaining 40% was held by the managers (10% each). He said that they drew up a Shareholder Agreement dated 17 July 2002 as ATL was a corporate entity but partnership principles and concepts were behind and contained in the Shareholder Agreement.
29. He said that Artemis Holdings Limited was established in 2007. Although not named in the Shareholder Agreement, he said “*we all treated it as applying to that entity from its Incorporation*”. A number of partners retired from the business until the only partners in business were Mr Sinclair and Mr Domaille. When each of the former partners retired, the documents recording the terms of their retirement reflected that the relationship was governed by the Shareholder Agreement. Ms Rosemarie Hancock and Ms Sheila Torode exited in 2003 and they did so under the terms of the Shareholder Agreement. Exit agreements recording the retirement of Mr James Gardner, Ms Maeve Gilbert, Ms Pamela Gerrard and Ms Debbie Calderwood were signed by Mr Domaille (amongst others) and they specifically referred to paragraph 4 of the Shareholder Agreement. Mr Sinclair said:

“I cannot think of a single occasion, except for in the current proceedings, where Mr Domaille, the other Defendants, or indeed others (including my former partners), have behaved as if the relationship is governed by anything other than the Shareholders Agreement...Indeed Ms Guillou wrote to me as recently as 19 June 2020 referring extensively to the Shareholders Agreement in the context of a transfer of my shares.”

30. Mr Sinclair said that his health has been poor and deteriorating for some time. His health conditions are such that they were and remain a threat to his life. In February 2015, he suffered a severe break to his right tibia at his knee and right fibula at his ankle, resulting in surgery and approximately three weeks absences from the office. In June 2015, he underwent further significant surgery, namely a transurethral rectification of the prostate. He recuperated at home for two more weeks before returning to work on a part-time basis. On 4 September 2015, he was rushed to hospital by ambulance suffering from an acute irregular heartbeat, later diagnosed as atrial fibrillation. Since 2015, he continues to suffer from significant heart related problems to date. His former directors were alerted as early as 2015 to the fact that he suffered from profound health conditions. He was frequently absent from the office working part-time for extended periods. In February 2016, he was diagnosed with a particularly aggressive form of prostate cancer and his prostate was removed in April 2016. In May 2017, it was confirmed that his cancer had metastasised to the bone and had become incurable. In February 2021, he collapsed and fell unconscious and suffered a slipped vertebra, as a result of the fall. He has come to terms with issues pertaining to his memory. Following his fall, he was administered with strong painkillers in the form of liquid morphine and Gabapentin which had a detrimental impact on his memory and ability to retain facts. He has grappled with significant health issues since 2015. This has impacted on his physical and mental well-being, his memory and his ability

to work proficiently and to the standard expected of a man in robust health. Mr Sinclair said that as a result of these health issues, it can take him longer to be in a position properly to consider matters, and there are days and sometimes even extended periods when he is unable to do so. He said that this may well impact on his ability to give oral evidence at certain times and he may need frequent breaks.

31. There was no medical evidence before the Court in relation to Mr Sinclair's health.
32. Mr Sinclair said that he has become increasingly reliant on those he trusts to assist him. Until relatively recently, that included those at Artemis, including Mr Domaille with whom he said he had a very long professional relationship. He said:

"I feel very let down. Mr Domaille's conduct has for a number of years, and particularly since my time in the Royal Marsden Hospital, struck me as ostensibly being aimed at removing me from the business and acquiring my interests in Artemis at as low a cost to himself as possible."

33. Mr Sinclair said that he sought to step back from the business over that period against the backdrop of his serious health issues. He resigned as a Director in June 2019 but his day-to-day involvement with the business had diminished over the previous few years due to his ill health. His role transitioned from active director to a more part time role when his health permitted.
34. He said that on a number of occasions, he discussed with Mr Domaille that Mr Domaille would buy Mr Sinclair's shares in the business in the same manner as when their former partners had retired. In 2017, they jointly sought a valuation from KPMG to facilitate those discussions. This valued the business at £13.8 million to £15.8 million, so his share was worth circa £6.9 million to £7.9 million. Mr Domaille agreed the valuation and was to find the necessary finance and was well aware that some form of vendor finance was available from Mr Sinclair along the same lines as previous share transactions with former partners. Mr Sinclair stated *"I believe his inability to put in place appropriate funding to buy my interests has driven Mr Domaille's strategy to date, culminating in the Dilution."* A further valuation was obtained from KPMG in March 2020 on Mr Domaille's sole instructions and without consulting Mr Sinclair. This valued the business at £6.3 million to £8.2 million, so his share was worth circa £3.15 million to £4.1 million. Mr Sinclair said that this valuation clearly shows that it is well in excess of the valuation used for the Dilution. In June 2020, Ms Guillou wrote to Mr Sinclair on Artemis Fiduciaries letterhead stating that *"The balance on the Management Accounts shows Capital and Reserves for ATL and SARL to be £4, 387,785. This would mean the value of your shares is £ 2,161, 607. This is, of course, subject to audit."* Mr Sinclair said what this clearly shows is that the valuation is well in excess of the valuation used for the Dilution.
35. Mr Sinclair said that for a number of years, he has received ad hoc requests from Artemis that he consider and sign documents, often at short notice with very little supporting documentation or background information, context or detail and with a demand for an urgent response. Where his health permitted, he considered, signed and returned these documents. There are some days when he finds it easier to work than others because of his health issues. He has tried to accommodate particularly urgent requests from Artemis where his health permits and this remains the case to this day. Mr Sinclair said:

"I confess that following the way that Mr Domaille and Artemis have previously treated me, I never enjoyed the receipt of requests from them. Their correspondence, given their earlier conduct, was always received with a sense of dread, which served to

impact upon my health, and it may well be, on reflection, that had Artemis treated me better earlier, and had I been in better health, I could have prioritised certain things, but I am confident I did what I could, when I could. There is no doubt in my mind that Artemis' conduct has served to shorten my life expectancy. I was a fundamentally important part of the business since its inception, and I do not think the way Artemis has treated and continues to treat me is in any way appropriate, respectful, or proper. I feel that their treatment of me has been appalling and I do not think it is a reasonable way to treat a fellow professional"

36. He referred to correspondence between Appleby, who were the Defendants' former Advocates and his own Advocates, Ferbrache & Farrell in July and August 2021. He referred to a letter dated 5 July 2021 in which Appleby, on behalf of the Defendants, requested Mr Sinclair to consider various requests and documentation under nine separate headings and a letter dated 29 July 2021 from Appleby which stated – wrongly in his view – that he had “consistently for a significant period of time either been unable or unwilling to assist in providing up to date customer due diligence (“CDD”) and/or other information which is linked to [my] status as having a shareholding in excess of 25%.” He said the 29 July 2021 letter threatened to reduce his shareholding below 25%. He said that with some considerable difficulty given his health, he supplied further copies of his CDD documents under cover of Ferbrache & Farrell’s letter dated 5 August 2021 with the cover email from the firm indicating that certified copies would be provided if required. He said that Appleby’s reply dated 5 August suggested that this may not in fact have been required and indicated that they would proceed “*as set out in previous correspondence*” i.e. to take steps to reduce his shareholding.
37. Mr Sinclair said that it was not at all clear to him then or now whether and if so, why the Defendants considered that dilution was the only course open to them or whether they had considered any alternative. He had been absent from Artemis for over two years prior to the dilution and if the Defendants had genuine concerns that his health would cause issues they could have, for example, sought to acquire his shares for their proper value, investigated whether a temporary transfer of those shares to another, such as his wife or children would or could address any of their concerns or proposed a workable process or solution that did not require him to be, in effect, available at a moment’s notice to consider documents that they wished him to.
38. On the dilution, Mr Sinclair said this:

“..... the Director Defendants went on to dilute my shareholding by issuing 975,000 shares to Mr Domaille, at a value of £0.06 per share. The shares are partially paid: he has only paid £0.01 per share, so a total of £9,750 which Mr Domaille did not even pay with his own money for an interest in the business which I consider to be worth several million pounds; instead he received a loan for that sum, which is repayable only on demand. He has acquired effectively one quarter of the business, yet provided no cash consideration whatsoever. I have received nothing, and have no real comfort that my position is and will remain protected.

A share issue at £0.26 per share provides for a valuation of the total shares of £260,000. That is less than 6% of (almost 17 times lower than) the valuation provided in the June 2020 letter just one year previously. I can see no basis on which this valuation can be fair or maintained... The Dilution does not respect the terms of the Shareholders and in any event is unfair and appears to fail to give any proper regard to the value of the underlying Artemis group structure. I consider the Plaintiffs' approach to be nothing more than a brazen attempt to traverse my rights without proper respect thereof, all of

which is so highly prejudicial to me and quite frankly, I find it an appalling way to treat me.

The effect of the dilution is that Mr Domaille has 'acquired' half of my shareholding for a discount of several million pounds which is very prejudicial and unfair. Mr Domaille can also now pass special resolutions on his own which I expect may make his shareholding more valuable still, even if only to a limited extent."

39. When asked by his Advocate in examination-in-chief about how his health has been since July 2022, Mr Sinclair said that his prostate cancer remains incurable. He said that subsequent to his witness statement, an MRI scan showed that several tumours in his spine, which were unknown when he signed his statement, through radiotherapy have been classified as presently benign. He said he continues to undergo regular cancer treatment. He said that his heart has probably deteriorated. He said that he suffers from chronic heart disease which is manifested through atrial fibrillation. He said that since he made his statement, he has had several attacks of atrial fibrillation. Two of the attacks were significant. In September 2022, when visiting friends, he was admitted to the Causeway hospital in Coleraine, Northern Ireland, for several days where he underwent a cardiac reversal. In January 2023, he had a bad incident when the ambulance came to take him to the hospital in Guernsey and they did a cardiac reversal there as well.
40. In cross-examination, Mr Sinclair confirmed that he was fit to give evidence.
41. He accepted that he has significant experience and that he has been involved in trust and company administration for a long time. He accepted that he has had various roles within other companies and has been appointed as a director on numerous occasions.
42. Mr Sinclair accepted that ATL principally provides trust administration services to their clients, that these are ordinarily ultra-high worth and high net worth individuals, families or corporate entities, and that the Artemis group try and grow their customer base through word of mouth and providing a good service. He accepted that the business is regulated by the GFSC and is required to be aware of CDD requirements. He accepted that often ATL would open bank accounts as trustee, director, administrator perhaps on behalf of clients, that this would require satisfaction of CDD and that CDD would be requested when dealing with trusts. He accepted that prior to departing from the company, he was familiar with certain clients and with what the CDD requirements were. In response to the question as to whether he accepted that if Artemis were not able to provide compliance with CDD, this would mean clients would get upset and they would not be impressed and Artemis could potentially lose business. Mr Sinclair said that if the CDD requirements had been properly explained to them, and they still did not understand they might become upset.
43. Mr Sinclair accepted that AHL was governed, at all times, by the Memorandum of Association and by the Articles of Incorporation.
44. He did not accept that after his departure he was starting to cause harm to the business of Artemis.
45. Mr Sinclair was cross-examined on the operational difficulties. He was asked about an email dated 24 September 2020 from BNZ (Bank of New Zealand) Partners Onboarding to Mr A of B regarding the setting up of accounts for a client. Mr Sinclair accepted that the email contained highlighted text, which referred to personal customer information and that the email referred to the setting up of a bank account.

46. He was referred to an email dated 27 October 2020 from Ms C to Mr A which stated *“I am still waiting for Robert’s utility bill and signed form, but I did not want to delay the account opening further so hopefully BNZ can start to process the attached forms in the interim.”* Mr Sinclair accepted that on 27 October 2020, documentation was awaited from him, and that the client needed the documentation for the purpose of the account opening. When it was suggested to him that it was not an unreasonable request, Mr Sinclair said that it was not explained to him why the client needed it or the name of the client and that he did not understand why it was required of him.
47. He was referred to a letter from Ms Alicia Falla, Assistant Trust Administrator at Artemis Trustees Limited to Mr Sinclair dated 20 October 2020. This was the request received by Mr Sinclair for the documentation relating to the opening of the BNZ bank account. Ms Falla stated *“I am enclosing a Personal Customer Information form from BNZ, in relation to the opening of a bank account with them for the above trust. Please check the form and complete the section ‘Countries of tax residence’ before signing and dating the form and returning it to me’.* Mr Sinclair did not accept that this was a trust that he was familiar with. He accepted that the letter requested him to check the form and complete a section.
48. Mr Sinclair was referred in cross-examination to a further letter from Ms Alicia Falla to Mr Sinclair dated 3 November 2020 in which she stated:

“Further to my letter to you of 20 October ...,please can you return the account opening form fully completed, signed and dated, as requested. Please could you also provide me with an up to date utility bill.’

Mr Sinclair accepted that he received this letter but said that he still did not understand why he was required to deal with it. He referred to the name of the client – D - and said that at that time at home they were receiving a number of calls on their landline from people in India or Pakistan, suggesting that if they gave them their bank account details they would send some money and he just became *“very very suspicious”*. Mr Sinclair said that he accepted that the letter and emails were not unsolicited being from Artemis but that he, nevertheless, just became suspicious. He accepted that he did not action the emails and letter from Artemis. He accepted that he did not make any phone calls about them to Artemis to check their provenance, stating that he became *“very very nervous”*.

49. He was then referred in cross-examination to an email from Ms Julia Church to Mr Sinclair dated 20 November 2020. In that email, Ms Church referred to her colleague, Alicia having recently sent to Mr Sinclair a form for BNZ in relation to the opening of a bank account for the client. She advised Mr Sinclair that the bank required his signature, in his capacity as Shareholder of ATL. She requested that Mr Sinclair let her know when he had signed the form and she would arrange for the form and a utility bill to be collected. Mr Sinclair accepted that Ms Church was known to him and that he received this email from her. Mr Sinclair was referred to a further email to him from Ms Julia Church dated 2 December 2020 in which she advised him that she had left a message regarding the request set out in the 20 November 2020 email. Mr Sinclair accepted that Ms Church had at this point called him although he could not remember that call, that she was known to him and that he knew at the time that she worked at Artemis.
50. Mr Sinclair was referred to an email that he sent to Ms Julia Church dated 4 December 2020 which stated:

“Dear Julia

I confirmed to you in our telephone conversation this afternoon that I have indeed received this request.

As I informed you I must say I am appalled at the manner that this request has been made to me with wholly inadequate information and explanations. I am offended that a person whom I have not met and who is certainly very much my junior should refer to me by my first name. I am equally concerned that there has been no explanation given as to why this request is necessary, until your email of 20th November which then only gave me briefest of details. This led to my initial reaction to be of concern that it may be a hoax or a scam, and I decided to ignore it in accordance with the general advice from the authorities on such matters.

Now you state that a ‘Bank require your signature in your capacity as Shareholder of ATL’ but you do not explain why you should require my personal details and my signature. I am guessing that the name of your client might have wrung alarm bells at the bank. D may refer to the Indian sub-continent where fraud and scams of this nature are abundant. They may also be concerned with the title ‘International Trust’ which has alarming connotations. They may also have concerns over the source of wealth and source of funds especially if the characters involved are from the part of the world already mentioned. Alternatively or additionally the characters behind D Trust may be involved in money laundering or Real Estate deals, or some other highly risky activities.

With all this in mind and the poor manner this has been dealt with by Artemis, I believe my initial conclusion to ignore this request is the right one. Furthermore, as I informed you, I do not wish my personal details to be to be given out to anyone without my express permission which in this instance is denied absolutely.

You and I have developed a good working relationship and I am sorry you have been put in the position of having to communicate with me on something that otherwise would have nothing to do with you.

*Kind regards
Robert”*

51. Mr Sinclair accepted that he had chosen to ignore the request from Ms Church. In response to the suggestion that the request had not been dealt with in a poor manner, Mr Sinclair said that the request had been dealt with in a poor manner initially. He did not accept that his email in response to Ms Church was aggressive. He accepted that there is no reference to his health in his email. In response to the suggestion that his objection really seemed to be that he was appalled that Ms Falla had used his first name, he said “*not really*”. Mr Sinclair accepted that his health at that stage did not prevent him from responding to the request. In response to the suggestion that throughout his years as a significant shareholder he should have contacted Artemis much earlier on to confirm the provenance of the document, Mr Sinclair said that he did not agree that he was a significant shareholder.
52. Mr Sinclair accepted that he understood the GFSC regulations in relation to control and that he owned more than 15% but said that whilst he may be mistaken, he did not think that a shareholder of less than 50% should have to give due diligence and that it was not properly explained to him at the time. When it was put to him that he must have been aware that persons with more than 25% shareholding would be requested to provide due diligence, Mr Sinclair said that not under CRS and he thought that this was a CRS requirement which is why he took

the view that he did. He did not understand and still does not understand why he would be required to do this for the bank account opening. When it was put to Mr Sinclair that when he received emails and communications from the proper Artemis address and latterly when they came from Ms Church being somebody that he knew, he just chose not to check and just ignored it, Mr Sinclair said that he did not understand it. It was put to him that if he did not understand the answer is to check as that would have been a helpful and productive way forward. Mr Sinclair said he thought he had done so but evidently not. He accepted he had not checked and that he could have done more but he was finding it really difficult. He did not accept that he was trying to be difficult. In response to the suggestion that the comment about Alicia using his first name was quite a difficult comment, Mr Sinclair said that he thought it was rather rude of her to have done so.

53. Mr Sinclair did not accept that not being able to proceed with the bank account opening for the client was very difficult for Artemis and their reputation with the client. He thought that there must have been another way of dealing with it and he hoped they would find it. He said he *“hadn't a clue”* who the client, D International, was until he received the bundle of documents from the Defendants. In response to the suggestion that this was an important client, Mr Sinclair said he had no idea, he had long since left the business and he did not know what D represented at all. He thought it was something to do with the Indian Subcontinent.
54. Mr Sinclair was then referred to an email from Mr Domaille dated 5 December 2020 to Ms Church, with copy to Ms Guillou regarding the BNZ account opening. In that email, Mr Domaille said:

“Debbie, Maybe we need to escalate this a little if his behaviour is detrimental to our clients”.

Mr Sinclair accepted that Mr Domaille was expressing concern that his conduct was detrimental to their clients. He accepted that it said that it may need to be escalated to address that conduct but he said that he did not know what was meant by that. Mr Sinclair was referred to an email from Mr Domaille to Ms Guillou dated 7 December 2020 entitled D Trust – BNZ Account Opening. The email stated: *“Dear Debbie, Having thought a little about this perhaps this correspondence needs to go to supervisory? If his behaviour impacts on us being able to provide services to our clients it would be worth letting them know. Robert of course knows this client very well.”* Mr Sinclair said he had no idea whether this reference was to GFSC and he did not know whether they were very concerned about this situation. He said he did not know that D stood for anything other than Pakistan. He had been absent from the organisation for some time and until he got this bundle of documentation he had no idea what D stood for.

55. He accepted that as MLRO for a number of years, client due diligence was something that he was very familiar with. He accepted that he was familiar with the B Group and that he met Mr Mr A once but did not know /could not remember his Trust was called D. He said he believed that Mr A came into the office once and he met him but that `this was many years ago. When it was put to him that he knew B was a very important client to the Group, he said *“it was a client, I didn't know”*.
56. Mr Sinclair was taken to an email dated 22 February 2021 from Ms Alex Willcocks, Trust Manager at Artemis Trustees Limited which related to a different request by Artemis to Mr Sinclair.

“Good afternoon Robert,

I am writing in relation to your due diligence and a request we have received in relation to a UK company ultimately owned by the ATL ATO the E F Family Settlement.

By way of background:

We have received a request from G (UK Solicitors) acting for a UK registered Company H Limited to be provided with Due diligence documents for the Persons with Significant Control (PSC) and for a follow up Zoom call with your documents for verification purposes (I am not sure if you have had to go through this process yet in lockdown, but it is becoming the new certification norm)

The PSC for H Limited are considered to be Mr I, as director, and yourself and Ian as owners of Artemis.

Please find link below...

I confirm that we do not provide director services for the UK Company and that the UK Company is owned by J Limited, which is ultimately owned by Artemis as Trustee of the E F Family Settlement.

The UK Company owns UK property, the property was previously held in the offshore structure and we transferred it to H Ltd in 2019 (see attachments). The UK Company is looking to purchase the vacant plot next door and as part of the due diligence requirements in your role as PSC the solicitors have asked for the following:

- 1. Photographic ID (passport/drivers licence)*
- 2. Two address verification documents dated in the last 3 months, such as utility bills or bank statements showing your home address.*

Please could I ask you to consider the request and, if comfortable to proceed, authorise me to release your due diligence to the UK solicitors prior to arranging a zoom meeting for them to verify your due diligence?

And if so, provide copies of two utility bills dated in the last 3 months to be presented for verification process on zoom?.....”

57. Mr Sinclair confirmed he knew Ms Willcocks. He accepted that the email was a standard request for him to provide CDD and that it was from a person he knew at an entity he once worked at, Artemis. Mr Sinclair was referred to his response to Ms Willcock’s email:

“I am well and hope you are also, but In [sic] am not at all enamoured by the contents of your email. As I have said in relation to previous like matters, I am extremely suspicious of such requests for my personal information and regard them as a scam. There is no way I can possibly be regarded as a person with significant control so any request for any personal details on such an obviously erroneous assertion can only be fraudulent and I urge you for your own protection to report this matter to Artemis’s MLRO.

I also do not give my permission and indeed forbid you to give any of my personal details to anyone connected to this scam.”

58. Mr Sinclair accepted that he sent this email to Ms Willcocks. He said that it had not been explained to him how he was regarded as a person with significant control. He said that at this stage, he was really very ill. He had collapsed on 6 February 2021 and an ambulance had been called and that fall which was on the road really affected him, he broke his back and was in significant pain. The doctor had prescribed very strong pain-killers and he was having a lot of

difficulty in dealing with things – the pain and the effect of the strong pain killers. It was put to Mr Sinclair that his email to Ms Willcocks did not state that he was too unwell to deal with the request, it stated that this was a scam and he was not dealing with it. Mr Sinclair stated “*on reflection, I should have said I am too unwell to deal with this.*” He said his wife notified Artemis that he was unwell later. He accepted that he was familiar with the client but he did not understand why he was regarded as a person of significant control. When asked if he was familiar with the GFSC regulations, he said “*I was familiar but I don’t know if I was then familiar or I am now*”. He accepted that anybody in excess of 15% for the purpose of GFSC regulations is a person with significant control. He said he was severely ill at this point in time and would not have remembered the percentages. When it was put to him that that is not something he communicated, that he had simply said “*its fraudulent, I can’t have significant control so I’m not dealing with it*” Mr Sinclair said “*On reflection I should have done something different, I agree.*”

59. He was taken to the subsequent correspondence where Ms Church had forwarded the email from Mr Sinclair and Ms Willcock’s response to Mr Domaille by email (confirming that his comments were noted and that they would not release ID documents or personal details). He was referred to Mr Domaille’s emailed response in which he stated that he wondered if they needed to inform the GFSC. Mr Sinclair accepted that Mr Domaille was in this email trying to resolve matters without his input and that this was a separate concern to the BNZ bank account opening matter. Mr Sinclair agreed that the reference to the business having to refer matters to the GFSC was Mr Domaille’s only stated concern and that Mr Domaille had expressed concern about the business. He accepted that there was nothing in Mr Domaille’s email to suggest ulterior motive and nothing to suggest any bad faith or secret agenda. Mr Sinclair did not accept that for this client and for the BNZ bank opening, he was deliberately trying to be difficult for Artemis stating that he was at that stage severely unwell.

60. Mr Sinclair was then referred to a letter from Ms Guillou as Chief Executive Officer addressed to him dated 26 February 2021 which set out the company’s concerns. In that letter Ms Guillou stated:

“I have been advised by a number of colleagues in recent months that you have failed to engage with various requests for provision of information and signatures on documentation. I am disappointed that this is continuing to occur and it is consistent with my own experience where I have written to you and you have failed to acknowledge my letters or provide any responses on other matters.”

Ms Guillou requested that the information requested of Mr Sinclair on 22 February be provided by return and that if she had not heard from him by 2 March 2021, she would have no choice but to report the matter to the GFSC.

61. Ms Guillou stated that if Artemis is unable to provide basic information to clients because of his unreasonable refusal, thereby placing them in breach of their obligations to obtain this information, Artemis would regard this matter a breach of the Fiduciary Rules 2020, and will report the matter to the GFSC.

62. Mr Sinclair accepted that Artemis was not able to provide basic information to their clients and could not act in the client’s best interests. He accepted that they are obliged to provide the information. When it was put to him that with his long-standing background with Artemis as MLRO and with other companies that he must have understood why this was needed, Mr

Sinclair said *“I didn’t fully understand why it was needed, I didn’t understand why I was regarded as a significant shareholder. That was never properly explained to me and I was totally confused. And at that stage I was severely ill and as I previously explained without going into it again I was in a lot of pain.”* Mr Sinclair accepted that by writing the letter dated 26 February 2021, AHL had some real issues asking to rectify the problem and he said his wife stepped in to help him. He was referred to the letter from his wife, Mrs Andrea Sinclair, dated 1 March 2021 addressed to Ms Guillou in which she stated *“..my husband is not well enough to deal with the matters contained in your letter. I therefore request that you correspond in future on such matters with his advocate, Mr Robert Breckon of Ferbrache Farrell LLP”*.

63. He accepted that correspondence and a request were sent to Advocate Breckon. He was referred to an email from Ms Guillou to Advocate Breckon dated 8 March 2021. Mr Sinclair accepted that in sending this correspondence to Advocate Breckon, the Defendants were trying to have a workaround, so that they did not have to come to Mr Sinclair. Mr Sinclair said he became seriously ill in February 2021 and was on a lot of severe pain killers and that his condition continued for most of the year. He accepted that at that time he was holding a NED directorship with various companies including I Limited, an Alternative Investments Markets listed company.
64. The Court permitted the Defendants to refer in cross-examination of Mr Sinclair to an extract (pg. 35) in I Limited’s *Annual Report & Accounts 2021*, a publicly available document. Mr Sinclair accepted that this extract recorded that he attended 17 out of 18 Board meetings and two Audit Committee meetings for the company. He accepted that I Limited was an Alternative Investments Market listed company. Mr Sinclair said that he offered his resignation to both I Limited and Z Limited quite early on from his retirement with Artemis. He said Mr K was the leading person behind both companies. Each of the Boards asked him to stay on notwithstanding that he wanted to retire and that they knew he was not very well and they offered him as much support as they could possibly give. Mr Sinclair accepted that throughout 2021, he remained as a Director of I Limited, a listed company with the help and support of the Directors. Mr Sinclair said that he didn’t offer his resignation because he was too unwell but he had the interests of the company in mind rather than his own personal interests. He said the meetings with I Limited were by telephone or by Zoom calls as he was not fit to travel. He accepted that there was a large pack of documentation which required consideration before a meeting, as he would be making important decisions about the company where he had to exercise reasonable skill and care in his duty as a Director.
65. Mr Sinclair said he was satisfied that he could do that with the help of I Limited. He could not recall whether he was able to deal with the I meetings and other matters around the time of his fall in 2021.
66. Mr Sinclair was then referred to an email from Ms Guillou to Senior Management dated 8 March 2021 in which she stated:

“Just a quick note to let you know that we have been advised that Robert is not in good health. If you have a need to obtain any information or signatures for him, please let me know as I am in contact with his legal adviser who may be able to assist in obtaining whatever is required.”

