IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 145 OF 2022 (RPJ)

IN THE MATTER OF SECTION 64 OF THE COMPANIES ACT (2022 REVISION)
AND IN THE MATTER OF THE AVIVO GROUP

Appearances:	Mr Francis Tregear KC instructed by Jonathon Milne and Spencer Vickers of Conyers Dill & Pearman LLP on behalf of the Applicant Ms Clare Stanley KC instructed by Barnaby Gowrie and Siobhan Sheridan of Walkers (Cayman) LLP on behalf of the Company
Before:	The Hon. Raj Parker
Heard:	21 September 2022 and 26 October 2022
Date of decision:	26 October 2022
Draft Reasons circulated:	30 November 2022
Reasons delivered:	16 December 2022

HEADNOTE

Appointment of inspectors by the Court-s.64 Companies Act (2022 Revision)-threshold-likelihood of fraud, grave mismanagement and/or misconduct, or concealment clearly established on the evidence-discretion-objective of an order for appointment of inspectors-alternative remedies

Introduction

1. Agricultural Development Fund ("ADF" or the "Applicant") seeks an order that David Martin Griffin and Andrew Richard Morrison of FTI Consulting (Cayman) Limited be appointed pursuant to section 64 of the Companies Act (2022 Revision), as inspectors for the purposes of examining the affairs of Avivo Group ("the Company").

The parties

2. ADF is a US$5.3 billion government credit institution which is based in the kingdom of Saudi Arabia. It specialises in funding various agricultural activities in Saudi Arabia.

3. In December 2016 and January 2017, ADF invested in the Company in two tranches of US$90,000,000 (2016) and US$10,000,000 (2017). It invested following discussions with Mr Pinkush Aggarwal of Al Masah Capital Management Limited ("AMCML"), which is incorporated in Dubai.

4. Its investments took the form of two subscriptions for shares in the Company and by January 2017, ADF had acquired 33,571,500 shares although it is registered as the holder of a slightly smaller number (33,571,429) of shares. It holds about 20% of the Company's total outstanding issued shares.

5. This gives it the necessary threshold for the purposes of an application under section 64 of the Companies Act for the appointment of inspectors in respect of the affairs of the Company.

6. The Company was established in 2011. It is affiliated with AMCML and AMCML's parent company Al Masah Capital Limited ("AMCL"), which is a Cayman Islands exempted company.

Regulus

7. The Company, AMCML and AMCL are also related to Regulus Capital Limited (which was formerly named Al Masah Partners Limited) ("Regulus"), which has been acting in the role of the Company's Investment Manager ("IM") since 28 January 2016. [1] The Company, AMCML, AMCL and Regulus had or have had interlinked directors and officers.

8. The IM and the Company are linked through the Company's Articles of Association. The IM has a very strong constitutional position which can be seen as follows:

a) The IM holds a Management Share which entitles it per Article 13 to a distribution equivalent to 2% of the Company's subscribed capital if it waives its 2% management fee;

b) The minimum number of directors of the Company is four. Regulus MENA Growth PE Fund LP (the "Regulus Shareholder") is entitled to appoint all of the directors to the Company per Article 89;

c) The Regulus Shareholder also has the power to remove all of the directors of the Company, as well as the Chairman of the board of directors – Articles 89-91;

d) No meeting of directors is quorate unless a majority of the directors present are "Regulus Directors" i.e., directors appointed by the Regulus Shareholder so that Regulus-affiliated individuals will always have a majority in board meetings; and

e) Ordinary shareholders, such as ADF, have no power to remove the IM; a simple majority of directors (which majority shall include all "Regulus Directors") can pass a resolution for the IM's removal or the termination of the Investment Management Agreement ("IMA") – Article 115.

[1] Prior to this the IM was Al Masah Capital which is in liquidation

Shareholder rights

9. In addition, the Articles do not give any shareholder (even a shareholder who has the ability to appoint its own director) the right to inspect the Company's accounts and books of the Company. This again is a matter of contract reflected in the Articles agreed by ADF when it subscribed for shares in the company.

Article 136 provides:

> *"The Directors may from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the Company or any of them shall be open to the inspection of Shareholders not being Directors, and no Shareholder (not being a Director) shall have any right of inspecting any account or document of the Company except as conferred by law or authorised by the Directors or by Ordinary Resolution*".

