Recent Cayman litigation emanating from the Middle East

Insights - 11/01/2024

This article provides an update on the disputes Ogier is seeing come before the Cayman Court involving a connection to the Middle East. There is a steady, substantial and varied pipeline of cases demonstrating the close connections between the region and the Cayman Islands.

Ogier has seen an increase in mandates either originating from or involving structures with investment activities in the Middle East[1]. Regional market drivers alongside a number of substantial fraud cases have propelled this growth. A significant amount of the work is oil related given the abundant natural resources in the region and thus the need for (and the needs of) Cayman entities and structures connected to oil production. There has also been a noticeable increase in structures involving digital assets given Dubai's recent statutory developments which have provided a modern regulatory regime allowing for the creation of the vehicles and structures involved with cryptocurrencies, blockchain and innovative technologies. Ogier's technology and Web3 teams across the Channel Islands and the Caribbean have been busy collaborating with clients involved with these structures.

There is strong demand for Cayman investment funds and private wealth structures. In respect of the former, Cayman is one of the world's leading jurisdictions for the formation of alternative investment funds. Private equity, hedge and hybrid Cayman funds are managed from around the globe and there are around 24,000 funds established here. Ogier regularly provides Cayman vehicles and structures that deploy Middle Eastern capital both into the region's economies, and elsewhere. On the private client side, Cayman is a leading domicile for offshore trust structures and that demand is growing. Ogier has seen more Middle Eastern families and high net worth individuals utilise private Cayman wealth solutions or require the restructuring of maturing structures in light of evolving family and economic circumstances.

In addition to private client matters coming before the Cayman Courts, disputes concerning investment funds are also particularly prominent. Litigating in Cayman is reliable, predictable and efficient. This is because the Cayman Islands is a British Overseas Territory and its legal

system is based on English common law as amended by domestic legislation with appeals from the decisions of lower courts ultimately being decided by Judges from the English Supreme Court. The Financial Services Division of the Grand Court, which was established in 2009, has highly experienced specialist Judges presiding over substantial and complex financial services and trust litigation.

Recent Cayman litigation emanating from the Middle East includes the following:

Private client

In the Matter of the Estate of Osama Abudawood (unreported, 27 July 2022) In the ongoing administration of the late Mr Osama Abudawood's estate, the Grand Court of the Cayman Islands clarified the circumstances in which a parent company can be compelled in litigation to give discovery of the documents of its subsidiaries where there is a "*practical arrangement or understanding*" giving access to documents notwithstanding there being no formal power to compel production. Mr Abudawood was domiciled in the Kingdom of Saudi Arabia and died intestate on 13 June 2017. He owned shares in WAFR Holdings Limited (**WAFR**) which were assets within his Cayman estate. WAFR in turn had various wholly owned subsidiaries, none of which were parties to the administration or part of the Cayman estate. The Administrator of Mr Abudawood's estate sought substantial discovery of the subsidiary companies' documents, including financial statements, a full statement of the portfolio investments, a fixed asset schedule, aged receivables, and loan agreements. However, the Court found that the Administrator had failed to prove that the documents of WAFR's subsidiaries were within WAFR's "power" pursuant to a practical arrangement or understanding which gave WAFR unfettered access to them. The Court found that had such an arrangement or understanding existed then it would have ordered the documents to be produced. Although this case was heard in the context of an administration and a parent-subsidiary relationship, it will have broader application in the discovery context where it can be established that a party obliged to provide discovery has the necessary relationship with another party which has potentially relevant documents to the issues in dispute in the relevant proceedings.

Funds Disputes / Fraud

The Port Fund L.P. (**TPF**) litigation continues to make its way through the Cayman Islands Courts. By way of background, TPF is the first Cayman Islands-exempted limited partnership (an **ELP**), which is a very popular vehicle for private equity investments, in which the Court has permitted derivative claims to be brought by certain limited partners on behalf of the ELP. The relevant limited partners are two Kuwaiti state entities, the Kuwait Ports Authority and the Public Institution for Social Security (**KPA** and **PIFSS** respectively). KPA and PIFFS have brought claims in Cayman focussing on the misfeasance, fraud and breach of duty of the general partner, investment manager, the former investment director of TPF, and their associated

persons and vehicles, in relation to TPF's multi-million dollar investments into world-wide port related projects. Other TPF limited partners have also brought claims related to their losses.

Kuwait Ports Authority v Port Link GP Ltd. FSD 236 of 2020 (RPJ) (Unreported, 25 November 2021) the Court considered the rights of limited partners in Cayman Islands ELPs to bring direct and derivative claims against the general partner of the ELP and associated third parties and the test to permit the same. It is the first decision to involve detailed consideration of section 33(3) of the Exempted Limited Partner Act, which gives limited partners the right to bring claims derivatively on behalf of an ELP, and has clarified the nature of the test going forward. This decision resolves a number of issues relevant to the pursuit of claims by limited partners which allege wrongdoing against those involved in the management of the ELP and third parties, which had not been considered by the Cayman Courts before, and particularly as to the nature of the claims that may be brought. The Court also confirmed that the nature of an ELP is such that, as with ordinary partnerships, the general partner of an ELP owes fiduciary duties directly to each limited partner who may bring claims against the general partner for any breach.

In the Matter of Kuwait Ports Authority FSD 118 OF 2021 (RPJ) (Unreported, 8 March 2022) KPA is independent to the State of Kuwait although it is wholly owned by the state. KPA sought an order under section 4 of the Confidential Disclosure Act 2016, ("**CIDA**") to permit it to pass confidential information to the State of Kuwait for its use in foreign arbitral proceedings to which KPA was not a party. KPA received the confidential information in question from the general partner of TPF pursuant to s 22 of the ELP Act (the "**s 22 Order**"). The s 22 Order granted KPA access to information regarding the state of business and financial condition of TPF. Confidentiality obligations attached to the information disclosed pursuant to the s 22 Order. In summary, the Court ruled that disclosure be permitted under:

1. s 3 (2) of CIDA on the basis that KPA acted in good faith with a reasonable belief that the information to be disclosed was substantially true and contained evidence of wrongdoing; and

2. s 4(2) of CIDA directing the disclosure of the specified documents obtained under section 22 of the ELP Act. On balance the request fell within the objective and purpose of CIDA. It was recognised that it would not be fair or just in all the circumstances to prevent disclosure of the documents. The potential prejudice to the other parties was not so great so as to warrant the refusal of the relief sought by KPA

Kuwait Ports Authority & Ors v. Port Link GP Ltd & Ors (CICA (Civil) Appeal Nos. 002 & 003 of 2022, 20 January 2023) the defendants (including the general partner) applied to strike-out certain of the claims made by KPA and PIFSS on technical grounds. The Court of Appeal confirmed that s 33(1) and (3) of the ELP Act apply only to derivative claims and have no application to direct claims brought by a limited partner in respect of its own right of action against the general partner and others. The Court of Appeal struck-out the limited partners' derivative claims against the general partner on the basis they could instead bring direct claims;

and upheld the first instance court's order that KPA and PIFSS be permitted to pursue derivative claims on behalf of TPF against numerous defendants. The Privy Council has recently granted leave to appeal this decision, which appeal will likely be heard during the course of 2024.

Kuwait Ports Authority v Port Link GP Ltd. FSD 236 of 2020 (RPJ) (Unreported, 25 May 2023) the court ordered the joinder of KPA and PIFSS as defendants to a crossclaim (in relation to allegedly unpaid management fees) which had been filed against the general partner by the former investment director of TPF and his related defendants, and appointed interim "litigation receivers" over the Fund GP to manage all TPF related litigation, notwithstanding the general partner was in voluntary liquidation (with separate office holders appointed). The Court of Appeal has granted leave to appeal the decision to join KPA and PIFSS as defendants to the crossclaim, which appeal will likely be heard during the course of 2024. At the hearing of a mandatory application to bring the voluntary liquidation of the Fund GP under the supervision of the Court as an official liquidation (thereby effectively ousting the receivers) the Court treated the application as a winding up petition deciding that it had a broad discretion to determine whether an official liquidation was the appropriate course(despite arguments to the contrary), and ultimately dismissed the application and confirmed that the receivers should remain in office.

Abdulhameed Jafar v Abraaj Holdings and others FSD 203 of 2020 (NSJ) this large fraud claim (as previously summarised in our article from September 2021) is ongoing and there have been several judgments in the course of 2023 arising out of various interlocutory applications, including:

Unreported decision of Segal J dated 30 April 2023 – This decision addressed an application made by certain of the Defendants seeking discovery in respect of additional custodians of the Plaintiff. Segal J made clear that the findings in this ruling were made for the purposes of the interlocutory summonses and in the exercise of the Court's case management powers (rather than affecting the issues of fact that will arise and will need to be decided at trial on the basis of a full examination (and cross-examination) of all of the evidence[2]. Segal J held that the documents of one of the proposed custodians (the son of the Plaintiff) were within the Plaintiff's power for the purposes of GCR O.24, and so the Plaintiff was required to put those documents through the discovery process[3]. This was on the basis of that the "*evidence establishes reasonable grounds to infer there was at least an understanding between* [the son] *and the Plaintiff that the Plaintiff would have and be given by* [his son] *free access to all such Documents*"[4]. Segal J summarised that the position on the authorities is such that an understanding (as between the Plaintiff and his son in this case) was sufficient to establish a power for the purposes of O.24: "*without the need for the understanding to be legally binding (although a mere expectation of compliance with a request for access to and the delivery of documents is insufficient)*"[5]. Segal J noted that in this case, where the claim is based on loans which are alleged to have been agreed orally "*it is both relevant and important that the documents created by or sent to someone actively and closely involved in the material*

discussions are discovered"[6].

Unreported decision of Segal J dated 2 May 2023 – This was another decision on discovery matters, this time relating to documents withheld from the Plaintiff's discovery due to asserted privilege. The applications being determined were the summonses made by certain of the defendants, seeking that the Plaintiff should conduct a re-review of documents withheld from his discovery on the basis of privilege. As set out in the Judgment, in this case, the Plaintiff's initial List of Documents referred to 54,350 documents and listed 25,520 of those as being withheld from production due to privilege[7] (so almost half had been withheld). The judgment describes the discovery review process undertaken by the Plaintiff's team, including that for the first and second stages of the review no Caman attorneys were involved[8]. The Judge concluded that there were good grounds for requiring the Plaintiff to undertake a further review of documents remaining subject to a claim to privilege and he said it was "*necessary to ensure the integrity of the Plaintiff's document review process and consequential claims to privilege*" and that the errors that the Defendants had been able to identify based on the limited information available to them "*indicated weaknesses and failures in the privilege review process that are likely to affect the whole process*"[9]. The Judge therefore required a re-review of certain portions of the withheld documents to be undertaken urgently by the Plaintiff's Cayman attorneys[10].

Unreported decision of Segal J dated 3 May 2023 – This is another decision on an interlocutory discovery application made by one of the defendants seeking further discovery from the Plaintiff. The claims in these proceedings relate to several hundred million dollars of alleged oral loans, and in this application the Fourth Defendant was Fund IV seeks the discovery of further documents relating to the ultimate source, movement and treatment of monies advanced and repaid pursuant to and in connection with the alleged loans made by the Plaintiff. As set out in the Judgment, at the time of the supporting evidence being sworn for the application (which after the deadline for exchange of discovery in these proceedings), the Plaintiff had only produced one bank statement and even that was heavily redacted[11]. The Fourth Defendant had argued that this further discovery was needed in order to establish whether the alleged Loans were funded by the Plaintiff alone and whether consequently he had suffered loss as a result of the Loans not having been repaid in full, and that therefore the parties required discovery of an unredacted copy of the bank statement (and other bank statements) as well as other related documents which evidence the purpose of payments into and out of the accounts[12]. The Judge held that discovery of the documents sought was "necessary and proportionate in the circumstances"[13] and was required in respect of the "issues in dispute in the Related Proceedings" for the purposes of GCR O.24[14].

Unreported decision of Segal J dated 2 October 2023 – On 10 August 2021, Segal J granted to the Second to Fourth Defendants initial security up to the stage of discovery. The 2021 decision was made on the basis that the Plaintiff is ordinarily resident outside of the jurisdiction (being domiciled in the United Arab Emirates) and the Court thought it just to grant security based on

the UAE law evidence filed because there was "*a real risk of "substantial obstacles to enforcement" or of an additional burden in terms of cost or delay*". In early 2023 applications were made for top up security in respect of costs to the end of trial (and for an upward adjustment to the amount of security awarded in respect of discovery). Between time of the granting of the original security in 2021 and the further security applications being made, there were some legislative changes in the UAE: the introduction of the New Civil Procedure Law effective from 2 January 2023. The Plaintiff argued that due to these changes there was no longer a real risk of non-enforcement of an adverse foreign costs judgment. After considering the additional UAE law evidence filed, the Judge concluded that notwithstanding the legislative changes "*the cumulative effect of the various uncertainties was in* [his] *view to create a real risk of unenforceability*" if the Defendants were to obtain a costs order against the Plaintiff and seek to enforce that in the UAE, and therefore the Plaintiff should be required to provide further security.

Neoma Manager (Mauritius) Limited and others FSD 322 of 2020, 141 of 2021 and 52 of 2022 (RPJ)

Unreported judgment of Parker J dated 10 March 2023 – This is another Abraaj-related piece of litigation, and it provides further guidance on the interpretation of section 22 of the Exempted Limited Partnership Act. This section of the ELP Act provides for limited partners to be provided with "*full and true information regarding the state of the business and financial condition of* [the Partnership]". In his 10 March 2023 judgment, Parker J made some observations including that: (A) the economic owners of an ELP (being the limited partners) have paid for the business activity undertaken on their behalf by the GP and its delegates and so they are each entitled to true and full information[15]; (B) section 22 "*seeks to address the imbalance of information which arises*"[16] in an ELP context as between the limited partners and the general partner; (C) the Court must look to the limited partnership deed to consider whether the parties have substantively excluded or modified the operation of section 22[17]; and (iv) what is required to fulfil the obligation to provide 'full information' "*will vary from case to case depending on the circumstances*"[18]. Given the popularity of the Cayman ELP structure in investments funds, it is important to have certainty as to the scope of the statutory information rights of limited partners, so additional court guidance is to be welcomed (in addition to the other recent judgment on this topic: *In the Matter of Gulf Investment Corporation et al v. The Port Fund LP et al*).

Applications to appoint inspectors or liquidators

In the Matter of The Avivo Group: Avivo Group (the "**Avivo**") was established to invest in businesses in the healthcare industry. Avivo, through subsidiaries incorporated in the United Arab Emirates, owns premium medical practices offering a wide variety of specialised healthcare services in the UAE. An application was brought by Agricultural Development Fund

("**ADF**") a US$5.3 billion government credit institution which is based in the kingdom of Saudi Arabia for the appointment of inspectors to examine the affairs of the Company pursuant to section 64 of the Companies Act. ADF held about 20% of the Company's total outstanding issues shares having invested in the Avivo in two tranches of US$90,000,000 (2016) and US$10,000,000 (2017) following discussions with Al Masah Capital Management (a company incorporated in Dubai which is affiliated with the Company). ADF applied for the appointment of inspectors on the basis of numerous concerns and in particular Avivo's relationship with Regulus Capital Limited (formerly named Al Masah Partners Limited), the investment manager retained by Avivo (the "**IM"**). 'In determining the application, the Cayman Court noted that (a) the correct approach to the wide discretion given by the Cayman statute is to balance the desirability of the remedy of inspectorship available in appropriate cases, and to ensure that the power is exercised only in a case which truly merits its exercise; (b) the jurisdiction 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; and (c) there needs to be an objective which the Court can see which would be achieved by such an order. The Court ultimately refused to make the appointment order on the basis that there was no case clearly established on evidence of grave misconduct and/or mismanagement or concealment.

Ironically, the IM subsequently presented a winding up petition against Avivo on the basis of unpaid fees under an Investment Management Agreement entered into on or about 28 January 2016 (totalling US$ 14,699,189.40). The Cayman Court ordered the winding up of Avivo on 24 May 2023.

In the Matter of MBC international Limited **(ongoing):** On 28 March 2023, MBC Group Holdings Ltd filed a petition seeking that MBC International Ltd (**MBC International**) be wound up on the basis that it is just and equitable to do so. The grounds for the application are that the (a) MBC International has lost its substratum; (b) there is a deadlock in the management of MBC International; and (c) MBC International is a quasi-partnership and there is an irretrievable breakdown in trust and confidence between the parties. MBC Group alleges that MBC International was established as a quasi-partnership company pursuant to a Joint Venture Agreement (the **JVA**) between MBC FZ LLC ("MBC Dubai", which is the operating company of the MBC Group), Majestic Media Sports Limited, and Sela Sports International Ltd. The JVA was said to be established for purchasing rights to direct and indirect television and digital broadcast of local competition games in the Kingdom of Saudi Arabia. The dispute is purported to have arisen following a settlement offer made by the Saudi government after it issued a decree ordering MBC International to transmit football matches free of charges. In particular, that there is a deadlock as between the joint venture partners of MBC International as to whether to accept the settlement offer. On 20 August 2023, the shareholders passed a written resolution appointing joint voluntary liquidators (**JVLs**) and the winding-up petition was withdrawn by consent on 29 August 2023. On 15 September 2023, the JVLs filed a petition seeking to place the liquidation under the supervision of the Court. The hearing was listed for 19 October 2023 but it is unclear whether the supervision order was made.

***In the Matter of ICONIQ Holding Limited* (ongoing):** ICONIQ Holding Limited (the "**ICONIQ**") was incorporated as an exempted limited company in the Cayman Islands on 11 March 2021. ICONIQ is headquartered are in Dubai, the United Arab Emirates and is a Smart Passenger Vehicle company which is said to offer innovative vehicle designs that integrate technologies such as digital connectivity and autonomous driving that will deliver outstanding travel experience to passengers. ICONIQ conducted its business primarily through its headquarters in Dubai and via various subsidiary entities incorporated in Hong Kong and the People's Republic of China. On 17 February 2023, China Renaissance Securities (Hong Kong) Limited petitioned to wind up the Company on the basis of unpaid fees owed to the petitioner for the provision of financial advisory services (in the sum of US$5,656,750) The Petition was withdrawn by consent on 30 March 2023.

Loop Capital Markets LLC (a Delaware based company) subsequently petitioned to wind up ICONIQ on 3 May 2023 on the basis of its failure to pay approximately US$10,069,870.28 for the provision of investment banking and financial advisory services in connection with the Company's objective to become publicly traded on a United States stock exchange. As at the date of publication, it does not appear that the petition has been determined.

Summary

It is clear from the above summary that Cayman vehicles and structures are extremely popular with clients in the Middle East. We expect that this recent popularity will continue to grow. In addition to providing any necessary structuring assistance (given our substantial investment fund, banking, technology, corporate and private wealth teams), Ogier is also well placed to assist with any disputes that might arise. Ogier is acting in many of the above cases and has 30 dispute resolution fee earners providing Cayman law assistance across the globe and across time zones.

[1] By which term we mean Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria, Turkey, United Arab Emirates (UAE), and Yemen.

[2] *Jafar v AH and others* FSD 203 of 2020 (NSJ) – unreported ruling of Segal J dated 30 April 2023, paragraph 2

[3] *Ibid*, paragraphs 7, 8 and 15

[4] *Ibid*, paragraph 8

[5] *Ibid*, paragraph 8

[6] *Ibid*, paragraph 15

[7] *Jafar v AH and others* FSD 203 of 2020 (NSJ) – unreported ruling of Segal J dated 2 May 2023, paragraph 5

[8] *Ibid*, paragraph 6

[9] *Ibid*, paragraphs 23 and 24

[10] *Ibid*, paragraph 30

[11] *Jafar v AH and others* FSD 203 of 2020 (NSJ) – unreported ruling of Segal J dated 3 May 2023, paragraph 4

[12] *Ibid*, paragraph 5

[13] *Ibid*, paragraph 19

[14] *Ibid*, paragraph 20

[15] *Neoma Manager (Mauritius) Limited and others* FSD 322 of 2020, 141 of 2021 and 52 of 2022 (RPJ) – Unreported judgment of Parker J dated 10 March 2023, paragraph 75(a)

[16] *Ibid*, paragraph 75(b)

[17] *Ibid*, paragraph 75(b)

[18] *Ibid*, paragraph 75(j)

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