Mr Sinclair accepted that at this stage Ms Guillou was taking steps to try and facilitate things happening via his Advocate. Mr Sinclair was also referred to a response to Ms Guillou’s email from Mr Justin Jager, Associate Director of Artemis Trustees Limited. Mr Sinclair confirmed that he knew Mr Jager. In his email, Mr Jager said he had been in *“almost daily communication*

with Robert over the last few weeks as we are in the process of migrating L Finance (Guernsey) Limited to Cyprus, he is an individual director. The last time I spoke to Robert was on Thursday". Mr Sinclair accepted that this was 4th March 2021, three days after the letter sent by his wife stating he could not deal with matters. He accepted that he was able to help and assist on the migration of L.

67. He was referred to an email from Ms Alex Willcocks dated 8 March 2021 to Ms Guillou in which she raised concerns about matters that Mr Sinclair had not dealt with:

"1. Robert has not acknowledged or responded to my emails asking him to review the Trust financial statements and therefore these have not been signed off.

2. The 1999 Trust has a problem whereby the wrong Trustees resigned when appointing Artemis. Robert will not engage in emails to correct this issue.

3. The 1978 Trust has a problem whereby we need to agree who the Appointer is because this was incorrectly managed and approved in the 1980's. The current appointer refuses to provide Artemis with CDD (creating a secondary problem). Again, Robert refuses to acknowledge emails relating to this."

It was suggested to Mr Sinclair that he was picking and choosing what he wanted to respond to. He said he *"didn't understand this one at all and I still don't understand it. It has never properly been explained to me"*. He accepted from the tone of the email that this was becoming of increasing concern for Artemis.

68. Mr Sinclair was referred to an email from Ms Guillou to Advocate Breckon dated 9 March 2021. In her email, Ms Guillou advised Advocate Breckon that she advised the client teams at Artemis that Mr Sinclair is not in good health at the moment and to contact her if they require any action on his part so that they can find a way to achieve whatever is required. Ms Guillou set out three responses that she had received. Mr Sinclair accepted that in this email Ms Guillou sets out in detail the responses received and the issues that she is trying to find a solution for. In response to the suggestion that when Ms Guillou wrote to his Advocate on 9 March 2021, there were increasing mountains of things that were not being dealt with and he did not know whether it had been brought to Advocate Breckon's attention at this point.

69. Mr Sinclair was referred to an email from Mr A to Ms Aimee Steer dated 18 May 2021 regarding the BNZ bank opening issue. Mr Sinclair accepted that seven months on from the correspondence with him in October, the BNZ bank account issue still had not been resolved but he said that he had not been reminded of this fact and he did not know whether Advocate Breckon had brought it to his attention at this point.

70. Mr Sinclair accepted that a request to provide CDD information ordinarily means that it needs to be provided swiftly. He accepted that his lack of engagement and the ability to do things for the client was going to affect the client's affairs and what they were trying to achieve but he said that it was not explained to him why it was necessary. In response to the suggestion that with his experience and his role within the industry he ought to have known, he said *"no not by that stage"*. It was put to him that he should enquire, he said that he had already stated his position and he believed that by involving Advocate Breckon there would have been a means to achieve this had he been brought into the picture at this point.

71. He was referred in cross-examination to email exchanges between Ms Aimee Steer and Mr Ian Domaille regarding the BNZ bank opening. In an email from Ms Steer to Mr Domaille dated 28 May 2021, Ms Steer stated:

“So far, A has been, in my opinion, very understanding about this but we have now missed the deadline to get this account operational.”

In response, Mr Domaille stated:

“I am hoping that if he is that poorly he will grant a PoA or have the court order his affairs be managed by someone else...What liability might we, Artemis, face as a result?”

Mr Sinclair accepted that this was causing problems for the business and that this had been a significant client of AHL since 2008. In response to the suggestion that Mr Domaille’s point on Power of Attorney (“PoA”) was a fair one, that if Mr Sinclair was struggling to provide documentation with his ill health why he did not ask his Advocate to arrange for a power of attorney to deal with matters for him, Mr Sinclair said that he was not aware that this point was still outstanding, otherwise he would have expected them to get in touch with Advocate Breckon to suggest it and he would advise Mr Sinclair that if that was the right course of action. Mr Sinclair was then referred to a letter from Appleby to Ferbrache & Farrell LLP dated 5 July 2021 which referred to the outstanding BNZ bank opening matter. It was suggested to Mr Sinclair that that documentation has not been completed. He said he did not know. Mr Sinclair was referred to an email from Ms Steer to Mr Domaille and Ms Guillou dated 10 August 2021 from Mr A in which he stated:

“given his ongoing ill health, Robert must have a POA in place surely by now?”

Mr Sinclair accepted that this had not been resolved but said that he did not know about the request for a power of attorney. He accepted that had Advocate Breckon advised him so, a power of attorney might have resolved matters.

72. Mr Sinclair did not accept that he was choosing what he was dealing with, he chose to attend the I meetings, to deal with the L migration and that he chose not to deal with the other matters. He did not accept that it was not due to his ill health because he had been capable of dealing with other matters. He did not accept the suggestion that he just did not want to respond.
73. He accepted that he had satisfied himself that he was able to exercise reasonable skill and care as Director of I with the help of the Board. It was put to Mr Sinclair that he could have asked Artemis for further advice and assistance, they had shown from the correspondence that they were willing to correspond with Advocate Breckon and were willing to find workarounds with BNZ; Mr Sinclair said he did not know that the BNZ bank opening matter was still outstanding. He did not recall the letter to Advocate Breckon from Appleby dated 5 July with the attached bundle of documents.
74. Mr Sinclair was referred to an email from Ms Guillou to the Directors dated 6 August 2021 in which she said:

“I have just spoken with A and this email is a file note of that conversation. I apologised unreservedly for the difficulties he has experienced in opening the NZ bank account and said that I wanted to give him a bit of background about why we have found ourselves in this situation...I explained that it was not just Robert’s ill-health that was causing the delays, especially as the account opening issue pre-dated Robert’s health issues as it dates back to at least October last year, if not before. I explained that Robert is not minded to be co-operative with Artemis for his own reasons so our respective legal advisers have been in contact to try to resolve the situation. I explained there is a board of meeting of Artemis Holdings on Friday where we hope to have a resolution

and either you (Aimee) or I will contact him to update him after that meeting. A said that what I have told him makes sense as he could not see why Robert's ill-health was causing such difficulties as a Power of Attorney would have overcome that problem."

Mr Sinclair accepted that the account opening predated his severe illnesses. He accepted this email and others set out the tone as to why legal advice was being taken to try to resolve the situation for Artemis. When it was suggested to him that the email sets out the background as to why that board meeting happened and why the dilution happened, he said he was not sure.

75. Mr Sinclair was then referred to an email from Ms Aimee Steer to Ms Guillou in which she stated;

"I have checked the application form (attached) and it looks like reducing Robert's shareholding in ATL to under 25% would work here, although the form, extract below, does say 'generally more than 25%. Presumably if we deal with this, then prepare a new structure chart only detailing shareholders over 25%, thereby not naming Robert, and update the bank accordingly, hopefully this will be acceptable...do you want me to see if I can get clarification on this? In any case I need to provide A with an update asap."

76. Mr Sinclair accepted that it could be seen from this email that the urgency of the BNZ bank opening was increasing as Ms Steer stated that she needed to provide an update to A as soon as possible.

77. Mr Sinclair was then referred to an email from Ms Jessica A Edwards, Senior Associate, Private Banking at BNZ Partnership Banking to Mr A dated 19 August 2021 in which she stated:

"...our Risk Management team have agreed that as long as the attached form can be completed for the ultimate shareholder of the professional trustee company Robert Sinclair; we can proceed with the opening of the accounts. So simply put; we just need to have this filled out and signed by an acting Director of Artemis Corporate Services Limited on Roberts' [sic] behalf".

Mr Sinclair accepted that this proposal would require his consent. In response to the suggestion that he had not provided his consent, Mr Sinclair said that he had not been asked.

78. When it was suggested to Mr Sinclair that by the date of this email from Ms Edwards, the documentation had not been produced by Mr Sinclair's Advocates and there could not be any confidence that consent could be obtained, Mr Sinclair responded that he did not believe this was correct as if Advocate Breckon had advised him to sign, he would have signed.

79. Mr Sinclair was referred to the correspondence from Appleby to Ferbrache & Farrell namely the letter dated 5 July 2021 and to their letter dated 19 July 2021 in which Appleby stated that Mr Sinclair's *"continued failure to sign is causing real prejudice to both my client and to its clients"* and that *"one client is now threatening to terminate the relationship over Artemis' continued inability to simply open a new bank account."* Mr Sinclair accepted that months and months had passed by and the documents still had not been provided but said that had he been asked to provide something by his Advocate he would have dealt with it. When asked if it was for him as a shareholder to recognise the need to sign that documentation, he said *"he didn't remember, he isn't party to the correspondence and he doesn't remember it at all"*. He accepted that it was put to his Advocate. He said he did not know if the BNZ bank account opening matter was considered to be incredibly urgent by this stage.

80. He was referred to the letter from Appleby dated 5 July 2021 which *inter alia* set out the 9 outstanding matters required of him:

“...enclosed with this letter are the various outstanding documents which require his attention. As discussed for his ease my client has endeavoured to complete as much details as possible, so in many cases this simply requires his review and signature.

1. *M Limited: Please find enclosed a share transfer form to transfer the one ordinary share held by your client on trust, to Mrs Julia Church, who we can confirm is a director of O which acts as director of P.*
2. *Q Limited: Please find enclosed a share transfer form to transfer to one ordinary share held by your client on trust, to Artemis Nominees Limited.*
3. *R Trust - Please find attached a letter of retirement for your client in respect of his position as co-trustee. In addition, I also enclose previous correspondence concerning the unsigned deed of appointment, which I would be grateful if your client could execute.*
4. *S Trust – Please find enclosed documentation relating to the above structure for your client’s attention, relating to obligations under CRS. The password to open AEOI SC forms is ALF171819.*
5. *T Limited – Please find enclosed confirmation for Barclays which needs to be signed by your client which is required to make changes to the mandate.*
6. *D Trust – Please find enclosed a copy of the BNZ bank account opening form, necessary to allow the client to open a new account.*
7. *U Trust – Please find enclosed a letter of resignation from the committee of trust advisors for our client to sign.*
8. *V – Please find enclosed an AML form 806a required by V regarding the ownership of my client, in order for them to put in place an arrangement to satisfy their obligations under the new secondary pension scheme legislation.*
9. *Release of Guarantor – Please find enclosed a copy of the draft release of W as an ongoing guarantor of the lease with X Trust. As your client will be aware Y left Artemis some time ago and has no ongoing connection, and so it is clearly inappropriate that he should continue to be guarantor.”*

81. On the outstanding matters referred to in that letter, Mr Sinclair’s evidence in cross-examination was this:

- i. on the first item, he said that he thought he had signed the share transfer form in 2019. He did not know why he should send another. He said he was totally confused, he did not understand why he was being asked to sign and why it was outstanding.
- ii. on the fourth item, it was put to Mr Sinclair that that documentation also had not been completed. He said he had no knowledge of it. He did not remember being asked for it. He had no recollection of it at all.

- iii. on the fifth item, it was put to Mr Sinclair that when the beneficiaries of the trust requested it of him, he complied and that this was an example of him not wanting to do anything to help or assist Artemis. Mr Sinclair said he could not remember what happened at the time, that this was a bad time and he did not remember getting a response from Artemis but he did recall the underlying client who knew him personally getting in touch with him and asking him.
 - iv. on the sixth item, the BNZ bank opening form, Mr Sinclair accepted that the personal customer information form had been prepopulated for him albeit inaccurately as his address was wrongly spelt. It was put to Mr Sinclair that he could have gone back to Artemis to say that he would sign the form but could they correct the address. He said that he had been through all of this and he found it difficult.
 - v. on the seventh item, Mr Sinclair said that he tendered his resignation directly to the Committee of Advisors rather than to Artemis Trustees which he thought was the correct way of dealing with it. In response to the suggestion that he had chosen not to tender his resignation in the way that it had been requested, Mr Sinclair said that he did it the proper way.
 - vi. On the eighth item, Mr Sinclair said he did not recall being asked to complete the documentation but that again they got his address wrong. He did not remember this form at all or being requested to do it. Mr Sinclair accepted that this matter had to be resolved by Mr Domaille signing it. In response to the suggestion that they were trying to do workarounds when he did not cooperate, Mr Sinclair said he did not know that he did not cooperate but he did not remember at all. He accepted that it had been sent to his Advocate by letter dated 5 July 2021.
 - vii. On the ninth item, Mr Sinclair said that had Advocate Breckon recommended that he sign the release of guarantor, he would have signed it. It was put to Mr Sinclair that it was not for Advocate Breckon to advise him as to what documentation to sign and what documentation not to sign. Mr Sinclair said that Advocate Breckon was assisting him greatly at that time, he did not really understand that document, he was not a Director of Artemis SARL and did not know what was going on. He did not feel it was appropriate to sign but had he been advised to sign, he would have signed certainly. He accepted that at the time when the correspondence was provided to Advocate Breckon, he was signing documentation that Advocate Breckon advised him to sign.
82. Mr Sinclair was pressed on whether it was right that he was too unwell to deal with the signature or that he would have dealt with it had his advisor told him to. Mr Sinclair said that his Advocate got it right, he was too unwell to deal with these matters at that present point in time, he found it very difficult and he still does. When it was put to him that this was a difficult contention to sustain given his other directorships, Mr Sinclair said that he had great support from the boards of those companies. It was put to Mr Sinclair that this did not withhold scrutiny; if one is carrying out the role of Director, one has to exercise a duty of care and skill and he was not in a position to deal with quite simple requests that were coming from Artemis to him with completed prepopulated forms which he had to address. He said he did not recall them at the time whatsoever.
83. It was put to Mr Sinclair that these were not complicated documents, it was the provision of CDD and signatures. He did not accept that he was choosing what he wanted to deal with. He

stated that he entirely disagreed with the suggestion that he chose not to deal with Artemis because he was not inclined to do so.

84. Mr Sinclair was then cross-examined in relation to the minutes of the Board meeting that took place on 20 August 2021. He was referred to paragraph 2.2 of the minutes which states:

“IT WAS NOTED that the Company has over the past 12 month period experienced various operational difficulties, both internally and externally with clients and third party service providers, as a result of RS’s inability or unwillingness to undertake certain actions which were required to order for the Company and its group companies (together the Group) to effectively undertake its business.”

85. Mr Sinclair accepted that paragraph 2.3 of the minutes stated:

*“IT WAS NOTED that the company had sought advice from Appleby (Guernsey) LLP and had received an Advice Memorandum (the **Memo**), a copy of which was tabled to the Meeting.”*

86. He was asked if he accepted that in cross-examination they had been through numerous examples of the issues that were causing those operational difficulties, he said that he did not believe they were as significant as Advocate Brehaut on behalf of the Defendants was making out. He did not accept that, from the emails from A, that the matters needed to be resolved as soon possible and the correspondence between Advocates with clients threatening to leave were significant issues.

87. He accepted that paragraph 5.1 of the minutes records that Mr Domaille had recused himself at the meeting. He was referred to paragraph 5.2 of the minutes which states:

“IT WAS NOTED that Mr Sinclair, in his capacity as minority shareholder, has been unable or unwilling to perform various actions required of him as a controller of a licensed entity. In particular, this relates to performing various actions to enable other entities, locally or internationally to fulfil their AML obligations. This has caused inconvenience and cost for clients and subsidiary companies and is expected to continue to do so in the future, along with reputational damage with clients, business partners and regulatory bodies and the potential for the loss of clients. MJB and DJG considered that the potential damage to the Company was not in the best interests of the Company or the shareholders.”

Mr Sinclair accepted that this was recorded at paragraph 5.2 but stated that he did not agree with it.

He accepted that paragraphs 5.4 and 5.5 stated:

“5.4 MJB and DJG agreed that the objective of any action to address this issue was that the Company and its subsidiaries must be able to cooperate effectively and efficiently in discharging their obligations to clients and business partners. In deciding any course of action to achieve that objective, that action must be fair, equitable and proportionate.

5.5 Appleby’s advice is that the directors are enabled under the Articles of Incorporation to issue new shares and these could be issued to the majority shareholder

only so as to dilute the shareholding of the minority shareholder below 25%, which is the limit for a controller for AML purposes in Guernsey (and it is generally accepted as the limit internationally)."

88. Mr Sinclair was asked if he accepted that 25% was the generally accepted limit, he said he has to take their word for it, he cannot remember if it is or is not. He accepted that paragraph 5.6 of the minutes states:

"MJB and DJG noted that the objective was not to raise funds for the Company as that is not required at this point in time. It was noted that, in the event that funds do need to be raised in the future, the change in shareholding would place a greater obligation on the majority shareholder than is currently the case which would be a disadvantage to the majority shareholder. MJB and DJG also noted that, in the event that a dividend was declared or the Company was sold, this would be a disadvantage to the minority shareholder; however it was further noted that the Company did not intend to declare any dividends and had not done so in the last 3 years and as such there was no immediate prospect that the minority shareholder would suffer any financial prejudice for the foreseeable future. In any event, MJB and DJG considered that if any of these events were likely in the future and the position could be reconsidered by the Board at that time according based on the circumstances at the time, which might include but would not be limited to giving consideration to an issue of shares to restore the situation should that be considered fair and equitable at the time."

In response to the suggestion that the Directors were having regard to Mr Domaille's position and also his position, Mr Sinclair said he would not know, he did not think so.

It was put to Mr Sinclair that in his Cause, he pleaded that there was no protection but that paragraph 5.6 of the minutes showed that there was provision for protection. He said that is what the wording says but he is not sure he would believe it. He said he is not sure he could ever gain confidence that that would ever happen.

89. Mr Sinclair was referred to paragraph 5.8 of the minutes which states:

"5.8 MJB and DJG considered whether sufficient steps have been taken to try to obtain the co-operation of RS (the minority shareholder) and DJG outlined the following steps that have been taken in the past:

- (a) Requests from various individuals within Artemis directly to Mr Sinclair over an extended period of time;*
- (b) Requests from various individuals within Artemis to Mr Sinclair's legal advisers over an extended period of time;*
- (c) Requests from the legal advisers of Artemis to Mr Sinclair's legal advisers including the production of a single pack of documentation to collate the diverse requests to facilitate Mr Sinclair's review and action."*

90. He accepted that given the earlier cross-examination that there had been efforts over a sustained period of time to obtain his cooperation and engagement.

91. Mr Sinclair accepted that paragraphs 5.10 and 5.11 referred to the other options the Board had explored and that they referred to legal advice that was taken. He accepted that paragraph 6.1 stated that:

“It was noted that in deciding whether the Company should take any of the actions mentioned herein the Directors must, in order to fulfil their duties (including those pursuant to the Law) act in the best interests of the Company.”

Mr Sinclair did not accept that it had been established that requests sent to him were being ignored or regarded as fraudulent and that there was no further enquiry from him. Mr Sinclair did not accept that Artemis were losing their ability to function as a company and that they had operational difficulties.

92. Mr Sinclair was then cross-examined on the dilution. He accepted that in a letter dated 19 July 2021, Appleby advised Ferbrache & Farrell that one client was threatening to terminate the relationship over Artemis’ continued inability to simply open a new bank account. He accepted that the letter advised that if the signed documentation was not provided by 5pm on 23 July 2021, they would have no choice but to assume that Mr Sinclair is either unable or unwilling to act and it then reserves the right to take all steps within its power to remove Mr Sinclair from any positions he holds, whether by resolution or court application and to seek costs from him. Mr Sinclair accepted that in a further letter dated 29 July 2021, Appleby set out that in order to address the issue:

“the Board of Artemis Holdings Limited is intending to meet in the near future to consider a proposal to issue new shares so as to reduce your client’s shareholding below 25%, such that he would cease to be considered a beneficial owner or controller and so would not be required take any further steps in the future in this regard. It is believed that such a step would be in the best interests of the company as a whole.”

Mr Sinclair accepted that in so doing, that his Advocate was advised of the intended action. Mr Sinclair accepted that neither he nor his Advocate applied for an injunction restraining the company from doing that.

93. He accepted that Appleby again wrote to his Advocate on 5 August 2021 and confirmed in that letter that they were going to proceed. He accepted that the letter indicated that there were still outstanding documents requested by that date, 5 August 2021. Mr Sinclair was referred to a further letter from Appleby to Ferbrache & Farrell dated 17 August 2021, which noted that Mr Sinclair had once again failed to provide the requested documentation. Mr Sinclair accepted that there was a chain of correspondence between Appleby and Ferbrache & Farrell which put his Advocate on notice of the intended actions. He said he did not remember opportunities being given to him to comply with the documentation or that he did not avail of those opportunities. Mr Sinclair accepted that by letter dated 27 August 2021, Appleby set out the steps that had been taken.
94. Mr Sinclair was then referred to a letter from Appleby dated 15 September 2021. He accepted that this letter set out protections provided to him in an open letter. He did not accept from looking at the correspondence that it was his inaction that caused the need for the dilution.
95. When asked if he accepted that undertakings were provided to him in the letter, Mr Sinclair said he read it as an offer of an undertaking not an actual undertaking. He accepted that the letter set out assurances and protections by Appleby to Ferbrache & Farrell. It was put to Mr Sinclair that from the Board minutes and the correspondence the share dilution was solely for the purpose of enabling business to conduct its affairs and that Mr Sinclair could not point to

any other purpose for the dilution, and not from the wording that he had been referred to. He accepted that no dividends have been declared and that from the Appleby letter, dividends will not be declared. When asked if the letter provides an undertaking that the shares will not be dealt with, Mr Sinclair responded *“It’s an offer of an undertaking I don’t know that it is actually an undertaking but I leave that to your legal wisdom”*.

96. He accepted that nothing has happened to the shares since the dilution and that there have not been any dividends. He did not accept that he has not suffered any prejudice nor did he accept that every attempt has been taken to try to protect his position. Mr Sinclair agreed that the evidence referred to does not support his own evidence in his witness statement where he stated *“I believe his inability to put in place appropriate financing to buy my interests has driven Mr Domaille’s strategy to date, culminating in the Dilution”*. Mr Sinclair said that he was not sure whether that point was pleaded in the Cause.
97. It was suggested to Mr Sinclair that there was no quasi-partnership. He accepted there was no 50/50 shareholding but stated that it was managed equally, that *“he and I managed it together”*. In response to the suggestion that any question of quasi partnership must have terminated when he left the business in 2019, he said that *“I regarded the shareholders agreement as being still in place rightly or wrongly”*. He accepted that he had not been involved in management since 19 June 2019.
98. He was then cross-examined in relation to the Shareholder Agreement. He accepted that the Second, Third and Fourth Defendants were not named in that agreement on the front page. He accepted there was no acknowledgment on the part of the First Defendant that the Shareholder Agreement would apply. In response to the suggestion that in a document entitled *“Proposed Revisions to Artemis Structure”* in which AHL was proposed as a holding company, there was nothing in the agenda item in relation to a restructure or a shareholder agreement, Mr Sinclair responded *“it does not mean that it did not continue. I believed the previous one just continued and it as an oversight that we didn’t change it or amend it.”* He accepted that there was no reference in the first Directors’ meeting to the Shareholder Agreement applying. When it was suggested to Mr Sinclair that the question of the Shareholder Agreement applying was not being specified or raised by anybody, and it was not raised in the Any Other Business page in the minutes of the first Directors’ meeting of AHL which took place on 28 November 2007, he responded *“It was an oversight if there was one.”*
99. It was suggested that Artemis Chartered Accountants were party to the Shareholder Agreement but that there was no evidence that it applied to anybody else. Mr Sinclair responded, *“We could have got our housekeeping in better order I would be the first to admit that.”* He said that the Shareholder Agreement should have been amended to take into account the dissolution of Artemis Chartered Accountants and to incorporate the shareholding of Artemis Holdings Ltd and it was not. He said *“bad housekeeping, I hold my hands up”*.
100. It was put to Mr Sinclair that if the Shareholder agreement applied to AHL, he would have been obliged to pursue arbitration as that is what Clause 20 says. He answered that he did not know the answer. He did not accept that he did not pursue arbitration because he knew the Shareholder Agreement did not apply.
101. It was put to Mr Sinclair that the valuation approach for outgoing shareholders was not the valuation approach that had been followed in the past and he accepted that. He accepted when it was put to him that he was not asking the Court to follow that valuation approach and he accepted that. He accepted that Clause 6 of the Shareholder Agreement only applied to the issue of shares to raise additional capital.