10. However, ADF has at all material times had its own appointee as a director on the board of the Company: first, Mr Al Sahali, and more latterly Mr Albayyat. ADF through these directors has had the right to inspect all of the Company's books of account by virtue of Art. 135 which provides:

> *"The books of account shall be kept at the Office, or at such other place or places as the Directors think fit and shall always be open to the inspection of the Directors".*

The corporate background

11. The Company was established to invest in businesses in the healthcare industry. The Company, through subsidiaries incorporated in the United Arab Emirates ("UAE"), owns premium medical practices offering a wide variety of specialised healthcare services in the UAE. Relevant subsidiaries in this case are Conceive the Gynaecology Centre DMCC and Conceive Gynaecology

and Fertility Hospital LCC (together "Conceive"), UAE companies which are jointly owned with a person by the name of Dr Pankaj. The Company has a majority (57.5%) shareholding in Conceive.

The Dubai regulatory proceedings

12. The education investment company, Al Najah Education Limited ("ANEL"), was investigated by the Dubai Financial Services Authority (DFSA) in connection with, among other matters, misleading and deceptive communications to investors in relation to fees charged and the alteration of a bank statement to conceal the payment of placement fees from auditors. The investigation involved a number of individuals, one of whom, Mr Singhdeo remains a director of the Company.

The Company Directors

13. The present directors of the Company are:

(1) Mr Najjad Ahmad Zeenni, who is also the Chairman of the Board of Regulus. Mr Zeenni has been a director of the Company since 12 December 2016.

(2) Mr Nrupaditya Singhdeo, who is a Regulus Director- has been a director: between 7 February 2011 – 29 November 2016, and from 11 October 2018 to date. There is criticism by ADF of Mr Singhdeo arising out of regulatory proceedings in the UAE mentioned above.

(3) Mr Kiran Kumar Varri, who is a Regulus Director, and has been a director since 17 August 2021. Mr Varri is also a director of ANEL.

(4) Mr Satish Kumar Gopinathan, who is a Regulus Director, and has been a director since 17 August 2021.

(5) Mr Suhaib Samir Asad Almabrouk, who is a director representative of another shareholder of the Company – QFB Healthcare Limited. He has been a director since 12 October 2020.

(6) Mr Maher Mansour A Albayyat ("Mr Albayyat"), who was appointed a director on 6 June 2022 as a representative of ADF.

Matters which give rise to the application

14. After investing US$100,000,000 in the Company, ADF became concerned about a number of matters[2]. Of particular concern was the relationship between the Company and the IM. ADF's lawyers, wrote on 22 April 2022 (the "22 April Letter") to the IM (copied to the Company) to raise and allege the following matters of serious concern:

a) The IM (which had directors who were also directors of the Company)[3] was invoicing the Company for management fees while providing no apparent management services;

b) The making of the decision to enter into the IMA with the IM;

c) How it had come about that the Company had appropriated AED 7m (approximately USD1.9m) from a company called Conceive Gynaecology and Fertility Hospital ("Conceive") as part of a "pooling" arrangement in order to support poorly performing assets; and

d) Whether a share buy-back (the decision as to which was, under the Articles, within the control of the (then appointed) Regulus Directors) was in the interests of the Company and/or shareholders as a whole.

[2] Mr Alqarni says at §14 of his affidavit "*As Mr Agarwal should know, over the course of the last four years, ADF has conveyed its concerns to the Company time and time again. ADF has met with Regulus Capital and the Company countless times, both in person and by telephone. ADF has expended huge resources and spent many hours explaining its concerns, including concerns in relation to lack of independent scrutiny, extortionate management fees for no apparent work product and incomplete or unreliable information".* See also §§ 27-36 of Alqarni 1.

[3] For example, Mr Singhdeo and Mr Zeeni are both directors of the Company and the IM. .

15. The letter concluded with an invitation by ADF to Regulus to discuss with ADF "*a change in approach with respect to the manner in which Management Fees are charged under the IMA, as the current fee structure is no longer workable given the financial condition of Avivo. ADF would like to discuss a merit-based approach, where fees are paid to Regulus as a percentage of profits actually earned by Avivo in each financial year.*"

16. There was no response from the Company, the reasons for which the Company explains in its evidence[4]. The IM responded three weeks later but the response did not satisfy ADF's concerns.

