

Cayman Inspectorship – an exceptional remedy?

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In the Matter of Jutal Offshore Oil Services Limited (unreported, 30 March 2023) is the latest judgment from the Grand Court of the Cayman Islands to consider the appointment of inspectors over a company under section 64 of the Companies Act (2023 Revision). The case builds upon Parker J's recent judgment *In the matter of Avivo Group* (unreported, 16 December 2022). The Court has provided a useful refresher on the appointment of inspectors to examine the affairs of a Cayman company, and a reminder of how exceptional the remedy is.

Background

As the largest shareholder in Jutal Offshore Oil Services Limited (the **Company**), Sanju Environmental Protection (Hong Kong) Limited (**Sanju**) sought the appointment of inspectors to examine the affairs of the Company, under section 64 of the Companies Act (2023 Revision) (the **Act**).

In support of its application, Sanju filed evidence from two former directors of the Company who had represented Sanju's interests on the board of the Company until 27 May 2022, after which Sanju ceased to have any representation on the board.

Since losing control of the Board, Sanju had issued multiple proceedings in Hong Kong in a bid to, *inter alia*, appoint new directors and require the chairman to report on the Company's financial position. Those proceedings had been unsuccessful, leading to the application for the appointment of inspectors before the Grand Court of the Cayman Islands.

The Law

Section 64 of the Act provides that the Court may appoint one or more competent inspectors to examine the affairs of a company and to report to the Court in such manner as the Court may direct. The application can be made by the holders of not less than one-fifth of a company's issued and outstanding shares.

Section 65 of the Act states that where inspectors are appointed (i) the company must produce all books and documents in its custody or power for inspection; (ii) the inspectors may examine (upon oath) the officers and agents of the company in relation to its business; and (iii) any officer or agent who refuses or neglects to produce any book or document directed to be produced, or to answer any question relating to the affairs of the company, shall incur a penalty in respect of each such offence.

Section 66 of the Act provides that, upon conclusion of the examination, the inspectors shall report their opinions to the Court.

The Decision

There was no material dispute between the parties regarding the jurisdiction to appoint an inspector under section 64 of the Act, nor was the standing of Sanju in dispute. The question for the Court was whether, in

the circumstances, the Court should exercise its jurisdiction and appoint inspectors in relation to the Company.

The application was ultimately dismissed on the basis that Sanju had failed to clearly establish a case of grave misconduct and/ or mismanagement or concealment, having advanced grounds in support of the application which were '*demonstrably weak*'.

In reaching his conclusion, Kawaley J had particular regard to the prior judgment of Parker J in *Avivo*. As Kawaley J noted, the commercial context in both *Jutal Offshore* and *Avivo* were similar. Kawaley J found 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*'. Compare this to Parker J's finding in *Avivo* that '*...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.*'

At paragraph 62 of *Avivo*, Parker J set out an extensive (non-exhaustive) list of principles which the Court will have regard to in considering any application for inspectorship. At paragraph 7 of his judgment, Kawaley J considered, endorsed and applied these principles in full. In particular, Kawaley J emphasised the importance of the following:

- The appointment of inspectors will not be made '*as of right*', but only upon evidence of suspicion of grave misconduct or mismanagement;
- The appointment of inspectors is extraordinary, and is only warranted when it is right and appropriate to do so;
- It is not appropriate for an examination to be ordered merely to satisfy disgruntled shareholders that there is no legitimate cause for complaint;
- The Court will not lightly make an order which interferes with the internal management of a company, without there being a compelling reason to do so; and
- An order should only be made where there is a strong likelihood – which is well founded on a solid and substantial basis - of some grave misconduct or mismanagement of the company.

In addition, the following principles were reiterated and applied by Kawaley J:

- The appointment of inspectors is a particularly fact sensitive issue, which will vary depending on the circumstances of the case;
- The appointment of inspectors is a serious step, and not one the Court will take lightly. The Court must balance the competing interests of the parties in exercising its discretion and ensure that the remedy is appropriate and proportionate in the circumstances;
- An important consideration is the conduct of directors, in particular whether the directors have declined to provide an explanation or whether the directors have concealed facts from the shareholders;
- The power to appoint inspectors should only be exercised where an object or particular outcome is likely to be achieved;
- The Court should satisfy itself that the application is genuine and is not being made for a collateral or improper purpose;
- The Court shall take into account the weight of shareholder support for the application, but this is not a determinative factor; and
- The Court should consider whether the applicant has other available remedies.

Comment

The judgment serves as a useful reminder of the principles (and high threshold) the Court will have in mind when considering the appointment of inspectors. They seek to dispel any perception that in circumstances where it may be difficult to obtain another remedy, such as winding up, pursuing an application to appoint inspectors may be an easier option.

Any party considering the appointment of inspectors for the purposes of examining the affairs of a company should bear in mind the clear comments and guidance of both Kawaley J and Parker J in *Jutal Offshore* and *Avivo*, respectively.

For more information on the appointment of inspectors under Cayman Islands law, get in touch with our team.

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