102. Mr Sinclair was referred to Clause 11 of the Shareholder Agreement which sets out a duty to account for fees. He said he accounted for fees from other director roles up to the point when he left Artemis and that he was not sure if he did afterwards except for I Limited which he thought went through Artemis when he was not there. Mr Sinclair said that he considered this agreement applied to AHL. It was put to him that if he was saying that the agreement applied, then he had a duty to account back to the company and he accepted that. It was put to him that he had not done so and he responded "*I overlooked that certainly*".
103. Mr Sinclair was referred to Clause 13 (b) of the Shareholder Agreement which provides that the Shareholders shall procure that each of the Directors shall enter into contracts of employment with ATL. Mr Sinclair accepted that neither he nor Mr Domaille had employment contracts. He said that he accepted that that clause had partly not been followed – he thought that other Directors at the time who were not partners of Artemis Chartered Accountants did have employment contracts.
104. He was referred to Clause 17 which is the indemnification clause. He accepted that if the Shareholder Agreement applied, then indemnification also applies.
105. Mr Sinclair did not accept that just because the value adopted for the valuation of the shares for the dilution was low did not mean that that it was not fair and reasonable to the company. He disagreed when it was put to him that it is a question of what is fair to the company and not to him. When it was put to Mr Sinclair that he was angry that Artemis had not agreed to enter into the consultancy agreement with him, he did not accept that he had held a grudge ever since.
106. He accepted that he had not engaged with KPMG on the draft valuation report dated 5 March 2020. He said that he was asked to sign a confidentiality agreement and he said he would not do so as he did not know what it would lead to. He said that the only reason he did not provide feedback was because of the request for a confidentiality agreement. He accepted that there had been an attempted valuation but said that it was not on joint instruction. It was put to Mr Sinclair that he had not provided feedback to KPMG for three months, Mr Sinclair said that he did not agree he should be providing feedback as it was not a jointly instructed report. He said that the valuation method that had been instructed was wrong in his view.
107. Mr Sinclair accepted that paragraph 5.10 stated that Ms Guillou noted that Mr Sinclair had been approached a number of times and had failed to engage. When asked if he accepted that this was correct that he had been approached a number of times and repeatedly failed to engage in the process, he said that he remembered one occasion but did not know a number of times.
108. He did not accept that valuing the business would be very difficult because of the GFSC involvement at that time. He said that he thought that it may have had an impact but it would not have meant that a fair valuation could not have been achieved.
109. On the suggested alternative that there should have been an investigation where the shares could have been allocated to his wife or children, Mr Sinclair accepted that no power of attorney had been put in place and said that one could have been put in place if that was a way of achieving it. It was put to him that that would not work because his wife and children would still be regarded as people under his control so it would not be a viable option. He replied that he was not sure, he was not an expert and would not know. When asked if he did not propose at any time that his wife or children would take those shares, Mr Sinclair said he did not realise it was important for him to propose it. He said he was not aware that either he or his Advocate had suggested that the shares could be diluted transferring perhaps to his wife or children.

110. On the suggested option that a workable solution be provided to Mr Sinclair for him to respond to documents at a moment's notice, it was put to him that the correspondence on the BNZ account was over a period of 10 months which was hardly a moment's notice. Mr Sinclair said that it started it off but then it went quiet over a long time, really a long time. It was in the hands of his Advocate. He said quite a long time elapsed before his Advocate was involved. It was put to Mr Sinclair that this was all at a time when he was still being able to deal with all the other matters, particularly related to the K situation, and that he simply picked and chose what he wanted to do. Mr Sinclair did not accept this nor did he accept that he was still reeling from what happened in 2019.
111. It was put to Mr Sinclair that he was operating effectively as a director in other areas, he was dealing with documentation in relation to the K entities, he had sent correspondence saying these were a fraud or a scam and that it is not for other people to tell him what to sign and that he chose what to deal with. He disagreed that he chose what to deal with. He did not accept that the directors really had no other option and that what they did was for the best interests of the company.
112. Mr Sinclair was referred to the decision of the GFSC by which it prohibited him from holding the position of controller subject to a limited exception permitting him to pursue the present proceedings in the Royal Court of Guernsey. He accepted that this means that he is prohibited from holding more than 15% of shares and he accepted the terms of the limited exception.
113. He did not accept that given the GFSC involvement in the business that there is no realistic prospect of sale of either the business or shares of the business to a third party. It was put to him that because of the prohibition by the GFSC on Mr Sinclair which means that he is prohibited from holding the position of controller, subject to a limited exception, he cannot hold more than 15% of the shares. He said he could not comment because of a confidentiality agreement that he had entered into with the GFSC.
114. Mr Sinclair did not agree that the Shareholder Agreement had not been applied in respect of AHL nor did he agree that there were numerous clauses of that shareholders agreement that had been completely ignored. He said it could have been better drafted, it could have been updated but it is not right to say it did not exist and did not apply. He said the valuation in the shareholders agreement was followed on previous exits and that is what he expected this time. He accepted that it was not strictly in accordance with "*but nevertheless in the spirit of the Shareholder Agreement*".
115. Mr Sinclair did not accept that this was not a quasi-partnership, stating "*that was the idea of it*".
116. He accepted that his health concerns did not result in him resigning from Z or I Limited until January 2022. When it was put to him that throughout that period, he complied with all of his duties as Director of I and of Z, he said "*I wouldn't say all of my duties but where I could I complied with them*". It was put to Mr Sinclair that he said that he relied on his co-directors at publicly listed companies, why not rely on Artemis to assure him that the documentation was genuinely required and why ignore it. Mr Sinclair said he thought it was a scam, they had not told him who the client was until the Court bundle, so he was in the dark. Mr Sinclair accepted as '*absolutely true*' that the truth was more as in his witness statement that following the way Mr Domaille and Artemis had treated him, he never really enjoyed receipt of requests from them.
117. It was put to Mr Sinclair, having gone through the emails and the schedule of documentation that he had provided, the large pack of documents sent to his Advocate and not complied with,

that he had caused operational difficulties. He said he did not accept that at all. Whilst they said that they were at risk of losing clients, he did not believe that.

118. He disagreed that what the Directors did was not unfair nor prejudicial, but it was essential otherwise this business could have “*gone completely down the pan*”.
119. When it was put to Mr Sinclair that he did not deal appropriately with Artemis, he said “*I could have done better*”. He did not accept that the directors at all times were acting in the best interests of the company and for a proper purpose. He said he disagreed wholeheartedly that there was no other choice for the directors.
120. There was no re-examination of Mr Sinclair.

Mr Ian Charles Domaille

121. Mr Domaille adopted his witness statement as his evidence-in-chief. In his statement, he said that that insofar as the facts within Ms Guillou’s statement were within his knowledge, they are true and correct. When asked by Advocate Brehaut about the financial impact on AHL if a buy-out order for the shares was made by the Court, Mr Domaille said it would have a significant financial impact and that depending on the quantum it could have a devastating financial impact. He said that if the Court ordered him to buy out Mr Sinclair’s shares personally, that would also have a significant impact on him. When asked how he felt about the allegations made against him and the attacks on his integrity, Mr Domaille said they are very serious, he said he takes them very seriously, he operates in the financial sector which requires trust and good conduct and he felt the need to defend them.
122. He said that he is the majority shareholder of AHL and has been a Director of AHL since 6 November 2007. As Director, he is responsible for the oversight of the company’s operations as a passive holding company along with his co-directors. Mr Domaille said that he qualified as a Chartered Accountant in 1987 and spent his entire career to date in the financial services sector and more particularly in the fiduciary sector since the 1990’s. He has been involved in leading Artemis Trustees Limited since its foundation to the current time. He has been the Managing Director of ATL with overall responsibility for client-facing matters since 2019.
123. Mr Domaille set out the background to Artemis Chartered Accountants (ACA) and AHL. He said that ACA was a Guernsey partnership between himself, Mr Sinclair, Mr James Gardner and Ms Rosemarie Hancock. It was formed shortly after ATL and Artemis SARL businesses began. The partners agreed to carry their interest in the fiduciary and related businesses through ACA. The partners of ACA held shares in ATL, Athena Administration Limited (AAL) and Artemis SARL. AAL was subsequently wound up. He said that the partners of ACA entered into a Shareholder Agreement dated 17 July 2002 with Ms Maeve Guilbert, Ms Debbie Calderwood, Ms Pam Gerrard and Ms Sheila Torode all of whom held shares in ATL, Artemis SARL and AAL. Mr Domaille said that the Shareholder Agreement was to govern the relationship between the shareholders which was not otherwise governed by the Articles of the companies and the law. He said that whilst the Shareholder Agreement was designed to put a framework around the future management of the businesses “*the reality was that there was no ‘formula’ for how matters were dealt with. We would usually consider the relevant paperwork and financial information and discuss and agree a way forward.*”
124. He said that Ms Hancock and Mr Gardner retired from ACA in around 2005 and 2007 respectively and sold their shares in ATL, AAL and Artemis SARL to Mr Sinclair and to himself. AHL was formed to simplify the ownership of the group. It was registered and incorporated on 6 November 2007. The intention was to use AHL as a ‘holding company’ for

the other Artemis companies. The first directors of AHL were Mr Domaille, Mr Sinclair, Ms Gerrard, Ms Guibert, Ms Calderwood and Mr Gardner. Mr Gardner stepped down as shareholder but remained as director of ATL. Mr Domaille said that Mr Sinclair was wrong to state that his interest and Mr Domaille's interest in AHL were to be "equal" and that all ongoing dealings with the company and its affairs were to be handled on that basis. He said his shareholding was greater than Mr Sinclair's and had been for many years and affairs have always been conducted on that basis with him as the majority shareholder.

125. He said that he and Mr Sinclair became the sole remaining beneficial owners of AHL as Ms Guilbert, Ms Gerrard, Ms Torode and Ms Calderwood all sold their shares in the subsequent years (Share Sales). Mr Domaille said at no point after the Share Sales, or at the time of setting up AHL, did he and Mr Sinclair conclude a Shareholder Agreement. His evidence was that, as a consequence the conduct of the business of AHL is governed by the Memorandum and Articles of Incorporation of AHL.
126. Mr Domaille said that negotiations were entered into with Mr Sinclair via his then lawyers, Babbe in relation to the terms of his ongoing roles following his departure from the business. Discussions took place about the terms of a "*Governance Agreement*", a "*Consultancy Agreement*" and a "*Valuation*" document. None of these progressed beyond drafts and none were put into effect. He said that the Governance Agreement was instigated by Mr Sinclair but he made repeated unreasonable demands which were refused. He said the Valuation document was proposed by Mr Sinclair but due to his lack of engagement it did not progress.
127. He said that a dispute arose between himself and Mr Sinclair during 2019 relating to the business of AHL, and in particular, to Mr Sinclair's conduct. He said that in the interests of AHL's business, he took the decision in his capacity as a majority shareholder in AHL to remove Mr Sinclair as a director of AHL, including its subsidiaries and Artemis SARL. Mr Domaille said that Mr Sinclair resigned of his own volition from ATL and its subsidiaries on 4 June 2019 having argued with the board. Mr Domaille said that having said he would hand over the running of the Artemis SARL business to Mr Domaille, Mr Sinclair failed to do so claiming that he wished to retain control over the board. Faced with this impasse, Mr Domaille circulated a letter of direction requesting that a shareholder resolution be passed removing Mr Sinclair as director of AHL. Mr Sinclair was given notice of the meeting at which the resolution was to be given consideration and he was subsequently removed. The same process followed in respect of Artemis SARL. Mr Sinclair was removed from both entities on 16 July 2019.
128. Mr Domaille said that the Board of Artemis SARL resolved to terminate the existing contractual arrangements between Artemis SARL and Mr Sinclair in relation to the provision of his shares. His wife who had, at the time, already given notice of her intention to retire and who previously worked as chief accountant/credit controller was placed on garden leave, with immediate effect. Mr Domaille said that whilst they had continued to supply Mr Sinclair with financial information in relation to ATL and SARL and AHL he has had no involvement in the day to day management of the businesses. However, he has been required to undertake certain actions as shareholder and in respect of the directorships he has retained.
129. He confirmed that he agreed with the content of Ms Guillou's witness statement. He referred to Ms Guillou's evidence on the Shareholder Actions that Mr Sinclair had failed to perform and he focussed on his own communications with Ms Guillou and various personnel within the Artemis Group as he said that those communications record his concern in relation to the potential consequences of Mr Sinclair's failure to perform the tasks required of him.
130. Mr Domaille said that following Mr Sinclair's failure to provide ATL with the Due diligence documents required for the purposes of opening a bank account on behalf of Client Trust A,

which had been requested on 20 October 2020, 3 November 2020, 20 November 2020 and 2 December 2020, he addressed emails to Ms Guillou on 5 December 2020 and 7 December 2020 indicating that Mr Sinclair's behaviour was detrimental to ATL's client and needed to be escalated. He said that meant formal meetings to consider all of the options, including seeking legal advice, to ensure that they could continue service delivery to clients.

131. He said that on 23 February 2021, Mr Sinclair again refused to provide ATL with the Due diligence documents which were required for verification purposes by another of ATL's clients, Property Co. He said he addressed an email to Ms Church and Ms Guillou on 23 February 2021 providing his suggestions on the steps to be taken in light of Mr Sinclair's lack of cooperation.
132. Mr Domaille said that what was of great concern was that the Bank account was required to be operational by 1 June 2021 and by May 2021, Mr Sinclair had still not provided the Due diligence documents which were required for that purpose. Mr Domaille said he was aware of other instances of Mr Sinclair failing to cooperate and he said he had seen the "*Table of Actions*" prepared by one of ATL's staff which summarises the various actions that Mr Sinclair had not performed.
133. He said that Ms Guillou had provided him with an update on 20 August, as to a potential solution to the problem they experienced attempting to open a bank account with BNZ. Ms Guillou noted that whilst on one level it might provide a solution, it still left the business exposed as Mr Sinclair may have refused to provide his consent for a director to sign whatever documentation may be required and he may also have actively refused which would have again left them in an unenviable position.
134. Mr Domaille said that the AHL Board was of the view that in order to preserve the commercial interests of AHL, its subsidiaries and their clients to enable them to carry on business effectively, the AHL Board was of the view that it would be appropriate to adopt a resolution authorising the Share Issue as it would have the effect of obviating the need to rely on Mr Sinclair in order to progress client relationships.
135. He said that various resolutions were adopted at the Board meeting which took place on 20 August 2021 including the Share Issue. He said that he excused himself from the meeting prior to the AHL Board considering the issues relating to the Share Issue as the outcome thereof would have had a direct impact on his shareholding in AHL. He said he also took no part in the voting on the Share Issue. Mr Domaille said that a draft of the resolution had been circulated alongside a letter to Mr Sinclair updating him on the position prior to the meeting. He confirmed to Ms Guillou by email dated 20 August 2021 that he had no comments on the resolution/letter.
136. He said that a further meeting took place on 27 August 2021, to consider the nature and forms of the Share Issue, in particular, the proposal to loan to him the amount necessary to pay for the newly issued Shares. He recused himself from the part of the meeting dealing with the draft loan agreement and its terms and he took no part in the voting on the loan agreement issue. He said that once the loan agreement had been formally approved, he duly signed it and the necessary arrangements were made by their staff to give effect to it.
137. Mr Domaille said that since that time, the dilution has allowed them to resolve similar situations in at least twelve client matters without the need to revert to Mr Sinclair. He said that whilst Mr Sinclair has complained about his treatment and issued proceedings against him, his fellow directors and AHL, he has still failed to address the Shareholder Actions. He said no proper

explanation has been proffered as to his persistent refusal to assist them in the execution of the companies' business.

138. He said that AHL has not declared dividends other than in relation to small amounts of shares received from client companies in lieu of fees in the past three years prior to the dilution nor does it intend to do so. He said neither AHL nor he intend to seek to issue any further shares in AHL or acquire, dispose of, charge, secure, encumber or deal (alienate) in any way with any shares in AHL, including altering the legal or beneficial ownership in the shares, save where such action is required by law or any prohibition order issued by the GFSC. He said that the one exception to this would be if Mr Sinclair wished to sell his shares. Mr Domaille said:

“It has always been open to him to engage with us to determine a method for valuing his holding (indeed KPMG were commissioned to produce a report in 2020, but Mr Sinclair refused to engage, so the report was only ever in draft form). Instead, he has chosen to issue proceedings which is regrettable given the reasons for the Share Issue.

As stated by Ms Guillou, AHL and I have further provided Mr Sinclair with an undertaking not to alienate the shares in AHL without providing him with 28 days' written notice, or within a shorter period as may be agreed between the parties.

As a consequence, Mr Sinclair has not suffered (and will not suffer) any prejudice as a result of the Share Issue. As Ms Guillou notes, the Share Issue was intended to obviate the need to rely on Mr Sinclair to cooperate; it was not intended to deprive him of the value of his shareholding in AHL.”

139. In cross-examination, Mr Domaille confirmed that his position is that the Shareholder Agreement is not relevant or binding in relation to the shares of AHL. He did not accept that agreements between shareholders in Artemis were conducted in line with the requirements of the Shareholder Agreement. He accepted that those agreements cross referenced obligations within the Shareholder Agreement but said that the purchase and consideration was not determined in accordance with the Shareholder Agreement. Mr Domaille said that subsequent events have shown that the Shareholder Agreement has not been adhered to and the parties that are shown in it do not include Artemis Holdings Limited. He said that there are other clauses in the Shareholder Agreement, which have been disregarded. Given the uncertainty surrounding the effectiveness of the Shareholder Agreement, he said that they sought legal advice and the advice received was that the Shareholder Agreement was no longer a document that was binding. He said that the Shareholder Agreement is not relevant to the shares in AHL.

140. He was referred to Ms Guillou's letter to Mr Sinclair dated 19 June 2020, in which she referred to the Shareholder Agreement and stated that the value of Mr Sinclair's shares was £2,161,607. Mr Domaille said he did not remember specifically giving permission to Ms Guillou to write the letter to Mr Sinclair but that he imagined that she would have asked before writing it. Asked about what he knew in June 2020, he said it was his understanding that the value of Mr Sinclair's shares was worth £2.1 million. In response to the question as to whether since the letter was written in June 2020, he believed that the Shareholder Agreement was binding, Mr Domaille said that the Shareholder Agreement was not considered in the context of whether it was binding at the time. It was a document they had previously referred to, they never had to consider whether it was binding, and certain factors show that the Shareholder Agreement has not been enforced or abided by in many ways. When it was put to him that the June 2020 letter from Ms Guillou only would have referred to the Shareholder Agreement if it was their position that it was binding on AHL, Mr Domaille said that it referred to a valuation mechanism.

141. Mr Domaille accepted that the legal advice had not been disclosed.

142. He was asked if he accepted that under Clause 6 of the Shareholder Agreement on ‘Issue of Additional Shares’ Mr Sinclair had not been given an opportunity to subscribe to the shares. He said Clause 6 must be read in its entirety; the companies did not wish to raise capital. He accepted that Mr Sinclair was not given an opportunity to subscribe to the shares that were allocated to him.
143. Mr Domaille was referred to his email dated 5 December 2020 to Ms Julia Church with copy to Ms Guillou in which he stated “*Debbie, Maybe we need to escalate this a little if his behaviour is detrimental to our clients.*” Mr Domaille said that he had no involvement in the decision (on the dilution) at the Board meeting. He left the Board meeting when these matters were discussed and decisions made. In response to the suggestion that he was involved in the process that led to the dilution, Mr Domaille said that if one looked at the emails, he believed that dilution was not even thought about at the time. He accepted that he had instructed his colleagues to escalate matters. He said that Artemis Trustees, as a licensed fiduciary, has certain responsibilities to the regulator not just the Guernsey regulator but internationally and to its clients and that they were not able to conduct business properly. He said it was prejudicial to the company that they could not establish or maintain relationships or that it was threatened that they could not maintain relationships due to lack of information. Therefore, he said, inaction was not in the best interests of the company, as a whole.
144. It was put to Mr Domaille that he would not expect in the normal course of things that his fellow directors would issue new shares on their own without his involvement, Mr Domaille said that as a recipient of the shares, he was involved but the decision was not his and he had not suggested it as a solution. He said that the dilution was a last resort. There were no alternatives that were forthcoming or able to be found by the discussions they had internally or with their legal advisors.
145. When it was put to him in cross-examination that the principal concern driving these matters with regard to the dilution and Mr Sinclair’s shareholding was the BNZ matter, Mr Domaille said that there was a list of incidences of non-compliance with requests to enable them to continue business with a number of clients. He said that he thought this was one where perhaps the client was most agitated.
146. Ms Steer’s email dated 19 August 2021 referencing that BNZ had agreed that Artemis Corporate Services Limited could sign off for Mr Sinclair (which was a BNZ suggestion) was put to Mr Domaille. He accepted that this was an alternative option but he said that it was a most unsatisfactory solution, as the bank account would not be a trustee bank account. He said he thought their regulators would be critical were they to utilise that sort of solution across the board for their clients. It was put to Mr Domaille that there were alternatives before the Board meeting, but he said that they had no authority to sign on behalf of Mr Sinclair. When it was put to Mr Domaille that they had a proposal from Ms Steer and they did not communicate it to Mr Sinclair, he said that the proposal came through just before 9pm on 19 August and would not have been seen until the following day. He accepted it had not been communicated to Mr Sinclair. Mr Domaille was asked if he thought it was appropriate to engage with Mr Sinclair once a workaround was presented to him. He said he could not remember the exact circumstances but if this was presented to them at the last minute they would not have been able to sign the form without having information and confirmation that they could sign the form and given the previous record of consents not being granted or lack of cooperation, he said it seemed very unlikely that it would be granted.

147. Mr Domaille accepted that the Board meeting could have been moved to accommodate inviting Mr Sinclair, as a matter of principle but that given the previous lack of engagement it seemed hardly sensible or practical to do so.
148. Mr Domaille was referred to an email he sent on 20 August 2021 to Ms Guillou which contained redacted text underneath the main text. He accepted that he had forwarded this email to Ms Guillou. He said the email could have been forwarded by himself to himself to bring it to the top of his inbox. He said that whilst he was speculating, the redacted text may be legally privileged. Mr Domaille accepted that it was possible that the text was redacted as it had been sent to him by Appleby. He accepted that he commented upon this and forwarded the email to Ms Guillou. When put to him that Ms Guillou was not copied to the email with Appleby, Mr Domaille said that he could not confirm that as it was speculation. In response to the suggestion that whereas he said that he was not involved, in all likelihood he was receiving emails from the lawyers, Mr Domaille said that he was not involved in the decision of the Board meeting. He accepted that he was likely to have received the emails from legal Counsel about what was going to happen and that he was well aware of what was going on. It was put to Mr Domaille that he was “*right in the middle of this*” communicating with lawyers; he said he was not sure that the email that he had been referred to was communication directly with lawyers, he said he maintained that it could have been an email from Ms Guillou.
149. When it was put to him that he sent an initial email requiring escalation and was “*in the middle of it*”, he said that they did not know where the escalation was going to lead and in relation to his involvement, he said he did not participate in the decision to issue new shares.
150. He accepted that it is his duty to act in the best interests of AHL, at all times. He accepted that it was entirely open to him to refuse to accept, at any time, the new shares but he said that to refuse to accept would not have been in the best interests of the company, that in fact to accept prejudiced his interests because he suffered a tax bill as a result. He did not accept that he recused himself from the meeting but knew exactly what was going to happen. He said that at the meeting his two co-directors are very independently minded and they challenge everything and that they are people of utmost integrity.
151. Mr Domaille accepted that the only independent valuation that Artemis had in August 2021 was the KPMG report. He did not accept that this transaction was likely to be highly controversial. Mr Domaille took issue with the suggestion that it halved Mr Sinclair’s asset base and he said that the valuation, for context of this transaction was largely irrelevant, as there was no economic disadvantage to the Plaintiff. When asked if before and after the dilution date the only credible valuation evidence that Artemis had available to it was the KPMG report, Mr Domaille said that the KPMG valuation report was not for the purpose of dilution. Had KPMG prepared it for the purpose of dilution, other economics would have had to have been taken into account and so it would not have been appropriate for the dilution.
152. Mr Domaille said that it was quite clear that if an asset is transferred to somebody that has no economic benefit it would not be worth much. The purpose of the issue (of the shares) was not to raise capital and it was not an “*arm’s length transfer*”. It was simply to get the company over the hurdle of being able to continue in business so that the control declarations could be made which was vitally important for the continuation of the business.
153. Mr Domaille denied that £260k was wrong and by a staggering margin. He said the figure was broadly neutral because there was no economic transfer. He said that he thought they had a conversation with their lawyers and that it supported the contention that an open market valuation, as per the KPMG report would not be appropriate in the circumstances. He said he

did not believe that legal advice had been disclosed. He accepted that Appleby, their Advocates, would not provide advice on valuation.

154. Mr Domaille agreed that he accepted the shares but said that it is completely different to the members of the Board that made the decision (on the dilution). He said he did not make that decision. He accepted that it was open to him to say that the valuation does not sound quite right. He said that there was careful management of the conflict issue – the offer of the shares and the issuance of the shares. He said that he did not make the decision to issue the shares. He accepted that he had to discharge his duties to make sure that this transaction was for a proper price and it was for a proper price. He accepted that he had a duty to ensure that the price he was paying for those shares was fair and reasonable and he said that it was fair and reasonable.
155. Mr Domaille accepted that Mr Sinclair has been ill but he was not aware prior to Mr Sinclair's witness statement of the extent of his illness. He accepted that he would not portray his health in anything other than a sincere manner. When it was put to him that he was offered the opportunity to have a truncated trial just dealing with matters not involving the cross-examination of Mr Sinclair on the valuation, he said that very serious allegations were made against him which he wanted to defend.
156. Mr Domaille was referred to the open offer in correspondence between the Advocates to the effect that Mr Domaille offered to purchase Mr Sinclair's shares for £2.75 million and to the counteroffer from Mr Sinclair in the sum of £3,386,513. He accepted that he had not engaged with that offer and that was why they were in Court. He did not accept he had fought tooth and nail to deprive Mr Sinclair of 49.27% of shares or that Mr Sinclair had been put through the stress of an unnecessary trial.
157. He said that he had breached none of his duties, he had acted only in the best interests of AHL in what he had done. He rejected the suggestion that by accepting the shares he had breached his duty of good faith to act in the company's best interests. He said that he had acted in the best interests of the company. Mr Domaille said that the value was proper value for the purpose of the transaction and that to stop the transaction would have been acting against the interests of the company. He rejected suggestions that the company has been deprived of in excess of £1.5 million, as a result of the transaction and he rejected the suggestion that he has brought himself into unresolvable conflict to that decision.
158. Mr Domaille said that the loan will erode in value with inflation so he will owe the company money but he gets no benefit from the assets acquired, such that on further analysis he is actually a lot worse off as a result of the transaction that he has undertaken. He has the tax burden but gets no benefit from having taken on that liability and he said he did that in the best interests of the company as a whole. He said the suggestion that he has 75% shareholding in a company worth, according to his expert, more than £6 million was incorrect because it disregarded the carefully drafted undertakings to protect Mr Sinclair's position.
159. In re-examination, Mr Domaille confirmed that legal advice was taken in relation to the share dilution from Appleby. He confirmed that paragraph 5.3 of the minutes of the Board meeting dated 27 August 2021, refers to the legal advice that they had received. He said that in his email to Ms Guillou dated 7 December, his reference to 'supervisory' was the Supervisory Division of the GFSC.
160. Mr Domaille said that he has been working in trust and corporate administration for over 40 years. The suggestion that the Trust collects the next rental instalments from the tenants and the use of the client's personal NZ bank account as nominee for the Trust, was not an acceptable

process to follow. He said it would not comply with regulations pertaining to trusts and that if he were to try and ask his Head of Compliance to allow such an arrangement he would refuse.