17. Attorneys for the parties continued to correspond. At one point the Company said through its attorneys:

> *"…the Company…is therefore prepared to support the appointment of independent directors to the Board, including Mr Griffin and Mr Morrison (being the proposed inspectors)…The Company also proposes that a sub-committee of the Board be established comprised only of members of the Board independent from the Company and/or Regulus (namely, the ADF Director, the QFB Director, Mr Morrison and Mr Griffin (if appointed) which shall be charged with resolving the matters in dispute".*

18. The matter was not resolved and by August 2022 ADF's concerns, following a hearing on 2 August 2022, were particularised further into the following six issues:

a) Solvency;
b) The role of the IM;
c) The "pooling" arrangement and how it came to be put into place;
d) The findings made by the DFSA about Mr Singhdeo who was a director of the Company and had been a director of ANEL;
e) The share buy-back transaction; and

[4] Email 18 June 2022 and Mr Agarwal's First Affidavit at §§15, 18, 21

f) Potential breaches of the Articles in that certain personnel were not in the positions with the Company that were required under the Articles.

Parties' contentions

ADF's submissions

19. Francis Tregear KC appeared for ADF.

20. He submitted that ADF has tried to obtain information over the years. Negotiation as to a practical way forward without the need for the appointment of inspectors had failed. This failure, he said, is due largely to (i) the attitude of the Company and (ii) the peculiar structure of the Company in which effective structural power is given to the IM and other Regulus-affiliated parties to frustrate any attempt by unaffiliated directors or shareholders to examine properly the issues that concern ADF. This he submitted is a highly unusual relationship.

21. The application is made for the simple reason that ADF has concerns which have not been properly addressed and which affect and have affected its interests as an investor (as well as those of other investors). It has very real concerns about the corporate governance of a company in which it has invested US$100m.

22. ADF has been left with a position where effectively nothing can happen within the Company that is not approved by the IM. There is no independence exercisable in or by the Board and the IM is embedded and irremovable.

23. ADF does not know how the IMA came to be agreed in the way that it was, where the IM has effectively a majority on the Board and the IMA can never be terminated unless the IM agrees to its termination. It does not know how that could have been agreed to be in the best interests of the Company.

24. The Investment Manager is entitled to a 2% management fee and an incentive fee. ADF is concerned by the lack of transparency and by the appearance of conflict. There are also concerns about the share buy back, a pooling arrangement, and solvency all of which provide a good reason for the appointment of inspectors. He submitted that they are well founded concerns.

25. He submitted that there is no collateral purpose, as has been suggested by Mr Agarwal (the CFO of the Company). ADF's concerns are real and genuine. ADF's motivation is to resolve the problem of an irremovable IM where there is no evidence as to what the IM is doing and clear evidence of what it is charging which has resulted in a considerable debt between the IM and the Company. It is clear that no independent examination of the IM can be reached by agreement with these structural arrangements in place.

26. He also pointed out that contrary to what Mr Agarwal suggests in his affidavit, the appointment of inspectors is not necessarily the precursor to or a proxy for the appointment of a provisional liquidator. It might be or it might not be. It is a far less invasive remedy than the appointment of a provisional liquidator. The terms of section 104 and the conditions that have to be satisfied before a provisional liquidator is appointed are very different from the terms of section 64, which gives the Court a wide-ranging discretion.

27. He referred to the fact that the combination of seeking the appointment of a provisional liquidator and a winding-up order has accurately been described as a "nuclear" option which may destroy the company – see *Seahawk China Dynamic Fund (Cause No. 23 of 2022 (DDJ*)). In such a case, the Court will be astute to determine whether the petitioner has less drastic options. In fact, in *Seahawk*, the Court concluded that there were other options, such as an exit by redemption together with separate litigation in Hong Kong. Therefore, the provisional liquidators were discharged and the winding up petition was dismissed as an abuse of process.

28. Here, he submitted that ADF has no option to exit. The Regulus Directors control redemptions and subscriptions to the Company. ADF has elected not to present a winding up petition and apply for

the appointment of a provisional liquidator[5]. Instead, it has reached for the lesser remedy which is provided in the Cayman Islands of applying for the appointment of inspectors.

29. He referred the Court to in *the Matter of Fortuna Development Corporation*[6] where a petitioner presented a winding up petition, but instead of appointing provisional liquidators the Court appointed inspectors. This was on the basis that such an appointment was a less intrusive step.

30. As to the admissibility of the DFSA and FMT findings, (in response to a point taken by the Company) Mr Tregear KC submitted that the Court is not, for the purposes of this case, charged with having to decide the issue as to whether Mr Singhdeo acted dishonestly as a director of ANEL or whether he is a fit and proper person. This Court is considering whether ADF has made out a case for the appointment of inspectors, although this matter is relevant background.

31. In this regard, together with the other evidence advanced, Mr Tregear KC submitted it is plainly relevant in considering issues of proper corporate governance, that one of the Company's directors has been found to have acted dishonestly and not to be a fit and proper person. He submitted that the weight to be attached to these obviously relevant facts is a matter for the Court. It is unreal to argue that the Court must take no account whatever of it when considering ADF's complaints as to the conduct of the affairs of the Company under the direction of, among others, Mr Singhdeo.

32. Mr Tregear KC submitted that although ADF's concerns revolve around discrete aspects of the conduct of the affairs of the Company, there is a unifying factor. All of ADF's concerns spring from a lack of attention to vital aspects of good corporate governance. They all betray a disregard for the interests of investors and a meticulous regard for the interests of affiliated parties such as the IM who are expensive, unproductive, and irremovable.

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[5] As can be seen from paragraphs 63 – 80 of the *Seahawk* judgment there is a degree of uncertainty as to whether the need for an investigation is a self standing sole ground for a winding up order. Accordingly, given that an independent investigation is the priority, this is another reason submitted by Mr Tregear KC that an inspector application under section 64 is the more reasonable and appropriate course.

[6] Although ADF has been unable to locate any written reasons, the Orders made by Levers J are described in the subsequent judgment of Henderson J at pages 2 and 3 Henderson J also confirms that: "*the petitioner asked Levers J of this Court to appoint provisional liquidators; she was persuaded not to take that step, but appointed inspectors under section 64 of the Law.*"

33. Mr Tregear KC submitted the available evidence[7] showed that by ADF's calculations about 40% of the 165 million shares which Mr Agarwal says are outstanding[8] are held by shareholders who are in favour of the appointment of inspectors in addition to ADF.

Company's submissions

34. Ms Clare Stanley KC appeared for the Company.

35. She argued that none of the matters raised in ADF's six particulars even get close to the threshold needed for the Court to consider appointing inspectors.

36. The Company has been completely transparent with ADF; it has answered its substantive queries raised by the 22 April Letter, and has responded in evidence when further points have been raised. It has offered to meet with ADF, and it has offered to put additional directors in place to report on ADF's concerns.

37. Mr Al Sahali and Mr Albayyat have never been denied access to the Company's books and records; the unchallenged evidence is that ADF's nominated director has been provided with and had access to all information made available to the Board regarding the conduct, management and operation of the Company (from at least 3 August 2017) and all the information made available to the audit committee in respect of financial reporting and related internal controls, risk and compliance[9].

38. Further, it is also unchallenged evidence that ADF's nominated director attended all but a handful of meetings of the Board from May 2017, and audit committee meetings of the Company, has been privy to every decision of the Board, and has had access to all related Board materials, Board packs, minutes of meetings of the Board, financial statements and accounts[10].

[7] Alqarni 3
[8] Agarwal 4
[9] Agarwal 2 at §18
[10] Agarwal 1 at § 10

39. This is the antithesis of a case where the Company is actively concealing matters from shareholders. But even if it had been (which it has not), the Company would be well within its legal rights to do so because of the terms of Art. 136 which restrict the shareholders' rights to see the Company's books and records.

40. The Company offered, at the very outset of the proceedings, to support the appointment of new independent directors. ADF rejected that offer out of hand. The Company has more recently offered again to support (and confirmed that Regulus Shareholder has agreed to appoint) Mr Morrison or Mr Griffin as an independent director for the purposes of enabling a report to be prepared on agreed issues. That offer has also not been accepted by ADF.

41. Ms Stanley KC submitted that the appointment of another (ADF already having its own representative on the Board) independent director specifically to report on the issues that ADF claims to be concerned with was reasonable and should have been accepted.

42. The appointment of inspectors (especially in the exceptionally wide terms sought by ADF) would be entirely disproportionate; to use the vernacular, it would be using a 'sledgehammer to crack a nut'.

43. There is no "fraud" or "mismanagement" or deliberate "concealment" which necessitates the protection of the shareholders. There is a highly qualified Board who understand their fiduciary duties and are complying with them.

44. The Motion for the appointment of inspectors has already attracted some publicity and is likely to give rise to severe reputational damage for the Company.[11] The costs of an inspectorship are likely to be very significant indeed, which should not in any event be for the Company to bear.

[11] Agarwal 2 at §99

The law

Sections 64, 65 and 66 of the Companies Act provide:

> **"64. Appointment of inspectors to report on affairs of companies**
>
> The Court may appoint one or more than one competent inspectors to examine into the affairs of any company and to report thereon in such manner as the Court may direct…
>
> > (b) in the case of any other company having a capital divided into shares,
> > upon application of members holding not less than one-fifth of the shares of the company for the time being issued…
>
> **65. Powers of inspectors**
>
> It shall be the duty of all officers and agents of the company to produce for examination by an inspector all books and documents in their custody or power; any inspector may examine upon oath the officers and agents of the company in relation to its business, and may administer such oath accordingly; and any officer or agent who refuses or neglects to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, shall incur a penalty not exceeding forty dollars in respect of each such offence.
>
> **66. Report of inspectors**
>
> (1) Upon the conclusion of the examination, the inspectors shall report their opinions to the Court.
> (2) Such report shall be filed by the Clerk of the Court, but shall not, unless the Court so directs, be open to public inspection.
> (3) All expenses of and incidental to any such examination and report shall be defrayed by the members upon whose application the inspectors were appointed, unless the Court

shall direct the same to be paid out of the assets of the company, which it is hereby authorised to do."

45. A few basic matters can be derived from the Cayman statute.

46. The Court (or the Company by special resolution[12]) has the statutory power to appoint inspectors upon application by a requisite number of shareholders.

47. As can be seen from s.66, once the inspectors have completed the examination, they must report to the Court (not the applicant), and the default rule is that the report is not open to public inspection.

48. The inspector's report is admissible in legal proceedings as evidence of the "opinion" of the inspectors in relation to any matter contained in the report[13].

49. Further, the costs and expenses of such an exercise are to be paid by the members on whose application the inspectors were appointed.

50. Aside from these basic matters there are no reported authorities in Cayman which touch on the critical question which arises on this application: the proper approach to the exercise of the Court's power under the relevant provisions.[14]

51. The Court has been assisted in this regard particularly by Ms Stanley KC's exposition of relevant authorities from England, New Zealand, Canada, South Africa, Hong Kong and Ireland. It is not necessary to set these out in detail in this decision (which would greatly add to its length), but I have referred to certain of them as and when necessary.

52. In particular, the Court has been referred to and considered:

[12] Section 67 Companies Act
[13] Under Section 68 of the Companies Act-see also *Gasco* [1984] 1 WLR 271 per Peter Gibson J where it was decided that the inspectors report was not admissible as evidence of fact
[14] After the hearing of this matter Counsel referred the Court to the very recent decision of Segal J *In the matter of Unicon Holdings* 21 November 2022. The Court did not think it appropriate, having reviewed the decision, to allow any further written submissions .

English legislation

Sections 56 to 61 of the Companies Act 1862

Section 135 of the Companies Act 1829

Sections 42 to 43 of the Companies Act 1947

Section 165 of the Companies Act 1948

Sections 431 to 432 of the Companies Act 1985

English case law

In re Miles (no 2) [1948] WN 178

Savings and Investment Bank v Gasco [1984] 1 WLR 271

New Zealand legislation

Sections 90 to 91 of the Companies Act 1882

New Zealand case law

In re Mercantile Finance (1893) 12 NZLR 248

Canadian case law

In re Town Topics [1911] MJ 9 No. 9

Re Automatic Phone Recorder (1955) 15 WWR (ns) 666

South African case law

Nafte v Allied Minerals Ltd 1966 (3) SA 94

Sage Holdings v Unisec [1982] 1 WLD 337

Hong Kong case law

In the matter of San Imperial HCMP 179/1978

Irish legislation

Section 8 of the Companies Act 1990

Sections 747 to 748 of the Companies Act 2014

53. The Court has been careful to identify the different statutory regimes and language used therein in the particular jurisdictions at the particular times before reading the foreign decisions across too closely. Nevertheless, they have been useful in identifying relevant principles.

54. The origins of the jurisdiction trace back to the 19th century in England. The evolution of the power to appoint inspectors in England was originally a matter for the Board of Trade, not the Court.

55. A 'good reason' for the appointment (language provided for in the legislation) needed to be established, which was a threshold issue before any discretion came into play[15].

56. The inspectors would originally report to the Board of Trade (not the Court) and the powers and duties of the inspectors were cast in wide terms. It would then be for the Board of Trade to decide what to do with the report.

57. The power in England was then enlarged in 1948 to allow for the Court to declare in appropriate cases that the Board of Trade should appoint inspectors (not that the Court itself could appoint them).

58. In addition to the Court making a declaration, Section 165 of the Companies Act 1948 provided that the Board may do so in circumstances which showed that: the business was being conducted fraudulently, for an unlawful purpose or where there was minority oppression to the members; or that persons involved in the management of the business have been guilty of fraud, misfeasance or other misconduct towards the company or its members, or its members have not been given all the information with respect to its affairs which they might reasonably expect.[16]

[15] '*The application shall be supported by such evidence as the Board of Trade may require for the purpose of showing that the applicants have good reason for requiring such investigation to be made and that they are not actuated by malicious motives in instituting the same.." s.57 Companies Act 1862.See also S.135 (2) Companies Act 1929 and s.431(3) Companies Act 1985. See also NZ Companies Act s.91.*

[16] See also s.432 (2) of the Companies Act 1985

59. An important distinction in the Cayman statute is that there are no threshold criteria suggested as to the circumstances when the Court might make an order, or as to the exercise of discretion for the Court's guidance. The matter has been left at large for the Court to fashion the applicable principles.

60. The inspectors' report under the Cayman statute is also a report to the Court, which is not automatically provided to the applicant shareholder, and which is not ordinarily open to public inspection.

61. In order to derive some applicable principles as to how the Court should approach the matter, the Court was taken to the materials referred to above from other jurisdictions.

62. From these helpful authorities, particularly the well reasoned judgment of Goldstone J in *Sage Holdings*, the Court derives the following (non-exhaustive) principles when considering its approach under the Cayman statute, where the threshold and discretion is at large:

a) The appointment of inspectors is made on the basis of the facts presented in the particular case. The determination by the Court as to whether the facts are sufficiently serious to warrant such an order and whether the Court should exercise its discretion to appoint inspectors is a particularly fact sensitive issue, which will vary depending on the circumstances.

b) The Court should give effect to the plain words of the statute and not read into it words which would unduly restrict its operation. However, the appointment of inspectors is a serious step. The Court should balance the competing interests of the parties and exercise its discretion in a principled way.

As noted in the New Zealand case of *In re Mercantile Finance* the powers given to inspectors are extensive. In that case Denniston J was considering under the New Zealand Act whether the applicants had shown the court that they had good reason for requiring the investigation.
He said:

'Such extensive powers show that such an appointment is not to be made as a matter of right to every dissentient minority, but only upon evidence of suspicion of grave misconduct or mismanagement.'[17]

The reputational implications to the company can be very serious: see *Sage Holdings.*

c) Such an appointment is extraordinary, in the sense of being warranted only when it is right and appropriate to do so. The Canadian cases are helpful on this point.
Coady J in the Supreme Court of British Columbia in *Re Automatic Phone Recorder* said that the particular section being considered (which was similar to that considered in re *Town Topics*, see below):

'*… provides an extra-ordinary remedy applicable only in certain circumstances. It is not intended… to provide for a summary investigation into alleged wrongdoing by officers or shareholders of a company in relation to the company's affairs, when the information relating to such alleged wrongdoing has been disclosed by the company to its shareholders.*'[18]

The power should be exercised "*with caution, and only in cases clearly calling for its application*": see *Re Town Topics.* In that case Robson J in the Manitoba Court was considering a provision under s.81 of the Manitoba Companies Act which allowed the court, if it deemed it necessary, to appoint an inspector to investigate the affairs and management of a company and report back to the court.
He said:

"This intrusts a discretion which must be exercised judicially. In considering the application of the provision, it must be born in mind that the courts have ordinarily no visitatorial power over companies, and will, therefore, exercise such power

[17] At p 24
[18] P 667

when, as under this Act, it is given them, with caution, and only in cases clearly calling for its application".[19]

d) It is to be observed that the appointments of inspectors is not routinely made. This is reflected in the paucity of reported cases from the common law jurisdictions. There is no reported case in Cayman[20] which deals with the Court's approach in such cases. That does not mean the appointment should not be made in an appropriate case.

e) It follows that it is not appropriate for an examination to be ordered merely to satisfy disgruntled shareholders that there is no legitimate cause for complaint: *Nafte*; *Sage.* Nor should an appointment be made as a matter of right to a dissentient shareholder: *In re Mercantile Finance (above).*

f) It follows from all of the above that the Court will not lightly make an order which interferes with the internal management of a company without what I would describe as a compelling reason to do so. What is a compelling reason?

g) The authorities to which the Court has been referred suggest, and this Court agrees, that an order for the appointment of inspectors should only be made on a strong likelihood, well founded on a solid and substantial basis, of some grave misconduct or mismanagement which related to the management of the company: In the matter of *San Imperial (Hong Kong)*, *In re Mercantile Finance (New Zealand)*, *Nafte* and *Sage Holdings* (South Africa).

h) As to the evidential standard required, *In Miles Aircraft* Roxburgh J said that he conceived it to be his duty to satisfy himself that a *prima facie* case had arisen for investigation by the Board of Trade. However, that case does not, it seems to me, indicate that the *prima facie* test should apply in contested matters. The company had not opposed the motion before Roxburgh J.

[19] § 4
[20] The Segal J decision of 21 November 2022 referred to above came after the hearing of this matter.

In *Nafte,* de Wit JP faced with extensive affidavit evidence putting many facts in dispute decided that the provision (section 95 of the Companies Act 1926 as amended) should only be invoked when undisputed facts could be placed before the court pointing to the desirability of an enquiry by an inspector[21].

Similarly in *Sage* [22], Goldstone J said that

> *'The grounds which make it right or desirable to order an investigation should be undisputed or clearly established'.*[23]

This it seems to me is the right standard of proof required on such an application. There needs to be shown a strong likelihood, well founded on a solid and substantial basis, of serious misconduct and/or mismanagement, or concealment.

A mere "feeling" that something is wrong or that there might be something that is dishonest or improper will not suffice: In the matter of *San Imperial.*

i) An important consideration is whether the applicant has sought an explanation from the directors and have been denied one and/or whether the directors have concealed facts from the shareholders.

j) An order for inspection can be a useful and important tool where the company's management have put themselves beyond the reach of the shareholders: *Sage Holdings.*

k) The power should not be exercised where there is a suspicion that a director or shareholder has been guilty of criminal conduct not clearly related to the affairs of the

[21] p95
[22] p338
[23] *Buckingham v Combined 1961 (3) SA 94*:'need or desirability" was the test

company; that is a matter for the police/prosecuting authorities: *Nafte* and *In the matter of San Imperial.*

l) The power should only be exercised where some object is likely to be achieved, for example,where the investigation might lead to a winding up or where steps may be taken to recover damages or property for the company: *Nafte*, *Sage Holdings.*

In Nafte, dismissing the application, *de Wit JP* said:

> "….. *In my opinion the court should only act if it is satisfied that some object is likely to be achieved eg the enquiry may lead to the winding up of the company …or when steps may be taken for recovery of damages or property by the company. In the present case it is suggested that an enquiry may lead to the repudiation of a contract entered into by the respondent allegedly to its prejudice*.....'

m) The Court should satisfy itself that the application is genuine (not made for a collateral or improper purpose) and that the remedy of appointing inspectors is appropriate and proportionate in all the circumstances.

n) The Court should take into account the weight of shareholder support for the application, but this is not a determinative factor.

o) The Court should have regard, in the exercise of its discretion, to whether the applicant has other available remedies.

Decision

63. This application is in effect the trial of the issue as to whether inspectors should be appointed. Much of the evidence put forward by ADF is disputed by the Company. Since no live witness evidence has been called by the parties, the Court is in no position to test the voluminous written evidence

submitted on affidavit. I have concluded on the evidence that the basis for an appointment has not been clearly established by ADF.

64. As such I bear in mind the dicta of Rimer J in *Long v Farrer [2004] EWHC 1774 Ch at §57:*

> *"It is, I believe, by now familiar law that, subject to limited exceptions, the court cannot and should not disbelieve the evidence of a witness given on paper in the absence of the cross-examination of that witness. The principle has traditionally been stated in relation to statements made under oath or affirmation, but it was not suggested to me that it does not apply equally to a witness statement."*

65. Unless contemporary documents plainly contradict the affidavit evidence or where it is inherently unbelievable, the general position is that the Court does not form concluded views on disputed facts. This does not mean that a material dispute on the facts will always rule out an order for inspection. There may be exceptional cases which might justify a different result.

66. In this case, Mr Agarwal's second affidavit [24] deals in detail with the concerns expressed by ADF regarding the conduct, management, and operation of the Company[25]. The Court, absent hearing his evidence live and tested, and despite having reviewed in detail Mr Alqarni's responsive affidavit[26], is in no position to disbelieve Mr Agarwal's account on the issues.[27]

67. As such the Court has concluded that the grounds which would lead to an order for inspection have not been clearly established. ADF has in addition not shown that concerns have been ignored or that the Company has concealed material matters.

[24] 24 August 2022
[25] Expressed in Alqarni 1 including: the company's financial position; management fees and role of Regulus; pooling; Mr Singhdeo and the DFSA decision notices and FMT decision; share buy back
[26] Alqarni 1, 5 September 2022
[27] The Court has also considered Balmain 1, 30 June 2022,

68. A failure of governance at the Company which would warrant an order for inspection has not been made out. The Board would seem to have on it a number of experienced directors with access to good professional advice [28].

69. Whilst the legislature in Cayman does not provide for shareholders to have freestanding rights to documents and information, perhaps for reasons of investor confidentiality, ADF has had its own nominated director on the Board since 2017. There is no evidence to show that the ADF nominee has been denied access to materials available to the Board or to the Company's records[29].The ADF director is also a member of the audit committee.

70. It seems to me that the Company has done its best to answer the substantive points raised in the 22 April Letter and has been reasonably forthcoming in answering ADF's concerns on affidavit. It has also in my judgment taken a reasonably constructive approach with regard to attempts to resolve this matter outside of this application.

71. When these attempts failed, ADF decided to press on and ask for an order for the appointment of inspectors in wide terms. It argued that if the remedy is not available on the facts of this case the conclusion would be drawn for investors in Cayman Islands companies that there was nothing in between a 'passive stance' and going for a more nuclear option (invoking the winding up jurisdiction of the Court) to address cases of poor corporate governance, compromised directors and embedded conflicts of interest.

72. The Court has carefully considered all of ADF's arguments and evidence. The correct approach to the wide discretion given by the Cayman statute is to balance the desirability of the remedy of inspectorship available in an appropriate case, and to ensure that the power is exercised only in a case which truly merits its exercise.

[28] Only Mr Singhdeo's integrity has been challenged as a result of the Dubai proceedings
[29] Agarwal 4 §13-15

73. In my judgment it is to be reserved for cases in which there is a strong likelihood, well founded on a solid and substantial basis, of serious misconduct and/or mismanagement, or concealment. That has not been clearly established by ADF on the evidence.

74. When it comes to considering the exercise of discretion once the threshold had been reached, there also needs to be an objective which the Court can see which would be achieved by such an order. That is also not sufficiently clear on this application, where there are alternative remedies available to ADF .

75. Depending upon the terms of such an order (which are for present purposes drawn widely), a report from the inspectors to the Court would no doubt provide extensive information, but it would be a matter for the Court (and possibly regulators and the Company itself) to decide what to do with it in the first instance.

76. Here ADF's central concern is the governance of the Company and the constitutional arrangements within the Company which have allowed the IM to have effective control and tenure. These have been in place for many years and ADF has had, through its nominated Board member, the ability to find out what has been going on. An order for inspection which might lead to or even force a renegotiation of these commercial arrangements is not an appropriate exercise of the Court's power.

77. Whilst ADF has pointed out in its evidence that there are arrangements at the Company which it and a number of other shareholders find highly unsatisfactory, it has not shown, to the requisite standard, serious misconduct and/or mismanagement or concealment. It is in the Court's view not appropriate to appoint inspectors to report in these circumstances.

78. In addition, ADF has a number of alternative remedies available to it, including: the so-called 'nuclear option' of invoking the Court's winding up jurisdiction; the appointment of provisional liquidators; by way of derivative action; *Norwich Pharmacal* relief; or for a declaration. It could pursue various direct claims concerning its allegations about the IMA and IM.

79. Absent any public interest in an appointment and a report to the Court, and no case clearly established on the evidence of grave misconduct and/or mismanagement or concealment, the application is refused.

THE HON. MR JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT