IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 247 OF 2022 (IKJ)

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

AND IN THE MATTER OF JUTAL OFFSHORE OIL SERVICES LIMITED

IN COURT

Appearances:	Mr Ben Valentin KC of counsel and Mr Bhavesh Patel of Travers Thorp Alberga, on behalf of Sanju Environmental Protection (Hong Kong) Limited (the "Applicant")
	Mr David Alexander KC of counsel and Ms Jessica Williams and Ms Catie Wang of Harneys for Jutal Offshore Oil Services Limited ("the Company")
Before:	The Hon. Justice Kawaley
Heard:	21 February 2023
Date of decision:	21 February 2023
Draft Reasons Circulated:	21 March 2023
Reasons Delivered:	30 March 2023

HEADNOTE

Notice of Motion for the appointment of Inspectors under section 64 of the Companies Act (2022 Revision) - exceptional nature of remedy

REASONS FOR DECISION

Background

1. By a Notice of Motion dated 2 November 2022, the Applicant sought, in addition to other ancillary relief, an Order that:

> "*1. Mr. Michael Chan of Kroll Hong Kong, Level 3, Three Pacific Place, 1 Queen's Road East, Hong Kong and Mr. Mitchell Mansfield of Kroll (Cayman) Limited, First Floor, The Harbour Centre 42 North Church Street, PO Box 10387 Grand Cayman KY1-1004 Cayman Islands be appointed as joint inspectors (the "Inspectors") pursuant to Section 64 of the Companies Act (2022 Revision) for the purpose of examining the affairs of Jutal Offshore Oil Services Limited (the 'Company') and reporting his findings and opinions to this Honourable Court.*"

2. The Applicant was the largest shareholder in the Company. Its affiants were both former directors of the Company until 27 May 2022 when the Applicant ceased to have any representation on the Board of the Company, which it had controlled prior to January 2021. At the time of the hearing the Company was actively trading as a listed member of the Main Board of the Hong Kong Stock Exchange ("HKEX"). Since losing control of the Board, the Applicant has issued at least two sets of proceedings in Hong Kong against the Company and/or its directors and requisitioned an extraordinary general meeting on 26 August 2022 in an unsuccessful bid to, *inter alia*, (a) appoint 2 new independent non-executive directors and 3 new executive directors, and (b) require the Chairman to report on the Company's financial position.

3. At the conclusion of the hearing on 21 February 2023, I dismissed the Notice of Motion and awarded costs to the Company. These are the reasons for that decision.

Governing legal principles

4. Sections 64 to 66 of the Companies Act (2022 Revision) provide as follows:

> "***Appointment of inspectors to report on affairs of companies***
>
> *64. 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 —*
>
> *(a) in case of a banking company having a capital divided into shares, upon the application of members holding not less than one-third of the shares of the company for the time being issued;*
>
> *(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; and*
>
> (c) *in the case of a company not having a capital divided into shares, upon the application of members being in number not less than one-fifth of the total number of persons for the time being entered on the register of the company as members.*
>
> **Powers of inspectors**
>
> *65. 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.*
>
> ***Report of inspectors***

66. (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."

5. There was no material dispute about the general principles governing the exercise of this jurisdiction, which it was common ground was exceptional in the sense that the Court would not without good reason appoint Inspectors. I was assisted by the two most recent decisions of this Court which counsel referred to. Firstly, in *Re Unicon Holdings Ltd*., FSD 33 of 2022 (NSJ), Judgment dated 21 November 2022 (unreported), where the section 64 jurisdiction does not appear to been the subject of extensive argument, but *In re Fortuna Development Corporation* [2004-05 CILR 197] was considered[1], Segal J held:

"*41. In my view, before appointing an inspector the Court needs to understand what is to be investigated (and examined) and why the applicant needs the information or opinions sought and to be satisfied that the applicant is properly entitled qua member to request that an investigation (examination) of the relevant subject matter be conducted by inspectors (in light of his/her rights and the conduct of the company). By properly entitled I mean that the applicant must show that he/she has a good reason for needing and a proper justification for obtaining the information and having an investigation (examination) conducted and will benefit qua shareholder thereby, and also that the appointment of inspectors is an appropriate way to obtain the information or assessment of the company's affairs sought. It may be that the applicant can show that the company is in breach of an obligation to provide information or documents to the applicant or that there is evidence or a reasonable allegation of a breach of duty by the company's directors or the commission of some other legal wrong (I would note the practice of the Board of Trade in the UK under the Companies Act 1948 in appointing inspectors when there were concerns*