161. He said he had no confidence, whatsoever, in the proposal that Artemis Corporate Services Limited (O) sign without the consent of Mr Sinclair.
162. When asked as to why he considered the valuation was fair and reasonable to the company, Mr Domaille said it was because the company was not seeking to raise capital. It had no purpose for the capital it would simply have to distribute it back to the shareholders. It was in the best interests of the company to carry out that transaction to enable it to continue in business. He said that if he did not dilute the shares they would have lost significant clients and the information that they would have to provide would not be forthcoming therefore they would not be able to conduct transactions on behalf of clients. They would not be able to comply with regulatory requirements, they would have been subject to fines and penalties for inability to file documents on time. He said it would have been catastrophic. He said that if the dilution had not taken place, the value of the company would have been severely diminished.
163. Mr Domaille said that the reason that KPMG had not concluded their valuation was because Mr Sinclair had not engaged.
164. He said that it was his position that he wanted to defend his good name and that these proceedings had not been defended in order to cause harm to Mr Sinclair or to damage his health.
165. Mr Domaille was referred in re-examination to the open letter to Mr Sinclair to purchase his shares. He said that the funding arrangements for that offer are no longer available.

Ms Deborah Guillou

166. Ms Guillou signed and dated her witness statement before giving her evidence. She corrected some typographical errors and adopted her witness statement as her evidence-in-chief. In response to the question as to how the allegations have impacted on her, Ms Guillou said that she takes the allegations against her very seriously in her capacity as a Director in the financial services industry and she felt the need to defend those allegations.
167. Ms Guillou stated that she has been Director of AHL since 1 July 2021 and has also been the Chief Executive Officer of Artemis Trust Limited (ATL) since September 2019. In her role as Director of AHL, she is responsible for overseeing the performance of the underlying subsidiaries and safeguarding their ability to meet their legal, regulatory and governance obligations whilst ensuring AHL itself meets its own legal and governance obligations. Ms Guillou is a qualified accountant and chartered director with past experience at board and/or senior management level in a variety of industries.
168. Ms Guillou's evidence was that ATL provides trust and company/administration services to various clients, typically ultra-high-net worth and high net worth individuals and families, corporate entities, family offices and similar. Many of the clients have long-standing relationships with the Artemis Group and its staff.
169. She said that the business is regulated by the GFSC and they are familiar with the requirements for putting in place appropriate structures for clients, including being aware of relevant filing deadlines, CDD requirements and dealing with institutions in other jurisdictions with similar (or varying) requirements of their own. As a corporate trustee or director of various client entities, ATL is required to open bank accounts as trustee, director or administrator on behalf

of such clients/structures. The relevant bank usually requires evidence of beneficial ownership of ATL, in order to satisfy its own CDD requirements in respect of the account holder.

170. Ms Guillou said that Mr Domaille and Mr Sinclair are beneficial owners of AHL and ultimately ATL. She said that whilst standards vary and many of the CDD requirements are context-specific and linked to a ‘risk-based’ approach, it is often the case that banks look to identify and verify beneficial owners whose interest in ATL (through AHL) is 25% or more. This involves Mr Domaille and Mr Sinclair providing appropriate CDD documentation in a timely manner as required by those institutions, in order to enable those institutions to complete their “onboarding” procedures and establish the relationship/open the account.
171. Ms Guillou said that Mr Sinclair has and continues to act in a manner which is causing operational difficulties for ATL and Artemis SARL and its clients, in respect of both internal and external (client issues).
172. As regards internal issues, Ms Guillou said that Mr Sinclair has, at times, acted in an uncooperative manner and has also failed to provide the required CDD documentation in a timely manner or at all, has failed to engage with AHL and its Board or with ATL and/or Artemis SARL and its respective boards/staff and has failed to take action in respect of other operational issues.
173. Ms Guillou stated that Mr Sinclair has also failed to provide signatures or information to enable AHL’s subsidiaries to effect transactions on behalf of clients (such transactions requiring Mr Sinclair in his capacity as a beneficial owner of AHL to provide various documents, information or signatures; lack of cooperation in his capacity as a trustee on various structures, causing issues for the proper administration of those trusts; and a general lack of engagement in the roles he retained for client entities (“Shareholder Actions”).
174. Ms Guillou said that the Shareholder Actions were proving to be an impediment to the ability of AHL, ATL and SARL to effect business transactions. Their clients could not proceed further with certain transactions until the Shareholder Actions were completed. She said that Mr Sinclair was either unwilling or unable to perform the Shareholder Actions. Whilst illness has been cited by Mr Sinclair’s lawyers as a reason for Mr Sinclair not being able to attend to matters in a timely manner, she said that she did not have any personal knowledge of that and that there is no evidence before the Court dealing with this point.
175. Ms Guillou said that from documentation in the public domain, during the period in question and until 20 January 2022, Mr Sinclair retained a board position for Zs Limited, a London Stock Exchange listed conglomerate in the mineral extraction industry and he held the position of Chair of the Audit Committee of that company until 20 January 2022.
176. She said that as a consequence of Mr Sinclair’s failure to perform the Shareholder Actions, one of ATL’s clients was threatening to end their contractual arrangement ATL. AHL and ATL were threatened with material reputational loss, as a consequence of Mr Sinclair’s failure to perform the Shareholder Actions.
177. Ms Guillou referred in her evidence to two examples of Shareholder Actions that she said Mr Sinclair had not performed. These were for Client Trust A and Client Trust B.
178. Ms Guillou said that *Client Trust A*, a client trust for whom ATL has acted as trustee since 3 April 2008, requested ATL to open a bank account in October 2020 on its behalf with the Bank of New Zealand (BNZ). As part of its Customer Due diligence, Anti Money Laundering and Combating the Financing of Terrorism procedures, BNZ required a Personal Customer Information Form (PCI Form) to be completed and signed by the beneficial owners of ATL

being Mr Domaille and Mr Sinclair. BNZ also required Mr Domaille and Mr Sinclair to provide it with copies of their identification documents and two recent copies of their address verification documents, such as utility bills not older than 3 months (Due diligence documents).

179. By letter dated 20 October 2020, Ms Alicia Falla, an Assistant Trust Administrator in the employ of ATL requested Mr Sinclair to complete and sign the PCI form and furnish ATL with a recent utility bill in order to enable BNZ to open the bank account. No reply was received by Ms Falla.
180. Ms Falla sent a further letter dated 3 November 2020. Ms Guillou said that she is aware from speaking to Ms Falla that Mr Sinclair did not respond to this letter either.
181. On 20 November 2020, Ms Julia Church, an Associate Director of ATL addressed a further email to Mr Sinclair requesting him again to furnish ATL with the documents requested in the letters of Ms Falla. She did not receive a response from Mr Sinclair. She sent a follow up email on 2 December 2020.
182. Ms Guillou said that Mr Sinclair responded on 4 December 2020 to Ms Church. He indicated that he had ignored the previous correspondence received, as he was concerned that the requests were a scam and he indicated that it was not explained to him why his personal information was being requested and refused to provide the documents. Mr Sinclair had been informed that ATL's beneficial owners' details were required for CDD, AML and CFT purposes in order to provide the Bank with Due diligence documents; likewise, the PCI Form was required as ATL was performing its duties as a trustee of Client Trust A.
183. Ms Guillou's evidence was that this was not the first time Mr Sinclair has been asked to sign or provide such documents in his capacity as beneficial owner of ATL. She said he failed to take the rudimentary step of contacting Mr Domaille, the board of directors of ATL or any other member of Artemis staff to enquire about the veracity of the requests.
184. She said that she understands that during the interim period, the team were in regular contact with BNZ endeavouring to find alternative solutions.
185. Further correspondence was entered into with Mr Sinclair on the BNZ issue. Ms Guillou called the client on 16 August 2021, with an update given that they had a potential solution to the issue being the dilution of the shares. The client subsequently updated them by email on 19 August 2021, as to a possible solution that BNZ had been willing to adopt; BNZ had advised the client that BNZ's Risk Management team had agreed that as long as a form could be completed for Mr Sinclair, they could proceed with the opening of the accounts. Ms Jess Edwards advised Mr A by email dated 19 August 2021 that "*we just need to have this filled out and signed by an acting Director of Artemis Corporate Services Limited on Roberts' behalf.*"

By mail dated 19 August 2021 to Mr Domaille, Ms Guillou and Ms DeGaris with copy to Mr Justin Jager, Ms Aimee Steer stated:

"Ian/Debbie

...it looks like at the very last minute we have agreement from BNZ for the O to sign off for Robert...not sure if this now affects the proposal at tomorrow's meeting?..."

Ms Guillou said that risks were associated with the proposed course of action which was identified, as they did not have Mr Sinclair's permission to release the information; they were still reliant on Mr Sinclair providing input to some extent.

186. Ms Guillou said that Mr Sinclair repeatedly failed to respond to requests from various authorised representatives of ATL to provide the Due diligence documents on this and other matters and made no enquiries as to the veracity of the requests. Even after confirmation was provided, he maintained his obstructive stance and to date has not provided the documents.
187. Ms Guillou said that *Client Trust B* is a client for whom ATL acts as a trustee. As trustee, ATL owns shares in a BVI company (“BVI Co”) which in turn owns the shares in a UK-registered company holding various real estate assets (“Property Co”). Ms Guillou said that ATL received a request from a UK-based accountancy firm acting on behalf of Property Co, requesting ATL to furnish it with CDD in relation to the ultimate beneficial owners of ATL. As part of due diligence requirements for the purchase of a vacant plot situated adjacent to a property it owned in the UK, and in order to identify and verify the beneficial owners of ATL, Property Co stated it was obliged to obtain Due diligence documents, in respect of ATL as trustee, in common with AML/CFT procedures in the UK.
188. On 22 February 2021, Alex Willcocks, a Trust manager at ATL, sent an email to Mr Sinclair requesting that he consented to ATL furnishing the accountancy firm with his Due diligence documents and requesting copies of two of Mr Sinclair’s utility bills for that purpose.
189. Mr Sinclair replied by email on 23 February 2021 to Ms Willcocks’ email, indicating that he was extremely suspicious of the request for his personal information and that he regarded it as a scam. He indicated that it was his view that he could “*not possibly be regarded as a person with significant control*” and that the request could only be fraudulent. He refused to give consent to ATL to furnish the accountancy firm with his Due diligence documents .
190. By letter dated 26 February 2021, Ms Guillou sought to address Mr Sinclair’s concerns setting out the basis of Property Co’s request for the Due diligence documents and why ATL was required to furnish the Due diligence documents to Property Co.
191. By letter dated 1 March 2021, Mr Sinclair’s wife informed Ms Guillou that Mr Sinclair was “*not well enough to deal with the matters contained in your letter*”. She requested that any further correspondence be sent to Advocate Breckon, Mr Sinclair’s Advocate.
192. On 8 March 2021, Ms Guillou had a telephone conversation with Advocate Breckon, in relation to the letter from Mrs Sinclair. She addressed matters raised in her email of 5 March 2021 and requested Advocate Breckon’s assistance with those matters. Ms Guillou sent an email on 8 March 2021 to Advocate Breckon attaching ATL’s initial request of 22 February 2021 to Mr Sinclair for his Due diligence documents and Mr Sinclair’s response to the request. She informed Advocate Breckon of the consequences of Mr Sinclair’s failure to make the Due diligence documents available from Mr Sinclair, to ensure that Property Co’s interests were preserved and seeking to fulfil ATL’s duties as trustee and/or progressing the client’s interests.
193. By email dated 9 March 2021, Ms Guillou sent a further email outlining some of the issues raised with her by members of Artemis staff, in relation to Mr Sinclair’s conduct and which remained outstanding. She explained the various proposals to address each one, including changing directors, appointing alternatives and requesting Mr Sinclair’s resignations, as the circumstances required. Despite those communications, Mr Sinclair did not provide the documentation required.
194. Ms Guillou said that, in addition to the examples regarding *Client Trust A* and *Client Trust B*, there were various other instances of Mr Sinclair failing or refusing to assist, provide

documentation or otherwise engage with AHL. A Table of Actions was exhibited in the Trial bundle setting out the actions required by Mr Sinclair, as of 18 November 2021.

195. Ms Guillou said that despite correspondence between Appleby and Ferbrache & Farrell (on behalf of Mr Sinclair), no material progress was made in respect of the Shareholder Actions. She said that they instructed Appleby to advise on what formal steps might be taken to remove the barrier that Mr Sinclair was presenting to ATL and/or AHL developing its business. She said in her statement:

“Without waiving privilege, a number of options were considered, as the dilution of the shareholding was an absolute last resort. These options are documented in the board meeting minutes... The upshot of the advice was that we might issue additional shares in AHL, the effect of which would be that Mr Sinclair’s shareholding would drop to below 25%. As such, the requirements of some counterparty banks for due diligence on shareholders/controllers with a 25% or more interest in the business would be removed. Mr Sinclair’s involvement would still be known, but we would be able to bypass his refusal to cooperate in terms of providing Due diligence documents ...”

196. Ms Guillou said that since Mr Sinclair’s removal from AHL in 2019, she is aware that there have been various discussions as to the potential purchase of his shares in AHL. At one point, a KPMG report was commissioned to produce a draft valuation report. She said that despite KPMG’s attempts to engage Mr Sinclair to seek his comments/feedback on the draft report, no response was ever received and the process stalled. Ms Guillou said this:

“..our intention has never been to adversely impact Mr Sinclair in financial terms. As was documented in the board minutes..., should the board have agreed (or agree in the future) to any transaction that would have a negative financial impact on Mr Sinclair while the shares were diluted (such as his shares being bought), we fully intend to pay an amount equivalent to the 49.27% holding he had prior to the Share Issue.

The issue was never about avoiding paying Mr Sinclair a fair value for his shares as that has always been the intention. The dilution was undertaken to enable ATL to deal with client relationships in accordance with the regulations of Guernsey and other jurisdictions and to preserve the value of the Company by maintaining a good reputation and offering a good service to its clients.

We have also provided undertakings to the effect that we would not issue any further shares in AHL, nor dispose, secure or deal with existing shares without 28 days’ notice being provided to Mr Sinclair save where required to do so by law, or by virtue of a prohibition order issued by the Guernsey Financial Services Commission.”

197. Ms Guillou said that AHL has not issued any dividends for the past three years, save where provided in lieu of fees, which instances are known to Mr Sinclair nor does it intend to do so. She said that in effect, should a sale of his shares be agreed, he would receive the value equivalent to his prior holding of 49.27%. She said that by undertaking the Share Issue, they have created better value for the shareholders, including Mr Sinclair by enabling those affected client relationships to develop rather than flounder, as a consequence of his obstructive behaviour.

198. Ms Guillou said that on 20 August 2021, the AHL Board met and proposed the Share Issue, such that Mr Sinclair’s shareholding in AHL be diluted to below 25%. She said that the Board Minutes recording the deliberation and the process involved were provided to Mr Sinclair. She said that the effect of the dilution is that Mr Sinclair would not be required to undertake some

of the Shareholder Actions, in order for AHL and its subsidiaries to continue to conduct their business in a manner which enables their clients to undertake their transactions. She said the Board of AHL was of the view that the Share Issue would be in the best interests of AHL, its shareholders and its clients.

199. Ms Guillou said that AHL is not a party to any Shareholder Agreement, whether between Mr Domaille or Mr Sinclair or otherwise. The conduct of AHL's business is, she said, regulated by AHL's Memorandum of Association, the Articles of Association and the Law. The AHL Board was advised that it may exercise the power of the company to effect the Share Issue.

200. She referred to correspondence between Appleby and Ferbrache & Farrell that preceded the dilution namely:

- i. A letter from Appleby to Ferbrache & Farrell dated 5 July 2021 with a pack of documents. A select number of items requiring attention were highlighted by Appleby.
- ii. A chasing letter was sent by Appleby on 19 July 2021 as they were no further forward. That letter set out a clear deadline for provision of documents/signatures required.
- iii. In a response dated 20 July 2021, Ferbrache & Farrell indicated that Mr Sinclair's ill health was the reason for the failure to deal with the paperwork. Ms Guillou said that they considered all alternatives and under advice concluded that this was the only course of action open to them given that this was and had been an ongoing issue since early 2020. She said that they could not allow the businesses to be impacted any longer nor did they have any evidence as to Mr Sinclair's condition or prognosis for the future.
- iv. By letter dated 29 July 2021, Appleby set out the steps that would be taken in terms of the Share Issue.
- v. By letter dated 5 August 2021, Ferbrache & Farrell provided limited documentation
- vi. By letter dated 5 August 2021, Appleby responded confirming why such documentation was inadequate and did not address the wider issues.
- vii. By letter dated 19 August 2021, Ferbrache & Farrell provided a resolution signed by Mr Sinclair appointing Mr Bright to the Board.

201. Ms Guillou said that the AHL Board called a meeting which was held on 20 August 2021. One of the matters to be addressed was whether to approve the Share Issue so as to dilute Mr Sinclair's proportion of shareholding in AHL. She said that Mr Sinclair was informed via his lawyers that a Board meeting would be taking place to consider the dilution of his shareholding (letter from Appleby to Ferbrache & Farrell dated 29 July 2021), notwithstanding that there were no formal requirements that he be informed of the position. The purpose of Appleby's letter was to put Mr Sinclair on notice of the proposed course of action *"in part in the hope that it might prompt him into fulfilling the Shareholder Actions and in part to give him an opportunity to consent/object to the course of action or take some action in response."*

202. She said that the Board meeting took place on 20 August 2021 and was attended by Mr Domaille, Mr Bright and herself. She said that Mr Domaille recused himself from the Board meeting prior to the consideration of the Share Issue by the AHL Board and he did not participate in the discussion or the vote. Ms Guillou referred to the minutes of the Board meeting. The following resolutions were adopted:

- a. AHL would issue 975,000 shares to Mr Domaille at a valuation of £0.26 per share (the fully paid up value of the new shares to be issued would be £253, 000);
- b. the shares would be issued as partially paid shares, i.e. Mr Domaille would pay a consideration amount of £0.01 per share, being a total of £9,750;
- c. the consideration of £9,750 would be settled by way of a loan from AHL to Mr Domaille which would be reflected in AHL's financial statements as a current asset.

203. Ms Guillou stated:

“Given the difficulties experienced and the need to maintain the client relationships, in the opinion of the AHL Board, the consideration and the terms of issue for the New Shares was fair and reasonable to AHL. It would enable us to resolve some of the Shareholder Actions without further reference to Mr Sinclair. It is also the case that, as ATL's business relies on undertaking trustee and director roles, it would be required to open bank accounts as trustee or director for other clients in the future. We were particularly concerned that any new/existing clients would not experience the delays we had suffered as a consequence of Mr Sinclair's inaction.”

204. Ms Guillou's evidence was that a further board meeting was held on 27 August 2021, at which the documents required to give effect to the Share Issue were considered, approved and effected. In relation to the shareholdings in AHL, she said that they are currently as follows: Mr Domaille holds 1,482,358 shares (75.06% of AHL's issued share capital) and Mr Sinclair holds 492,642 shares (24.94% of AHL's issued share capital).

205. On the determination of the value of the new shares, Ms Guillou said that the AHL Board (excluding Mr Domaille) considered the most recent Financial Statements of AHL for the year ending 30 April 2021. She said that the AHL Board resolved the Statements would be a suitable and appropriate objective valuation for the purposes of the Share Issue, particularly in light of the fact that the objective of the Share Issue was not to raise additional capital for the company. The Board determined the value of the shares would be £0.26 per share, based on the total Capital and Reserves of AHL (which was £260,000 according to the Financial Statements) divided by the number of shares in issue (1,000,000 shares).

206. She said that the purpose of the Share Issue was to enable AHL, its subsidiaries and its clients to undertake their business and transactions – not to raise capital for AHL, and as such, the Board was of the view that the value of the New Shares, as determined, was reasonable and fair. She said that there was no requirement on the Board to undertake a formal valuation of the business prior to taking the steps that they did, a matter which Mr Sinclair has conceded.

207. Ms Guillou said that they understand that Mr Sinclair is now subject to a Prohibition Order from the GFSC save for the purposes of permitting him to pursue these proceedings and that the Board is keen to assist him to dispose of his shares, in order that he may comply with the Prohibition Order and so that there would be no further issues around the provision of controller/shareholder Due diligence documents going forwards.

208. Ms Guillou said:

“..the motivation for the Share Issue was to prevent Mr Sinclair from causing harm to the business. It has always been our intention to pay him the relevant value for his shares on the basis of a 49.27% holding. As a consequence, Mr Sinclair has not suffered (and will not suffer) any prejudice as a result of the Share Issue. To the contrary, it is to his benefit that the business does not lose clients, which would in itself impact on the value of the business and thus his shareholding.”

209. She said that there was correspondence between Appleby and Ferbrache & Farrell subsequent to the Board meetings in September – December 2021 during which the possibility of the Company purchasing Mr Sinclair’s shares was mooted. She said that they were unable to reach a resolution on the proposed process, not least because Mr Sinclair’s position on the necessity for a valuation, who should do the work and on what basis it be done was not settled.

210. In cross-examination, Ms Guillou accepted that the valuations for AHL in the March 2020 KPMG report were £6.8 million and £8.7 million but said that this is a draft valuation. The report was incomplete in two areas; it lacked comments from Mr Sinclair and it lacked confirmation on its factual accuracy. Ms Guillou said that she had no other comments to make on the report, but perhaps they may have had other comments had the points on factual accuracy been received from Mr Sinclair.

211. Ms Guillou did not accept that a letter that she wrote to Mr Sinclair dated 19 June 2020 (regarding discussions with Mr Sinclair on the possibility of him selling his shares to Mr Domaille) was written by her on behalf of Mr Domaille, but accepted that it was a letter in relation to the transfer of Mr Sinclair’s shares. She accepted that in that letter she referred to the Shareholder Agreement. She said that at the time when she wrote the letter, she was of the opinion that Mr Domaille and Mr Sinclair were bound by the Shareholder Agreement although that has subsequently changed. By 14 September 2020, she was beginning to have doubts about the applicability of the Shareholder Agreement, in view of the fact that Mr Sinclair had not engaged with the valuation as she had set out in her letter of June 2020. She engaged with Appleby, their then legal advisors, in order to ascertain the applicability of the Shareholder Agreement to AHL.

212. Ms Guillou did not accept that she changed her mind on the applicability of the Shareholder Agreement only once proceedings issued.

213. When it was put to Ms Guillou that because Mr Sinclair is not the legal owner of shares he cannot sell 49.27% of those shares to any third party, Ms Guillou said that he could because of the undertakings that they gave and the protections they put in place for him. She said that if he managed to find a buyer for his shares, they would review the dilution as the Board of AHL and consider whether it was correct and fair to reinstate that shareholding in order to enable him to sell his shares to a third party. She said that they have had no cause to carry out the review but have made open offers to Mr Sinclair to purchase his shares based on a 49.27% shareholding.

214. Ms Guillou said that she did not think a guarantee can be given that anyone would buy Mr Sinclair’s shares. When it was put to her that when she stated in her witness statement that it has always been the intention to pay Mr Sinclair a fair value for his shares, that the only thing the Plaintiff has to rely on is her word, Ms Guillou said that the Plaintiff has the word of the AHL Board, not just her word.

215. Ms Guillou did not accept that the fundamental issue in the dispute between the parties was about value. She said it was an unfair prejudice claim. She was referred to the open correspondence in which AHL made an offer to purchase Mr Sinclair's shares and in response to the suggestion that she could have avoided a trial and just dealt with valuation, Ms Guillou said that the proceedings were about unfair prejudice and serious allegations against herself, her fellow directors and the company. She said that the issue of valuation of the shares would only be addressed as a remedy if unfair prejudice was proven.
216. Ms Guillou accepted that Mr Sinclair is very unwell. When it was suggested to her, with reference to the written offers made to Mr Sinclair, that she could have avoided a trial, Ms Guillou said that it was their intention to defend the unfair prejudice claim. She said that her preference was to defend herself against serious allegations that had been made by Mr Sinclair.
217. Ms Guillou accepted that in June 2020, she believed that the value of Artemis was £4.3 million based on the Shareholder Agreement. She accepted that between June 2020 and August 2021 advice had not been obtained on valuation. She said that they had no reason to take an independent valuation between the value available in August 2021 and the value they applied. Ms Guillou said that there is a difference between those two figures but they were for very different purposes. She said they had no reason to take an independent valuation.
218. When it was put to her that she did not believe in August 2021 that Artemis was worth £260k, she said that was not their view of the open market. It was put to her that such a valuation would provide for a bargain of a lifetime and she agreed it would on the open market. When it was put to her that not only had AHL had been deprived of capital but that Mr Sinclair had been deprived of that benefit as well, Ms Guillou said that she totally denied that.
219. When it was put to her, Ms Guillou said that there was no need for negotiation on the price with Mr Domaille. It was put to her that the company had been deprived of well over a million pounds in capital, she said the *"company has been deprived of absolutely nothing. The company has no need for capital. The company has no use for capital. It needed to be able to operate and the dilution was done for that purpose and that purpose alone and for that reason the valuation that the directors applied was fair and reasonable to the company."*
220. Ms Guillou said that the dilution did not favour Mr Domaille because he had to pay money from his own pocket, in order to pay tax on the loan, which was considered to be a distribution for tax purposes and he was not able to deal with those shares because of the undertakings that they had provided to protect the interests of Mr Sinclair. Mr Domaille had received the economic value of the shares but not the economic benefit.
221. Ms Guillou said that some protections were given to Mr Sinclair during the course of the Board meeting but the formal undertakings were provided after the date of the Board meeting.
222. Ms Guillou said that the legal advice received from Appleby had not been disclosed because they believed that it is subject to privilege but the pertinent elements of that advice are reflected in the 20 August 2021 minutes. Ms Guillou said that the correspondence from Appleby to the Plaintiff's Advocate embodies the advice that Appleby provided. She said that she thought there is abundant evidence that they had acted in accordance with the legal advice given, the minutes and the subsequent correspondence which is on the headed paper of their then legal advisors.
223. She said that whilst the legal advice had not been disclosed, the effect of that legal advice, and the content is reflected in the correspondence. She gave an example in the trial bundle. She

referred to a letter from Appleby dated 15 September 2021, which she said was a clear reflection of the advice received from Appleby and then communicated to Ferbrache & Farrell.

224. Ms Guillou accepted that the firm of Advocates could not advise on the method of valuation but they could advise on the implications of obtaining or not obtaining a valuation. She said they did not need to advise on a valuation of £260k because it was the opinion of the Directors as to whether it was a fair and reasonable price to put on the shares and that there was no requirement for a valuation.
225. Ms Guillou said that the dilution was an absolute last resort. She said that the BNZ matter was a catalyst but that there were a number of shareholder actions that were causing inconvenience and difficulties for the company and for its client and for the company's staff.
226. Ms Guillou said that figure of £260k was chosen based on the financial statements of Artemis Holdings. It was not a figure plucked from the air, it was a figure supported by the financial statements of the company, which had been communicated over time to both shareholders.
227. With regard to the "workaround" email from Ms Steer, that the client's bank account be used if the trust account was not set up in time, Ms Guillou did not accept that this was a solution. She said that Ms Steer was a relatively junior member of staff. She agreed with Mr Domaille that if they had approached their Head of Risk and Compliance with this, as a suggestion, that this would not be an acceptable course of action for them to take.
228. With regard to the possible solution from BNZ that O could provide the information on Mr Sinclair's behalf, Ms Guillou accepted that her initial response to Ms Steer's suggestion was that it was good news. She said that the meeting notes do not record this suggestion and that was because she looked into whether it was in fact a workable solution to put at the Board meeting and she was, at that point, reminded of Mr Sinclair forbidding them from signing any document or releasing his personal information in relation to the matter, and therefore, she did not consider it appropriate to raise the matter at the Board meeting as a solution to the BNZ matter.
229. Ms Guillou further said that they did need to put the BNZ proposal to the Board meeting on 20 August 2021 because there were a number of other shareholder actions detailed in a non-exhaustive table. The BNZ matter, whilst it could be considered a catalyst for the timing, was in no way the only shareholder action that was causing damage for the company. It was a catalyst for the timing of the board meeting but it was not the main issue.
230. She accepted that Mr Sinclair has responded to certain client matters. She said that there had been some engagement between the client teams and Mr Sinclair on matters that Mr Sinclair chose to engage on but there were considerable actions where he had not engaged.
231. She accepted that there was no evidence in the bundle that any client was threatening to terminate its relationship with Artemis. She said there were verbal discussions along those lines. She was not personally party to those discussions, as she is not a client facing director.
232. Ms Guillou did not accept that proceeding with the Board meeting on 20 August was hasty. Some of the shareholder actions dated back to 2019 and the BNZ matter was problematic in October 2020, and action was not taken in respect of the dilution until August 2021. Therefore, she did not consider it was hasty.
233. In response to the suggestion that there is no conceivable basis upon which to adopt a proper price of shares based on the notional value of £260k for AHL, Ms Guillou said that it was the

opinion of the Board that the value of AHL as set out in the financial statements of the company was a fair and reasonable consideration for the shares for the purpose of the dilution - not to raise capital - and that that was in the best interests of the company and it was fair and reasonable to the company.

234. She said she did not accept that depriving any businessman or businesswoman of their assets could be highly prejudicial to them, if the appropriate undertakings are provided to them. She said that she did think that allowing the company belonging to the shareholders to have its value eroded by the directors not acting to further the success of the company is prejudicial to both shareholders and they have a duty to further the success of the company. If by doing so, they have to take steps to deprive one of the shareholders from a portion of their shares with the appropriate undertakings and protections, then she thinks they have acted in the best interests of the company and the shareholders.
235. On re-examination, Ms Guillou said that she did not consider the KPMG report to be final because she required comments from Mr Sinclair and still needed confirmation of factual accuracy. She said that when the KPMG report was prepared, the company had been informed on 4 September 2018 that they were being referred to the GFSC enforcement but no decisions had been made by the GFSC enforcement division. She said that ATL settled with the GFSC in July 2022, but in relation to three individuals who were named in the enforcement process, that still remains a live issue, such that matters are still ongoing. She said that the final outcome in the GFSC proceedings could have an impact, in particular, because Mr Domaille is one of the three individuals.
236. On the suggestion of a truncated trial on valuation of the shares, Ms Guillou said that that would not give them a fair opportunity to examine the allegations against the directors and the company and give them an opportunity to state their case, and therefore, she said that it would be inappropriate to simply look at the valuation of the company, as that is a remedy rather than the fundamental issue at hand. Ms Guillou was asked if the funding in respect of the open offer made by 19 April 2024, is still available. She said an element of the funding was being secured from a third-party bank and that element of the funding is not currently in place, as it expired on 1 May 2024.
237. In response to a question from Jurat Jones on the evidence of the existence of the undertakings, Ms Guillou said that protections were provided at paragraph 5.6 of the Board minutes, dated 20 August 2021. She said that further undertakings were provided in a letter from Appleby to Ferbrache & Farrell in correspondence. Ms Guillou said that no separate document was legally drawn up by the parties, aside from the AHL Board minutes and the correspondence from AHL's legal representatives, in relation to the undertakings provided by the AHL Board to Mr Sinclair.

Mr Mark Bright

238. Mr Bright corrected a typographical error and adopted his witness statement as his evidence in chief. In his statement, he said that insofar as the facts within Ms Guillou's witness statement were within his knowledge, they are true and correct. When asked by his Advocate as to how he regarded the allegations that had been made against him, Mr Bright said that the cornerstone of being a Company Director is integrity and that he was clearly concerned about being in Court. He said he had not been in Court before to defend himself and that he was clearly concerned about having to defend himself against the charges laid against him. Mr Bright said that for a Director to have his integrity impugned, effectively means that he would no longer offer his services to other companies should that be the case.

239. He said that he has held the position of Director at AHL since 2 August 2021. He joined the board of ATL on 1 January 2020, as an independent non-executive director and subsequently joined the board of Artemis SARL and he became chair of the newly established Group Audit Committee. His role with AHL is also that of an independent non-executive director.
240. He said that he has worked in financial services for 45 years and has held authorisations for various regulatory bodies, including the GFSC. He has worked in the Channel Islands for the last 29 years and has held executive responsibility for a broad range of financial services businesses in Guernsey, Jersey, UK and the Isle of Man.
241. Mr Bright said that as a new appointee of the Board of AHL in August 2021, he undertook a good deal of due diligence on all matters proposed for the consideration by the Board and he made enquiries with his fellow board members and staff at the relevant Artemis company, so as to satisfy himself of the appropriateness of the proposed course of action, relating to the share issue to Mr Domaille.
242. He said that various operational issues were brought to his attention, which he reviewed with management to see if he could offer alternative solutions to those proposed. He raised questions with Ms Guillou on 16 August 2021 during a telephone call on various questions, including the potential financial impact of the proposal and any quantification of possible consequential loss. He wished to be very clear as regards any possible alternative proposals for remedy for the situation and they jointly challenged the proposal from different perspectives, in order that they could become comfortable with it. He stated that he believed that the result of the deliberations is reflected in the minutes of the meeting of the board of directors on 20 August 2021.
243. Mr Bright said that Mr Sinclair's refusal to provide ATL with the required Due diligence documents (and other actions) was such that something had to be done in order to prevent ATL from losing clients. The due diligence requests were not controversial (they were not excessive, unreasonable or otherwise outside what one would expect when operating in a regulated environment). Had they not been able to satisfy due diligence requirements, this might have broader regulatory impacts.
244. He said that the AHL Board called a board meeting which was held on 20 August 2021, attended by him, Ms Guillou and Mr Domaille. Before the discussion on the share issue took place between Ms Guillou and himself, Mr Domaille excused himself from the Board meeting. Mr Domaille took no part in voting on the issue.
245. He said that having taken appropriate legal advice, the Board was of the view that the appropriate course of action would be to issue further shares to Mr Domaille, which would have the effect of diluting Mr Sinclair's shareholding in AHL below 25%. This would have enabled AHL and ATL to continue with their business and assist their clients without the need to require any Due diligence documents from Mr Sinclair. He would remain identifiable as a beneficial owner but they would not be beholden to him in terms of being able to progress client relationships.
246. Mr Bright said that the Board considered steps taken to achieve a resolution without the need for the share issue and the effect on the two shareholders, noting the potential impact on Mr Domaille of having to fund the acquisition of additional shares, as a consequence of the potential damage caused by Mr Sinclair. They carefully considered the potential value to be attributed to the new shares.
247. He said that as there were ongoing GFSC enforcement proceedings against ATL and several senior directors in the Artemis Group, the value attributed was always going to be discounted.

They therefore decided to use the balance sheet valuation from the most recent financial statements (April 2021). As there was no need to raise capital, they considered that a loan would also be appropriate for the purposes of funding the acquisition. They considered the problems the business had encountered and the lack of alternative (effective) solutions allied to Mr Sinclair's unwillingness to engage in discussions around a sale of his shares. There was no intention to financially impact Mr Sinclair, rather it was to effect a solution to operational issues that his conduct had created.

248. Mr Bright said that the AHL Board resolved that it would be in the best interests of AHL, its subsidiaries and its clients and its shareholders to issue sufficient shares to dilute Mr Sinclair's shareholding below 25%. The Board resolved to issue 975k shares to Mr Domaille. As the share issue was not intended to raise capital for AHL, the Board was of the view that AHL's Financial Statements for the year ending 30 April 2021 would be a suitable and appropriate objective valuation for the consideration of the new shares.
249. He said that the AHL Board was of the view that the consideration for the new shares should be determined based on the total Capital and Reserves of AHL, as recorded in the Financial Statements, divided by the number of shares which were in issue. In so doing, the AHL Board resolved that the consideration for the new shares would be £0.26 per share, representing a total value of £253,000. The new shares were issued as partially paid shares; Mr Domaille would pay the partly paid consideration amount of £0.01 per share being a total of £9,750. The £9,750 consideration would be settled by way of a loan from AHL to Mr Domaille.
250. He said that the Board discussed and gave consideration to the loan agreement at Board meeting on 27 August 2021, where it was determined that the loan would be reflected in AHL's financial statements as a current asset. The draft loan agreement was agreed at that meeting.
251. Under cross-examination, when asked if he accepted that the primary concern of the Board of AHL, in relation to the share issue and dilution was the matter pertaining to the BNZ, Mr Bright said that during the time of the few weeks when he was reading in to become a Board member and once he became a Board member, and before that, to a certain extent, in his capacity as Chairman of the Group Audit Committee of the Artemis Group, he had become aware of various operational issues that the company was having in terms of obtaining information and or CDD from Mr Sinclair and that "*certainly one of those issues was indeed the matter of the form to be signed*" for the Client Trust A matter (BNZ bank opening). When asked if he accepted that the BNZ matter was the "*driving force*", Mr Bright said that there were "*numerous issues spanning considerable periods of time*" and that the issue of the BNZ form "*clearly was one which was entirely unacceptable to us as a service provider to high net worth clients to expect a client to wait some 9 months to open a simple bank account on their behalf so in that sense it was quite imperative that we dealt with it.*"
252. Mr Bright accepted that no document had been disclosed from any client of Artemis that said it was going to terminate its relationship with the company.
253. He said that prior to the dilution, he was not made aware of emails relating to the Steer proposed workaround solution and that it was not taken into account at the Board meeting. He stated that he believed that one of the reasons it was not raised at the Board was the fact that it was not a workable alternative and still would have required Mr Sinclair's cooperation and authorisation to provide that information.
254. He accepted that the legal advice had not been disclosed to the Court. He accepted that there was no record before the Court as to what the legal advice said and he accepted that Appleby

could not at the time advise on a proper price. Mr Bright said that the advice of Appleby was sought on the methodologies for the valuation.

255. Mr Bright stated that they did not “*come up with a number*” – the figure of £260,000 was the balance sheet value of the company from the latest financial statements. He said that before the 20 August 2021 meeting, he was not aware in any detail of the March 2020 KMPG valuation. He was aware that previous valuations had been sought for the reasons of potentially concluding a deal between the two shareholders. He said that he did not see the report as a relevant document, as it was a draft, which had not been finalised and was dated some 13 months previous to the meeting.
256. When asked under cross-examination if, on reflection, perhaps negotiating the price or in reaching the price with Mr *Domaille* “*you did not fiercely protect the company’s interests in getting the best price?*”, Mr Bright said that he believed that they protected the company’s interests absolutely by the issue of the shares which resolved the harm. He said he did not believe the company needed the cash injection and still does not and that was not the purpose of the issue. He did not accept that he failed to obtain a fair and reasonable price, fair and reasonable consideration for the purpose of Section 295 of the Companies Law, stating that the consideration he felt that had accrued to the company was the relief from the harm it was suffering. He said that he categorically did not accept that he had failed to act independently from Mr *Domaille* in agreeing the price with Mr *Domaille*.
257. He accepted that he could not offer any guarantee that Mr Sinclair’s current shareholding position of 24.94% will ever change. He said that he could promise to review matters but without any certainty as to the outcome.
258. When re-examined, Mr Bright said that he is not a trust practitioner but he holds the requisite exam qualifications. He has been responsible as a director of trust companies since 2000 and in his opinion, the Steer emailed suggestion was not a workable solution because his assumption would be that that would be deemed a distribution rather than payment of money within the trust.
259. He said that there was no doubt in his mind that undertakings had been provided. On paragraph 5.6 of the Board minutes, he stated that he considered himself individually bound as a director by 5.6 and he considered that the Board of AHL is bound by paragraph 5.6.
260. When asked by Jurat Jones if it was correct to say that Appleby was instrumental in the wording that appears in the minutes of the Board meeting, Mr Bright said that he certainly relied on their advice to capture the requisite aspects that they needed to in the minutes. He agreed that in relation to some of the wording in the clauses in the minutes, the Court could read into that that was the legal advice from Appleby, at least in assisting the Board to make sure it was going down the right line.

The Experts

261. The Plaintiff’s expert was Mr Paul Smethurst, Fellow of the Institute of Chartered Accountants in England Wales and former Forensic and Investigations Services Partner with Menzies LLP, a firm of chartered accountants. Mr Smethurst furnished to the Court a report dated 5 June 2023 and an Amended Supplementary Report dated 24 April 2024.
262. The Defendant’s expert was Ms Kirsty Wheadon, Director of Grant Thornton Limited Guernsey, Fellow of the Institute of Chartered Accountants in England and Wales and Head of

Business Advisory for the Channel Islands. Ms Wheadon furnished to the Court a report dated 5 June 2023 and an Amended Supplementary Report dated 24 April 2024.

263. The experts furnished to the Court a Joint Statement dated 30 June 2023 and a Supplementary Joint Statement dated 1 May 2024.

264. Both experts gave oral evidence during the trial. For reasons that shall become clear below, it is not necessary to set out the expert evidence in detail other than to set out the overall conclusion of the experts. In the Joint Supplementary Report, in terms of the overall conclusion, it is stated that there is some congruence in the approach and estimated current valuations of the experts. This is most apparent in the Income Approach valuation conclusion of Ms Wheadon, where the Plaintiff's shareholding before the application of a minority discount is estimated at £3,516.354 and the mid-point of the range of values estimated by Mr Smethurst is £3,439.275 together with valuations set out in the Joint Supplementary Report.

The Legislative Framework

265. Part XIX of the Companies Law deals with "*Protection of Members*". Sections 349 and 350 govern unfair prejudice.

266. Section 349(1) provides for applications in respect of unfair prejudice. It provides, *inter alia*, that a member of a company may apply to the Court for an order under Section 350 on the ground that:

"(a) the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

267. Section 350 provides for the power of the Court to grant relief for unfair prejudice:

350. (1) If the Court is satisfied that an application under section 349 is well founded it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(1) Without prejudice to the generality of subsection (1), an order of the Court may –

(a) regulate the conduct of the company's affairs in the future,

(b) require the company –

(i) to refrain from doing or continuing to do an act complained of by the applicant, or

(ii) to do any act which the applicant has complained it has omitted to do,

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such persons and on such terms as the Court may direct,

(d) provide for the purchase of shares of any member of the company by other members of the company or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly,

(e) require the company not to make any, or any specified, alterations in its Memorandum or Articles without the leave of the Court,

and the Court may make such consequential alterations to the company's Memorandum or Articles and any of its resolutions as the Court thinks fit.

(2) Any alteration to a company's Memorandum or Articles or any of its resolutions made by or by virtue of an order of the Court under this section are of the same effect as if duly made in accordance with the provisions of this Law.'

268. Part XVII of the Companies Law is entitled “*Capital and Shares*”. Section 291 provides for the powers of directors to issues shares.

269. Section 295(1) provides *inter alia* that:

“295 (1) Before a company issues shares under [Section 291], the board of directors must –

(a) decide the consideration for which the shares will be issued and the terms on which they will be issued, and

(b) resolve that, in its opinion, the consideration for and terms of the issue are fair and reasonable to the company [...].”

Unfair Prejudice - Relevant Applicable Principles

270. The parties were largely agreed on the relevant governing principles on unfair prejudice.

271. In *CLO Holdco Limited and Highland Clo Funding Limited* [2023] GRC061, Lieutenant Bailiff Marshall set out important guidance on the unfair prejudice statutory provisions set out in the Companies Law.

272. Lieutenant Bailiff Marshall stated that the unfair prejudice statutory power was introduced to “provide a very wide and flexible discretionary remedy, which could be adapted to fit the merits of any particular case” (paragraph 86) and went on to set out the essence of conduct which can be unfairly prejudicial:

“87. However, that jurisdiction had to be reconciled with the general principles of company law, which dictate that the company is a construct whose affairs are governed by the agreements constituted, basically, by the company's Articles of Association, those being the terms upon which its shareholders have agreed to create it. The jurisdiction is not simply a jurisdiction to remedy any perceived grievance which may be advanced

by a member or members of a company. The limits arising from such reconciliation are apparent, therefore, in three particular aspects of the statutory power:

- i. *It is the conduct of the affairs of the company which founds the jurisdiction, not the conduct of any particular member (unless that conduct does, in fact, constitute conduct of the affairs of the company itself);*
- ii. *The jurisdiction is to grant relief on the grounds that the affairs of the company are being or have been conducted in a manner which is not merely “prejudicial” to the interests of the “members generally” (ie, the company as a whole) or to “a part of the members including [the complainant]”; the relevant conduct has to be “unfairly prejudicial” (emphasis added). This recognises the fact that there is an intrinsic prejudice in the very position of a minority shareholder, in that such a shareholder’s wishes or interests may be overruled by the majority, whether directly by force of numbers, or indirectly through the majority’s ability to appoint directors more attuned to their own views. That situation is not unfairly prejudicial, because it is inherent in the structure of the company to which the minority shareholder has subscribed. It only becomes unfairly prejudicial if that power is exercised in some way which goes outside the boundaries of what can be seen as properly inherent in the agreement which the complaining member has subscribed to.*
- iii. *The “unfair prejudice” must have been suffered to the interests of the complainant as a member of the company. This limitation is implicit in the words of the statutory provision. If the prejudice is suffered only to some other interest of the complainant, which cannot be seen to be part of his interests as a member of the company, then relief under the statutory power is not available. The interests of a member of a company are linked, of course, to the value of his share-holding, but are essentially his right to have the company (in whose enterprise he has a financial interest) administered and managed properly in the best financial interests of the enterprise as a whole. It is also to be observed that the formulation of s 349 provides the court with jurisdiction in three distinguishable situations. The first is that the prejudice has been suffered by the whole undertaking of the company, and the complainant complains as a representative of the whole company. The second is that the prejudice has been suffered by some part of the membership, and the complainant complains as a representative of that part. The third is that the prejudice has been suffered by a “part” of the membership comprising solely the complainant. That ultimate reduction renders the complaint effectively an individual one. But whatever the situation, the relevant prejudice must be seen to be being (or have been) suffered to the complainant’s interests as a member of the company, and not in some other interest.”*

273. At paragraph 89 of the judgment, Lieutenant Bailiff Marshall observed that as the Guernsey provision has been imported from English law, with the wording of Section 349(1) of the Companies Law being identical with that of (now) Section 994 of the English Companies Act 2006, and with there being little Guernsey law on the application of the relevant principles, it is accepted that Guernsey law will regard English authorities on the topic as highly persuasive.

274. Lieutenant Bailiff Marshall cited *O’Neill v Philips* [1999] 1 WLR 1092, a Privy Council case, setting out that it is now regarded as the leading authority in England and Wales (paragraphs 90 – 91):

“91. *At 1098D and onwards, Lord Hoffmann said*

“In section 459 [as it then was] Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief..... But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based on rational principles.

“Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others (‘it’s not cricket’) it may maybe unfair to take advantage of them. All is said to be fair in love and war. So the context and backgrounds are very important.”

“In the case of section 459 the background has the following two features. First, a company is an Association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the Association are contained in Articles of Association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly company law has developed seamlessly from the law of partnership, which was treated by equity ... as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

“The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus 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”.

“92. *Lord Hoffmann also referred back to his previous observations in In Re Saul D Harrison & Sons PLC [1994] BCC 475, to similar effect, at [488]:*

In deciding what is fair or unfair for the purposes of s 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The Articles of Association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s 450 will be to ask whether the conduct of which the shareholder complains was in accordance with the Articles of Association. The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole. If the

board act for some ulterior purpose, they step outside the terms of the bargain between the shareholders and the company. Although one begins with the Articles and the powers of the board, a finding that conduct was not in accordance with the Articles does not necessarily mean that it was unfair, still less that the court will exercise its discretion to grant relief. There is often sound sense in the rule in Foss v Harbottle. Not only may conduct be technically unlawful without being unfair, it can also be unfair without being unlawful. In a commercial context this may at first seem surprising. How can it be unfair to act in accordance with what the parties have agreed? As a general rule, it is not. But there are cases in which the letter of the Articles does not fully reflect the understandings upon which the shareholders are associated.”

“93. Thus the starting point in judging whether conduct is “unfairly prejudicial” to the interests of any member is the agreement documents which govern his or its relationship with the company and with the other members. Here, that is the Articles of Association of HCLOF and the Members’ Agreement...

275. In CLO Holdco, Lieutenant Bailiff Marshall further observed that:

“118. A finding of unfairly prejudicial conduct within s 349, as the gateway for any judicial intervention in the company’s affairs, requires findings that the conduct which is impugned has caused prejudice to the interests of the complainant as a member of the company, and that such prejudice is unfair. The first is a matter of law, the second is a matter of fact, but they are sufficiently intertwined that it is convenient to consider them together in relation to any particular complaint.

119...it is appropriate to note legal authority as to the requirement that the relevant prejudice is prejudice to the “interests of the members” of the company (or some part of them). This has been held to mean the interests of the members of the company as such members. Thus, if the prejudice being suffered from the conduct complained of its suffered to a different interest of the relevant plaintiff, not being his interest as a member of the company, no relief can be given.”

276. At paragraph 55 of Prodefin Trading Limited v Midland Resources Holding Limited and Ors (Royal Court Judgment 7/2017), the then Bailiff Sir Richard Collas endorsed the summary of the relevant English principles given by Hillyard J in Apex Global Management Limited v Fi Call Limited [2015] EWHC 3269 at paragraph 37, namely that where the Presiding Judge held that a petitioner seeking relief must establish the following three elements:

- “(1) first, that the matters of which he complains are either actual or proposed acts or omissions of the company or consist of the conduct of the company’s affairs;*
- (2) secondly, that those matters have caused prejudice to his interests as a member of the company; and*
- (3) thirdly, that the prejudice is unfair.”*

277. In Prodefin, the Court held that in section 349 of the Companies Law, “prejudicial” is qualified by the adverb “unfairly” indicating that there may be some managerial decisions taken by a company which are prejudicial to one or more of its shareholders but that the court will only intervene in cases of unfairness.

278. The test for unfair prejudice must be established objectively, not according to the subjective views of the Plaintiff (*Re Noble & Sons (Clothing) Ltd* [1983] BCLC 273).
279. In *Coroin Limited (No 2)* [2012] EWHC 2343 (Ch) (affirmed by the Court of Appeal in the same matter at [2013] EWCA Civ 781), Richards J held that prejudice is capable of being established either as economic prejudice in some capacity connected with the members' shareholding or in a non-economic sense.
280. In *Carlyle Capital Corporation Limited v Conway & Ors* [Guernsey Judgment 38/2017], Lieutenant Bailiff Marshall set out in detail the fiduciary duties of Directors in Guernsey law [paras. 367 – 499]. Those duties may be summarised as follows:
- a. a duty to act in good faith;
 - b. a duty to act for proper purposes;
 - c. a duty to exercise independent judgment;
 - d. a duty to avoid conflicts of interest; and
 - e. a duty to act with reasonable skill, diligence and care.
281. A company may be considered a quasi-partnership in circumstances where it exhibits some or all of the features as described by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at paragraph 379[F]:

“The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an Association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a preexisting partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be “sleeping” members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members’ interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.”

Submissions

The Plaintiff’s Submissions

282. The Plaintiff’s central submission was that £260k was a gross undervaluation of AHL. On the basis of the draft KPMG report, which was the only independent evidence that appeared to have been available to the Defendants, the adopted price was potentially as low as 2.9% of the apex of that KPMG valuation. The Plaintiff submitted that the Defendants were not obliged to obtain a valuation and that the failure to obtain a valuation was not a breach of their duties. However, the failure to ascribe a proper price was absolutely a breach of their duties and a breach of Section 295 of the Companies Law, which required the consideration of the price to be “fair and reasonable”. The Plaintiff invited the Court to find that it must have been obvious to the Defendants that the adoption of the valuation of £260k was to totally disregard the value of the underlying trading subsidiaries of Artemis Holdings Limited and that this point was confirmed by the Defendants’ own expert.
283. Advocate Breckon submitted that none of the Defendants were able to provide any sensible explanation for why they believed that £260k was an appropriate figure for the company’s total equity value. He submitted that no authority had been produced to suggest that fair consideration as required by Section 295 of the Companies Law can be abandoned in these circumstances. The figure of £260k was a notional value taken from the company’s balance

sheet and this figure did not reflect the value of the two trading subsidiaries and is wholly contradicted by all of the evidence available before the Court both from the experts and the KPMG draft report. It was submitted that Mr Domaille and Ms Guillou had accepted that they knew about that valuation and had ostensibly departed from it but that the reasons as to why they did so were unclear.

284. It was submitted that despite Mr Bright's evidence that he had undertaken "*a good deal of due diligence*" and was the Chairman of the Board for the meeting on 20 August 2021, Mr Bright did not seek out the report and this was a momentous decision for AHL to undertake. It was submitted that it was clear from Mr Bright's evidence that key information was not presented to him. The Court was invited to find that the dilution was carried out with no regard for the underlying value of the shares or at all. There was no negotiation at all with Mr Domaille or any third party and no attempt to obtain more monies.

285. It was submitted that this was a case of Directors who had not fearlessly defended their company on the issue of price. The cross-checks and balances of having more than one director with duties to exercise independence from each other "*failed horribly*" and they failed AHL.

286. Advocate Breckon submitted that the Directors had a number of duties that they had to comply with. He referred to paragraph 10 of the Cause (obligations owed by Directors to the company). All of the Directors accepted that they had a duty to comply with the law, a duty to comply with the Articles and to satisfy themselves that the consideration was fair and reasonable. They accepted that they had fiduciary duties to accept to act in the best interests of the company and to exercise their powers for a proper purpose and a duty to exercise reasonable care and skill. It was submitted that in addition, there is a duty to respect the Shareholder Agreement and that if the Court was with the Plaintiff on that point, Clauses 5 and 6 of the Shareholder Agreement had been breached because Mr Sinclair did not have the opportunity to participate. It was submitted that the dilution was "*the nuclear option*", a draconian step and one that stripped away assets from Mr Sinclair. The dilution was not a last resort and it was not necessary. There were alternatives to the dilution available to the Defendants. They could have:

- (a) proposed a process for a trusted person to be nominated to sign documents on Mr Sinclair's behalf (for instance, as an agent or under a power of attorney);
- (b) made allowance for Mr Sinclair's ill health and afforded him some additional time;
- (c) proposed to acquire Mr Sinclair's shares for proper value, such that he would no longer be a beneficial owner;
- (d) issued shares on full commercial terms to a willing third-party investor, so as to dilute Mr Sinclair and Mr Domaille fairly and equally;
- (e) investigated whether a transfer of Mr Sinclair's shares to some other person, such as his family members, would have addressed their concerns, such that he would no longer have a shareholding above 25%;
- (f) even if they were determined to issue the shares to Mr Domaille, they could and should have done so for their proper market value.

287. It was submitted that there is no document before the Court from any client to suggest that there was a threat to the relationship with AHL. Ms Steer had sent an email the day before the dilution in which a workaround was presented. Ms Guillou indicated in her email that she would share this with the Board but this was never mentioned to Mr Sinclair and the deadline of 20 August was self-imposed. The Defendants had a workaround, they failed to embrace it and there was no real evidence of any urgency whatsoever. The Court was invited to find that the consideration of that workaround and taking a step back was a far better option than the draconian steps of reducing Mr Sinclair's shares in real terms. It was submitted that Mr Bright

was frank in his evidence, he had indicated that despite being a member of the Board and Chair of the meeting on 20 August 2021, the workaround emails had not been shared with him and Ms Guillou conceded that she did not share it with the Board.

288. Advocate Breckon submitted that a substantial threat to client relationships had not been established on the evidence and that no such threats were made.
289. It was submitted that the Table of Actions to be completed by Mr Sinclair “*cobbles together*” incidents over three years. On a consistent reading, certain matters could never be regarded as urgent and others had been completed. Mr Sinclair accepted that he could have done better but he had done certain things. He had signed over the resolution appointing Mr Bright. He had signed stock transfer forms and they had been lost by the Defendants. He had attended to the T matters. Advocate Breckon submitted that Defendants had recognised Mr Sinclair was very unwell. The Defendants were trying to establish that this nuclear option was the absolute last resort but it was not in the Plaintiff’s submission. It was submitted that the Defendants were inviting the Court to create new case law to rescue them to state that changing the shareholder power for CDD is a proper purpose. Even if they could do that, Advocate Breckon contended that the Defendants could not escape Section 295 of the Companies Law. The Plaintiff invited the Court to find that this dilution had real economic effect. It was real to Mr Sinclair who had lost entitlements to dividend and capital, as well as voting rights after a lifetime of working to secure these assets. It was real for Mr Domaille as he had received 25% of AHL without, in real terms, paying anything for it. Paragraph 5.13 of their minutes sets out that they intended to transfer the full economic benefit.
290. Advocate Breckon then set out in submissions the breaches that he said occurred which causes the unfair test to be satisfied.
291. First, it was submitted that contrary to Section 295 of the Companies Law, the price was not a fair and reasonable price to the company. It was a tiny percentage fraction of the actual market value of the company. No Director or shareholder with knowledge of the facts could reasonably have believed that this was fair and reasonable in respect of price. It was Mr Domaille’s duty when he was to receive the shares to say that this did not sound right. It was submitted that he did not do that, and the Court was invited to find that Mr Domaille was intimately involved in these matters. The evidence was that Mr Domaille set the ball rolling. He asked for the matters to be escalated and that was what followed. Mr Bright’s evidence was that he discussed matters with his fellow board members, including Mr Domaille and Mr Domaille in his evidence accepted that prior to the Board meeting he received a copy of the draft resolution.
292. Second, the Plaintiff submitted that the Articles of Incorporation were breached. Article 2 of the Articles of Incorporation provides that the Directors were obliged in issuing new shares to comply with the law. If the Court finds that the price, the consideration was not fair and reasonable and was a breach of Section 295 of the Companies Law, it was submitted that it goes hand in hand that the Articles have been breached. It was submitted that this was another example of unfairness.
293. Third, the Plaintiff submitted that the parties agreed by their conduct and over a number of years that the Shareholder Agreement was binding. It was submitted that what changed the Directors mind, in relation to the applicability of the Shareholder Agreement was this litigation. If the Court is satisfied that the Shareholder Agreement does apply, then the Plaintiff’s case is straightforward. Clauses 5 and 6 clearly provide that Mr Sinclair should have been involved in these matters. He should have been given a right of subscription to the shares and he simply was not. It was submitted that it was not at all attractive for the Defendants to say “*we did not intend to raise capital*” because that would create a mockery of the agreement because the

capital was raised. If the Court is satisfied that the Shareholder Agreement applies, then the logical and only route from there is to find that Clauses 5 and 6 were breached because Mr Sinclair was not permitted to take part in the issuance of these new shares and that is against the terms of the contractual document. This, it was contended was another example of unfairness.

294. Fourth, it was submitted that the Defendants breached their duties. The Plaintiff did not allege dishonesty or nefarious conduct on the part of the Defendants but rather technical breaches of Director's duties. It was submitted that a breach of any one of those duties was sufficient to establish the "unfairness" test. They were as follows:

- i. it was a breach of duty to act in the best interests of the company. Ms Guillou and Mr Bright did not negotiate with Mr Domaille. Mr Domaille was "in the thick" of these issues. There could have been negotiation, they could have found the best price for AHL. When the shares are worth in excess of £1.5m they could have obtained more than £9,750. None of the Defendants did so. The consideration for these highly valuable assets was not paid and that is not just to Mr Sinclair's disadvantage but to the company's disadvantage, being deprived of capital. The Defendants did not fearlessly defend the interests of the company when it came to price. The Court was invited to find that Mr Domaille and Ms Guillou erred and moved with a preference towards Mr Domaille's interests.
- ii. it was a breach of the duty of skill and care to come up with the value of £260k. The Defendants did not bargain with Mr Domaille. He did not stop them at the point of transmission of the shares and say that it did not sound right and that they had undervalued the company by 95%. Failing to get a valuation was not a breach of their duty but they did need to get the right value, the right consideration and on the evidence before the Court there is no good reason why the KPMG valuation was disregarded to the extent that it was or at all. Mr Bright had not studied it but knew it existed and this was negligent when issuing such a large number of shares.
- iii. Mr Domaille failed in his duties to avoid a conflict. He placed himself in a position of impossible conflict when he received the shares. He accepted that his duties were re-engaged at the point when the shares were transmitted. He had the opportunity not to engage in those matters.
- iv. Ms Guillou and Mr Bright failed to act independently from Mr Domaille. Ms Steer presented Ms Guillou and Mr Domaille with a workaround in an email before the Board meeting on 20th August 2021. Ms Guillou did not take it to the Board. That important information was kept from Mr Bright. He did not know about that at the Board meeting. He accepted in cross-examination that he was not aware of it.
- v. It was a breach to act for a proper purpose. It was submitted that the judgment of the Privy Council in *Howard Smith v Ampol Petroleum Ltd & Others* [1974] 1 AC 821 establishes that the power to issue shares must be deployed with great care and this power is primarily conferred for the purpose of raising capital. It was submitted that in *Howard Smith v Ampol*, the Court held that it is improper for directors to issue shares in order to dilute the voting powers of the majority shareholders (per Lord Wilberforce on behalf of the Privy Council at pg. 837):

"...So far as authority goes, an issue of shares purely for the purpose of creating voting power has repeatedly been condemned....."

[It] must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist...

It was submitted that this principle was approved in Guernsey in *Fountain Street Developments Limited* [2018] GJ 42/2018 (paragraphs 96 and 111 – 114) where the Court held that it was improper for directors to issue additional shares “*in order to obtain shareholding control of the Company itself*” (paragraph 112). Advocate Breckon submitted that shares should not ordinarily be issued for the primary purpose of raising capital and that this is consistent with Section 295. The Court should conclude that that the Defendants’ contention that their primary purpose for issuing the shares was for the removal of the requirement of Mr Sinclair’s cooperation on anti-money laundering and CDD was not a proper purpose for the exercise of the Director’s powers under Article 2.1(a) of the Articles of Association of AHL. It was submitted that there was no case before the Court to say that it is permissible to change the power between shareholders for KYC or CDD purposes and that there are good policy reasons why it should not be permissible to do so.

295. Advocate Breckon referred the Court to the following extracts from *Sunrise Radio Limited* [2009] EWHC 2893 (Ch):

“108. The directors did not in 2005 give any consideration to issuing the shares at more than par. The board minutes (though professionally prepared) reveal that there was no discussion of price..

113the probability is, for the reasons appearing below, that the directors (or at least Mr Jain and Mr Tony Lit) would not have considered issuing the shares at par had they given considered thought to the factors I have held it was their duty to have regard to. They would instead have issued the shares at a price significantly in excess of par. On Ms Hindson’s expert evidence (which was the most favourable to the Respondents) a discount down to anything like par could not be justified.”

296. In *Sunrise Radio Limited*, a buyout was ordered. It was submitted that the concerns in that case are strikingly similar to the concerns in this case and he invited the Court to find that in dealing with the dilution there had been at least four or potentially five breaches of various duties by directors and any one of those breaches is sufficient for the Plaintiff to establish the unfair elements of the “*unfair prejudice*” test.

297. Advocate Breckon submitted that the Court cannot draw adverse inferences from the failure of the Defendants to disclose the legal advice that they received in relation to the dilution. He contended that if the legal advice did not have caveats or anything of that nature, it would have been disclosed to the Court. It was submitted that the Court has been deprived of the legal advice and there is no evidence before the Court, as to what that legal advice says. Advocate Breckon submitted that there is nothing before the Court other than the interpretation of the Defendants as to what the advice says. The content of the legal advice is not known, the Court has been deprived of the opportunity to review it and it is wholly wrong to seek to rely upon advice without letting the Court see it. Advocate Breckon invited the Court to disregard any references to legal advice and contended that it is for the Court to decide itself whether the Defendants acted in breach of any of their duties.

298. Advocate Breckon then invited the Court to find that this transaction was inequitable in a broader sense. To reach that conclusion, the Court must first find that there existed a quasi-partnership. The test for a quasi-partnership is set out in *Ebrahimi v Westbourne Galleries Ltd*

[1973] AC 360 (per Lord Wilberforce at pg. 379 [F]. Advocate Breckon submitted that only one of the characteristics referred to by Lord Wilberforce needs to be in place: trust and confidence that the shareholders were all people who were involved in the management of business and that it was hard to exit. If any one of the tests are established, it was submitted that the Court can make a finding that there is a quasi-partnership. It was submitted that there is a quasi-partnership. The Court was invited to reject the Defendants' submission that if there was a quasi-partnership, it ended in 2019 when Mr Sinclair left his directorships in Artemis. There is no evidence that determines that the business changed or that it became more commercial or more at 'arm's length'.

299. On prejudice, Advocate Breckon submitted that the prejudice suffered to a shareholder can be economic in nature, for example a decrease in the value of a petitioner's shareholding or alternatively it can be non-economic, for example an infringement of their rights such as decreasing their voting power (*Coroin Limited (No 2)* [2012] EWHC 2343 (Ch)). It was submitted that the dilution was the plainest possible example of damage to the financial value of a person's shareholding. Mr Sinclair's assets were worth almost half the day after the dilution. He has lost valuable voting powers and can no longer prevent a special resolution. It was prejudicial because Mr Sinclair lost his voting rights, his dividend rights and his right to the capital.
300. It was submitted that the assurances referred to by the Defendants in the Board minutes and the correspondence from Appleby are wholly inadequate. None of the assurances have any legally binding effect. There was no contractual commitment or Court order. There are no commitments or promises or contractual obligations that can be sued upon. The assurances could not be enforced by a Court. It was submitted that the only guarantee was that unless the Court intercedes there is nothing that might ever change.
301. On the subject of remedy, relying on *Sunrise Radio Limited, Legal Costs Negotiators Ltd Properties Ltd* [1999] 2 BCLC 171 CA and *Re Dingless and Dingless v Dingless and others* [2019] EWHC 1664 (Ch), Advocate Breckon submitted that the appropriate relief is an order for the purchase of the shares.
302. The relief sought by the Plaintiff was for his shares to be bought for a fair price and those shares are by reference to 49.29% of AHL. There was no dispute between the parties that the valuation date is the date hereof.
303. It was submitted that the only form of relief that would work is an order that Mr Domaille buys the shares and the appropriate valuation is not less than £3.4m to £3.5m which is the bracket the experts reach. There is a great deal of congruence between the experts at £3.4 to £3.5m.
304. The Plaintiff submitted that if the Court is not satisfied that there is unfair prejudice, the Plaintiff seeks a derivative claim. It was submitted that a derivative claim is a flexible, equitable procedure designed to achieve practical justice where it would otherwise be unavailable. Relying on *Jackson v Dear & Ors* (Guernsey judgment 10/2013), it was submitted that the key points to consider by reference to English authority were these:
 - (a) where wrongs have been done to a company, the proper Plaintiff is *prima facie* the company;
 - (b) there are however recognised exceptions. One is "where the wrongdoer has control which is or would be exercised to prevent a proper action being brought against the wrongdoer." In such cases, a shareholder may bring a derivative action on behalf of the company;

(c) the shareholder will be allowed to sue on behalf of the company “if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available”. If another adequate remedy is available, the Court will not allow the derivative action to proceed.

305. It was submitted that the key tests are whether the company is under “*wrongdoer control*” and whether there are any other adequate remedies available. The Plaintiff submitted that the derivative claim is sought only if the Court is not persuaded to grant relief on his unfair prejudice claim and as such it is pursued as a last resort. It was submitted that derivative actions should only be brought where the relevant breaches benefited the majority shareholders at the expense of the company (*Hollington on Shareholders’ Rights* (10th ed.) at 6 – 10). The rationale is that such breaches cannot be ratified or waived by the majority shareholders (*Jackson and Dear* at paragraph [8]). The Plaintiff submitted that this requirement is also met and that Mr Domaille directly benefited from the dilution.
306. Advocate Breckon submitted that the derivative action should be considered as a last resort because it is unattractive. It does not provide for a clean break.

The Defendants’ Submissions

307. The Defendants robustly resisted the unfair prejudice claim. They contended that they had acted entirely in accordance with the Articles and the Memorandum which govern the sophisticated relationship between the parties.
308. Advocate Brehaut underlined the seriousness of the allegations made against the Defendants which impugn their character and integrity. She described the consequence of the judgment of the Court as momentous for them.
309. It was submitted that the Plaintiff is constrained by his pleading. He raised one sole allegation, namely that the dilution of the shares was prejudicial to him. He was provided with the opportunity to expand on his case in pleadings and had not done so. It was further submitted that the Plaintiff’s witness statement was ‘sorely lacking’ on his case.
310. Relying on *CLO Holdco* and *Prodefin*, Advocate Brehaut submitted that in order to make out his unfair prejudice claim, the Plaintiff must establish all of the following aspects:

- i. the conduct complained of must consist of conduct of the company’s affairs or an ‘act or omission of the company (including an act or omission on its behalf); and
- ii. his (or shareholders’ generally) interests as a member must have been
 - a. prejudiced;
 - b. unfairly.

All elements must be established in order for the Plaintiff to succeed; conduct may be unfair without being prejudicial and *vice versa*. The Defendants agreed with the Plaintiff that the applicable standard must be established objectively, not according to the subjective views of the Plaintiff.

311. Advocate Brehaut submitted that the jurisdiction to make an order under Sections 394/395 of the Companies Law arises only upon the Court being satisfied that there has been such unfairly prejudicial conduct.
312. It was submitted that the judgment of the High Court of Justice in England and Wales in *Isaac v Tan & Anor* [2022] EWHC 2023 (Ch) is of particular importance to the present case on the question of whether the Directors acted for a proper purpose. Mr Isaac petitioned the Court for relief under Section 994 of the Companies Act 2006. He contended that the company's affairs had been conducted in a manner which had caused him unfair prejudice. His complaint related to an open offer of shares – the '5:2' offer' - made by the Company following a resolution of the Board of Directors. The 5:2 offer was only taken up by one shareholder, the first Respondent Mr Tan. Mr Tan, at that time, was a majority shareholder in the company and held 94.22% of the shareholding. As a result of him taking up the 5:2 offer, Mr Tan escalated his shareholding to 98.3% and Mr Isaac's shareholding in the company was reduced from 3.9% to 1.19%. Mr Isaac alleged that the dilution of his percentage shareholding was prejudicial and unfairly so. Prejudicial because it left him worse off in respect of his shareholding interest and unfair because he alleged that the whole exercise was orchestrated by Mr Tan who was not motivated by any proper business purpose but instead by animosity towards him. Advocate Brehaut referred the Court to the following findings of Johnson J:

"108. A good starting point is Howard Smith v. Ampol Petroleum [1974] AC 821 which was directly concerned with the power to allot shares. In giving the advice of the Privy Council, Lord Wilberforce said this of the case where the complaint made is one of improper exercise of a power: " ... it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not."

109. In the present case, the directors were exercising the power conferred on them following the resolutions of the shareholders dated 8 November 2016 (above at [34]). That resolution conferred on the directors a general and unconditional authorisation to allot new shares of 10p each, and expressly disapplied the pre-emption rights that would otherwise have applied under the Company's Articles. Moreover, that general authorisation was given against the background of the Pledge, and thus in light of Mr Tan's anticipated ongoing plan of converting debt to equity.

110. That being so, it seems to me plain that the power to allot shares was properly exercisable in order to facilitate Mr Tan's planned conversion of debt into equity. Indeed, the relevant authority was conferred on the Board expressly for that purpose.

.....

125. In the present case, I am not concerned with the validity as such of the decision to allot new shares to Mr Tan. That decision is not sought to be unwound. Instead, the decision being regarded as effective, the Petitioner's argument is that it was unfairly prejudicial in the statutory sense.

126. It seems to me that one can easily adapt Lord Sumption's logic and apply it in this scenario. Indeed, in the Sunrise Radio case, as Ms Betts for the Respondents pointed out in argument, HHJ Purle QC did more or less exactly that. In the passage I have

already drawn attention to at [113], he accepted the submission that, even though the directors had failed to take into account relevant factors in making their decision, and even though that was a breach of duty by them which was ipso facto unfair, it would not be prejudicial if it could be shown that, had they in fact taken all relevant matters into account, they would have made the same decision nonetheless. On the facts, however, that could not be shown, and so the relevant prejudice was made out.

127. In the present case, applying the same line of reasoning, I conclude that although Mr Dalman took into account an improper purpose and thus acted in breach of duty, so giving rise to unfairness, there was no prejudice to Mr Isaac arising therefrom. That is because, even had Mr Dalman paid no regard at all to Mr Tan's improper purpose, there would nonetheless still have been a proper reason for making an allotment of new shares to Mr Tan, and I find that Mr Dalman would still in fact have supported the decision to do so (as Mr Borley did). 128. Thus, I find that even without Mr Tan's improper purpose as a factor, the Board as a whole would still have made the decision it did. That being so, I do not consider that the presence of that factor in the mind of Mr Dalman resulted in any unfairness in the statutory sense."

Advocate Brehaut submitted that in *Isaac v Tan*, even though Mr Isaac's shareholding had been diluted, it had been done for a proper purpose, therefore, there was no unfairness. That case was brought in the context of the same wording under Section 994 of the English Companies Act. It was submitted that this is important because the Plaintiff alleged that the Defendants had breached their duty to act for a proper purpose. It was submitted that in the pleadings, the Plaintiff had failed to adequately set out the basis for improper purpose allegation other than in respect of allegations made in relation to the valuation of the shares (although the Plaintiff had accepted that no written valuation or formal valuation is required).

313. Advocate Brehaut referred the Court to the judgment of the Privy Council (on appeal from the Supreme Court of New South Wales) in *Howard Smith v Ampol*. In that case, the Plaintiff alleged that the issuance of shares was in breach of the fiduciary duties of the directors. Advocate Brehaut referred the Court to paragraphs 834H – 835G (Lord Wilberforce delivering judgment of the Privy Council):

"But it does not follow from this, as the appellants assert, that the absence of any element of self-interest is enough to make an issue valid. Self-interest is only one, though no doubt the commonest, instance of improper motive: and before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made. This is recognised in several well-known statements of the law. Their Lordships quote the clearest which as so often been cited:

"Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason." (Hindle v John Cotton Ltd (1919) 56 ScL.R. 625, 630 – 632 per Viscount Finlay).

On the other hand, taking the respondents' contention, it is, in their Lordships' opinion, too narrow an approach to say that the only valid purpose for which shares may be issued is to raise capital for the company. The discretion is not in terms limited in this way: the law should not impose such a limitation on directors' powers. To define in

advance exact limits beyond which directors must not pass is, in their Lordships' view, impossible. This clearly cannot be done by enumeration since, since the variety of situations facing directors of different types of company in different situations cannot be anticipated...

In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls."

Advocate Brehaut submitted that whilst the facts in *Howard Smith v Ampol* may not be the same as those in the present case, the case makes it very clear that the issue of shares does not have to be done solely to raise capital. Their Lordships referred to the following considerations: taking into account the *bona fide* opinion of the directors, taking into account the proper purpose, the reason for which it was exercised. The Defendants submitted that this case is on all fours with the present case and that the opinion of their Lordships is of fundamental importance.

314. Advocate Brehaut referred to the Defendants' evidence at trial:

- a. Mr Domaille's evidence in cross-examination was that the decision for dilution was taken by the company as one of last resort, there were no workable or realistic alternatives, nothing could be found by discussions internally or with their legal advisers. He did not accept when it was put to him that it was unusual for a company not to obtain a valuation. He confirmed that legal advice that they received was consistent with an open market valuation not being appropriate to the exercise. He said that it is the transfer of the asset without full economic benefit and that, at all times, there was careful management of the conflict issue and that, at all times, he acted in the best interest of AHL.
- b. Ms Guillou confirmed the practical effect of the dilution. In relation to an alleged sale by Plaintiff, she said *"He could sell because of the undertakings we gave, the protections we put in place for him. If he found a buyer, we would have reviewed the dilution, reinstated the shareholding, enabled the sale to a third party."* She confirmed that it was always their intention to pay fair value. She was referred to Section 295 of the Companies Law and asked if in her opinion she had acted fairly and reasonably to the company. She explained that "a valuation for dilution was not undertaken for the very specific purpose that market value was just not appropriate so there was no reason to obtain an independent valuation. She confirmed *"of course, on the open market the shares would be valued on the basis of an open market valuation, but that was not the purpose of the exercise which had to be undertaken"*. It was put to her that it was the bargain of a lifetime and she confirmed it was not because it was not a transaction on the open market;
- c. Mr Bright confirmed he was aware of all of the operational issues. The BNZ bank account was not the only one. He confirmed in respect of the valuation, it needed to be an objective number, a way of dealing with it was that the balance sheet value

from the financial statements. As the other Defendants had done, he confirmed that the purpose was not to raise value for the company. It was to provide relief for the company.

315. Advocate Brehaut submitted that there was no breach of the Memorandum or the Articles of Association. The Directors acted for a proper purpose in the best interests of the company. In the *Isaac Tan* case, it was submitted that proper purpose of allotment of shares was found in that case and no unfairness had arisen and that was in the context of Section 994 of the English Companies Act. It was submitted that the Court can overwhelmingly find that there clearly was a very proper purpose behind the share dilution and any pleading by the Plaintiff has to be limited to the Cause. The very proper purpose was the protection of the business and the necessary steps which had to be taken in order that the business would continue to thrive.
316. Advocate Brehaut underlined that the test under Section 295 of the Companies Law is that it is in the opinion of the board that the consideration for and terms of the issue of the shares are fair and reasonable to the company (not to Mr Sinclair). The Court had heard evidence that the board considered that it was fair and reasonable and they said that this was for good reason. They did not need to raise capital and the shares would be encumbered. The company needed to take action because of the operational difficulties and the issue of the shares was the step that they needed to take on legal advice.
317. It was submitted that the starting point as to whether something is unfairly prejudicial to any member is the agreement documents which govern the relationship with the company. In *CLO Holdco*, it was the Articles of Association and the members' agreement. It was submitted that in the present case, the agreement documents governing the relationship are the Memorandum of Association and the Articles of Association. The Plaintiff accepted in evidence that the Memorandum and the Articles of Association govern AHL. Clause 5.1 permits AHL to increase its share capital. Clause 2.1 of the Articles of Association provides that:
- “Subject to the provisions of the law and such terms and conditions as it sees fit, the board may exercise the power of the company to issue shares or grant rights to subscribe or convert any security into shares in accordance with section 291 of the law.”*
318. Advocate Brehaut submitted that overwhelmingly, the Directors had acted in accordance with the agreements that govern the affairs of the company. If the Court agrees, then the Plaintiff cannot overcome the first hurdle. The Defendants, at all times, acted in accordance with the Articles and the Memorandum. As in *CLO Holdco*, the Plaintiff cannot in this case establish a breach of the contractual documentation. The Plaintiff cannot overcome the first hurdle in establishing any breach in the way the parties agreed to conduct themselves in AHL.
319. The Defendants contended that the Plaintiff's suggestion that there is a quasi-partnership in order to convince the Court that equitable considerations should be taken into account is a bizarre assertion. On the one hand the Plaintiff pleads that the Shareholder Agreement applies but at the same time that this was a quasi-partnership. He had accepted that large parts of the Shareholder Agreement did not apply to the arrangement at all. It was submitted that this was a sophisticated entity with a Memorandum and Articles of Association. The Defendants accepted that if the Court concludes that this was a quasi-partnership, then equitable considerations can apply but submitted that it had in no way been established. Even if the Court were to find that this was a quasi-partnership, it was submitted that it would have been brought to an end by virtue of Mr Sinclair leaving as a director, ceasing to be involved in management.

320. Advocate Brehaut submitted that when cross-examined about the suggestion of a quasi-partnership, the Plaintiff himself seemed confused about it. He stated *“I was talking about the Shareholder Agreement. It was managed equally, managed together”*. The Defendants contended that this assertion does not make much sense. When it was put to him that when he left the company as a director that any quasi-partnership came to an end the Plaintiff’s reply was that the Shareholder Agreement was still in place. It was submitted that this misses the point that you cannot easily or happily on the one hand assert a quasi-partnership and then assert that there is a written Shareholder Agreement in place.
321. It was submitted that the Plaintiff’s contention that the Shareholder Agreement governed the affairs of AHL did not bear scrutiny. The front of the Shareholder Agreement shows who the parties to the agreement are. They are Artemis Chartered Accountants and four named individuals. In the preamble, the parties are defined as ‘all shareholders in the following companies’: ATL, Athena Administration Limited, Artemis SARL. AHL was not one of the companies and the shareholders are those set out in the definition. They did not include Mr Ian Domaille or Mr Sinclair. It was submitted that Mr Sinclair was responsible for the organisation and Incorporation of AHL. A Shareholder Agreement was not drafted for AHL. There is no variation to the Shareholder Agreement or to the application of the existing Shareholder Agreement. There is no contemporaneous evidence (*Mumtaz Properties Ltd* [2011] EWCA Civ 610]. No evidence was exhibited to the Applicant’s witness statement and his evidence in examination-in-chief was supplemented only in relation to his health.
322. The Defendants submitted that they had put several matters to the Plaintiff in cross-examination as to why the Shareholder Agreement could not apply and had not been applied by the parties:
- a. it was put to the Plaintiff that in the agenda item there was nothing in relation to a restructure or a shareholder agreement. Mr Sinclair said *“it does not mean that it did not continue. I believe previously continued. It was an oversight, we didn’t amend it.”* It was submitted that an oversight seems a stretch if one is seeking to suggest that the 2002 agreement applies for everyone.
 - b. It was put to Mr Sinclair that in the minutes of the first meeting there was no reference to the Shareholder Agreement either by him or anybody else. He responded that *“Could have done our housekeeping in better order, first to admit that”*.
 - c. It was put to Mr Sinclair that no unwritten agreement applied and he provided no details in his amended Cause and he said *“the Shareholder Agreement should have been amended to take into account the dissolution of ACA and to take account the Incorporation of Artemis.”*
 - d. Mr Sinclair was referred to numerous paragraphs in the Shareholder Agreement which do not apply to AHL or the First Defendant. On the arbitration clause, it was put to Mr Sinclair that if the Shareholder Agreement did apply, the matter would have to exclusively proceed to arbitration. His response was *“not sure, I don’t know the answer”*. Advocate Breckon drew the attention of the Court, in particular, to the wording of the Arbitration clause which reads *inter alia* ‘the parties will irrevocably submit to binding arbitration’. It was submitted that the Plaintiff would have been obliged to proceed by way of arbitration but that he did not do so and that this must have been because he had been advised that the Shareholder Agreement did not apply. If it did apply, it was binding and these proceedings would not have been permitted.

- e. The Plaintiff accepted in cross-examination that the valuation approach in the Shareholder Agreement had not been followed in the past. He accepted when it was put to him that he was not asking the Court to follow that approach. He accepted that the practice of applying a minority discount, as had been suggested in a letter to a person named on the Shareholder Agreement, that this was not compliant with the Shareholder Agreement. It was also put to the Plaintiff that Clause 6 (which is specific and provides that should any of the companies wish to raise additional capital by the issue of shares) in the Shareholder Agreement would not apply because the issuing of new shares has not been done to raise capital. All of the Defendants told the Court clearly and unequivocally that the issuance of shares was not done to raise capital.
- f. It was put to the Plaintiff that he had been in receipt of remuneration, a matter which was covered at Clause 11 and he said *“I didn’t until I left Artemis. Not sure when I left Artemis. Yes, I got those direct but I left Artemis at that stage. Yes, I say that applies to AHL”* but he has not accounted for that remuneration, such that paragraph 11 does not apply either.
- g. It was submitted that the *“real sting”* in the intention to rely upon the Shareholder Agreement is Clause 17, the indemnity provision. The Defendants submitted that this was fatal to the claim against the First Defendant. It states *“Notwithstanding any agreement to the contrary, no shareholder shall be liable, responsible or accountable in damages or otherwise to the companies, any third party or to any shareholder for any act performed”* and it refers to such shareholders performance or failure to perform any act on the reasonable reliance on legal advice to the companies. If the Shareholder Agreement applies, then Mr Domaille is indemnified. It was submitted that if the Shareholder Agreement applies, Mr Domaille is indemnified and the Plaintiff should never have pursued this action against Mr Domaille if that is his position.
- h. The Defendants submitted that as the cross-examination continued, Mr Sinclair’s position shifted slightly and he said *“Well, the way we conducted our affairs was in the spirit of the shareholder agreement.”* It was submitted that a Plaintiff cannot advance a claim alleging the Shareholders’ Agreement applied and then change his mind and say it was the spirit of the Shareholder Agreement that applied.

323. The Defendants submitted that there has been no breach of the Articles, no breach of the law, no quasi-partnership and the Shareholder Agreement does not apply. The Defendants have done absolutely nothing that has caused unfair prejudice.

324. On the operational difficulties which AHL was struggling with, Advocate Brehaut described CDD and KYC compliance and regulation as of the *“greatest importance and gravity”*, the *“fundamental bedrock”* of this business was to be able to work with clients and to comply with regulations.

325. It was submitted that the Plaintiff was taken to numerous documents with examples of how AHL and its underlying companies needed his assistance on various issues. The issue had become so acute that there was the risk of losing clients. The Court heard oral evidence on this from Ms Guillou and in a letter to Ferbrache & Farrell, the Plaintiff’s Advocates, dated 19 July 2021, Appleby, the Defendants’ former Advocates, advised that a number of outstanding client and corporate documents had previously been sent to the Plaintiff by the Defendants to no avail and his continued failure to sign was causing real prejudice to the Defendants and their clients. It also advised that one client was threatening to terminate the relationship over Artemis’

continued inability to simply open a new bank account. It was submitted that there was substantial factual background which the Defendants were operating against which led them to the action that they took, in relation to the dilution of the shares.

326. It was submitted that in cross-examination, Mr Sinclair had accepted that he had worked for over 50 years in the industry. He accepted that he had been appointed as a Director more than 100 times, although he could not remember quite how many. He accepted that he was a MLRO until 2019 and confirmed that AHL would deal with ultra-high net individuals worth and family offices. He accepted that they grew their customer base by word of mouth and reputation. He accepted that the business was regulated by the GFSC and required to be aware of CDD. Mr Sinclair accepted that they would have to open bank accounts both as trustee, director, administrator and AHL's clients would need them to satisfy these CDD requirements. It was submitted that it was very surprising against this backdrop that the Plaintiff operated in a way which was actually contrary to the best interests of the company. The Defendants accepted that he was no longer a Director but said that he used to be.

327. The Defendants submitted that half a day in evidence was spent taking the Plaintiff through the operational issues. In cross-examination, the Plaintiff was asked if he had received the requests, he responded that he did not understand them but he accepted that he did not query this with anybody from AHL. He did not ask for assistance. He was addressed in cross-examination in relation to Julia Church, whom he knew. He accepted in cross-examination that he knew this email was from Ms Church, so he knew it was a legitimate email but instead of querying it, instead of asking for assistance, instead of asking for explanation. It was submitted that he ignored it. Advocate Brehaut drew attention to the penultimate paragraph of his email to Ms Church:

“With all this in mind and the cool manner this has been dealt with by Artemis, I believe my initial conclusion to ignore this request is the right one. Furthermore, as I informed you, I do not wish my personal details to be given out to anyone without my express permission, which in this instance is denied absolutely.”

When asked about it, the Plaintiff said his health had prevented him from responding to the request at that stage. It was put to him that he was a significant shareholder, owning slightly less than 50 per cent of the shares. He did not agree that he was a significant shareholder. Advocate Brehaut submitted that it was a bizarre assertion for a gentleman of Mr Sinclair's considerable experience in the industry, MLRO until 2019, to state that he simply did not understand why he would be regarded as a significant shareholder and that he did not understand why the requests were being made.

328. Advocate Brehaut submitted that throughout the questioning he accepted that *“I could have done more”*. He accepted that in an email from Mr Domaille to Ms Church and Ms Guillou, Mr Domaille had expressed concern over the conduct but that as Mr Domaille had confirmed in his evidence this was him asking the question as to whether they needed to refer the matter to the Supervisory Division of the GFSC, not to moving the matter through to dilution.

329. Mr Sinclair said, in evidence, that he did not know D and that the reference to one of their clients was a reference to Pakistan. The Defendants contend that the reality is that the Plaintiff did know and that the request made to him in relation to this client was a standard one. In his response to Ms Alex Willcocks, Mr Sinclair expressed his extreme suspicion of requests for his personal information and said that he regarded them as a scam. Advocate Brehaut submitted that such conduct is impossible to understand of an individual with over 50 years working in the industry, 100 directorships, MLRO until 2019, various ongoing non-executive roles. It was submitted that dealing with these standard and reasonable CDD requests in the way that he did

was unfathomable. The Defendants contend that the Plaintiff wanted to cause issues for this company and that he wanted to cause issues for the individuals and that he was doing so.

330. The Plaintiff accepted, in evidence, that he did not say to anybody at AHL that he became very unwell around February 2021 and he did not say that he was too unwell to deal with it. He said that on reflection, he should have communicated this. The Plaintiff accepted that Mr Domaille in an email communication to Ms Church and Ms Guillou was trying to find a way around things and that there was no hidden agenda. He accepted that there was no ulterior motive and he accepted that Artemis had to write to him (letter from Ms Guillou dated 26 February 2021) setting out that the Plaintiff's response was unhelpful and surprising given that these were straightforward requests. At the end of the letter, Ms Guillou requested the information to be provided by 22 February and that if she did not hear from the Plaintiff by 2 March 2021, she would have no choice but to refer the matter to the GFSC.
331. Advocate Brehaut submitted that it was put to Mr Sinclair that despite not responding to Artemis' requests, he was able to hold various NED positions on two publicly listed companies, namely I Limited and Z Limited. He accepted that I is an AIM listed company. He was able to attend 19 meetings for I in 2021, but could not respond to Artemis' requests. It was submitted that whether one is attending a meeting by telephone, Zoom or in person, board meetings have to be prepared for, board packs have to be read, votes have to be cast, and one must act in accordance with Director's duties.
332. The Court was referred to the letter from Mrs Sinclair to Artemis dated 1 March 2021, advising them about Mr Sinclair's ill health. That information had been forwarded on by Ms Guillou to the most relevant people in Artemis. Mr Jager said on 8th March that he had been in almost daily communication with Mr Sinclair over the last few weeks in the process of migrating L to Cyprus. It was submitted that the Plaintiff was a director in L at that time, Mr Jager stated that he had last spoken to Mr Sinclair on 4th March, which was only three days after Mrs Sinclair's letter. It was submitted that there was a real inconsistency in the accounts put forward by the Plaintiff. It was a remarkable feature of the Plaintiff's evidence that he could recall some aspects in remarkable detail. When asked in cross-examination about L, he was able to give a very detailed response yet on other points he simply was not able to remember anything at all. It was submitted that the Plaintiff had cherry-picked what he is able to remember before the Court.
333. Advocate Brehaut submitted that the Plaintiff said, in evidence, that he tendered his resignation but had been asked to stay on and he was able to do so with the assistance of the director but at no point did he ask for any assistance from AHL. He accepted in cross-examination that he was able to act in accordance with his director's duties at all times when he was having the 19 meetings in 2021. It was put to him about the size of the board packs, about considering extensive documentation, all around the same time he was ignoring all of the requests from Artemis. He accepted that and said "*sometimes they are too large*" regarding the documents that he would be required to consider and that he was satisfied he could comply with his director's duties. Advocate Brehaut drew attention to an email from Mr Justin Jager dated 8 March 2021, in which he said that he had been in almost daily communication with the Plaintiff over the previous few weeks in the process of Migrating L to Cyprus. The Plaintiff was a Director on L at the time. Mr Jager said that he last spoke to the Plaintiff on 4th March, 3 days after Mrs Sinclair's letter by which she advised Ms Guillou that he was unwell. Advocate Brehaut submitted that there is a real inconsistency in the accounts put forward by the Plaintiff.
334. On the Table of Actions that were outstanding from the Plaintiff, he said that he was not aware that these matters were still outstanding. Had he known, he would have contacted his Advocate to have a power of attorney undertaken. Advocate Brehaut submitted that letters were,

however, sent to his Advocate. The issues were repeated again and again and they were not rectified and that all the while, the Plaintiff remained a NED of I Limited and Z Limited and continued to attend all of their meetings and dealt with the entities linked to Mr K.

335. Advocate Brehaut submitted that it was put to the Defendants that alternative options could have been considered. She referred to an alternative option suggested in an email from Ms Jessica Edwards, Senior Associate at Private Banking, Bank of New Zealand to Mr A. Ms AA stated:

“...our Risk Management team have agreed that as long as the attached form can be completed for the ultimate shareholder of the professional trustee company Robert Sinclair; we can proceed with the opening of the accounts. So simply put; we just need to have this filled out and signed by an acting Director of Artemis Corporate Services Limited on Roberts’ [sic] behalf”.

Advocate Brehaut said that Ms Guillou’s evidence was very clear. In response to suggestion that the meeting notes did not record the taking into consideration of this alternative, Ms Guillou said:

“No, because between the time of me sending that email I looked into whether it was in fact a workable solution to put at the board meeting. It was at that point that I was reminded of Mr Sinclair forbidding us to sign any document or to release his personal information in relation to this matter and therefore I did not consider it appropriate to raise that matter at the board meeting as a solution to the BNZ matter”

336. Advocate Brehaut submitted that whilst ignoring Artemis and their requests, Mr Sinclair responded to the beneficiaries on the requests straightaway saying in cross-examination that he had some confidence in their request and understood it which is why he dealt with it. The Plaintiff accepted that any requests connected to Mr K, his friend, had been dealt with by him. It was submitted that the Plaintiff was motivated to act because Mr K is his friend. It was submitted that the Plaintiff tried to suggest that this meant he would comply with requests that he understood but he made no effort to understand, no communications with Artemis. No phone calls, no attempts to give assistance but when he was asked to resign from the Trust advisors, rather than write to Artemis Trustees, he said *“I felt that it was the correct way of doing it”*. It was submitted that the Plaintiff’s evidence changed in approach and he started to say *“Well I would have done something if my advocate had told me to do it”*. Advocate Brehaut submitted that this became evident when he was asked in cross-examination about the lease document (referred to in the Table of Actions). He said that if Advocate Breckon had told him to sign it, he would have signed it. Advocate Brehaut submitted that it is not really clear what was going on with Mr Sinclair’s evidence. Either, on the one hand, he was too unwell to respond to requests or he did not understand the requests. It was submitted that it seems unlikely that he was too unwell given all the other roles he was carrying out and the numerous meetings he was attending and the requests from Mr K that he was able to comply with. If he did not understand the enquiries, he should have made enquiries or if Advocate Breckon did not tell him to do something, he did not do it.

337. Advocate Brehaut referred to the Plaintiff’s evidence in cross-examination when he was referred to his Advocate’s letter, by which he advised Appleby that his client was simply too unwell to deal with the matters and that as the position changes, he will consider matters further. The Plaintiff conceded that his Advocate got it right, he was too unwell to deal with matters. He found it very difficult and still does. It was submitted that whilst it was put to the Defendants in cross-examination that there could have been other options that they could have taken, although it was not pleaded, the Plaintiff’s Advocate did not get very far with those points.

Advocate Brehaut submitted that she had explored all of the alternatives with the Plaintiff in cross-examination. It was not for the Defendants to have a Power of Attorney put in place for the Plaintiff. It is not something they could do and the Plaintiff accepted that efforts had been undertaken over a sustained period of time to get his engagement, emails from the company, letters from the company, emails from the company to his Advocate, letters from the company's Advocate to his Advocate. Nothing happened. What cross-examination of the Plaintiff demonstrated was that there is a real inconsistency as to his argument that his health was preventing him from responding to reasonable requests.

338. It was submitted that the Plaintiff simply did not want to deal with the requests from AHL but that he attended meetings for I and Z. Had he done all of that in 2021, it was submitted that he could have dealt the requests from AHL. The Plaintiff was causing grave problems for the running of the business and was starting to damage the business. All of the Defendants had been very clear with the Court about this. Their view, without a doubt, was that Mr Sinclair was causing a serious problem. They did not go off and take action immediately. It was not a kneejerk situation. The consulted Advocates and they tried to find a way out of this impasse.
339. Advocate Brehaut then referred the Court to the correspondence between Appleby and Ferbrache & Farrell:
- a. In a letter dated 19th July 2021, Appleby set out that the Plaintiff's actions were causing real prejudice.
 - b. By 29th July 2021, Appleby put the Plaintiff on notice that the *"Board of Artemis is planning to meet in the near future to consider a proposal to issue new shares, so as to reduce your client's shareholding to below 25 percent"*.
340. It was submitted that on 5 August 2021, Advocate Breckon had on behalf of the Plaintiff provided some of the documentation but it was not complete and no other action was taken by the Plaintiff to prevent any action being taken by the company. No injunction was sought at that stage or at all. The Plaintiff threatened one after the share dilution but the dilution had happened by that stage, so it would have been fairly fruitless.
341. The Defendants have always said that they acted in accordance with legal advice given to them by Appleby. This was pleaded in their Defence. At no point in their replies to the exceptions de fond, or otherwise, did the Plaintiff request a copy of the legal advice or rebuke that legal advice was ever taken. It was submitted that it was surprising that at trial for the first time, it was suggested that legal advice should have been disclosed. It had never suggested that legal advice was not taken. It had never been suggested that it was not followed. That was not put to the Defendants. It was put to them that the legal advice had not been produced but not put to them that legal advice was not taken or not followed. All of the Defendants gave evidence on oath. They all said they took and followed legal advice. That is the evidence before the Court. If he had wanted it previously, Mr Sinclair could have sought disclosure of it by way of application for specific discovery. It was a pleaded matter in the defences. It was submitted that the Plaintiff did not question this and it is wrong to do so now. No lesser weight should be afforded to the Defendants evidence because they have not waived privilege, particularly in the face of the failure of the Plaintiff he wanted it or even advance a suggestion that legal advice was not taken or followed. It was submitted that the legal advice remains privileged at all times unless privilege is waived by the Defendants. It is a fundamental right that all Defendants are entitled to. The Defendants should not have been challenged on this issue when the Plaintiff has been aware that this has been the Defendants case from the start.

342. On the Board minutes Advocate Brehaut submitted that paragraph 5.2 set out the rationale for the share issue and referred to the correspondence exchanged with the Plaintiff on the difficulties that were being encountered. The sole objective of the dilution was set out at paragraph 5.4 and at 5.6 of the minutes. It was submitted that the Board minutes is an important document and that it is clear that, at all times, the Defendants were seeking to protect the position of the Plaintiff, in particular at the end of paragraph 5.6:

“In any event, MJB and DJG consider that if any of these events were likely in the future, then the position could be reconsidered by the board at that time, according and based on the circumstances at the time, which might include but would not be limited to giving consideration to an issue of shares to restore the situation should that be considered fair and equitable at the time.”

343. The Court was referred to paragraphs 5.8 (the steps they had taken); 5.11 (the alternatives considered); 5.12 (Appleby had confirmed that neither of the alternatives would be effective). It was submitted that it was not a decision taken lightly and that from paragraph 5.13 it could be seen that Appleby had advised that the only effective solution was to issue the shares. Paragraph 5.14 considers the valuation process in detail. Advocate Brehaut underlined that Section 295 of the Companies Law requires that the terms of the issue of the shares are to be fair and reasonable to the company in the opinion of the Board. It was submitted that this was their duty and that the Defendants had at all times owed their fiduciary duties to the company and to act in the best interests of the company. The terms of the share issue were fair and reasonable to the company.

344. It was submitted that *Fountain Street Development Limited*, a case relied on by the Plaintiff, is not an unfair prejudice case but a judgment on the application for the winding up of a company. That case is entirely different to the present case. In that case, all four shareholders had contributed £250,000 in a building venture in cash. The applicants were to be in the background to the running of a building project and the purchase of two properties at 32 and 35 Fountain Street. It was agreed that two of the investors would sell their shares to the other two and investment capital would be returned to them but, despite that being agreed, that is not what happened and further shares were issued and the applicants were concerned the conduct of the directors was in some way fraudulent. They discovered that the sale of a flat, Flat No. 1 in property No. 32 had been made at a sale price for a company, which was owned by one of the directors and his wife and the company had also incurred borrowing without the other shareholders' knowledge. It was submitted that this was an entirely different scenario and that in that case, the issue before the Court related to the winding up of a company and whether the company was unable to pay its debts. The cases relied on by the Defendants are on all fours with the factual scenario before the Court. The valuation applied in the present case was fair and reasonable.

345. The valuation approach set out at paragraph 5.14 of the Board minutes records that the valuation of the shares was considered and that Mr Bright and Ms Guillou noted that under the law, the shares could be issued at a discount and be fully or partially paid, to be settled by way of cash or loan. It stated:

“In view of the uncertainty facing the company in relation to the enforcement action taken by the GFSC, MJB and DJG consider that any efforts to value the company would be problematic and open to challenge. It was agreed that the balance sheet value in the most recent financial statements is the only objective valuation that can be reached. As the company has not need to raise funds, MJB and DJG agreed that a loan would be acceptable.”

The Defendants submitted that this would be an entirely appropriate approach to take. There is nothing unusual about the purchase being funded by a loan from the company and it was put to the Defendants that the KPMG valuation should have been the basis but it was a draft. It was a draft that Mr Sinclair did not engage with. It was submitted that it was somewhat peculiar that it was now being put to the Defendants as a proper valuation. The Third Defendant said, in his evidence, that the valuation was now some 13 months old and Ms Guillou was able to provide some helpful evidence on this point. She confirmed that an independent valuation was not required and that the valuation in place was fair and reasonable, in her view, and that of Mr Bright and that this was not applicable to an open market sale. Advocate Brehaut underlined that the Plaintiff had conceded that no valuation was required and that was in the response to the exceptions de fond. At all times, legal advice was taken and it was confirmed that it was taken in respect of the mechanism for the valuation and that the purpose of the share dilution was to preserve the status quo, in respect of the shares and nothing was going to happen to them. In response to a question from Jurat Jones, confirmation was given from the Third Defendant that the minutes had been drafted by Appleby, as part of the advice given. Advocate Brehaut submitted that it was also important to have in mind that Ms Wheadon said that matters had moved on with the GFSC after the KPMG report. That, it was submitted, was highly relevant as it was an expert opinion on the position of the KPMG report at the time of the Board meeting.

346. Advocate Brehaut drew attention to paragraph 4.20 of Ms Wheadon's report 'the valuation of 0.26 shares is therefore not considered fair or reasonable in the course of a normal third party commercial transaction'. It was submitted that this was not a normal third-party commercial transaction. The minutes encumbered the shares. This was something accepted by the Second Defendant and acknowledged in her oral evidence. Ms Guillou confirmed in cross-examination that in fact the dilution was detrimental to the first Defendant. He had to pay tax on the loan. It was considered to be a distribution for tax purposes and he was not able to deal with the shares due to what was in the minutes and due to the undertakings that had been provided to protect the interests of Mr Sinclair. Accordingly, the actions taken were at all times fair and reasonable in respect of the company.
347. It was submitted that even if the Court found that the figure was not fair and reasonable to the company, the Plaintiff could still not overcome the unfair prejudice test. The Plaintiff had at no point been able to set out in his pleaded case or in his replies to further and better particulars or in his witness evidence or oral evidence why he says that the decision was prejudicially unfair. Nothing has happened to the shares. Written undertakings were provided in open correspondence. These were set out in a letter between the Advocates dated 15 September 2021. That the undertakings were referred to in open correspondence enables a party to refer to it if they wanted to enforce the issue. Advocate Brehaut submitted that in Guernsey, parties often provide undertakings in this way. They are rarely set out in a separate document. If it is an open letter, any party can rely on the contents and seek to enforce it in the event of a breach. The fact that there is no separate document is not significant.
348. Advocate Brehaut referred to a letter from Ferbrache & Farrell stated that if "*undertakings are not provided forthwith, there will be an immediate escalation of the matter*". It is submitted that undertakings were provided and there was no escalation, no application for an injunction, no suggestion the undertakings were invalid in any way. In a letter from Ferbrache & Farrell to Appleby dated 16 September 2021, they refer to the two undertakings. Whereas, they said that the undertakings are insufficient, they noted that they have been provided. It was submitted that if there is a breach of an undertaking, one can sue on the breach of an undertaking. There has been no breach of the undertakings. Nothing has happened to the shares. The status quo has been preserved since 27 August 2021. It was preserved by the undertakings at the Board

meeting when the dilution decision was taken. Mr Bright said, in evidence, that he considered that he and the Board were bound by what was in the minutes and what was in the undertakings.

349. Advocate Brehaut submitted that there was no unfair or prejudicial conduct in this case. The two-stage test in *CLO Holdco* has not been made out. The Plaintiff cannot get beyond the first stage of the test. There has been no breach of the agreement between the parties. Even if the Court found that there was a breach, there has been no unfairness demonstrated by the action taken. The shares were diluted for a proper purpose and following receipt of legal advice. Relying on *Isaac v Tan*, Advocate Brehaut submitted that if the Court accepts the proper purpose, the Plaintiff cannot demonstrate unfairness.
350. It was submitted that whilst the Court will have sympathy for the Plaintiff's health issues, the driving force behind the actions of the Plaintiff would appear to be that he was disgruntled that his consultancy agreement was not to be pursued. The evidence of his ill-health is, at best, unsupported by medical evidence (the election of the Plaintiff) and at worst, was utterly undermined by his ability to carry out the directorship roles in listed companies and other companies demanding numerous meetings and his attention. It was submitted that the proposition that he was too unwell to deal with the requests from AHL is not sustainable.
351. It was further submitted that the action commenced by Mr Sinclair appears to have been a kneejerk reaction to simply force a purchase of his shares. Advocate Brehaut drew the Court's attention to a letter from Advocate Breckon dated 20 September 2021, which threatened to issue proceedings and also invited the purchase of shares. Share discussions had taken place in open correspondence at a point in time when there was funding. Offers were made on both sides. That was a commercially pragmatic thing but the exchanges ended there. The parties were unable to reach agreement.
352. The Defendants submitted that the Plaintiff's submissions on a truncated trial was wrong in law. An unfair prejudice application can be made if the affairs of the company have been conducted in a manner which is unfairly prejudicial. The power of the Court is set out at Section 350. If the Court is satisfied that an application is made out under Section 349, it may make an order as it thinks fit to provide relief in respect of the complaint. It is wrong in law to suggest that the Defendants should have jumped straight to a valuation exercise. The Court must be satisfied that an application under Section 349 is well founded before it makes an order under Section 350. The Plaintiff, in this case, does not get even close to showing that the conduct of the affairs of the company was unfair and prejudicial conduct. It is, therefore, entirely improper to suggest that the Defendants should have gone straight to a valuation exercise. It ignores the very test embodied in the Companies Law.
353. It was submitted that if the Court does not find that the test has been met, the Court does not have to make any award. Its powers are wide and far-ranging under Section 350. The overriding principle is one of fairness. Where the Plaintiff has contributed to any wrongdoing or has himself been guilty of wrongdoing, such as not complying with reasonable requests, this can result in the Court deciding no award should be made. The discretion of the Court to grant relief under Section 350 is very wide.
354. Advocate Brehaut referred to *Interactive Technology Corporation Limited v Ferster* [2016] EWHC 2898 in which it was first held that the Petitioner's wrongdoing may make the prejudicial conduct of the Respondent not unfair. Second, the Court held that the Petitioner's wrongdoing may justify the Court in refusing to grant relief to the Petitioner or may influence the choice of any relief which is granted. The Court held in that case that no relief should be granted. It was submitted that the case demonstrates the very real discretion that the Court has

in deciding how to exercise its powers under Section 350. If the Court decides to make an award, the Defendants submitted that a minority discount of at least 10% should be applied.

355. On the expert evidence, the Defendants submitted that Ms Wheadon's evidence must be preferred for the following reasons. She has local knowledge and experience of the relevant sector. Mr Smethurst was able to point to a couple of relevant matters which he dealt with within the Channel Islands. The entirety of Ms Wheadon's experience is local, Guernsey and Jersey experience. Mr Smethurst accepted that Guernsey is a different jurisdiction, different services, different applicable principles. The approach that she took to valuation is more thorough and she used relevant transactions that were appropriately weighted. It was submitted that Ms Wheadon's approach to the threats to the business was based in sound local knowledge and experience of companies struggling with issues such as those faced by AHL, the non-dom regime, the FIU, the GFSC, her experience of due diligence reports for financial services business included GFSC impact. It was not put to any of the witnesses that the concerns about the non-dom, the insurance, the FIU were not true. Ms Wheadon was very clear on how GFSC investigations can have an impact on a business. Her evidence was that she had extensive involvement in this area. It was submitted that she provided compelling evidence about how the Fourth Defendant is in the public domain, fines being levied and that a lot of people would know about it. She said it would have an impact on valuation. She confirmed that when a business has a regulatory difficulty and a due diligence assignment is undertaken, someone may well just walk away because of the GFSC involvement. When asked about this further by Jurat Hooley, Ms Wheadon was able to confirm that the GFSC and the prohibition would have a particularly detrimental effect on the business because it is a trust business. She worded in terms that people are trusting people with their money and these have been very longstanding clients. Whilst she admitted that people may well try and stay with their provider, this would have an impact.
356. It was submitted that Mr Smethurst's evidence at times was not convincing. When it was put to him that he was not experienced in the local financial services sector he said "*no, it's not where the majority of my experience lies*". Advocate Brehaut submitted that in a case such as the present one, extensive knowledge in the sector and local knowledge is required so that the Court can understand the risks and difficulties encountered by the company and the local market. It was submitted that Mr Smethurst is not an expert in the local market, whereas Ms Wheadon is.
357. Advocate Brehaut submitted that it was surprising that when it was put to him that the shares had been ringfenced or encumbered, Mr Smethurst did not accept that there was any suggestion that the valuation should be anything other than a commercial open market basis. He did accept that there had never been any suggestion by any of the parties that a valuation exercise should be done on the value of 24% of the shares. Advocate Brehaut submitted that overall, Ms Wheadon's evidence was compelling and highly persuasive.
358. It was submitted that a further problem with Mr Smethurst's approach was his changing methodology. Advocate Brehaut submitted that Advocate Breckon had attempted to discredit Ms Wheadon by suggesting to her that she had, in some way, entered into the fray and had been arguing on behalf of the Defendants rather than being an independent expert. Those points, in Advocate Brehaut's submission, made no ground whatsoever. It was submitted that those points made no ground whatsoever. She was clearly a woman who took her duties to the Court incredibly seriously and she had completed her valuation in the full knowledge of her obligations as an independent expert. The Court should favour the valuation evidence of Ms Wheadon if needed. It was submitted that the Court will not need to make out a valuation at all. The Plaintiff simply does not make out his case on liability and if that is the case, there is no need to move to quantum or remedies at all.

359. Advocate Brehaut submitted that the Court can also decide, having heard all of the evidence both from Ms Wheadon and Mr Smethurst, to choose a different valuation which is higher or lower. If the Court decides to make an award in line with the expert evidence, then the Defendants contended the appropriate valuation would be the one set out in 2021 because matters have been held in abeyance for three years while the litigation is concluded and Mr Sinclair should not benefit from the efforts of the Defendants to build the business over that period. This is made on the assumption that the Court accepts that the Plaintiff did cause operational difficulties which forced the hands of the Defendants but if the Court is giving consideration to a figure for the shares for whatever reason, the Court may conclude that there was unfair prejudice but that the result still has to be fair and the Defendants submitted that the valuation at the start of the commencement of the litigation is the appropriate valuation. If the Court adopts the present date for valuation, the Defendants invited the Court to err on the side of caution and to go with the lowest valuation set out by Ms Wheadon and to reduce it even further to acknowledge the Court's agreement with the Defendants on the risks faced by the company. The Defendants submitted that if the Court makes an order for the purchase of the shares – which it should not as the unfair prejudice is not made out - then the order should be for the purchase by the company and not by Mr Domaille.
360. Advocate Brehaut submitted that there is very little case law in Guernsey in respect of derivative claims. *Jackson and Dear* is the only case. In that case, the Court notes the need to apply to Court for leave to issue a derivative action. If leave is given, then a properly pleaded Cause would be required. It was submitted that the Plaintiff's suggestion that a hybrid unfair prejudice claim can turn – without the leave of the Court – to some form of derivative action – is not sufficient. The allegations of breach of duty by the Directors of the company would have to be pleaded. The Defendants contended that there has been no breach of fiduciary duty and the Plaintiff has not set out any factual basis in the pleading, as to how the Directors have breached their duties under the Companies Law. Other than reciting the duties owed, there is no specific factual pleading relating to meetings or dates when they should have acted differently. It was submitted that a derivative action is an action pursued on behalf of the company. It would need to be very carefully pleaded as to what the directors have breached in respect of their duties to the company and this is not in the Cause.
361. Relying on paragraph 86 of *CLO Holdco*, Advocate Brehaut submitted that the best the Plaintiff could ask this Court for – although it was not accepted that the grounds were made out – was permission to pursue a derivative claim on behalf of the company, not going straight to the remedy which may be provided. The Defendants relied on *Ntzegekoutanis v Kiminionis* [2023] EWCA Civ 1480 in which the Court considered if it was an abuse of process to bring a derivative claim as part of an unfair prejudice claim. Snowden LJ held at paragraph 74 that:

“The result is that I consider that Mr Ntzegekoutanis’s petition does not fall within Section 260(1)(a) any more than it falls within section 260(1)(b). I agree with Lord Justice Newey’s observations in [38] above, that Mr Ntzegekoutanis is not asking for relief on behalf of the Company under Section 260(1)(b) because he is exercising his personal entitlement, as a member of the Company, to apply to the court on unfair prejudice grounds...”

The Defendants referred the Court to the Plaintiff's skeleton which states:

“In the premises and whilst it would be preferable to produce a clean break between the parties, if this Court does not do so, then Mr Sinclair continues to suffer”

It was submitted that the Plaintiff seeks to do the same as that suggested by Snowden LJ in *Kiminionis*. The claim is for the Plaintiff, not the company. A derivative action is for the company. As stated in *Kiminionis*, it is an abuse of process to bring a derivative claim as part of an unfair prejudice claim. The most the Plaintiff could ask the Court for is leave of the Court to pursue a derivative action but no such application is made. Regardless, there has been no breach and if a breach was established, the damages would go to the company and not the Plaintiff. The derivative claim does not get off the ground.

Discussion

Questions for the Jurats

362. The parties helpfully agreed a number of questions for determination by the Jurats. One of the questions was not agreed. For reasons that will become clear below, it was unnecessary for the Jurats to reach findings on all of the agreed questions and it was unnecessary for the Presiding Judge to decide on whether the unagreed question should be determined by the Jurats.
363. The first question is: prior to the Board meeting on 27 August 2021, was the Plaintiff causing operational difficulties for the Fourth Defendant?
364. The Jurats accepted the evidence of the Defendants that multiple requests relating to operational matters had been made by AHL to the Plaintiff. They found on the evidence that the Plaintiff had received those requests. The Jurats considered that those requests were reasonable, that the Plaintiff had considerable experience of the work carried out by AHL and its subsidiaries and it was reasonable to believe that he would have understood why those requests were made of him.
365. The Jurats were satisfied on the evidence that significant efforts were made by the employees of AHL and its subsidiaries to explain the reason why those requests had been made. They were also satisfied that no response had been received from the Plaintiff by AHL and its subsidiaries to a significant number of requests.
366. The Jurats found that whilst there was no medical evidence before the Court, at certain times during the events leading to the dilution, the Plaintiff had been incapacitated by ill-health. However, they did not accept that that this had been the case throughout the period during which no responses had been received by AHL and/or its subsidiaries. They accepted the Defendants' evidence that the Directors of AHL were concerned that the delays caused by the lack of response from the Plaintiff were a threat to the business of AHL and its subsidiaries. The Jurats were satisfied that the business of AHL and its subsidiaries was being adversely affected by the lack of response from the Plaintiff to the various requests made to him by employees of AHL and its subsidiaries for signatures and for information required for operational purposes.
367. The Jurats were satisfied, on the balance of probabilities, that the Plaintiff was causing operational difficulties for the Fourth Defendant prior to the Board meeting on 27 August 2021.
368. The second question is: was the Plaintiff put on notice of the proposed action to be taken by the Fourth Defendant?
369. The Jurats found that the Plaintiff was put on notice of the proposed action to be taken by the Fourth Defendant. In July and August 2021, written notice of the proposed action was set out in the following correspondence from Appleby to Ferbrache & Farrell:

- a. by letter dated 19 July 2021, Appleby advised the Plaintiff's Advocates that the documents previously sent to the Plaintiff by their client to no avail and the continued failure to sign was causing real prejudice to both their client and its clients. The letter advised that one client was threatening to terminate the relationship over Artemis' continued inability to simply open a new bank account. The letter stated:

"Accordingly, if your client is not in possession of the signed documentation requested by 5pm on 23 July 2021, then it will have no choice but to assume your client is either unable or unwilling to act and it then reserves the right to take all steps within its power to remove your client from any position he holds, whether by resolution or court application, and to seek costs from your client."

- b. by letter dated 29 July 2021, Appleby advised Advocate Breckon as follows:

"As stated in my previous letter my client is not disputing that your client is unwell, but the unfortunate reality of the present situation that has been the case for some time, and sadly it would appear will remain the case for the foreseeable future. Certainly, your letter makes no indication that there is any real prospect that your client will be in a position to address these matters.

Accordingly, as stated my client is not willing to allow the present impasse to remain and will therefore start taking all the steps as are necessary, acting in the best interests of the company or its clients as the case may be to address the fact of your client's inability to sign any documentation. I can confirm in relation to each step of the process, that my client will be transparent with your client with regards to its intentions and shall inform you of the proposed course of action before it is taken.

The first step that is under consideration is to address the fact your client has consistently for a significant period of time either been unable or unwilling to assist in providing up to date CDD and/or other information which is linked to his status as having a shareholding in excess of 25% of my client. The most recent example of this has been your client's failure to sign a bank account opening form for the D International Trust which has been outstanding for several months, and now looks almost certain to result in the loss of this particular client. In order to address this issue, the Board of Artemis Holdings Limited is intending to meet in the near future to consider a proposal to issue new shares so as to reduce your client's shareholding below 25%, such that he would cease to be considered a beneficial owner or controller, and so would not be required take any further steps in the future in this regard. It is believed that such a step would be in the best interests of the company as a whole.

To the extent that your client wishes to make any representations in respect of this proposal, please ensure that they are received by no later than 2pm on 5 August 2021, and I can confirm that they will be tabled at the forthcoming board meeting and considered by the directors."

- c. by letter dated 5 August 2021, Appleby advised Ferbrache & Farrell that:

"We note that your client has again indicated that if his health improves he will set aside a morning to review the documents provided. Whilst this is clearly appreciated,our client ..does hope your client's health improves, however neither of our respective clients can know if and when this might occur. As such our client will now proceed as set out in previous correspondence.

Should your client's health improve at some point in the future and he is able to sign the requested documentation, then clearly this will be very much appreciated and our client will then review the position."

d. by letter dated 17 August 2021, Appleby advised Ferbrache & Farrell that:

"...given the ongoing prejudice that is being caused our client will proceed to take such steps as it determines are appropriate in the circumstances without further notice. We will revert to you again in due course after the decision has been taken."

370. The third question is: did the Second Defendant and Third Defendant take steps to ensure that no prejudice was suffered by the Plaintiff?

371. The Jurats found on the evidence that the minutes of the Board meeting dated 20 August 2021 expressly stated (paragraph 5.6) that in the event that a dividend was declared or the Company was sold, this would be a disadvantage to the minority shareholder but also noted that the Company did not intend to declare any dividends and had not done so in the last 3 years and as such there was no immediate prospect that the minority shareholder would suffer any financial prejudice for the foreseeable future. The minutes also record that Mr Bright and Ms Guillou considered that if any of these events were likely in the future, and the position could be reconsidered by the Board at that time based on the circumstances at the time, which could include but would not be limited to giving consideration to an issue of shares to restore the situation should that be considered fair and equitable at that time.

Further, the Jurats were satisfied that undertakings were provided to the Plaintiff to the effect that the Directors would not issue any further shares in AHL, nor dispose, secure or deal with existing shares without 28 days' notice being provided to the Plaintiff, save where required to do so by law, or by virtue of a prohibition order issued by the GFSC. Those undertakings were expressly set out in correspondence from Appleby to Ferbrache & Farrell dated 15 September 2021. The Jurats accepted the evidence of Mr Bright that there was no doubt in his mind that undertakings had been provided and that he considered himself individually bound by paragraph 5.6 of the Board minutes and that the Board of AHL is bound by paragraph 5.6.

372. The Jurats concluded that the Second and Third Defendants took steps to ensure that no prejudice was suffered by the Plaintiff.

373. The fourth question is: is it accepted by the Jurats that no material dividend has been declared nor any other action has been taken by the First, Second, Third and Fourth Defendants in respect of the shares since the 20 August 2021.

374. There was no dispute between the parties on the answer to this question. The Jurats found that no material dividend has been declared nor has any other action been taken by the First, Second, Third and Fourth Defendants in respect of the shares since 20 August 2021.

375. Before turning to questions 5 and 6 below, the Presiding Judge directed the Jurats on the law on unfair prejudice as set out at paragraphs 265 – 281 above.

376. As a matter of law, the Presiding Judge was persuaded by the Defendants' submissions that any party can rely on the undertakings provided by the Defendants to the Plaintiff in open correspondence and seek to enforce them in the event of a breach and so directed the Jurats.

377. The fifth question is: was the dilution of the Plaintiff's shares as defined within the Cause unfair on the Plaintiff?

378. The Presiding Judge directed the Jurats that in assessing whether there has been unfairness, the starting point is whether the conduct complained of is contrary to what the parties have agreed (whether in the company's Articles or otherwise) or involves a breach of a fiduciary duty by a director. If not, then the question is whether the majority shareholders have used their powers in a way which equity would regard as contrary to good faith applying traditional equitable principles.

379. The Jurats considered whether the Shareholders Agreement applied to AHL. They found, on the evidence, that the Shareholders Agreement was entered into on 17 July 2002 and that it had not been amended to bring AHL within its scope when the company was incorporated on 6 November 2007 or anytime thereafter. The Jurats found that the Shareholders Agreement does not apply to AHL, and consequently, was not relevant to the issue in dispute.

380. The Presiding Judge directed the Jurats that Clause 5(1) of the Memorandum of Association of AHL dated 6 November 2007 permits AHL to increase its share capital and that Clause 6 provides that *"the shares shall be paid for according to the terms of allotment or otherwise by calls as the Board shall think fit"*. Pursuant to Clause 2.1 of the Articles of Association, the Board may undertake any of the following:

"(a) exercise the power of the company to issue shares or grant rights to subscribe for, or convert any security into shares in accordance with Section 291 of the Law.

(b) issue shares of different types within the meaning of section 277 of the Law of shares of different classes, and the creation or issuance of any such shares or any additional shares ranking equally with an existing type of class of shares deemed not to vary the rights of any existing member.

(c) subject to sections 343 and 348 of the Law convert all or any classes of its shares into redeemable shares.

(d) issue shares which have a nominal or par value.

(e) issue shares of no par value.

(f) issue any number of shares they see fit.

(g) issue fractions of a share within the meaning of section 280 of the law".

381. The Presiding Judge directed the Jurats that Section 291 of the Companies Law provides for the powers of directors to issue shares. Section 295(1) of the Companies Law provides that before a company issues shares under Section 291, the board of directors must decide the consideration for which the shares will be issued and the terms on which they will be issued and resolve in its opinion the consideration for and terms of the issue are fair and reasonable to the company.

382. The Jurats found, on the evidence, that the Directors acted in accordance with Clause 5(1) of the Memorandum of Association of AHL and with Clause 2.1 of the Articles of Association. They concluded that when the shares were issued, AHL had no need of additional capital and

that there was no ready source of additional funds. They also found that the business of AHL and its subsidiaries was being adversely affected by the lack of response from the Plaintiff to AHL and its subsidiaries to various requests made to him by AHL employees and its subsidiaries for signatures and for information required for operational purposes. In light of these circumstances, which prevailed when the shares were issued, the Jurats concluded that the Directors were justified in their conclusion that the shares were issued at a price which was fair and reasonable to AHL.

383. The Presiding Judge directed the Jurats that the duties of a Director are (i) to act in good faith; (ii) to act for proper purposes; (iii) to exercise independent judgment; (iv) to avoid conflicts of interests and (v) to act with reasonable skill, diligence and care (*Carlyle Capital Corporation Limited*). On the duty to act for proper purpose, the Presiding Judge directed the Jurats on the judgments in *Isaac v Tan & Anor* and on *Howard Smith v Ampol* and directed them that she preferred the submissions of the Defendants in relation to both judgments. The Presiding Judge also directed the Jurats that she accepted the Defendants' submission that *Fountain Street Developments Limited*, namely that that case related to a different type of application – an application for the compulsory winding up of a company - and that the facts in that case were distinguishable to the present case.
384. The Jurats found on the evidence that the Directors were concerned that the delays caused by the lack of responses from the Plaintiff were a threat to the business of AHL and its subsidiaries and that action needed to be taken to remedy the problem in the short term. The Jurats considered that the Directors were justified in holding this view. The Jurats found that the Directors took legal advice before issuing the additional shares to the First Defendant. They were satisfied that the Directors believed that the issue of the additional shares to the First Defendant was the only viable short-term solution and that they were justified in taking this view. The Jurats found that the additional shares were issued to the First Defendant for the purpose of protecting the business of AHL and its subsidiaries. The dilution of the Plaintiff's shareholding to below 25% was the mechanism by which this was achieved and there was no intention to transfer value from the Plaintiff to the First Defendant. The Jurats found that the undertakings given by the Directors and AHL were sufficient to ensure that the value was not transferred from the Plaintiff to the First Defendant.
385. The Jurats found that the Plaintiff's preferred solution, namely the purchase by the First Defendant of sufficient of his shares at their 'market value' would not have provided any additional capital to AHL or its subsidiaries. Instead, it would have encumbered the First Defendant with additional debt and therefore would have meant that he was less able to inject additional capital to AHL and/or its subsidiaries in the event that the enforcement action then being undertaken by the GFSC resulted in AHL and/or subsidiaries requiring additional capital. They also found that it would not have been feasible within the requisite time period.
386. The Jurats considered all of the separate allegations of breaches of the Directors' duties and they came to the conclusion that the Directors of AHL had satisfied the fiduciary duties that they owed to AHL at all times. They were satisfied on the evidence that the Directors had taken legal advice on the Share Issue and had acted on foot of that legal advice. They accepted that the Directors had acted for proper purpose, namely the protection of the business. The steps they took were necessary steps that had to be taken in order that the business would continue to thrive.
387. The Jurats were satisfied that there was no breach of the duty to act in the best interests of the company. They accepted the evidence of the Defendants that Mr Domaille recused himself from the Board meeting before the dilution decision was made. There was no requirement for

negotiation with Mr Domaille as the Directors were not seeking to raise capital. The Jurats found that there was no breach of the duty of skill and care in the reaching of the value of £260k. The KPMG report was not relevant to the dilution as it related to the sale of shares. For the reasons set out above, the Jurats were satisfied that the value of £260k was fair and reasonable to the company in light of the circumstances that prevailed at the time of the dilution. Protections and undertakings were put in place. The Jurats found on the evidence that Mr Domaille had not failed in his duties to avoid a conflict; he recused himself from the Board meeting when the dilution decision was made.

388. In relation to the alternative option suggested by the Bank of New Zealand namely that the Bank would proceed with the opening of the bank account on receipt of a completed and signed form by an acting Director of Artemis Corporate Services Limited on Mr Sinclair's behalf (as suggested in Ms Jessica Edwards' email to Mr A), the Jurats accepted Ms Guillou's evidence that the proposal contained in that email was not a solution, that she had agreed with Mr Domaille that if they had approached their Head of Risk and Compliance with this as a suggestion there was not a possibility that this would be an acceptable course of action for them to take. They further accepted Ms Guillou's evidence that she was reminded of an email from Mr Sinclair in December 2020 in which he specifically forbade his information to be shared with any third party in relation to this matter. The Jurats found that Ms Guillou was justified in her conclusion that she did not consider it appropriate to raise the matter with the Board meeting as a solution to the Bank of New Zealand matter.
389. The Presiding Judge directed the Jurats that a company may be considered a quasi-partnership in circumstances where it exhibits some or all of the features as described by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at paragraph 379[F]:

"The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an Association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a preexisting partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

390. The Jurats found that it was not clear on the evidence if the Plaintiff and the First Defendant had ever been in a quasi-partnership. They were, however, satisfied that had there been a quasi-partnership, it was not in existence since 16 July 2019 when the Plaintiff ceased to be a Director of AHL.
391. Consequently, the Jurats found that the Defendants had acted entirely in accordance with the Memorandum and Articles of Incorporation which govern the sophisticated relationship between the parties. The Directors had not breached their fiduciary duties. They acted for proper purpose. There was no quasi-partnership at the date of the dilution.
392. The Jurats, therefore, concluded that the dilution was not unfair to the Plaintiff.
393. The sixth question is: was the dilution of the Plaintiff's shares prejudicial to the Plaintiff?
394. The Presiding Judge directed the Jurats that prejudice suffered to the shareholder can be either economic in nature or non-economic (*Coroin Limited (No 2)* [2012] EWHC 2343 (Ch)).

395. The Jurats found that undertakings were in place and they accepted the Defendants' evidence that they were bound by those undertakings. They were satisfied that there was no intention to transfer the economic benefit of the asset from the Plaintiff to the First Defendant and that the undertakings were sufficient to ensure that economic benefit of the asset was not transferred from the Plaintiff to the First Defendant. The Jurats accepted the Defendants' evidence that they were bound by the minutes and by the undertakings. The Jurats were satisfied that the dilution of the Plaintiff's shares was not prejudicial to the Plaintiff.
396. The seventh question is: was the dilution of the Plaintiff's shares in the best interests of the Fourth Defendant?
397. The Jurats found that the dilution of the Plaintiff's shares was in the best interests of the Fourth Defendant. They accepted the evidence on behalf of the Defendants that the operational difficulties caused by the Plaintiff's lack of cooperation was causing grave harm to the company and that one client had threatened to terminate its relationship with the Fourth Defendant.
398. In light of the findings of the Jurats above, it is unnecessary for them to determine the eighth question (If the answer to question 6 and/or 7 above is yes, were the First to Third Defendants in breach of their duties in causing/permitting the dilution to take place?).
399. The ninth question is: was the Fourth Defendant required to follow a specific methodology for the issue of the new shares? The Jurats were satisfied on the evidence that no specific methodology was required and they found that the Plaintiff had conceded that no formal valuation was required.
400. The tenth question is: was the valuation methodology adopted for the issue of the new shares for the dilution fair and reasonable? The Jurats were satisfied on the evidence that the Defendants had taken legal advice and that this was not a third-party commercial transaction.
401. The eleventh question is: was the valuation determined for the issue of new shares for the dilution fair and reasonable? The Jurats found on the evidence that the valuation determined for the issue of the new shares for the dilution was fair and reasonable to the company.
402. In light of the findings of the Jurats above, it was not necessary for the Jurats to reach a determination on the remaining questions. For completeness, they were:

As of the date of the dilution, was the Shareholder Agreement, as defined within the Cause, binding on the Defendants or any one of them?

If the answer to the question as to whether the at the date of dilution the Shareholder Agreement as defined within the Cause is binding on the Defendants or any of them is yes, have the Defendants, or any of them, breached the terms of the Shareholder Agreement?

What was the value of a 49.27% interest in the company at the time of the Dilution?

What is the value of a 49.27% interest in the company at the date of the trial?

Has the Plaintiff been responsible for any wrongdoing which would make it unfair to make an award to him?

If relevant, will making an award place the Fourth Defendant in a precarious position (and the First Defendant?)

If the Dilution was unfairly prejudicial and/or committed in breach of the First, Second and Third Defendants' duties, should the valuation of the Plaintiff's interest be ascertained as at August 2021 (the date of the dilution) or the date of the trial?

If the First – Third Defendant have acted in breach of their duties, what level of damages should they, and if separately each of them, pay to the Fourth Defendant, if any.

403. Similarly, it was not necessary for the Presiding Judge to decide on whether the unagreed question should be determined by the Jurats. Again, for completeness that question was:

If the Jurats find the Defendants had taken all steps to ensure that no prejudice was suffered by the Plaintiff (yet still find that the issuance of the new shares was unfair and prejudicial conduct), is it fair and proportionate to grant any of the relief sought?

The Derivative Action

404. The derivative action has not been pleaded in the Cause. In any event, in light of the conclusions of the Jurats set out above, for completeness the Presiding Judge determined that there is no basis for the derivative claim.

Conclusion

405. In light of the findings of the Court, there is no basis for the unfair prejudice claim and there is no basis for the derivative action. Accordingly, the Court dismisses the application. The Court shall hear from Counsel on the form of the Order and on costs.