IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 33 OF 2022 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF UNICON HOLDINGS LTD.

Before:	**The Hon. Mr. Justice Segal**
Appearances:	**Ms. Jessica Williams and Ms. Catie Wang of Harney Westwood & Riegels for the Applicant**
	Ms. Jennifer Colegate of Collas Crill for the Company
Hearing date:	**16 November 2022**
Draft judgment:	**17 November 2022**
Judgment handed down:	**21 November 2022**

HEADNOTE

Application to appoint an inspector under section 64 of the Companies Act (2022 Revision) – whether the Court had jurisdiction to appoint an inspector – the basis on which the Court should exercise its discretion to appoint a manager – the Inspector's powers

JUDGMENT

Introduction

1. This is an application by Soumiya Pereira Nee Tamboula Ibrahim (the ***Applicant***) for the appointment of an inspector to examine into the affairs of Unicon Holdings Ltd (the ***Company***).

2. The application was made by an Originating Motion filed on 17 February 2022 (the ***Application***) pursuant to section 64 of the Companies Act (2022 Revision) (the ***Companies Act***).

3. The Application was originally heard by me on 31 March 2022. At that hearing the Company did not appear but I adjourned the hearing since I concluded that before considering further whether I should grant the Application, the Applicant needed to clarify and spell out to the Company the information she sought and give the Company a reasonable opportunity and time to respond.

4. Since the hearing in March the Applicant had written again to the Company. On 10 May 2022, the Applicant's Cayman attorneys, Harneys, wrote to the Company (the ***May 2022 Letter***) at its then registered office in Cayman setting out the information and documentation she required the Company to provide. In their letter, Harneys requested a response within fourteen days and noted that the Court had indicated that it would be open to the Applicant to seek to have the Application relisted if the Company failed to respond and cooperate. The Company failed to respond or provide the information requested. The Applicant decided to proceed with the Application.

5. On 20 October 2022, the Applicant filed further evidence to update the Court on developments since the March hearing (by way of the Applicant's Second Affidavit (***Applicant 2***)) and on 1 November 2022, the Application was re-listed for hearing on 16 November 2022.

6. On 1 November 2022, Harneys discovered that Walkers, who had provided company management services to the Company, and whose address therefore was treated as the address of the Company's registered office pursuant to section 50(2) of the Companies Act, had resigned so that (the Applicant submitted) Walkers' address was no longer the address of the Company's (and the Company no longer had a) registered office. Nonetheless, on 2 November 2022, Harneys arranged for delivery by hand to Walkers of hard copies of the notice of hearing and Applicant 2 with exhibit SP-2. Electronic copies of the same documents were also sent by email to Walkers. However,

Walkers refused to accept the documents by hand but on 3 November 2022 they confirmed that they had forwarded those documents to their former client contact. Also on 2 November 2022, the notice of hearing, Applicant 2 with exhibit SP-2, and the hearing bundle for the hearing on 31 March 2022 were sent by email to the sole director of the Company, Mr. Serge Pereira (***Mr. Pereira***) to his usual email addresses. The relayed delivery receipt and the read receipt indicated that the email was delivered to and opened by Mr. Pereira.

7. Faced with this difficulty, the Applicant applied by way of *ex parte* summons for an order that service on the Company be dispensed with or be treated as having been validly effected. I was satisfied that it was appropriate to make, and made on the papers, an order pursuant to GCR O.65 r.5(1)(d) that service of the notice of the relisted hearing and of Applicant 2 (with exhibit SP-2) be effected (and shall be treated as having been effected) by being sent (and having been sent) by email to Mr. Pereira as the person who was and appeared still to be the sole director of the Company (to the two email addresses that Harneys had used). I concluded that since the notice of the relisted hearing and Applicant 2 did not need to be served on the Company personally, since ordinary service should be effected whenever possible, and since it appeared from the Applicant's evidence that the Company no longer had, in breach of its statutory obligations, a registered office, that Mr. Pereira remained a director of the Company, that these documents had been sent by email on 2 November 2022 to an email address that he had formerly used and was likely to continue to use, and that the email had been opened, the appropriate order to be made on the summons was an order under GCR O.65, r.5(1)(d) in the terms I have described. I was also satisfied that it was appropriate to make an order that where in future service was required to be made in the proceedings (other than by way of personal service) of other documents, service may be effected in a similar manner unless and until the Company gave notice to the Applicant that service may be effected to another email address or on its attorneys of record in these proceedings or until further order of the Court

8. On 15 November 2022, the day before the Application was due to be heard, Collas Crill contacted Harneys to inform them that they had been instructed by the Company and would be appearing at

the hearing to seek an adjournment of the hearing and, failing that, to oppose the appointment of an inspector.

9. Ms. Jessica Williams of Harneys appeared for the Applicant and Ms. Jennifer Colegate of Collas Crill appeared for the Company at the hearing.

10. Ms. Colegate applied for an adjournment of at least four weeks to give the Company an opportunity to prepare its response and if appropriate file evidence in opposition to the Application. However, the Company had not set out its position, let alone given an explanation of the reasons for its substantial delay and why it had failed until now to respond to the Applicant's information requests and to the Application, in evidence (or by way of a letter that could be adduced in evidence subsequently). I dismissed the application. I said that the Company had been given more than sufficient time to respond (indeed the adjournment that I had previously ordered at the hearing in March had given the Company even more time to do so and had ensured that the information requests made by the Applicant were clearly set out) and that in the absence of any explanation of and a reasonable justification for the delay, there was no proper basis for ordering an adjournment.

11. Ms. Williams proceeded to make, and Ms. Colegate proceeded to oppose, the Application. At the end of the hearing I informed the parties that I would grant the Application and I reviewed with counsel the form of order to be made. I indicated that I would prepare and circulate a note of my reasons, which are now set out in this judgment. I also invited Ms. Williams to file for my approval (and to seek to agree with Ms. Colegate) the final form of the order.

The background

12. The Applicant had been registered as a member of the Company on 23 June 2019. This was in respect of fifty of the Company's shares (the ***Shares***). The other fifty shares in issue are held by Mr. Pereira, who is the Applicant's former husband. Mr. Pereira is the sole director of the Company.

13. Mr. Pereira has been involved for some time in the management of a group of companies dealing with architecture, engineering, real estate development, and construction management in North America, Africa, Europe and the Middle East (the ***Unicon Group***). The Applicant had, as I note below, previously held shares in some of the Unicon Group entities but was not involved in the day-to-day running of the Unicon Group and had very limited information regarding its operations.

14. The Applicant and Mr. Pereira were divorced in 2016. They entered into a divorce settlement agreement dated 4 May 2016 (the ***Divorce Agreement***). This was approved on 30 June 2016 by the Court of First Instance of the Republic and Canton of Geneva which issued a divorce judgment (the ***Divorce Judgment***). The agreed arrangements were also documented in an Escrow Agreement dated 4 May 2016 (the ***2016 Escrow Agreement***).

15. Pursuant to the Divorce Agreement and the 2016 Escrow Agreement, the Applicant agreed (and pursuant to articles 33-35 of the Divorce Judgment she was ordered) to transfer her shares (the ***Unicon Group Shares***) in seven companies or entities within the Unicon Group (which were incorporated in the United Arab Emirates (***UAE***)). In consideration of the transfer of the Unicon Group Shares (and under article 44 of the Divorce Judgment) Mr. Pereira agreed (and was ordered) to pay to the Applicant CHF 40,500,000 (approximately US$44,077,523.88) in instalments plus 5% interest on late payments, with the final payment due on 30 September 2019 (the ***Judgment Debt***). As security for the Judgment Debt, Mr. Pereira agreed to grant a pledge over the Unicon Group Shares to the Applicant.

16. Subsequently, Mr. Pereira paid some of the Judgment Debt but defaulted on the payment of various instalments. The total amount of the Judgment Debt then became payable and the Applicant refused to transfer the Unicon Group Shares. The Applicant and Mr. Pereira then agreed to an alternative approach with respect to the granting of security to the Applicant. This variation to the security to be granted to the Applicant was recorded in a new escrow agreement dated 13 July 2018 (the ***2018***

Escrow Agreement). The 2018 Escrow Agreement was governed by the laws of Switzerland and contained an arbitration clause. Clause 19.3 states that:

> *"... [the Applicant and Mr. Pereira] may choose to have a dispute with the other Party arising out of or in connection with their obligations under this Agreement referred to and finally resolved by arbitration under the Arbitration Rules of the DFIC-LCIA Arbitration Centre .."*

17. Pursuant to the 2018 Escrow Agreement, the Company was incorporated with Mr. Pereira as sole shareholder and director and the Applicant was to be granted by Mr. Pereira a security interest in respect of 50% of the Company's shares (pursuant to the ***Equitable Share Mortgage Agreement***). Mr. Pereira and the Applicant agreed to transfer to the Company the shares in a number of trading entities registered in the UAE (the ***UAE Trading Entities***). Mr. Pereira also agreed to pass a shareholder resolution to amend and restate the Company's articles in the form set out in Schedule 4 to the 2018 Escrow Agreement. These amended articles would confer on the Applicant what was described as a veto voting right in respect of various matters, including any amendment to the Company's articles which changed the Applicant's shareholding position or was to the detriment of the Applicant's rights under the Equitable Share Mortgage Agreement or the 2018 Escrow Agreement; any decision by the Company to amend the memorandum of association or articles of any of the UAE Trading Entities and which had a similar effect and any decision by the Company to transfer shares in any of the UAE Trading Entities. Mr. Pereira undertook that while the Equitable Share Mortgage Agreement remained in force he would not transfer any shares in the Company or procure the transfer of any shares in the UAE Trading Entities, in each case without the Applicant's consent and that he would ensure that the Company operated the business of the UAE Trading Entities in the usual way so as to maintain the relevant business as a going concern. In addition, an escrow agent was appointed to hold various documents related to the Equitable Share Mortgage Agreement including a share transfer form signed in blank by Mr. Pereira and the escrow agent was directed in the event of a default by Mr. Pereira in payment of the Judgment Debt to "*procure the transfer of the [Shares] (including procuring the relevant updates in the [Company's] company*

registers) pursuant to and in accordance with the Equitable Share Mortgage Agreement, to [the Applicant] …" The Applicant was released from her obligation to transfer and Mr. Pereira was released from his obligation to grant a pledge over the Unicon Group Shares but the parties' rights and obligations and remedies under the Divorce Agreement and the 2016 Escrow Agreement were otherwise preserved.

18. The shares in the UAE Trading Entities were transferred to the Company and Mr. Pereira granted the Equitable Share Mortgage Agreement.

19. In 2019, Mr. Pereira defaulted once again in making payments in respect of the Judgment Debt. On 20 June 2019, the Applicant gave notice of default and then exercised her rights as a secured creditor under clauses 5 (Rights in Respect of Mortgaged Property) and clause 7 (Enforcement of Security) of the Equitable Share Mortgage Agreement. The Shares were then transferred to her and she was registered as a member in the Company's register of members on 23 June 2019.

Other proceedings

20. The Applicant has briefly described other proceedings she commenced against Mr. Pereira in Dubai. She said that on 27 May 2021 she commenced proceedings in the Dubai Court of First Instance seeking the enforcement of the 2018 Escrow Agreement. However, on 25 August 2021 the Dubai Court of First Instance dismissed the Applicant's claim. The Applicant said that the Dubai Court of First Instance's decision was based on the arbitration clause in the 2018 Escrow Agreement. The Applicant appealed to the Dubai Court of Appeal. On 26 January 2022 the Dubai Court of Appeal dismissed the appeal. The Applicant appealed again to the Dubai Court of Cassation. On 26 September 2022 the Dubai Court of Cassation dismissed the appeal. At the hearing I noted that the evidence included a translation of the Applicant's claim before the Dubai Court of First Instance, which appeared to be based on the terms of the 2018 Escrow Agreement, but that there were no translations in the evidence of the judgments of the Dubai courts.

21. The Applicant also disclosed that she had relatively recently also commenced separate proceedings in this Court against Mr. Pereira by way of a writ of summons filed on 29 June 2022 (the ***Writ***). A copy of the Writ was exhibited to Applicant 2. It contains a general endorsement seeking payment of the balance of the Judgment Debt and/or sums owing pursuant to the Divorce Agreement. At the hearing, Ms. Williams confirmed that the Writ has not yet been served.

The information sought

22. I have noted that in the May 2022 Letter Harneys had set out again and clarified the information and documents being sought by the Applicant. Harneys referred to copies of Company's current memorandum and articles; its register of members; its register of directors; copies of written resolutions of members and minutes of meetings of members since the Applicant became a shareholder; the Company's financial statements including management accounts for the Company and each of its subsidiaries (in the case of its subsidiaries starting from the financial year ending on 31 December 2016); other documents relating to amendments to the constitutional documents of or transfers of the shares in various subsidiaries and all documents relating to the transfers of assets.

23. In the May 2022 Letter Harneys stated that the Applicant was entitled to a copy of the Company's memorandum pursuant to section 29 of the Companies Act and that the Applicant needed to see whether the rights of veto to which she was entitled under the 2018 Escrow Agreement had been incorporated into the Company's constitution. Harneys also noted:

> *"that since she became a shareholder of the Company, [the Applicant] has received no information about the Company's performance or that of its subsidiaries. The lack of reporting is concerning to our client, particularly in circumstances where: (a) she is one of only two shareholders of the Company with the other shareholder (Mr. Pereira, [the Applicant's] ex-husband) being the sole director of the Company; (b) the circumstances in which the Company was incorporated and its purpose (as set out in the evidence in support of the [Application]); (c) past financial records (for the year ending 31 December 2017) which [the Applicant] has seen for one of the subsidiaries (Dohar Trading DMCC) appear, by way of example to demonstrate the transfer of assets to unknown related parties for no*

consideration; and (d) we understand [the Applicant] has made previous requests for financial information through her Swiss lawyers which were ignored."

The Applicant's submissions

24. The Applicant submitted that the Court's jurisdiction to appoint an inspector under section 64 of the Companies Act was engaged and that in the circumstances the Court should exercise its discretion to do so.

25. The Applicant argued that she was registered as a member and had and was able to exercise all the rights of a member, including the right to apply under section 64 of the Companies Act. Thus the Court had jurisdiction to make the order she sought.

26. Ms. Williams accepted, in response to a question from me, that the Applicant's interest in the Shares was a security interest. She remained a secured creditor of Mr. Pereira and he retained an equity of redemption in the Shares. As I suggested during argument, the equitable charge in respect of the Shares had been converted into a legal mortgage upon the Applicant having the Shares transferred to her and becoming registered as a member of the Company. I also noted during argument that this was clearly permitted by the terms of the 2018 Escrow Agreement which gave the escrow agent clear powers, as I have noted above, to transfer the Shares to the Applicant and procure her registration as a member.

27. Ms. Williams submitted that the fact that the Applicant only had a security interest did not prevent her from being able to rely on section 64. She relied on the judgment of the UK Supreme Court in *Farstad v Enviroco* [2011] UKSC 16 in support of the proposition that where a mortgagee of shares was registered as a member he/she was to be treated as the member for all purposes and to the

exclusion of the mortgagor. In *Farstad* it was held that where a secured creditor was granted a mortgage by a parent company (A) over its shares in a subsidiary (B) and the secured creditor was registered on the members' register (following the shares being transferred to it), the secured creditor was to be treated as the shareholder to the exclusion of all other parties including A so that, for the purpose of a charterparty which defined an affiliate as including a subsidiary, B was not an affiliate of A since it had ceased to be a subsidiary of A.

28. Ms. Williams submitted that in the circumstances, the Court should exercise its discretion to appoint the inspector.

29. The Applicant was seeking information that was relevant (indeed highly material) to the value of the Shares and to her position as a member. She needed the information in order to understand what the Shares were worth and what action she needed to and should take, by exercising her rights as a holder of the Shares and as a member, to protect their value. The information that the inspector would obtain and the investigation that he would undertake would assist the Applicant in deciding whether Mr. Pereira had properly performed or was in breach of his duties as a director of the Company and whether action had been taken with respect to the shares held by the Company in or the assets of the UAE Trading Entities which had damaged or prejudiced the interests of the Company (and the Applicant as a holder of the Shares). Ms. Williams (as I understood her submissions) accepted that the information may also be relevant to the Applicant's claims and rights against Mr. Pereira in respect of the Judgment Debt and under the Divorce Agreement and the 2018 Escrow Agreement but submitted that the Applicant's primary focus was on obtaining information relating to the value of the Shares and her rights as holder of the Shares. Her other interests were, in the context of the Application, ancillary and irrelevant.

30. Accordingly, the appointment of the Inspector would result in the conduct of an investigation of matters and the production of information (and indeed potentially the provision by the inspector of opinions regarding the conduct of the Company's affairs) that were highly relevant to the

Applicant's position as and needed by the Applicant as holder of the Shares. Furthermore, the appointment of an inspector was justified because it was necessary (or at least expedient) in the circumstances because of the Company's abject failure to respond to the Applicant's information requests and the concerns the Applicant reasonably had, as set out in her evidence, regarding the financial position of the Company and action taken and transactions entered into that were prejudicial to the Company. The fact that the Applicant held the Shares as secured creditor of Mr. Pereira was a factor to be taken into account when the Court was exercising its discretion but in this case did not weigh against or preclude the appointment of the inspector.

31. In response to a question from me regarding the possible relevance of the arbitration clause in the 2018 Escrow Agreement, Ms. Williams argued that it did not impact on the Application. In the first place, the clause required Mr. Pereira to elect for arbitration and he had not done so. Secondly, and more significantly, the clause did not apply to the Applicant's Application which related to and involved the enforcement of her rights against the Company, which was not a party to the arbitration clause in the 2018 Escrow Agreement.

32. I also raised with Ms. Williams the fact that in this case the inspector would need to take action in the UAE – indeed it appeared to be likely that his investigation would need largely to be conducted there since Mr. Pereira was resident there and the UAE Trading Entities were incorporated and conducted their business there – and my concern that no evidence had been filed to show that the appointment would be recognised there or that the inspector would be permitted under local law and in practice take action in the UAE. Ms. Williams said that the Applicant had not obtained advice from local UAE counsel but that in the absence of any evidence or information that indicated that the inspector would be unable to act or would not be recognised in the UAE, the Court should not refuse to make the appointment based on this concern. The inspector would need, if appointed, to proceed with his investigation and see whether he faced any difficulties in conducting the investigation and obtaining access to relevant documents and personnel in the UAE.

33. The Applicant submitted that the appropriate order as to costs, in light of the terms of section 66(3) of the Companies Act (which provides that all expenses of an incidental to the inspector's examination and report shall be defrayed by the members upon whose application the inspector was appointed *unless* the Court directs that they be paid by the Company) was that she be ordered to pay the expenses of the inspector's examination but that she be given liberty to apply for an order that some or all of the expenses be paid by the Company, so that if the information obtained or report produced by the inspector indicated that the Company should be liable to pay such expenses the Applicant could apply for an order that it did so.

The Company's submissions

34. Ms. Colegate had not filed any written submissions and was only able (since she had just been instructed) to make brief oral submissions at the hearing.

35. She indicated that the Company (and Mr. Pereira) considered that the Applicant had in her evidence and submissions misstated or mischaracterised the factual background and the position of the Company (and Mr. Pereira). However, as I explained during the hearing, since neither the Company nor Mr. Pereira had filed any evidence to contradict the Applicant's account, the Court was only able to base its decision on the evidence filed and Ms. Colegate was unable to give evidence by way of her submissions.

36. Ms. Colegate submitted (once again, as I understood her submission) that the Applicant was abusing the statutory jurisdiction to appoint an inspector. This Court was given the power to appoint an inspector to undertake an investigation and obtain information for the benefit of and relevance to the members of a company. The Applicant was seeking the appointment of an inspector to assist her as a creditor of Mr. Pereira and as part of her efforts to secure payment of the Judgment Debt. This was not appropriate and the Court should decline to exercise its discretion to facilitate this.

37. Ms. Colegate also submitted that the Applicant had available to her and should first be exercising other remedies for obtaining the information she seeks. She could and should take action against Mr. Pereira. Insofar as she sought relief against the Company, there were other grounds for doing so. For example, she could apply for relief under the *Norwich Pharmacal* jurisdiction.

38. Ms. Colegate also objected to the width of the powers to be given to the inspector in the Applicant's draft order (which she said were similar to those given to a provisional liquidator and inappropriate in this case). She also submitted that the order, if the inspector was to be appointed, should make it clear that the inspector's investigation was only to be conducted for the purpose of establishing and obtaining information relevant to the value of the Shares and the exercise of the Applicant's rights as a shareholder. During the hearing, Ms. Williams confirmed that this was acceptable.

Discussion

39. Section 64 of the Companies Act is in the following terms:

> *"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…."*

40. In *In re Fortuna Development Corporation* [2004-05 CILR 197] (***Fortuna***) Justice Henderson, after noting that the power to appoint inspectors was only rarely used in this jurisdiction and that there were no prior Cayman authorities, commented as follows on the role of inspectors and the extent of their powers (underlining added):

"8. ..... Upon conclusion of the inspection, the inspectors file a report with the court containing their opinions. The legislation does not empower them to make decisions on any disputed questions: In re Pergamon Press Ltd [1971] Ch 388 In re Mirror Group Newspapers Plc [2000] Ch 194. Their role is to inspect and to report, although the report may be a mixture of factual assertions and informed opinion....

18. A striking feature of the legislation is the breadth of the powers conferred upon inspectors. They are appointed to "examine into the affairs of" the company and may require the production of "all" books and documents in the custody or power of the company. They may examine officers and agents of the company under oath "in relation to its business." Given the essentially private nature of an inspection under the [Companies Act] and the fact that the legislation contemplates the appointment of inspectors by special resolution of the shareholders themselves, it is unsurprising that the [Companies Act] imposes no real boundaries on the scope of the inspection.

19. Nevertheless, every investigation must have a purpose and a focus. The court can, and usually will, define the purpose and focus of the investigation in its order of appointment. The words "in such manner as the court may direct" in s.64 are intended to apply not only to the report itself but also to the examination leading up to it. They permit the court to spell out the purpose of the inspection and any constraints it decides to impose.

20. The order of Levers, J. begins by tracking the very broad language of s.64 (she appoints the inspectors "for the purpose of examining into the affairs of the company and its subsidiaries") and then, before describing the focus of the investigation, states that that description is "without prejudice to the generality of" the words I have just quoted.

21. ..... They have been appointed to look into allegations of misappropriation of dividends—theft and fraud. Their mandate is to search for documentary and oral evidence to prove or disprove that allegation. They must follow the trail wherever it leads. They should be permitted to examine any document and question any witness if that might advance the investigation. As long as they are acting in good faith, the question of relevance is to be determined by the inspectors; not by the company, the majority or minority shareholders, or their legal advisers. The inspectors may examine records relating to transactions before or after January 1st, 2002 and without regard to when those records were created if there is some prospect they may shed light on the subject of the investigation. In this sense, the role of the inspector is analogous to that of an auditor."

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 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.

43. I accept the Applicant's submission, and the arguments summarised above supporting her claim, that she has standing to apply under section 64 despite the fact that she holds the Shares as a secured creditor of Mr. Pereira. The Shares have been transferred to her and she has been registered as and become a member of the Company. Standing under section 64 is derived from holding not less than one-fifth of the shares of the relevant company. The Applicant does so. It is irrelevant for this purpose that Mr. Pereira, by reason of his equity of redemption, is entitled at some future date and upon full repayment of the Judgment Debt to require the Applicant to transfer back the Shares so that at that point the Applicant will cease to be a member (I note that the Equitable Share Mortgage Agreement is governed by Cayman Islands law). As *Farstad* demonstrates, the fact that a person to whom shares are transferred and who is registered as a member, holds the shares pursuant to a charge or mortgage and only has a security interest, does not prevent them from being treated as or qualify or condition their status as a member of the company.

44. I am also satisfied that the appointment of an inspector is justified in the circumstances. The Company was established to hold the shares in the UAE Trading Entities and to facilitate the granting of a security interest, albeit indirectly, to the Applicant in those shares. This was to be done by giving her a charge and subsequently a mortgage over shares in the Company. The Applicant has a real interest in the value of the Shares and in ensuring that the value of the Company's assets are maintained and protected. She has a real interest in acting as a member of the Company. While this interest exists to protect her claims in respect of the Judgment Debt, it is separate from that and in my view entitles her to exercise the rights of a member and to have an inspector appointed where an investigation is needed to protect her interest in the Shares. Furthermore, for the reasons given by the Applicant, as summarised above, she has demonstrated that the information sought is needed and the scope of the examination (and investigation) is justified in order to enable her to ascertain the value of the Shares and to provide information and documents relevant to the exercise of her rights and position as a shareholder. The Applicant accepted that the order should make the purpose of the appointment clear, and link the appointment

to her interest as a shareholder, by stating that that the inspector was appointed "*to examine the affairs of the Company (including the affairs of its subsidiaries) for the purpose of and with a view to ascertaining the value of the shares of the Applicant and for the purpose of providing to the Applicant information and documents relevant to the exercise of her rights and position as a shareholder of the Company and to report his findings and opinions to [the Court]*."

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. The inspector's examination and report held out the prospect of clarifying the position and may allay her concerns or perhaps provide evidence to support further action by her as a shareholder, for example the presentation of a winding up petition. I would note that the jurisdiction to appoint an inspector should not be used by shareholders as a means of obtaining information to which they are otherwise not entitled (and as an end-run around the limited rights to information which shareholders have). However, when there is a proper basis for concern as to the conduct of the company's management and a refusal to provide information to which the shareholder is entitled (or perhaps which it may reasonably expect to be given in the circumstances) then an examination by an inspector may be justified.

46. The Applicant has proposed, and it seems to me to be appropriate, that the inspector be given the power to access, obtain copies of and examine the books, documents and records of the Company (and its subsidiaries); identify the assets and liabilities of the Company (and those of its subsidiaries) and investigate any dissipation or transfer of assets that appear to be outside of the ordinary course of the Company's business (and the business of its subsidiaries); review the audited and unaudited financial statements, any internal working papers provided to the auditors and the management accounts of the Company (and those of its subsidiaries) and examine any irregularities, discrepancies, or payments requiring further investigation; review the source and application of the Company's funds; review the bank and any investment account statements of the Company (and its subsidiaries); review all related party transactions; review any contractual and licensing documentation relating to the on-going businesses of the Company (and its subsidiaries); and if thought appropriate by the inspector, to examine upon oath such directors, officers and agents of the Company in relation to the activities of the Company as the inspector thinks fit.

47. In my view, the inspector should, at least initially, limit his examination to events occurring from and after the time at which the Applicant became entitled to be registered as a member of the Company, which I am prepared to take as being the date of Mr. Pereira's default in his secured payment obligations, which was 20 June 2019. This will ensure that the scope of the inspector's inquiries are in the first instance limited and tied to the period in which the Applicant was entitled to become a shareholder, so that costs are contained and the scope of the examination is related to the time during which the Applicant was or became entitled to become a member. But I do not rule out expanding this period if there is good cause for doing so but before extending the scope of the investigation I would prefer first to see whether the inspector considers it necessary or appropriate and to see the basis on which an application to extend is made (and the evidence in support of such an application). The Applicant is to be given leave to apply to vary the order and the Inspector is to be given the power to apply for directions.

48. I have had some concerns as to whether the arbitration clause in the 2018 Escrow Agreement might be engaged and would have preferred to see precisely what the Dubai courts had said as to why the Applicant's Dubai proceedings were dismissed. However, I accept that there is no scope for the operation of the clause unless and until Mr. Pereira invokes it and elects for arbitration and obviously he has not done so in relation to the Application. Even if he did so, the question would then arise as to whether the arbitration clause covered the Application and the Applicant's proceeding against the Company. Mr. Pereira or the Company would then need to make the case and file full submissions that it did, but they have to date said nothing.

49. I also had concerns about appointing an inspector in this case without evidence being filed to show that he would as a matter of local law be permitted to act in the UAE and able to conduct his investigation there. In my view, such evidence should have been filed. Nonetheless, I am satisfied that the failure to file such evidence does not require me to dismiss or further adjourn the Application. There is, as the Applicant submitted, nothing at present before the Court to suggest that the inspector would be in breach of UAE law in seeking to conduct his investigation there or that he and his powers will not be recognised there. However, it seems to me that the inspector will need to and must obtain suitable local law advice before embarking on his examination and taking steps in the UAE to ensure that there is no question of him acting in breach of local law and to ensure that he is able to exercise his powers, and if required takes appropriate steps to obtain recognition of his appointment and powers, in the UAE. If the advice indicates that there are or may be difficulties in him so acting, he will be able to apply to the Court for directions.

50. I also accept the Applicant's submission that the potential availability of other remedies against Mr. Pereira does not require or justify the dismissal of the Application. The Court has not been told what these other remedies are and shown whether they are in fact available, or what relief would be available. As presently advised, the Applicant appears to need information concerning the Company and the appointment of an inspector for the purpose of obtaining it appears to be the most direct and expedient remedy available to her. I do not consider that the Writ, which has yet to be

served, can be said to provide an adequate alternative remedy or a basis (at least at this stage) for refusing to grant the Application.

51. I also accept that the Applicant's proposed order with respect to the expenses of the inspector's examination is appropriate.

The Hon. Mr. Justice Segal
Judge of the Grand Court, Cayman Islands
21 November 2022