[1] This case concerned inspectors who had already been appointed, not the appointment jurisdiction itself.

as to and evidence that directors had acted improperly). But I do not see, as presently advised, that such a breach or allegation of wrongdoing is a condition to the exercise of the power to appoint inspectors (but in the absence of a full citation of authority in the UK and other jurisdictions or evidence as to the history of the power to appoint inspectors, it is inappropriate on this application to seek to offer a full account of what needs to be established to justify the appointment of an inspector). Of course, the Court will take into account the cost and other implications of an appointment when exercising its discretion and will be unlikely to exercise the power to appoint if some alternative, less expensive and intrusive method for doing so is available.

42. I am satisfied that the Applicant has properly identified the subject matter and purpose of the proposed investigation to be conducted by the inspector; that such investigation is needed to enable her to establish the value of the Shares, the financial position of the Company and its subsidiaries and whether she should take any action as shareholder to protect the value, and her interests as a holder, of the Shares and to ensure that the Company is being properly managed by Mr. Pereira…

45. I am also satisfied that the Company's conduct justifies the appointment of an inspector. It is clear that the Applicant is entitled to have copies of at least some of the documents she has sought (although the question of the extent of her entitlement to information from the Company was not dealt with in depth in submissions) and that the Company's complete failure to respond to her requests for these documents and generally to her communications or to provide any information regarding its financial position or any (let alone a reasonable) explanation as to why the information requested was not being provided, and the recent discovery that the Company, in breach of its statutory obligations, no longer had a registered office, raised legitimate concerns regarding the conduct of the Company's management and as to its financial position, and the possibility that Mr. Pereira might be seeking to cut the links between the Company on the one hand and himself and the UAE Trading Entities who are in the UAE, on the other, called for an investigation…"[Emphasis added]

6. In appointing an Inspector, Segal J clearly was influenced by the factual matrix in which the company was established to facilitate the granting of a security interest to the applicant over the shares in the company to secure the payment obligations owed to her by her former husband as a

result of the divorce proceedings. Following the exercise of her security interest, the applicant held 50 % of shareholding in the company while her former husband held the other 50%. This was a world away from the commercial context of the present case.

7. Secondly in another case where a reserved judgment was delivered but the jurisdictional threshold appears to have been more fully argued by Leading Counsel, *Re The Avivo Group*, FSD 145 of 2022 (RPJ), Judgment dated 30 November 2022 (unreported), Parker J held as follows:

> "*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.'*

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.'

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

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 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.*

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.

Similarly in Sage, Goldstone J said that

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

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 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…*

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…

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." [Emphasis added]

8. There is no need for me to attempt any elaboration upon Parker J's cogent articulation of the principles applicable to the section 64 jurisdiction, which was based on a consideration of an array of persuasive Commonwealth authorities. In addition, the commercial context of *Re Avivo* also seemed not dissimilar to that in the present case. In the present case it seemed clear from the outset that the Applicant's central concern was its loss of control over the Board rather than any objectively substantive concerns justifying an investigation of the Company's affairs.

9. As far as how to approach the evidence, the Company's Skeleton Argument invited the Court to apply the following principles in the present case, which did not appear to be controversial:

"*80 In Long v Farrer114, Rimer J said the following:*

'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 and affirmation, but it was not suggested to me that it does not apply equally to a witness statement.'

81 Given the statement from Long v Farrar (which Parker J quoted), Parker J said the following in Avivo Group:

'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' ".

The Applicant's evidential case

10. The Applicant filed substantive evidence in the form of the First Affirmation of Gao Zhiqiang dated 19 October 2022 ("Gao 1") and the First Affirmation of Liu Lei dated 7 February 2023 ("Liu 1"). The latter deponent was Chairman of the Company between 10 June 2017 and 9 April 2020, and Vice- Chairman between 10 April 2020 and 27 May 2022 and is currently a director of "Sanju BJ"[2], a member of the Sanju Group. The first deponent was a director of the Company from 10 April 2020 to 27 May 2022. Sanju BJ acquired over 641 million shares in the Company in March 2017 for somewhere in the region of HK$ 750 million[3].

11. The Applicant's standing to seek relief under section 64 of the Act as the holder of 32.38 % of the Company's shares was not in dispute. It seemed obvious that following such a significant investment, management control and/or influence would be of some importance to Sanju BJ. Gao 1 addresses the following key matters relied upon in support of the application:

(a) the Hong Kong "570/2021 Proceedings" and the "First Hong Kong Injunction";

(b) Hong Kong "HCMP 823/2021" and the "Second Injunction";

(c) Hong Kong "HCMP 1612/2021" and the "Undertaking";

[2] Beijing Haixin Energy Technology Co., Ltd. (formerly Beijing Sanju Environmental Protection & New Materials Co., Ltd.)
[3] Sanju BJ's subscription for 641, 566,566 shares and Golden Talent's subscription for 161, 995, 555 shares were said to cost together HK$ 964, 272, 533.

(d) the removal of "Dissenting Directors";

(e) the Independent Auditor's Report;

(f) Profit Warnings;

(g) the EGM on 26 August 2022;

(h) the "August 2022 Results";

(i) the "Issuance of New Shares Resulting in the Dilution of the Applicant's Shareholding"

12. The First Hong Kong Injunction made by Justice Linda Chan on 17 May 2021 for reasons given on 27 May 2021 restrained the majority directors from issuing in excess of 164 million new shares before the 2021 AGM. The Second Hong Kong Injunction granted by Chan J on 11 June 2021 restrained the majority directors from proceeding with another share issue to staff before the AGM. The majority director's conduct was said to be improperly motivated by a desire to increase their faction's control over the Company and reliance was placed on findings recorded in Chan J's judgment.

13. As far as the Company's finances are concerned, reliance was placed on the following matters. Firstly, the qualified audit opinion in the 30 March 2022 Independent Auditor's Report for the year ending 31 December 2021. This was in relation to the Company's assessment of a reserve in relation to a liquidated damages claim. Secondly, reference was made to Profit Warnings posted on the HKEX website on 9 January and 22 July 2022. Linked to these concerns was the Company's announcement on 28 August 2022. As far as the 26 August 2022 EGM was concerned, the EGM was requisitioned by the Applicant and it complained that the results of the meeting were tainted by the Company's failure to permit remote attendance.

14. The Company responded through the First Affirmation of Cao Yunsheng dated 9 January 2023 ("Cao 1"), the current CEO and President of the Company who first became a director in 2005. He describes the Company as the holding company of the Jutal Group which provides services (including making equipment and engineering) to customers in the energy, refinery and chemical fields. The deponent firstly deposes on the control exercised by the Sanju Group over the Board between mid-2017 and January 2021 because of market concerns about the Sanju Group which resulted in it being blacklisted by numerous banks. Next it is averred that Sanju BJ owes the Company substantial sums. As regards the present application, it is averred:

(a) under the Articles and the Listing Rules, the Applicant is not entitled to the information it seeks;

(b) although the First Injunction was granted, the Judge considered that the matter was for the shareholders to determine;

(c) the intended subscriber withdrew, being put off by "*management fractures*" before the 2021 AGM. The three executive director defendants were re-elected and the Board's mandate to issue new share subscriptions was renewed;

(d) HCMP 823/2021 was a further attempt by the Applicant to disrupt the Company's management. Again, Chan J decided to restrain the allotment of new shares until the AGM;

(e) HCMP 1612/2021 was similarly motivated. Four resolutions were proposed to streamline approval processes, not to give the deponent "unfettered" power. The Board undertook not to implement the resolutions until the litigation was determined. The hearing took place on 12-13 January 2022 and judgment is expected to be handed down in March 2023;

(f) as far as the Removal of Directors was concerned, it was averred that the shareholders had the right to decide who to appoint and that the Applicant's nominees received comparatively little support from independent shareholders;

(g) as far as the qualified Independent Auditor's Report was concerned, this was merely a disagreement about the appropriate level of the reserve. The Board's judgment was vindicated because the liability was subsequently settled at a level far closer to its proposed reserve than the far higher figure proposed by the Auditors;

(h) the poor financial results are partly due to the Company's management being harassed by the Applicant;

(i) the EGM was held in accordance with the Articles and the Listing Rules and a virtual meeting was not possible;

(j) the practice of conferring a mandate on the Board to issue new shares dates back to 2009 and was supported by Sanju from 2016 until 2021 after it lost control of the Board.

15. Unsurprisingly, Liu 1 takes issue with the suggestion that the Company's misfortunes are attributable in any way to the Sanju Group. It is averred that the Company's fortunes improved after 2017, and that Sanju's involvement in the management was anticipated from the outset. An example of negative media attention cited in Cao 1 is dismissed as "*nothing more than amateur investigative journalism written for entertainment purposes in order to generate clicks for advertising revenue purposes*" (paragraph 33). I saw no need to form even a preliminary view of the merits of the Company's various criticisms of the Sanju Group, or indeed, the disputed suggestion that the Applicant was still indebted to the Company. It was the Applicant's grounds for seeking the appointment of Inspectors which had to be evaluated. And Liu 1 only began to reply to these matters at page 30 in paragraph 79 of his Affirmation:

(a) it was strongly denied that the application was improperly motivated;

(b) it was averred the Hong Kong Proceedings were part of Sanju's efforts to protect the interests of minority shareholders and reliance was further made on adverse findings recorded in Chan J's judgment;

(c) "*further context*" was given to the initial complaints about the majority directors conduct in 2021 which formed the basis of the various Hong Kong Proceedings;

(d) the position set out in Gao 1 on the other complaints was reaffirmed.

16. The Company sought leave to adduce further evidence to deal with new matters supposedly raised by Liu 1. I saw no need to formally deal with that application on the basis that any new matters raised either (a) did not call for a response because they were of peripheral relevance, or (b) in absence of express agreement could be assumed to be disputed.

Findings: merits of application

Preliminary

17. In seeking to paint a portrait of corporate concerns justifying a judicial investigation, Mr Valentin KC was forced to adopt a highly impressionistic approach to the unpromising evidential landscape (from the Applicant's point of view). However, the one point on which he prevailed upon to some extent was the Company's attempt to invalidate the application on the grounds that the Applicant was improperly seeking to obtain information to which it was not entitled to under the Articles and/or the Listing Rules.

18. Although paragraph 4 of the Notice of Motion, perhaps drafted in standard from, clearly contemplated service of the Inspectors' Report on shareholders, the Applicant's counsel rightly argued that the Court could make whatever ancillary directions it saw fit to avoid the Applicant accessing material to which it was not entitled.

19. However, what the reference to the Company's listing status helped to indirectly point out was that however flexible the jurisdiction might be in the context of private closely-held companies where shareholders might legitimately expect generous access to information about management affairs, the present context was entirely different. As I observed in the course of the hearing, the Company appeared to be merrily trading with no HKEX regulatory concerns. The case for this Court to grant section 64 of the Companies Act relief would need to quite clear to be acceded to.

The Hong Kong Proceedings

20. In my judgment the fact that the First and Second Injunctions were granted in 2021 provided no material support for the proposition that adverse findings had been made against the majority directors by Chan J. She pivotally found that, as a matter of basic company law, the merits of the proposed commercial decisions were for the shareholders to decide[4]. The shareholders, broadly, decided the relevant issues in favour of the majority directors and so the complaints cannot be pursued before this Court. To the extent that 'final' determinations were technically made on the basis of disputed affidavit evidence, because of the form of injunctive relief sought, the findings (in relation to the First Injunction) merely were that the majority directors failed to give their fellow directors sufficient information to make an informed decision and in so doing "*acted in breach*

[4] Reasons were only available for the First Injunction, but it is reasonable to assume that she adopted a similar approach in relation to the Second Injunction.

of…the duty to act in good faith owed to the Company"[5]. If similar findings were made as a basis for the Second Injunction as well, and considering the context of a 'scrap' between two Board factions, this fell far short of affording grounds for a shareholder to seek to appoint Inspectors. The decision of the majority directors to give an undertaking, presumably to avoid the risk of a third injunction in HCMP 1612/2021, where the Court is adjudicating the substantive complaints, adds next to nothing to the case for the need to investigate serious misconduct in the interests of shareholders as a whole.

21. This was, on its face, and as skilfully articulated by Mr Valentin KC, one of the Applicant's stronger grounds. In other contexts, an express judicial finding of breach of duty by a director would constitute potentially strong grounds of mismanagement. Chan J had to decide whether or not the Board meeting should proceed based on affidavit evidence, but that does not confer on her findings the same persuasive weight as findings made based on oral evidence and cross-examination. Nor is what one Board faction does to another in the heat of a corporate battle a reliable indicator of the probity of a company's governance systems overall.

The removal of Dissenting Directors

22. I was bound to accept the simple submission of the Company that that any directors who were not reappointed by the shareholders were not removed by the Board. This complaint was not seriously pursued at the hearing.

The Independent Auditor's Report

23. The qualification to the Auditor's Report did not suggest any misconduct on the part of management. The relevant qualification critically stated "*we were unable to obtain sufficient appropriate audit evidence to support the carrying out of the provision for liquidated damages*". Cao 1 is not challenged in asserting that the ultimate amount paid on the claim was closer to the Company's estimate than the auditor's; Liu 1 (at paragraph 90) merely pointed out that the ultimate settlement was twice the reserve assigned by management. This complaint based on uncontested facts in my judgment provided no material support for the Inspectorship application.

[5] Reasons for Decision, paragraph 38.

The Company's financial condition

24. A decline in financial fortunes usually sets alarm bells ringing. Here, it seems odd that the Profit Warnings issued in January and July before negative results were announced in late August were relied on as grounds for complaint of misconduct. If negative results (a 42.88% decrease in revenue and a 94.05% decrease in profit) had been announced without any forewarning, the failure to issue prior profit warnings would have been a potentially valid ground for complaint. No complaint was made about a collapse in share price. In relation to listed companies a suspension in trading is usually the clearest indicator that a state of crisis has emerged; the resignation of auditors is another red flag. Nothing like this was complained of. This ground, perhaps the Applicant's strongest, failed to pass muster in section 64 terms as well.

The August 2022 EGM

25. This complaint had a sense of artificiality about it. The Applicant requisitioned an EGM, did not request the Company to circulate a statement setting out its concerns about the management to shareholders but instead invited the Company to permit unprecedented remote participation to take place. It then used the rejection of this request as grounds for impugning the results of the meeting which rejected its proposed resolutions. Manipulation of general meetings gives rise to serious concerns. The record of the meeting shows that a Mr Bernard Lam addressed the meeting before the vote and made the case orally for "*new directors to enrich the composition of the company's management and decision-making…nominated by Sanju Hong Kong*". Mr Alexander KC made the important point that the results did not reveal unanimity on the part of independent shareholders; there was, as he put it, "*some variation*". Sanju BJ's proposals did attract some support.

26. I found that there was no basis for concluding that either (a) shareholders who wanted to participate were disenfranchised because remote participation was not allowed or (b) that remote participation was permitted by the articles and/or the Listing Rules and so that management deliberately spurned a straightforward opportunity to increase participation. The Applicant's complaints accordingly were entirely lacking in substance or merit.

The Issuance of New Shares Diluting the Applicant's Shareholding

27. The Applicant fairly pointed out that the size of its stake in the Company means that it is impacted more significantly than smaller investors by the diluting effect of issuing new shares. However, the critical question was whether the Board's proposed use of the mandate conferred by the

shareholders was indicative of impropriety. Mr Alexander KC demonstrated through reference to the documentary record that the Applicant's opposition to this corporate strategy coincided with its loss of control of the Board. Raising capital rather than borrowing on the heels of perturbing financial results, in any event, seemed like an entirely rational business decision. It is no less rational for a major shareholder which has lost control of the Board to be suddenly more concerned about the dilution of its shareholding. But it was impossible to infer any, let alone any grave, misconduct from this impugned decision.

Alternative remedies

28. Although counsel addressed the issue of alternative remedies, I found that the need to consider this issue did not arise because the grounds advanced in support for the Applicant's Notice of Motion for the appointment of Inspectors were demonstrably weak.

Summary

29. In summary, I reached the same conclusion as Justice Raj Parker in *Re The Avivo Group*, FSD 145 of 2022 (RPJ), Judgment dated 30 November 2022 (unreported) (at paragraph 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* [must be] *refused.*"

30. For these reasons on 21 February 2023, I dismissed the Applicant's Notice of Motion for the appointment of Inspectors under section 64 of the Companies Act (2022 Revision) and awarded the respondent Company its costs to be taxed if not agreed on the standard basis.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT