CAD/PSX/25-12-002
December 09, 2025

Executive Director/HOD
Offsite-II Department
Supervision Division
Securities & Exchange Commission of Pakistan
63, NIC Building, Jinnah Avenue, Blue Area
Islamabad

Chief Listing Manager
Pakistan Stock Exchange Limited
Administrative Block
Stock Exchange Building
Stock Exchange Road
Karachi

Subject: **Disclosure of Material Information**

Dear Sir,

In accordance with Sections 96 and 131 of the Securities Act, 2015 and Regulations 5.6.1(a) of the Rule Book of Pakistan Stock Exchange Limited, we hereby enclose a disclosure form, as required pursuant to SRO 143(I)/2012 dated December 05, 2012, as 'Annexure-A', conveying the material information concerning the Company.

You are requested to disseminate the information to the TRE Certificate Holders of the Exchange accordingly.

Yours sincerely,

Rizwan Pesnani
Chief Risk Officer & Company Secretary

Encl.: As above

Annexure-A

DISCLOSURE FORM
IN TERMS OF SECTION 96 AND 131 OF THE SECURITIES ACT, 2015

Name of Company:	K-Electric Limited
Date of Report:	December 09, 2025
Name of Company as specified in its Memorandum:	K-Electric Limited
Company's registered office:	KE House, 39/B, Sunset Boulevard Phase II, Defence Housing Authority, Karachi
Contact information:	Rizwan Pesnani, Chief Risk Officer & Company Secretary, K-Electric Limited

Disclosure of price sensitive/inside information by listed company

In accordance with Sections 96 and 131 of the Securities Act, 2015 and Regulations 5.6.1(a) of the Rule Book of Pakistan Stock Exchange Limited, we hereby convey the following:

This is further to our earlier disclosures dated August 21, 2023 and August 24, 2023 regarding the proceedings before the Grand Court of the Cayman Islands between the shareholders of KES Power Limited ("KESP"), the majority shareholder in K-Electric Limited ("K-Electric").

We are sharing herewith a letter dated December 05, 2025, along with its exhibits, received from the Director of KE Holdings Limited (formerly IGCF SPV 21 Limited), outlining certain developments in the ongoing proceedings.

(A copy of the letter dated December 5, 2025, along with its exhibits, is attached herewith)

The Company has duly caused this form/statement to be signed/on its behalf by the undersigned hereto duly authorized.

Sincerely yours,

For and on behalf of **K-Electric Limited**

Rizwan Pesnani
Chief Risk Officer & Company Secretary

5th December 2025

The Board of Directors
K-Electric Limited
Karachi Pakistan

Mr Akif Saeed
Chairman
Securities & Exchange Commission of Pakistan
NIC Building, 63 Jinnah Avenue,
Blue Area, Islamabad- 44000

Dr Shamshad Akhtar
Chairperson
Pakistan Stock Exchange Limited
Stock Exchange Building,
Stock Exchange Road
Karachi – 74000

By Email: cmcdonald@calderwood.ky

Dear Sirs,

Re. Letter from Al Jomaih Holding Co dated 24 November 2025

I write on behalf of KE Holdings Limited (formerly IGCF SPV 21 Limited and referred to herein as **"KEH"**) further to my last letter dated 21 November 2025 and in response to the letter from Al Jomaih Holding Co (**"Al Jomaih"**) dated 24 November 2025.

The allegations in the letter of AJP dated 24 November 2025 are denied in full. It is incumbent upon KEH to correct the record and inform the board of some important and material recent developments. Accordingly, the full judgments referred to in this letter have been exhibited and the below should be released to the PSX by K-Electric Limited ("**KE**").

Background to the Sage Transaction

Sage Venture Group Limited (**"Sage"**), which is ultimately owned and controlled by Mr Shaheryar Chishty, is the lawful owner of indirect ownership interests in K-Electric Limited (**"K-Electric"**) via Sage's shareholding in K Power Holdings Limited ("**KPH**"), which originated from the former Infrastructure and Growth Capital Fund (**"IGCF"**). These interests were acquired by Sage in a number of arm's length transactions with former investors in IGCF.

In addition, Sage also acquired the sole voting share of KEH, along with a majority stake in the general partner of IGCF. These interests were lawfully sold by the Official Liquidators of Abraaj Investment Management Limited (**"AIML"**) in the Cayman Islands in October 2022, a transaction which was subject to the supervision and sanction of the Grand Court in that jurisdiction.

Throughout 2022, Al Jomaih and its partners were aware that IGCF-related interests were for sale and failed to put forward a credible and sustainable proposal in a timely and professional manner. Upon

completion of the Sage acquisition from the Official Liquidators of AIML, KEH put forward its nominees for the board of K-Electric in accordance with the clear contractual rights and powers set out in the Shareholders' Agreement (**"SHA"**) of KES Power Limited (**"KESP"**) which governs the shareholder relationship between KEH, Al Jomaih and Denham Investments Ltd ("**NIG"**).

Following the nominations of the directors (Mr Chishty and Mr Darin Baur), Al Jomaih and NIG issued ex parte, without notice, proceedings in the Sindh High Court and improperly obtained an injunction dated 21 October 2022 preventing any further changes to the Board of K-Electric (the **"SHC Proceedings"**).

The Grand Court of the Cayman Islands has found (in its judgment of 20 July 2023 and subsequent Order of 16 August 2023) that the SHC Proceedings were a breach of the SHA by Al Jomaih and NIG and ordered them to withdraw both the injunction and the proceedings generally against several parties including KEH. That decision was the subject of a stay pending an appeal to the Court of Appeal of the Cayman Islands.

On 2 July 2024, the Court of Appeal dismissed the appeal of Al Jomaih and NIG. In its subsequent order of 10 January 2025, the Court of Appeal granted a further limited stay in respect of the Order of 16 August 2023 on a conditional basis giving Al Jomaih and NIG a period of five months to apply for and obtain an order from the Grand Court granting the same injunctive relief which was improperly obtained in SHC Proceedings. In a separate development, and in a further effort to delay the inevitable, Al Jomaih and NIG filed an appeal to the Judicial Committee of the Privy Council (**"JCPC"**) in respect of the judgment of the Court of Appeal.

Al Jomaih and NIG issued new proceedings seeking further injunctive relief and the application came before the Grand Court on 9 June 2025. This application was refused and indemnity costs were awarded against Al Jomaih and NIG by the Grand Court due to their conduct and the manner in which the proceedings were brought. This decision was also appealed.

New Cayman Legal Findings

Injunction Appeal

On the 5th December 2025, the Court of Appeal handed down its judgment dismissing the appeal of Al Jomaih and NIG against the refusal of its application for injunctive relief before the Grand Court. Furthermore, the stay in respect of the Order whereby Al Jomaih and NIG must withdraw the injunction improperly obtained in the SHC Proceedings (preventing changes to the Board of K-Electric), has now been lifted. Accordingly, Al Jomaih and NIG are now legally compelled to take immediate steps to withdraw the injunction and its proceedings against several parties, including KEH.

The relevant order (dated 16 August 2023) states that Al Jomaih and NIG:

1. Shall forthwith terminate or otherwise discontinue and take steps to cause the order of the SHC Proceeding against (i) KEH, (ii) Alvarez and Marsal, (iii) KESP and (iv) K-Electric to otherwise be set aside.

2. Shall not commence or pursue, or procure or assist the commencement or pursuit of, any proceedings in connection with any dispute or disagreement under, arising out of, or relating to

the KESP SHA, in any court or tribunal other than in either the Grand Court of the Cayman Islands or an English court.

3. May continue the Pakistan Proceedings against (i) the Government of Pakistan through the Secretary, Privatisation Commission, Ministry of Privatisation and Investment (ii) the Government of Pakistan through the Secretary, Ministry of Energy, Power Division (iii) National Electric Power Regulatory Authority and (iv) the Securities and Exchange Commission of Pakistan as defendants to the Pakistan Proceedings if and to the extent that the Other Shareholders only apply for and pursue relief that requires those defendants to the Pakistan Proceedings to exercise their duties, rights or powers in relation to K-Electric Limited or KES Power Limited in a manner that does not prevent the Applicant (being KEH) from exercising, or interfere with the exercise (whether before or after the date of this order) by the Applicant of, its rights under the SHA as a KES Power Limited shareholder.

4. Are finally injuncted and restrained from continuing, pursuing, or taking any further steps in the Pakistan Proceedings.

Privy Council Appeal

Further, in a judgment handed down on 24 November 2025, the JCPC (the final court of appeal for the Cayman jurisdiction) dismissed the appeal of Al Jomaih and Denham against the Cayman anti-suit injunction. In doing so, the JCPC stated:

"*Having made one volte-face in these proceedings by advancing an entirely new case before the Court of Appeal, the appellants* [i.e. Al Jomaih and Denham] *now seek to do so again. This is not how appellate litigation should be conducted."*

As is evident from two decisions of the Grand Court, two decisions of the Court of Appeal and the decision of the JCPC – all in favour of KEH - Al Jomaih and NIG, having failed in their attempts to acquire certain interests of KESP in 2022, have pursued hopeless and vexatious litigation designed to block any changes to the Board of K-Electric and stymie the progress of the company.

Grand Court ruling in relation to Mr Arif Naqvi

In a judgment handed down by Hon. Justice Segal on 28 November 2025 in separate proceedings involving Al Jomaih, NIG and KEH (Grand Court FSD No. 262 of 2023), the Grand Court gave an order requiring Al Jomaih and NIG:

"…to discover (and provide a list of) documents recording or relating to any discussions which they or those acting for them had with Mr [Arif] Naqvi in the period of April-June 2023 regarding the need for or action to be taken to enable KESP to defend any proceedings to enforce the KESP Payable, and to influence or direct the decision making as to the composition of the KESP board, for the purpose of, or as a means for, challenging or interfering with the implementation of the Sage Transaction and the exercise of Sage's direct or indirect rights in relation to SPV 21."

The order was made following evidence filed on behalf of KEH which included emails in relation to meetings between representatives of Al Jomaih and Mr Arif Naqvi in May 2023. The judgment specifically

noted that the relevant email:

"…does indicate that representatives of at least one of the Original Shareholders were probably discussing with Mr Naqvi the dispute with Sage and the need for litigation against Sage and those who were controlled by, or acting for, it. It is possible to infer that they probably discussed what steps might, or should be, taken and how to conduct and cooperate in managing the dispute. The discussions that took place around the time of the KESP board meetings in June 2023 might well throw light on the Ashary Plaintiffs' reasons for wishing to resist and defend the English Proceedings and whether they considered at the time that there was a bona fide basis for doing so."

The relationship between Mr Naqvi, the architect of the collapse of the Abraaj Group who is currently awaiting extradition to the United States, and Al Jomaih is of serious concern to KEH and should be a matter that the Board of K-Electric takes very seriously. This is all the more so given that it appears that Al Jomaih and Mr Naqvi are working together to develop a strategy against Sage which inevitably has an impact on K-Electric too.

Alternative KE Shareholder Proceedings (suite No 1477 of 2023)

On 6 September 2023, two shareholders of K-Electric, along with a 'concerned citizen', filed a suit in the Sindh High Court which contained claims which closely mirror those made in the improperly-issued SHC Proceedings filed in October 2022.

KEH holds serious concerns about the *bona fides* of these proceedings, noting that these shareholders hold only 7500 shares collectively which are currently valued at approximately PKR 41,000 or $145.

KEH urges the appropriate regulators in Pakistan to investigate who is behind these minority shareholders and funding their legal fees to maintain the proceedings which are seemingly designed to somehow sustain the claims made in the SHC Proceedings which Al Jomaih and NIG are now legally compelled to withdraw.

SECP Direction

Having been notified of the decision of the Cayman Islands Court of Appeal on 5th December 2025, compelling Al Jomaih and NIG to withdraw the SHC Proceedings against KEH and other parties, KEH is also seeking the immediate removal of the restriction imposed by the SECP on 8 November 2022 under section 125 of the Securities Act 2015. There is clearly no longer any basis whatsoever, if there ever was one, for such a restriction.

Conclusion

It is now incumbent on Al Jomaih and NIG to take immediate steps in the Sindh High Court to comply with the orders of the Grand Court of the Cayman Islands. If they fail to do so, or deliberately delay taking the required steps, they will be in contempt of court in the Cayman Islands and face serious consequences.

It is demonstrably clear from the judgments of the courts of the Cayman Islands and the JCPC that the strategy of litigation and obstruction pursued by Al Jomaih and NIG for over 2 years has been misguided and resulted in a sizeable waste of time and money for all parties and has been detrimental to the interests

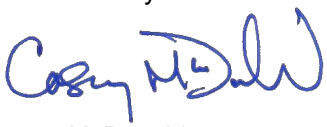
of K-Electric and all of its stakeholders.

As soon as the SHC Proceedings and SECP Direction are withdrawn, the Board of K-Electric must fulfill its own corporate obligations and convene an EGM to elect a new board of directors, including those nominated by KEH in accordance with its contractual entitlements under the KESP SHA. KEH previously put forward the appointment of Mr Chishty and Mr Baur as directors, having carefully consulted with its advisers and stakeholders. Both individuals have significant experience owning and operating power sector assets in Pakistan and are motivated to improve the performance of K-Electric.

KEH looks forward to working to create shareholder value at K-Electric and improving its operating performance for the benefit of Karachi and Pakistan as a whole.

I have enclosed the relevant judgments from the recent decisions of the Grand Court, the Court of Appeal of the Cayman Islands and the JCPC and note that this letter should be considered as material to the shareholders of K-Electric given public market disclosure requirements.

Yours faithfully



Casey McDonald

Director, KE Holdings Limited

THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 0269 OF 2022 (NSJ)

IN THE MATTER OF ORDER 29 OF THE GRAND COURT RULES

AND IN THE MATTER OF IGCF SPV 21 LIMITED

Before:	The Hon. Mr. Justice Segal
Appearances:	Graham Chapman KC instructed by Conal Keane of Dillon Eustace Cayman for the Applicant Simon Birt KC instructed by Laura Hatfield and Richard Parry of Bedell Cristin Cayman Partnership for Al Jomaih Power Limited and Denham Investment Ltd.
Heard:	31 March and 3 April 2023
Draft judgment Circulated:	17 July 2023
Judgment Delivered:	20 July 2023

HEADNOTE

Exclusive jurisdiction clause in a shareholders agreement governed by English law with respect to a Cayman company (A) stipulating that disputes arising out of or in connection with the agreement be litigated in Cayman or London – X, Y and Z own the shares in A - A owns a majority stake in a company incorporated in Pakistan (B) – B is a regulated utility company in Pakistan and the other shares in B are owned by the Government of Pakistan – the shareholders of B are subject to the terms of a sale and purchase agreement governed by Pakistan law - the sole voting share in X and interests in other shareholders of X were transferred and X sought to exercise its rights under the shareholders agreement to require A to appoint new directors to the board of B – Y and Z opposed such an appointment and commenced proceedings in Pakistan against X, A and B and the Government of Pakistan and the Pakistan regulatory authorities seeking orders against X and the Pakistan authorities – Y and Z also obtained an interim injunction against X – X claimed that the commencement of the proceedings in Pakistan were in breach of the exclusive jurisdiction clause and applied for a permanent injunction restraining X and Y from continuing with those proceedings

JUDGMENT

Introduction

1. This is my judgment following the trial of the originating summons dated 25 January 2023 (the ***Summons***) issued by IGCF SPV 21 Limited (the ***Applicant***) in which it claims permanent injunctive and associated relief against Al Jomaih Power Limited (***AJP***) and Denham Investment Ltd. (***Denham***) (together the ***Respondents***). The Applicant seeks a permanent anti-suit injunction to restrain the pursuit of proceedings (the ***Pakistan Proceedings***) brought by the Respondents before the High Court of Sindh at Karachi, Pakistan (the ***Pakistan Court***) which the Applicant claims were in breach of an exclusive jurisdiction clause that binds them (clause 25.2 of the SHA).

2. The background to and the basis of the Applicant's claim is set out in detail in my judgment dated 1 February 2023 (the ***Judgment***) which explained my reasons for granting the Applicant's application (heard on 17 January 2023 – the ***Interim Hearing***) for interlocutory (interim) injunctive relief restraining the further pursuit of the Pakistan Proceedings. I shall use the same definitions in this judgment as those set out in the Judgment (save for the definitions of the parties) and I shall not repeat the summary of the background to the dispute, the evidence, the SHA, the SPA 2005 and the proceedings in Pakistan which is set out therein.

3. Following the handing down of the Judgment an order was made on 30 January 2023 setting out the terms of the interim injunction and giving directions consequential on the Judgment, including for the filing and listing of the Summons and for the service of evidence in reply by the Applicant and of expert evidence in relation to relevant issues of Pakistan law (one expert for the Applicant and one for the Respondents). The Applicant filed evidence in reply by way of the Third Affidavit of Casey McDonald (***McDonald 3***). The Applicant's expert is Mr Bilal Shaukat (a licenced advocate and managing partner of RIAA Barker Gillette, a law firm in Karachi) (***Mr Shaukat***). The Respondents' expert is Justice Syed Zahid Hussain (a former Judge of the Supreme Court of Pakistan, and former Chief Justice of the Lahore High Court) (I shall refer to him as ***Justice Hussain*** even though he has now retired). Each expert has served a report (which I shall refer to as the ***Shaukat Report*** and the ***Hussain Report*** respectively) and the two experts have also completed and filed a joint memorandum (the ***Joint Memorandum***), summarising the points on which they agree and disagree. However, there have been no reply reports. Both experts were cross-examined at the trial. While not having permission to do so, the Respondents also

filed further evidence in response to McDonald 3 by way of a further affidavit, his second, sworn by Mr. Shan-e-Abbas Ashary (***Mr Ashary***), a director of AJPL (***Ashary 2***). The Applicant did not object to the Court giving such weight as it considered to be appropriate to Ashary 2 (subject to a properly sworn copy of Ashary 2 being filed and served after the hearing, which it was).

4. At the hearing, Mr Chapman KC again appeared for the Applicant while on this occasion Mr Birt KC appeared on behalf of the Respondents.

5. In summary, I have decided as follows:

(a). the Applicant has established that the Respondents are in breach of clause 25.2 of the SHA as a result of having commenced and continued the Pakistan Proceedings against the Applicant, Alvarez and Marsal, KESP and KEL.

(b). the Applicant has not established that the Respondents are in breach of clause 25.2 of the SHA as a result of having commenced and continued the Pakistan Proceedings against the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP *if and to the extent* that the Respondents only apply for relief that requires those parties to exercise their duties, rights or powers in relation to KEL (or KESP) without challenging the steps taken by the Applicant as a KESP shareholder. The proceedings in Pakistan *commenced by the Respondents* must not seek to challenge or seek relief that will interfere with the actions taken by the Applicant *as a KESP shareholder*. Of course, the Pakistan authorities in exercising their rights and powers with respect to KEL (and possibly KESP), may impact on the ability of KESP to put into effect the instructions and decisions made by its shareholders (and thereby indirectly affect the exercise of the Applicant's rights as a KESP shareholder). That is unobjectionable because the Applicant's rights under the SHA are against the Respondents and KESP and do not override KESP's obligations under the SPA and Pakistan law. But the Respondents cannot be permitted indirectly to do that which they are not permitted to do directly and so cannot formulate their claim against the Pakistan authorities in a way that seeks to put in issue matters covered by, and the validity of, the exercise by the Applicant of rights granted by the SHA. Paragraph 5 of the prayer in the Plaint is unobjectionable. Paragraph 8 should be clarified to make it quite clear that the Respondents only seek an order that the Privatisation Ministry exercises such rights as it has under the SPA and the other Pakistan authorities exercise the powers they have under applicable Pakistan law in relation to KEL (and if appropriate KESP). It remains to be seen whether the Privatisation Ministry and the other Pakistan authorities will permit these

claims to continue or challenge the Respondents' standing (in circumstances where the Respondents are not permitted to bring claims against the Applicant, KESP or KEL based on the SHA or a breach of the SPA which is said to arise because of the exercise of rights under or steps taken which are regulated by the SHA).

(c). the Respondents have not established that there are strong reasons for refusing to grant an injunction.

(d). in particular, they have not shown (a) that the Applicant has submitted to the jurisdiction of the Pakistan Court by taking a step in those proceedings going beyond a challenge to that court's jurisdiction or that the Applicant has conducted itself in a manner that is inconsistent with the contractual agreement for the Courts of either the Cayman Islands or England & Wales being the sole fora for the resolution of the dispute between the Respondents and the Applicant; (b) that in the event that the injunction is granted, there would be a material risk of a multiplicity of proceedings and of inconsistent findings such that it would be in the interests of justice to refrain from granting an injunction in order to allow the dispute between the Applicant and the Respondents to be litigated in one place (or that there are material benefits of one-stop shopping by having all disputes litigated before the Pakistan Court which would override the Applicant's prima facie right to enforce its contractual exclusive jurisdiction clause); (c) that the connections with Pakistan require or justify the refusal of an injunction to restrain the continuation of the Pakistan Proceedings (or that the interests of the Pakistan authorities require or justify a refusal of injunctive relief) or (d) that the Applicant impermissibly delayed its application for injunctive relief in this jurisdiction.

(e). the Applicant is not entitled to an anti-suit injunction against the Respondents in respect of the proceedings against the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP on the ground that such proceedings are vexatious or oppressive.

The shares in KESP, the Applicant's shareholders and the Transaction

6. At [5] of the Judgment, I noted that the Applicant and the Defendants are shareholders in KESP with the Applicant holding 53.8%, AJPL holding 27.7% and DIL holding 18.5% of the KESP shares and that KESP in turn holds a majority (66.4%) interest in KEL, an important Pakistani-incorporated utility company whose shares are listed on the PSX.

7. At [9] of the Judgment, I also noted that the Applicant had been incorporated by members of the Abraaj group for the purpose of acquiring shares in KESP and that the sole voting share in the Applicant was held by AIML with other non-voting shares in the Applicant being held (directly or indirectly) by the Infrastructure and Growth Capital Fund LP (the ***Fund***). The Fund is a Cayman Island registered exempted limited partnership (which is a form of private investment fund) managed by IGCF General Partner Limited (the ***GP***) with approximately one hundred institutional and high net-worth investors who are the limited partners in the Fund. Mr Mark Skelton of Alvarez and Marsal Europe LLP (***Mr Skelton***) is a director of the GP. The shares in the GP were owned as to 75.5% by AIML and as to 24.5% by Ithmaar Holdings BSC (***Ithmaar***).

8. At [10] of the Judgment, I noted that on 3 August 2022, AIML (acting by its JOLs) entered into the Transaction pursuant to which it agreed to sell its share in the Applicant to SVL, a BVI company. It is owned by AsiaPak Investments Limited (***AsiaPak***). The ultimate beneficial owner of SVL and AsiaPak is Mr Chishty, a national of Pakistan. SVL completed the purchase on 17 October 2022. SVL has also agreed to acquire AIML and Ithmaar's shares in the GP and certain limited partnership interests in the Fund from some of the LPs.

Clause 25.2 of the SHA

9. The exclusive jurisdiction clause relied on by the Applicant is, as I have said, clause 25.2 of the SHA. For convenience, I set this out below:

> *"Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be settled by the English courts or the Grand Court of the Cayman Islands and those courts alone shall have exclusive jurisdiction to settle any such dispute."*

The expert evidence

10. I summarise below the expert evidence given by Mr Shaukat and Justice Hussain. That evidence was set out in their written reports and in the Joint Memorandum and was also subjected to cross-examination. I have identified and provided extracts from the main parts of the reports and the Joint Memorandum that relate to the issues that I have decide. I have also set out below extracts from the evidence given by Judge Hussain in cross-examination since he elaborated on his analysis and further explained his position in response to questions from Mr Chapman. I have

referred to the relevant parts of Mr Shaukat's cross-examination when summarising the parties' submissions.

11. The experts were asked to consider the following four issues (and various sub-issues):

(a). how do the Pakistan proceedings fall to be characterised?

(i). what causes of action, recognisable as a matter of Pakistan law, are pleaded in the Suit?

(ii). identify and explain the principles of Pakistan law, whether statutory or otherwise, which govern or are applicable to those causes of action.

(iii). without limit to the above, do the plaintiffs in the Pakistan Proceedings have standing to pursue those causes of action or any of them and, if so, which and on what basis or bases?

(iv). (i) do the Other Shareholders have any right to make a claim under the SPA 2005?

(ii) would the Applicant or KESP be acting in breach of Pakistan law or the terms of the 2005 Agreement by seeking to give effect to a direction by the Applicant under the SHA relating to the board of directors of KEL? If so, what right, if any, would the plaintiffs in the Pakistan Proceedings have to bring a claim in respect of the same?

(b). has the Applicant submitted to the jurisdiction of the High Court of Sindh in Karachi, Pakistan and, if so, on what ground(s) has it done so and what is the effect of any such submission to the jurisdiction?

(c). what are the laws and principles applicable to the two applications brought by the Applicant in the Pakistan Proceedings and what is the likely outcome of those applications?

(d). (i). when is a decision on the two applications brought by the Applicant likely to be rendered by the High Court of Sindh?

(ii). what are the routes of appeal following any such decision and the likely timing(s) if those routes are pursued?

12. The Joint Memorandum noted that as regards:

(a). the experts had partially agreed on this issue.

(a)(i). the experts partially agreed on this issue save for various disagreements which they set out in the commentary to the Joint Memorandum.

(a)(ii). the experts were unable to reach agreement on this issue.

(a)(iii). save that Justice Hussain agreed with paragraphs 50 and 51 of the Shaukat Report dealing with the standing of the Respondents to pursue a claim for breach of the SHA, the experts were unable to reach agreement.

(a)(iv). the experts were unable to reach agreement.

(b). the experts were unable to reach agreement.

(c). the experts agreed that the Referral Application (in its current form) was likely to be dismissed. However, the Pakistan Court had the power to treat the application differently and order a stay of proceedings. The experts were unable to agree on other issues.

(d)(i). the experts agreed that it was possible that the Pakistan Court may decide the two applications within 6 months to a year.

(d)(ii). the experts agreed that an appeal will lie to a Divisional Bench of the High Court following which an appeal will lie to the Supreme Court of Pakistan.

The Shaukat Report

13. In relation to the characterisation of the Pakistan Proceedings, Mr Shaukat said this:

16. I am of the view that the character of the Pakistan Proceedings is inter alia of a civil claim seeking declaratory and injunctive relief after final determination on merits on the

questions of: whether the Applicant and other defendants have breached the terms of the SHA; whether the Applicant and other defendants have breached the terms of the SPA 2005; whether the Applicant and other defendants have breached the Companies Act, 2017: and whether the Applicant and other defendants have breached the Electricity Laws.

…….

18. The Plaint for the purposes of the Pakistan Proceedings is the primary pleading filed by the Other Shareholders containing the facts pleaded and prayers sought at pages 1 to 35 of the court file of the Suit. Based on a careful review of the Plaint I have distilled that the Other Shareholders are seeking to claim under the following causes of action:

18.1. The transfer of beneficial ownership / change in board or management control of the KEL as contemplated by the Transaction is unlawful. The same allegation has been further developed to identify the following illegalities:

18.1.1. The Transaction is in violation of Section 9.4 of the SHA5 ("Breach of the SHA").

18.1.2. The Transaction is in violation of Section 5.2 of the SPA ("Breach of the SPA").

18.1.3. The Transaction is in violation of the Electric Power Act read with the Regulations ("Breach of Electricity Law")

18.2. The notice of the Annual General Meeting of KEL held 26 October 2022 was required to include matters relating to the transfer of beneficial ownership/change in control or management control of KEL.

18.3. The manner in which the Transaction is being implemented is in violation of Section 159 of the Companies Act, 20179 (the above two causes of action are collectively referred to as "Breach of Company Law")."

14. In relation to the question of whether the Respondents have standing to sue under the SPA, Mr Shaukat said as follows (underlining added):

53. The SPA is admittedly an agreement entered into between the Government of Pakistan as the seller and KESP, Hassan Associates (Private) Limited and Premier Mercantile Services (Private) Limited, as the purchasers. In order to opine on whether the Other Shareholders having standing to make a claim under the SPA, we must consider to what extent the laws of Pakistan allow a non-party to make a claim under a contract in derogation of the doctrine of privity of contract as discussed above as read with the terms of the SPA.

54. The SPA is a contract by way of which the shares of KEL were sold to private sector purchasers. In the Pakistan Proceedings, the [Respondents] have sought to rely on Section 5.2 and 5.3 of the SPA. Section 5.2 restricts the purchasers from disposing or encumbering the 'shares', as defined in the SPA, in any manner. Further, 5.3 provides for the circumstances in which the 'shares', as defined in the SPA, can be transferred or encumbered.

55. *Applying the law to the facts, the two generally accepted exceptions of the doctrine of privity of contract discussed above can be discounted as Section 5.2 and 5.3 of the SPA do not create a trust or a quasi-trust and is not in the nature of a family settlement agreement. Thereafter, we apply the test laid down by the High Court in the case of the Karachi Water and Sewerage Board case discussed above. All the limbs of the test laid down by the High Court necessitate that the contractual provision sought to be enforced by the third party must actually confer the benefit claimed by the third party. As such we must interpret the provisions of the SPA to determine whether the SPA confers a benefit or right upon the Other Shareholder in relation to the transfer of the shares of the Applicant.*

56. *In our case the SPA does not mention, let alone contemplate, any rights of the [Respondents] or even the direct or indirect shareholders of KESP in general. Section 5.2 and 5.3 of the SPA applies to that transfer of 'Shares' which have been defined in the SPA as the shares of KEL. There is no material before me on the basis of which I could say that the parties had intended for the [Respondents]her Shareholders to enjoy rights under the SPA.*

57. *On this basis I have concluded that the [Respondents] do not have a right under the SPA and therefore do not have standing to make a claim for breach of the SPA before the courts in Pakistan."*

15. In relation to the question of whether the Respondents have standing to sue under the electricity laws, Mr Shaukat states as follows (underlining added):

"58. *Section 39 of the Electric Power Act provides "Any interested person may file a written complaint with the Authority against the licensee for contravention of any provision of" the Electric Power Act and the Electric Power Regulations. To the extent there is a breach of the Electric Power Act and the Electric Power Regulations that effects KEL, the [Respondents] can claim to be interested being beneficial owners of some of the shares of KEL. Based on this the [Respondents] do have standing to make complaints against the contraventions the Electric Power Act and the Electric Power Regulations. However, it is to be noted that such standing extends to the ability to make a claim to NEPRA against the licensee, being KEL, and not the [Respondents [should this be the Applicant?] who are not licensees of NEPRA.*

59. *Given that the [Respondents] have chosen to file the Suit in respect of the Breach of Electricity Laws rather than a complaint under the Electric Power Act, we must consider whether they have standing to claim for declaratory and injunctive relief sought in the Suit. As discussed above in paragraphs 38 to 43, both Section 42 as regards declarations and Section 53 as regards permanent injunctions requires the person claiming the relief to have a pre-existing right that is sought to be protected or enforced. The only specific allegation made in this regard in the Suit as regards the Breach of Electricity Laws are the alleged breaches of Section 33 of the Electric Power Act and Regulation 14 of the Electric Power Regulations. As such we must see whether these provisions confer any rights upon the Respondents.*

60. *Section 33 of the Electric Power Act provides as follows: "33. Organizational matters.— Subject to the procedures established by the Authority under this Act, the*

Authority may, in the public interest, with or without modifications, approve the following activities by a licensee for generation, transmission and distribution, namely :— (a) the undertaking of a merger or a major acquisition or sale of facilities; (b) the expansion of the licensee's business activities; and (c) the undertaking of a re-organization of the licensee's business structure."

61. *A plain reading of Section 33 of the Electric Power Act as quoted above reveals that the Authority, i.e., NEPRA, is empowered to approve, subject to certain conditions, certain activities by a licensee including mergers, expansions and reorganization. The term 'licensee' has been defined in Section 2(xvii) read with Section 2(xvi) of the Electric Power Act as a holder of a license issued under the Electric Power Act. There is nothing in the Section quoted above that would in any way appear to confer any rights upon the indirect shareholders of the Licensee, being KEL, and therefore it does not confer any rights on the [Respondents].*

62. *Regulation 14 of the Electric Power Regulations provides as follows: "14. Investment programme, acquisition, and disposal of assets.— (1) A distribution licensee shall, no later than thirty days following the grant of licence, submit its five year investment programme to the Authority for approval: Provided that the status on implementation and any changes in the approved five-year investment programme shall be submitted to the Authority on annual basis for its consideration and approval. (2) A distribution licensee's investment programme shall be drawn up consistently with the provisions of the applicable documents and to achieve the distribution performance standards. (3) A distribution licensee shall not, except under a prior authorization, acquire, whether on ownership basis, lease, hire-purchase, or any other mode of possession or use, any tangible or intangible asset of a nature or value inconsistent with or which is not expressly or by necessary implication stated in the licensee's investment programme approved by the Authority in accordance with the applicable documents, provided however that, until such time the licensee's investment programme is approved by the Authority in terms of sub-regulation (1), the licensee may acquire assets required for the operation and maintenance of the distribution system or assets of a value not exceeding the value specified for the purpose by the Authority in the distribution licence. (4) A distribution licensee shall not, except under a prior authorization by the Authority, sell or dispose of in any manner any tangible assets comprised in the distribution system or any intangible assets accruing or likely to accrue to the licensee from the distribution business in a manner inconsistent with or which is not expressly stated in the licensee's investment programme approved by the Authority in accordance with the applicable documents, provided that until such time the licensee's investment programme is approved by the Authority in terms of sub-regulation-(1), the licensee may dispose or sell assets of a value not exceeding the value specified for the purpose by the Authority in the distribution licence; (5) The Authority may impose additional conditions in the License or it may specify the procedure in respect of the manner of acquisition or disposition of or the creation or permitting the subsistence of any encumbrance over the assets comprised in the distribution system or accruing or likely to accrue from the distribution business."*

63. *A plain reading of the Regulation 14 quoted above reveals that it only imposes obligations on the licensee, being KEL, and does not confer any rights upon the [Respondents].*

64. *Given that Section 33 of the Electric Power Act and Regulation 14 of the Electric Power Regulation do not confer any rights upon the [Respondents], the*

[Respondents] do not have standing to bring a claim for declaratory or injunctive relief in regards thereto."

16. In relation to the Breach of the Companies Law issue, Mr Shaukat stated as follows (underlining added):

> *"65. In order to consider the standing of a person to bring a claim for breach of the Companies Act we must consider the provisions of the Companies Act that are alleged to have been breached and the mechanism available under the Companies Act for a person to take action against such a breach. As discussed above in paragraph 26 to 31 the Other Shareholders have alleged two separate breaches of the Companies Act relating to the requirements of the notice of the Annual General Meeting of KEL held 26 October 2022 and a breach related to Section 159 of the Companies Act which provides for the procedure by way of which directors can be elected at a general meeting The redressal mechanisms for such breaches can be found in Sections 136 and 160 of the Companies Act which state as follows:*
>
> *"136. Power of the Court to declare the proceedings of a general meeting invalid.—The Court may, on a petition, by members having not less than ten percent of the voting power in the company, that the proceedings of a general meeting be declared invalid by reason of a material defect or omission in the notice or irregularity in the proceedings of the meeting, which prevented members from using effectively their rights, declare such proceedings or part thereof invalid and direct holding of a fresh general meeting: Provided that the petition shall be made within thirty days of the impugned meeting.*
>
> *160. Powers of the Court to declare election of directors invalid.—The Court may, on the application of members holding ten percent of the voting power in the company, made within thirty days of the date of election, declare election of all directors or any one or more of them invalid if it is satisfied that there has been material irregularity in the holding of the elections and matters incidental or relating thereto." (Emphases Added)*
>
> *66. The provisions quoted above provide a redressal mechanism in respect of a breach in the nature of the Breach of Company Law and require the person invoking the mechanism to be a 'member' holding at least 10% of the voting power in the relevant company. The Companies Act does not specifically define the term 'member' however Section 118 of the Companies Act provides as follows: 118. Members of a company.—The subscribers to the memorandum of association are deemed to have agreed to become members of the company and become members on its registration and every other person- (a) to whom is allotted, or who becomes the holder of any class or kind of shares; or (b) in relation to a company not having a share capital, any person who has agreed to become a member of the company; and whose names are entered; in the register of members, are members of the company.*
>
> *67. Based on this, a member of a company is a person whose name has been entered into the register of members of the Company. Pertinently, this excludes any indirect shareholders of a company as their names are not entered on the register of members. Accordingly, the Other Shareholders, not being direct shareholders of KEL, do not have any standing to invoke the jurisdiction of the 'Court' as defined in the Companies Act, in respect of the Breach of Company Law. Given that the Other*

Shareholders have chosen to file the Suit in respect of the Breach of Company Law rather than adopt the redressal mechanism in the Companies Act, we must consider whether they have standing to claim for declaratory and injunctive relief sought in the Suit. As discussed above in paragraph 38 to 43, both Section 42 as regards declarations and Section 53 as regards permanent injunctions require the person claiming the relief to have a pre-existing right that is sought to be protected or enforced. The Other Shareholders have alleged two separate breaches of the Companies Act relating to the requirements of the notice of the Annual General Meeting of KEL held 26 October 2022 and a breach related to Section 159 of the Companies Act 2017 which provides for the procedure by way of which directors can be elected at a general meeting. Both the requirement for a notice of an annual general meeting prescribed in the Companies Act and the procedure for election in Section 159 relate to the manner in which notices are given to 'members' and how elections are conducted at meetings of 'members'. The Other Shareholders, not being members of KEL, do not have any rights under these sections and therefore have no right to claim declaratory or injunctive relief in respect of a breach of Company law."

17. In relation to the question of whether the Applicant or KESP could be said to be in breach of the SPA Respondents, Mr Shaukat states as follows (underlining added):

"70. <u>As regards the possibility of the Applicant having breached the SPA</u>, we note that the Applicant is not a party to the SPA and therefore we must consider the possibility of a breach of the SPA in light of the doctrine of privity of contract discussed in paragraphs 47 to 49 above. The doctrine has two limbs, one which prevents the imposition of obligations on a non-party and the second which prevents the exercise of rights by a non-party. In paragraphs 47 to 49 above we have discussed possible exceptions to the second limb which apply to empower a non-party to enforce rights granted by a contract. However, this test does not apply in respect of the first limb which prevents obligations being imposed on a non-party, such as the obligation under the SPA being imposed on the Applicant. The generally accepted exceptions to the doctrine of privity of contract could still apply. However, as I have noted in my discussion in paragraph 48 above, I have discounted the application of these exceptions to Section 5.2 and 5.3 of the SPA as they do not create a trust or a quasi-trust and are not in the nature of a family settlement agreement and the same is true for the SPA in general. I am not aware of any judgment of the Superior Court of Pakistan which has chosen to depart from the first limb of the doctrine of privity in respect of a commercial contract in the nature of the SPA 2005 and impose obligations on a non-party. <u>As such, I would opine that the Applicant cannot be said to have an obligation under the SPA which is capable of being breached</u>.

71. <u>As regards the possibility of KESP having breached the SPA, I reiterate my discussion in paragraph 56 above whereby I have concluded that the SPA does not contemplate any rights or obligations in respect of the transfer of the shares of the Applicant</u>. <u>My review of the SPA has not revealed any provision which would inhibit KESP from giving effect to the directions of the Applicant in respect of the appointment to the board of directors of KEL nor have any such restriction been specifically alleged in the Pakistan Proceedings. As such, I do not see how KESP would be acting in breach of the SPA by making the nominations as instructed by the Applicant</u>. I do note that Section 3.2(d) of the SPA records a representation that the ownership structure of KESP shall not be changed for a period of 3 years from

the 'Closing Date' as defined in the SPA 2005. However, I understand that this timeline has long since expired."

18. In relation to the question of whether the Applicant or KESP could be said to be in breach of the laws of Pakistan, Mr Shaukat opined that (underlining added):

> "*72.* As regards the possibility that the Applicant or KESP may be in breach of the laws of Pakistan, I note that only specific allegation made in this regard in the Pakistan Proceedings are alleged breaches of Section 33 of the Electric Power Act, Regulation 14 of the Electric Power Regulations and Section 159 of the Companies Act, 2017. In addition to the foregoing, some unparticularized allegations have been made in the Pakistan Proceedings contending that the Transaction breaches the laws of Pakistan, however, these have not been addressed as they do not identify the laws alleged to have been breached.
>
> *73. In this regard Section 33 of the Electric Power Act and Regulation 14 of the Electric Power Regulations, please refer to these sections as quoted in paragraphs 58 and 64 above. Both provisions deal with the obligations of KEL being the licensee and do not seek to impose any obligation upon the Applicant or KESP and therefore neither the Applicant nor KESP can be said to be in breach of these provisions.*
>
> *74. As regards Section 159 of the Companies Act, I have already explained above that this relates to the procedure by way of which directors are to be elected. Given that the impugned appointment of directors to the board of KEL was not by way of election, there cannot be said to be a violation of Section 159 of the Companies Act."*

19. In relation to the question of whether the Applicant had submitted to the jurisdiction of the Pakistan Court (underlining added):

> *"92. In order to apply the principles discussed above to our present case we must first consider the actions of the Applicant with respect to the Pakistan Proceedings.*
>
> *93. The Plaint in the Pakistan Proceedings was presented before the High Court of Sindh on 21 October 2022 along with an application for the grant of an interim injunction. As discussed in paragraph 18 above, the Plaint is the document which sets out all facts relating to the causes of action taken and relief claimed. Upon filing of the suit by the plaintiff, the court issues a summons to the defendants requiring the defendant(s) to file their response to the plaint which is known as the written statement. Based on our review of the record of the Pakistan Proceedings no summons appears to have been issued to any of the defendants. Had such summons been issued we would have had to consider if the Applicant had perhaps sought time to file its written statement, thereby indirectly accepting that they would be contesting the Suit on merits. However, in this case no written statement has been filed by the Applicant nor has any time been sought for filing of the same. The High Court has not even issued Summons for this purpose as yet. Based on this, the Applicant does not appear to have taken any steps to challenge the substantive case put forward by the [Respondents].*

94. *The first formal activity recorded on the part of the Applicant was on 3 November 2022 on which date the Applicant filed the Injunction Removal Application, the Referral Application and its authorization documents. Thereafter, the aforementioned applications were fixed in Court on 4 November 2022 on which date counsel for the Applicant first appeared. Both applications filed by the Applicant expressly seek to enforce Clause 25 of the SHA by seeking resolution of the dispute in accordance with such provision. While the Applicant has incorrectly quoted and relied on the unamended version of Clause 25 and the arbitration clause which it embodied, I feel the intention of the Applicant to avoid adjudication of the underlying dispute by the High Court of Sindh is evident. I understand that the Applicant intends to rely on the correct version of Clause 25 in respect of further proceedings in the Suit.*

95. *Applying the principles identified in the Mitsui case, there does not appear to be any reason why the exclusive jurisdiction clause should not be respected by the High Court of Sindh. Recent judgments of the Superior Courts discussed above demonstrate that the court is willing to stay proceedings in light of an exclusive jurisdiction clause. The Applicant does not appear to have taken steps which are inconsistent with the Applicant's desire to seek a resolution of its dispute with the [Respondents]. in terms of Clause 25 of the SHA. Nor has the Applicant taken any 'steps in the proceedings' as contemplated under Section 34 of the Arbitration Act. Therefore, I do not see any conduct on the part of the Applicant which would disentitle it to rely on Clause 25 of the SHA."*

96. *The Applicant has filed two applications in the Suit, namely the Injunction Removal Application and the Referral Application. The prayer clauses of both applications read as below:*

Injunction Removal Application It is prayed that this Hon'ble Court may be pleased to grant this application and recall/ modify the ad-interim order dated 21.10.2022 and allow nominations of Directors on the board of Defendant No.4 in proportion to the shareholding of the Defendant No.3.

Referral Application It is prayed that this Hon'ble Court may be pleased to grant this application and vacate the interim order and stay proceedings in the title suit and refer the matter for adjudication in accordance with Clause No.25 of the Shareholders Agreement dated 15.10.2008 executed between the Plaintiffs and the Defendant No.1 and 3. 97.

97. *The premise of both applications is the same, i.e., the subject matter of the Pakistan Proceedings ought to have been referred to foreign arbitration in accordance with Clause 25 of the SHA and that the [Respondents] have misled the High Court in obtaining the injunctive order. We understand that these applications were made in terms of the original dispute resolution clause of the unamended SHA though the SHA was later amended to provide for the exclusive jurisdiction of the English courts and the Grand Court in respect of disputes arising out of or in connection with the SHA. We have been instructed that the Applicant will be seeking to continue these applications, however, we are not aware whether the Applicant will be seeking to formally amend the pleadings made in this application or whether the Applicant's counsel will be orally requesting the High Court to be treating these applications as seeking relief on the basis of the revised Clause 25 of the SHA. Further, 1 have also noted that the [Respondents] have filed counter affidavits resisting these*

applications on inter alia the ground that the Applicant has relied on the incorrect unamended version of Clause 25 of the SHA. As such, in the event the Applicant formally or orally amends the existing applications or files new applications the Other Shareholders will also be given an opportunity to respond to the new pleadings. Given that the applications have been filed on an erroneous premise, we do not know the manner in which the erroneous premise of the applications will be corrected, what pleadings will be adopted in the course of such correction, and what response will be filed by the [Respondents] to such correction. As such it is very difficult to opine on the likely outcome of these applications. Based on the current premise of these applications, whereby they seek to rely on an arbitration clause as it existed prior to amendments made in the SHA, these applications are liable to be dismissed. However, the High Court has the discretion to allow the premise of these application to be amended or may even, on the basis of oral submission, treat these applications as corrected.

98. *In order to facilitate the Grand Court, I have set out the principles which would be relevant for the grant of these applications if they are to be properly amended.*

99. *The Injunction Removal application perhaps can be dealt with most simply. Interim injunctions during the pendency of a suit are granted by a civil court in accordance with Rules 1 and 2 of Order 39 of the Civil Code. It is in accordance with these provisions that the [Respondents] have filed an application for an interim injunction in the Suit before the High Court and obtained the Pakistan Order. It is to be noted that such an injunctive order is ad-interim in nature, i.e., it must be extended on each date of hearing and is meant to operate during the pendency of the interim injunction application. This order is meant to operate in a period during which the respondents will file replies to the interim injunction application and submissions will be heard and considered by the High Court. In the event that the injunction application of the [Respondents] is granted, the Court would essentially grant an injunction till the Suit is decreed (after recording of evidence). Rule 4 of Order 39 of the Civil Code permits a court to "discharge, vary or set aside" an injunctive order and an application under this rule essentially allows the applicant an opportunity to approach the court and make submissions against an injunction already granted. In the case where only an ad-interim injunction has been granted the aggrieved party is in any case given the opportunity to file a reply and be heard by the court. Rule 4 of Order 39 of the Civil Code is ordinarily meant to apply to a situation where the aggrieved party does not have the opportunity to make such submissions. This is consistent with the caselaw on this provision which sees Rule 4 of Order 39 of the Civil Code as a means of apprising the court of altered circumstances after the grant of an injunction which merits the vacation or variation of the injunction. In the circumstances where the interim injunction application of the [Respondents] is pending in the Suit, the High Court will not be making any separate order on the Injunction Removal Application and will simply proceed to decide the interim injunction application. That being said, applications under Rule 4 of Order 39 of the Civil Code are often filed for strategic reasons in order to expedite the hearing of an interim injunction application. They allow litigants an opportunity to obtain a preliminary order on the application and create pressure on the party seeking the injunction. To this extent the Injunction Removal Application appears to have served its purpose.*

100. *The Referral Application is an application under Section 4 of the Foreign Arbitration Act, which Act was enacted in Pakistan in order to give effect to the New York Convention. This provision allows a party to an arbitration agreement against*

whom legal proceedings have been brought in respect of matters covered under the agreement to obtain a stay of proceedings. In the present circumstances it is admitted by the Applicant that the Referral Application was made on the unamended Clause 25 of the SHA and Clause 25 of the SHA as amended does not contain a binding arbitration clause. As such there can be no case for asking the High Court to make an order under Section 4 of the Foreign Arbitration Act in the absence of a binding arbitration agreement and therefore the Referral Application in its current form cannot be granted."

20. On the question of the time it will take for the Pakistan Proceedings to be concluded, Mr Shaukat said that:

> *"101. Proceedings before the High Court of Sindh, particularly civil proceedings of original nature, are plagued with systemic delays. Judges are overburdened and often do not have time to hear cases, adjournments are leniently granted and there is an immense back log of cases with older cases being given more priority. Due to these reasons, it is very difficult to provide any reliable timeline in respect of the applications. In order for these applications to proceed in the near future, one of the parties will have to be able to make out a case before the High Court for why these applications are more urgent than other cases before the Court. This is highly subjective matter and will differ from judge to judge. If such a ground can be established a decision on both applications can be expected before the summer vacations of the Court in June 2023. However, in our experience applications of this nature can remain pending for over one or more years. It is to be noted that the applications are of an interim nature and will not necessarily bring the proceedings to a close. For instance, if the High Court does not stay the proceedings, and proceeds to trial, there is unlikely to be a Judgment by the High Court for five or more years."*

Mr Shaukat's summary of his opinion in the Joint Memorandum

21. In his commentary in the Joint Memorandum, Mr Shaukat cross-referred to the opinions set out in the Shaukat Report and commented on Justice Hussain's opinion as set out in the Hussain Report. I extract below those comments that I consider to be most relevant to the issues that I have to decide:

22. In relation to issue (a), Mr Shaukat said this (underlining added):

> *"Following the exchange of reports, Justice Hussain has partly supplanted his earlier views and in respect of which I have the following comments:*
>
> *• Justice Hussain has identified the breach of the SPA 2005 as the 'principal' cause of action and claims that the other causes of action emanate from this 'principal' cause of action. However, any view that Justice Hussain may hold as to which cause of action ought to be identified as the 'principal' cause of action is not relevant to the questions addressed*

to the experts. The Civil Code does not contain any concept of principal cause of action and therefore nothing turns on this finding."

23. as regards issue (a)(i):

"Paragraphs 18 to 21 of my report identify 4 causes of action in the Suit and finds that such causes of action are recognizable in Pakistan law and it is my understanding that Justice Hussain agrees with such paragraphs. However, he appears to place greater importance on the breach of the SPA 2005 as opposed to the other causes of action. He has not provided any legal basis for elevating one cause of action in the Suit above the rest."

24. as regards issue (a)(ii), the following passages are relevant:

"My comments in respect of Justice Hussain's report are as follows:

• Justice Hussain's report identifies various provisions of the Civil Code as the principles appliable to the cause of action. However, in my view the Civil Code does not determine whether or not a cause of action is founded in law or not. The Civil Code only prescribes the procedure by way of which relief can be sought in respect of a cause of action. In my understanding, this section ought to have discussed the principles relevant to determining the substantive rights of the parties and perhaps principles relevant to determining whether the jurisdiction of the High Court was barred."

25. as regards issue (a)(iii):

"My specific comments on this section of Justice Hussain's report are as follows:

• I do not believe that Justice Hussain has answered the question of whether the [Respondents] have standing to bring the Pakistan Proceedings. Any finding on a party's standing to bring a claim necessarily requires a discussion on the substantive rights of the parties that are sought to be enforced by way of the proceedings.

• In paragraphs 6.1 to 6.2 it has been claimed that the issue of standing has already been discussed, however, the discussion in the earlier parts does not address the question of the standing of the plaintiffs to bring a claim. Thus, a conclusion appears to have been drawn on standing without any discussion on how such conclusion has been reached.

• In paragraph 6.3 the expert has placed reliance on the terms of a waiver issued by the Government of Pakistan to say that the certain transfer restrictions apply to our case. However, I am not familiar with such document nor am I able to see any discussion on how such conclusion has been reached."

26. as regards issue (a)(iv):

"My specific comments on this section of Justice Hussain's report are as follows:

• Justice Hussain has stated that the question on standing has been answered in the affirmative, however, I am unable to find any analysis which forms the basis of this conclusion.

• At paragraph 7.1 Justice Hussain suggests that the SPA overrides the SHA without providing any authority or analysis for the same. It is stated that the rights under the SHA are inter se thus implying that the rights under the SPA are not inter se. However, no basis has been provided for such a finding."

27. as regards issue (b):

"My specific comments on this section of Justice Hussain's report are as follows:

• In paragraph 9.5, Justice Hussain claims that that seeking an adjournment has been held to be a 'step in the proceedings', however fails to consider the finding in the PIA case cited by Justice Hussain in paragraph 10.9 where the court held that "In my opinion, the true tests for determining whether an act is a step in the proceedings is not so much the question as to whether the party sought an adjournment for filing the written statement although of course that would be a satisfactory test in many cases but whether taking into consideration the contents of the application as well as all the surrounding circumstances that led the party to make the application display an unequivocal intention to proceed with the suit, and to give up the right to' have the matter disposed of by arbitration".

• In paragraph 9.5 Justice Hussain gives a categorical finding that the Applicant has submitted to the jurisdiction of the High Court without properly discussing his basis for the same or applying any of the caselaw on the matter such as the extract from the PIA case quoted above."

28. as regards issue (c):

"My position on this question remains as discussed in my report. However, I would like to clarify that I agree with the following:

• I agree with paragraph 10.4 of Justice Hussain's report to the extent it suggests that the Applicant has the option to file a fresh application for stay of proceedings and the High Court is bestowed with the inherent power to treat the arbitration application or as an application seeking stay of proceedings.

• I agree with Justice Hussain's report that an exclusive jurisdiction clause cannot have the effect of ousting the jurisdiction of a Pakistani court that it may otherwise enjoy.

• I agree with paragraph 10.13 of Justice Hussain's report to the extent it finds that the High Court may stay the proceedings and refer the dispute for adjudication in terms of the exclusive jurisdiction clause."

The Hussain Report

29. I set out below the key passages in the Hussain Report (underlining and bold added).

*"4.5 In [the] Pakistan Proceedings, prima facie, there is a single recognizable cause of action accrued to the [Respondents] i.e., **the transaction between the Applicant in respect of its sale of majority shareholding in KESP with a third party** and the steps taken to take over the ultimate management control of KEL through KESP. The cause of action accrued when, the [Respondents] became aware of the same through various newspaper articles and the letters of explanation issued by the Pakistan Stock Exchange and the SECP to KEL in this regard.*

4.6 The effect/consequence of the same gave rise to the accrual of cause of action to the [Respondents] for filing the Suit thereby impleading multiple Defendants including the Applicant; the KESP; the Government of Pakistan; and other Regulators of KEL.

4.7 In other words, this cause of action prompted the [Respondents] to seek multiple and different relief(s) against each of the Defendants in the Pakistan Proceeding i.e., against Applicant and Defendant No.2, to be restrained to appoint their nominee directors on the Board of KESP and ultimately in KEL and to effect any change in the management control of KEL; against the Government of Pakistan and other Regulators to take cognizance of such hostile takeover of KEL in breach of, the provisions on transfer restrictions under the SPA, as well as regulatory framework in Pakistan.

5. IDENTIFY AND EXPLAIN THE PRINCIPLES OF PAKISTAN LAW, WHETHER STATUTORY OR OTHERWISE, WHICH GOVERN OR ARE APPLICABLE TO THOSE CAUSES OF ACTION?

5.5 The dispute primarily revolves around the ultimate management control of KEL, which is a target entity having its place of business at Karachi to which the Other Shareholders are indirect minority shareholders. And whereas, KEL was served notices by the apex regulators at Karachi and news articles had significant readership in Karachi, therefore, in terms of Section 20 (c), clearly the cause of action has arisen in Karachi, be it wholly or partly. Thus, the Pakistan Proceedings fulfil the prerequisites as prescribed under Section 20 (c) of CPC. As a result, in terms of Section 9 of CPC, the Pakistan Court, at the time of presentation of plaint and institution of the Suit, had assumed jurisdiction to adjudicate upon the Pakistan Proceedings.

……

5.7 ….. While the [Respondents] have primarily sought relief against the Applicant …, at the same time, relief has also been sought over the same cause of action, against the Government of Pakistan and apex regulators of KEL to manage the affairs of KEL as reflected in the prayer clauses of the Plaint in Pakistan Proceedings.

……

6. WITHOUT LIMIT TO THE ABOVE, DO THE PLAINTIFFS IN THE PAKISTAN PROCEEDINGS HAVE STANDING TO PURSUE THOSE CAUSES OF ACTION OR ANY OF THEM AND, IF SO, WHICH AND ON WHAT BASIS OR BASES

6.2 I am of the view that the [Respondents] have competent standing to pursue the cause of action accrued to them.

6.3 The [Respondents] were the original 100% shareholders of KESP when KEL was privatized by the Government of Pakistan. Whereafter, post execution of SHA, the shareholding of [Respondents] was diluted when, Abraaj/Applicant acquired majority shareholding of KESP. Accordingly, Waiver and Consent was provided by the Government of Pakistan whereby application of certain conditions under the provisions of SPA 2005 were removed and waived in their entirety. However, in terms of clause 7 of the Waiver and Consent, the provisions of transfer restrictions are still intact.

6.4 It is inter alia, on such basis, whereby the [Respondents] consider to have accrued a cause of action against the Applicant since, the provisions of SPA particularly Articles 5.2 and 5.3, and ultimately the regulatory framework in Pakistan in relation to the affairs of KEL have been alleged to have been violated by the Applicant through sale of its majority shareholding in KESP to a third party i.e., Sage Ventures Limited.

……

7. TO THE EXTENT NOT ADDRESSED IN THE ANSWERS TO THE QUESTIONS ABOVE, DO THE PLAINTIFFS IN THE PAKISTAN PROCEEDINGS HAVE STANDING TO MAKE A CLAIM AGAINST THE APPLICANT UNDER THE [SPA]?

7.1 From the perusal of the pleadings and the provisions of SPA and SHA, I am of the view that for the purposes of the affairs of KEL, the SPA is a fountain document and the SHA is secondary to it whereby only the shareholders have rights and obligations inter se. To the extent that the Pakistan Proceedings are concerned, the primary cause of action that has accrued is in respect of the ultimate management control of KEL which is subject to regulatory control and transfer restriction provisions under the SPA. Therefore, in case of any change in the management control of KESP and ultimately KEL, the same would have to sail through the waters of the provisions of SPA, as this document continues to govern the subsequent matters.

9 HAS THE APPLICANT SUBMITTED TO THE JURISDICTION OF THE HIGH COURT OF SINDH IN KARACHI, PAKISTAN AND, IF SO, ON WHAT GROUND(S) HAS IT DONE SO AND WHAT IS THE EFFECT OF ANY SUCH SUBMISSION TO THE JURISDICTION?

9.6 .....for the purposes of foreign jurisdiction clause, the prayer clause of the Applicant in its Applications under Section 4 of the Act of 2011 as well as Application under Order XXXIX Rule 4 CPC, to modify the Pakistan Interim Injunction and to allow the nominations of the Applicant to the board of KEL, does reflect that the Applicant has categorically submitted to the jurisdiction of Pakistan Court by seeking relief from the Pakistan Court. It is beyond controversy that the Applicant has submitted

to the jurisdiction of Pakistan Court by making applications and seeking modification of injunctive order.

10. WHAT ARE THE LAWS AND PRINCIPLES APPLICABLE TO THE TWO APPLICATIONS BROUGHT BY THE APPLICANT IN THE PAKISTAN PROCEEDINGS AND WHAT IS THE LIKELY OUTCOME OF THOSE APPLICATIONS?

10.13 Considering the principle in Mitsui case above, in case the Pakistan Court considers the provisions of SHA to be applicable, it might, at most, in view of Mitsui principle, stay the lis while referring the dispute in terms of foreign jurisdiction clause without ousting its jurisdiction.

10.14 However, prima facie, the Pakistan Court is more likely to give preference to the applicability of the provisions of SPA on ground of public policy. Moreso, the Pakistan Proceeding involves other Defendants against whom certain reliefs have been prayed for in relation to the affairs of KEL. Since, the other Defendants are not privy to the SHA, thus, SPA would more likely be considered to have an overriding effect to that of SHA.

10.15 Furthermore, my observation in this respect is in view of the fact that, the ultimate effect of the obligations of the Parties, be it under SHA or SPA, is in respect of the management of the affairs of KEL, which is a utility company and has its place of business in Karachi, Pakistan. Therefore, the Pakistan Court, on ground of public policy would not consider the provisions of SHA and to have the affairs of KEL to be decided by a foreign jurisdiction.

11 WHEN IS A DECISION ON THE TWO APPLICATIONS BROUGHT BY THE APPLICANT LIKELY TO BE RENDERED BY THE HIGH COURT OF SINDH

11.1 Since, the matter is partly heard by the Pakistan Court and the counsel for the Applicant has argued the arbitration application under section 4 of the Act of 2011 and made his submissions on the Stay application filed by the Other Shareholders. It is likely that the Pakistan Court would expedite the hearing of these applications in case the parties move an urgent application for early fixation of the hearing.

11.2 While, sometimes, the urgencies are allowed by the Pakistan Courts however, there are situations whereby the Court is busy with some other urgent matters, the hearing of the applications may be adjourned. In any case, the applications (two applications of the Applicant and [the Respondents'] stay application) may be disposed of within four (4) to eight (8) weeks provided urgent Applications are regularly moved by either of the Parties.

Justice Hussain's summary of his opinion in the Joint Memorandum

30. In relation to the characterisation of the Pakistan Proceedings Justice Hussain said as follows (underlining and bold added):

> *"I partially agree with the view expressed in Mr. Shaukat's report and add that the principal breach alleged in the plaint is of SPA relating to the change of control and all the other breaches of the SHA, Companies Act, 2017 and Electricity Laws as listed in the plaint, are a direct consequence of and emanate from such breach of the SPA 2005. Pakistan law therefore remains relevant in respect of the change of control as evidenced by the SPA 2005 and the regulatory requirements."*

31. As regards the causes of action recognised under Pakistan law in the Plaint, Justice Hussain said this (underlining and bold added)::

> *There is a substantial cause of action that has accrued to the [Respondents]i.e., the Transaction involving the* ***sale of the majority shareholding of KESP*** *by the Applicant to a third party and the ultimate change in the board and management control of KEL as claimed in the Plaint. The rest of the claims and breaches as mentioned in the Plaint emanate from the Transaction. The identified causes of action (or, rather, separate claims) mentioned in Mr. Shaukat's report all stem from breaches under the SPA and/or violations of Pakistan electricity laws.*
>
> *……*
>
> *While sections 159, 155 and 161 lay down the process of re-election/co-option of directors, the [Respondents] are not seeking relief under Section 136 or 160 (i.e. to declare proceedings at a general meeting invalid as a result of an omission or irregularity in the notice or proceedings or to declare the election of directors invalid). Instead, the relief sought is for the [Respondents]* ***to retain their lawful and legitimate substantive rights which were given to them after they complied with Section 5.2 and 5.3 of [the] SPA and more particularly to [the Applicant] by way of Waiver and Consent dated November 27, 2008, and accordingly in order to maintain their standing in KESP and hence KEL, SAGE cannot acquire [the Applicant] in a manner that breaches [the] SPA and hence the substantive rights of [the Respondents].***
>
> *……*
>
> *In the present suit [****the Respondents] are seeking a declaration on their legal character as shareholders of KESP and indirectly KEL on the grounds that the incoming purchaser (SAGE / SVL) is not legally eligible (hence lacks legal character as shareholder of KESP and indirectly KEL) to nominate directors on the board of KEL*** *in absence of: (i) obtaining National Security Clearance as prescribed by 5.2 and 5.3 of the SPA 2005 (which apply in circumstances where the ultimate beneficial interest in KEL is indirectly being sold, as is the case here); and (ii) by evading approvals triggered under Pakistan utilities statues and Competition laws in relation to change of control.*
>
> *……*
>
> *In this case, the cause of action, which has accrued in favour of the Applicant namely the breach of SPA 2005, and the consequential breaches, are clearly recognized in Pakistan law. The High Court therefore has the jurisdiction to determine the dispute arising out of these causes of actions in view of Section 20(c) of the CPC for the following reasons:*

1. *KEL is a listed company having its registered office and principal place of business at Karachi.*

2. *KEL itself is making material disclosures to the Pakistan Stock Exchange in relation to the change of control of KESP and hence KEL, without consulting its shareholders i.e. AJP and Denham.*

3. *The Pakistan Court has ordered for the Securities and Exchange Commission of Pakistan to become a party to the Pakistan Proceedings vide order dated October 21, 2022.*

4. *KEL has filed Form 44 in regard to a change of control with the Securities and Exchange Commission of Pakistan.*

It is inferred on this basis that the cause of action has wholly or partially accrued in Karachi and accordingly, the civil jurisdiction of the High Court of Sindh has been correctly invoked by the Other Shareholders under Section 20 of CPC."

32. In relation to the Respondents' standing to bring the Pakistan Proceedings, Justice Hussain stated the following (underlining and emphasis added):

(a) *As shareholders in KESP, under Pakistan law, the [Respondents] have rights over the transfer of control through the SPA, which rights are enforceable in the Pakistan courts. This means that [the Respondents] may seek declarations in the Pakistan courts, as to legal rights because they are shareholders in KESP, and therefore indirectly shareholders in KEL.* ***In other words, their capacity as (indirect) shareholders in KEL gives them standing in the Pakistan courts to seek declaratory relief.*** *The same applies in relation to the other relief sought in the Pakistan proceedings (including injunctive and ancillary relief.*

(b) *Under Exhibit IV (Form of Guarantee and Undertaking) of the SPA, Al-Jomaih Holding Company, the owner and controller of AJP is a guarantor to the Government of Pakistan acting through the President for the duties and obligations of KESP under the SPA 2005. This apprehension clearly gives the [Respondents] locus standi to approach the Pakistan Courts and seek appropriate legal recourse. Under Pakistan law, this interest still exists although Al Jomaih Holding Company is a different entity than the [Respondents]. Under Exhibit IV of SPA 2005 (Form of Guarantee), AJH is liable in respect of the Guaranteed Obligations to the Government in case of any breach. If [the Applicant] does not follow the national security clearance procedure as prescribed under 5.3 (which has not been waived by the Government) in respect of the incoming SAGE, then under SPA, AJH and hence AJP shall be responsible to the Government for a breach. The guarantee has continuing effect and there is no termination date for the Guarantee nor SPA 2005.*

(c) *The principle of Privity of Contract does not come into play as the provisions of Waiver and Consent (being continuation of SPA) are fully applicable to the shareholders of KESP, i.e. the Applicant and [the Respondents] and the same may be enforced by either of the Parties i.e., KESP or its shareholders.*

(d) *Because of the Waiver and Consent, clause 3.2 of Article III of [the] SPA is still applicable, the relevant excerpt of which reads as follows: "……Each entity*

comprising the Purchaser hereby represents and warrants that it has full corporate power and authority to execute, deliver and perform its obligations under this Agreement and in doing so will not violate any provision of law or contravene any provision of its memorandum and articles of association or other constitutional document or any other law, rule or other Authorisations, instructions, orders or agreement by which it is bound" The representation under clause 3.2 clearly binds KESP, to perform its obligations under the SPA 2005, strictly in non-contravention of any provisions of its memorandum and articles of association, or other constitutional document or agreement.

(e) Further, in terms of Schedule 4 of the SHA, there is a covenant between the Company (i.e., KESP), the [Respondents] (Al-Jomaih and Denham) and Abraaj ([the Applicant]) that the issues relating to Reserved Matters shall be undertaken subject to mutual consent of the Parties. Pursuant to Clause 16 of the Amended SHA dated January 5, 2021, schedule 4 (Reserved Matters) of the SHA the same was amended as below: Any merger or acquisition of/by the Company or its Subsidiary (including transfers, Sales or purchases of shares in the Subsidiary by the Company). Given that a change of control is subject to the approval of the [the Respondents] under the SHA, this means that any such action shall trigger consequent breaches under Sections 3.2, 5.2 and 5.3 of the SPA.

(f) Hence, the Transaction of [the Applicant] with SVL appears to be in violation of the provisions of SHA amongst the shareholders inter se; it is therefore primarily and ultimately in contravention of SPA.

(g) I therefore consider that the Other Shareholders have a standing to continue to pursue the cause of action relating to the breach of SPA and all consequential and connected reliefs.
In addition, as far as AJP and Denham are concerned they are also aggrieved insofar that at the time of acquisition of KEL they were subjected to a level of scrutiny by Government and regulators which SAGE has clearly managed to evade.

The Supreme Court of Pakistan in Uzma Mazoor versus Vice Chancellor Khushal Khan Khattak University reported as 2022 SCMR 694 held that:

"A person may have a reasonable expectation of being treated in a certain way by administrative authorities owing to some uniform practice or an explicit promise made by the concerned authority. When such legitimate expectation was obliterated, it afforded locus standi to challenge the administrative action and even in the absenteeism of a substantive right, a legitimate expectation may allow an individual to seek judicial review of a wrongdoing".

AJP and Denham have impleaded the Government of Pakistan and NEPRA and the Court has ordered SECP to be made party as per injunction dated October 21, 2022.

Whether or not AJP and Denham's rights are substantive, there is a legitimate expectation for the incoming purchaser, SAGE, to be treated on par and not be afforded preferential treatment.

The arbitrary nature of the transaction and the directions sought in the suit are for the government defendants and regulators to be estopped and from IGCF to be restrained from effecting any change of control."

33. In relation to the question of whether the Respondents had the right to make a claim for breach of the SPA, Justice Hussain said this (underlining and bold added):

> *"The Government of Pakistan currently has shareholding in KEL. The purpose of incorporating KESP was simply to create a special purpose vehicle for the [Respondents] and [the Applicant] to coexist to invest in KEL.* ***The [Respondents] and [the Applicant] vis a vis KESP are joint shareholders with the Government of Pakistan.*** *By prioritizing the SHA, the rights and obligations of the Government of Pakistan in KEL as per the SPA are compromised.* ***While the SHA governs the relationship between the KESP shareholders, the entire constitution, functioning and working of KEL is under the SPA in which the Government of Pakistan is a party, and accordingly the same cannot be ignored; further, I consider that it would not be ignored by the Pakistan courts****."*

34. In relation to the issue of whether the Applicant had submitted to the jurisdiction of the Pakistan Court, Justice Hussain said this:

> *"The Applicant has submitted to the jurisdiction of the Pakistan Court by seeking relief to "modify" the injunctive order as well as a prayer to allow the Applicant to nominate directors on the board of KEL. I have no doubt that by doing so the Applicant has submitted to the jurisdiction of the Pakistan Court because by praying for a modification of the injunctive order, the Applicant has sought relief from the Pakistan Court."*

35. As regards the likely outcome of the Pakistan Proceedings Justice Hussain stated:

> *"The Pakistan Court is likely to give preference to the applicability of the provisions of SPA 2005 on ground of public policy as: (a) the same involves other Defendants against whom certain reliefs have been prayed for in relation to the affairs of KEL. (b) The Government of Pakistan has great interest in the functioning of KEL and public policy may require that any question relating to control of KEL be adjudicated and adjudged in Pakistan. The Courts of Pakistan have in fact taken cognizance of the affairs of KEL in various matters on the basis that the affairs of KEL involve issues of public importance and relate to enforcement of fundamental rights of the people of Pakistan."*

Justice Hussain's evidence given in his cross-examination

36. In relation to [4.5] of the Hussain Report (see the transcript for day 1 at pages 175-181), the following exchange between Mr Chapman and Justice Hussain took place (underlining added):

> "*Q. Now, when you refer in that paragraph [4.5 of the Hussain Report]to the transaction being a sale by [the Applicant] of a majority shareholding in KESP and steps taken over the ultimate management control of KEL, are they statements drawn from your own review of the documents or are they matters which you have been asked to assume for the purposes of giving your evidence?*

……

You say in your report, and you've just told us that this comes from the record in the Pakistan Proceedings, there has been a sale by SPV21, who you call the Applicant, of a majority shareholding in KESP, and I'm suggesting to you that there has not been any such sale, there has been no sale of any shares in KESP and I'm inviting you to either agree or disagree with that proposition.

A. In the materials that was placed before me, I have come to this -- I made this observation on the basis of the materials that were produced before me.

Q. So your assessment is that there has been a sale by [the Applicant] of a majority shareholding in KESP?

A. Yes. It appears so.

Q. And would I be right to assume that your other opinions insofar as they deal with, for example, the standing of the [Respondents] to bring the claims that they do in Pakistan and the causes of action in Pakistan are based on your assessment, that that is the transaction that has taken place?

……..

A. Yes. Yes.

Q. And if you are wrong about that and that was not the transaction that took place, then that would undermine your opinions in your reports?

A. No, it will not, because I have proceeded on the basis of the materials placed before me and examined it in light of the law that's applicable in Pakistan.

Q. Yes; but, with all due respect, if that assessment was wrong and the transaction in fact does not concern a sale of the majority shareholding in KESP, it would follow, would it not, that your opinions based on that erroneous assessment would fall away, would they not?

A. Of course it is for the Honourable Judge to assess, make assessment of respectable opinions. It is also of the pleadings of the parties and the law applicable thereto….The Court can come to its own independent opinion despite the opinions given by the experts, the experts of the other side or this side, the Court is not bound by that.

Q. I understand. And am I right to understand that when you also refer to there having been steps taken to take over the ultimate management control of KEL through KESP, that again is a reference primarily to steps taken as a result of what you think is a sale of a majority shareholding in KESP?

A. My position remains the same, which is what formed my opinion."

37. As regards the characterisation and analysis under Pakistan law of the causes of action asserted and relied on in the Plaint, Judge Hussain said as follows (see the transcript for day 1 at 188) (underlining added):

"Q. He [Mr Shaukat] identifies effectively four causes of action which he goes on to consider in detail, one is whether there has been a breach of the [SHA], the second is whether there has been a breach of the SPA, the third is whether there has been a breach of the Companies Act and the fourth is whether there's been a breach of the Electricity Laws……Do you agree with Mr. Shaukat that there are four causes of action pleaded in the suit in Pakistan …..

A. Maybe so. Maybe so. When the case proceeds for the -- and the trial begins, maybe so the judge comes to such a conclusion.

Q. Well, forgive me, we're not asking about what the judge might decide in due course, we are simply trying to identify what causes of action are asserted by the [Respondents] in the Pakistan Proceedings, and they are the four identified by Mr. Shaukat, aren't they?

A. I don't dispute that statement and that's why I partially agreed with him on this aspect of the matter.

Q. And can I suggest, with respect, that the reasons you don't address these four causes of action separately and in detail in your report is because as soon as you start to consider those causes of action, it is clear that the [Respondents] do not have standing to bring any of them other than a breach of the [SHA]?

A. You see, in [the] Pakistan Proceedings, there are other parties, the Government of Pakistan is also one of the parties who was an essential party for the reason that [the SPA] was executed by the President of Pakistan who presented to the Government of Pakistan. The whole scenario was subject to conservation by the court when the trial position comes.

Q. But, again, with respect, that's not an answer to my question. The reason you haven't addressed the four separate causes of action separately in your report, I suggest, is because as soon as you investigate each cause of action separately, as Mr. Shaukat has, it's clear that the only cause of action that the {Respondents] have standing to bring is the cause of action for breach of the [SHA], and that's right, isn't it?

A. It is and it isn't. Even if one single cause of action can give rise to many other causes of action, and it is for the court when the evidence is produced by the parties whether the cause of action is established by the plaintiff or whether it is denied by the defendant and what is the court's opinion about that.

……

Q. The principal relief being sought is to stop the first defendant, [the Applicant], from exercising its rights under the [SHA] to nominate members of the board of KEL through KESP. That's what the relief is trying to stop.

A. If it is in violation of the [SHA] or in violation of some law, such a relief can be claimed from the Court.

Q. Well, and it is the relief that is being claimed from the Court?

A. Yes.

Q. …. And the only agreement referred to in the prayer is the [SHA] at paragraph 4 of the prayer, is it not?

A. The [SPA], you mean?

Q. No. The [SHA]….

A. Well, that's the subsequent agreement, see, the plaintiff's focus has been in the suit on [the SPA], that is the basic and fundamental agreement and [the SHA] subsequent to that is [the] outcome of that, it's not [an] independent agreement, it's an offshoot of the basic agreement.

Q. Sorry. Just pause there, let me understand that. Your professional opinion is that the [SHA] is not a separate agreement from the [SPA]?

A. It sets out the agreement, but in continuity of the [SPA].

Q. Well, what do you mean by in continuity of the [SPA]?

A. Because the basic agreement is [the SHA] where the Government of Pakistan is also a party and in the [SHA], the Government of Pakistan is not a party.

38. Justice Hussain was cross-examined on the issue of whether and how the Applicant could be bound by and liable under the SPA (see the transcript for day 1, pages 201- 211) (underlining added):

"Q. No. And looked at the other way around, neither the [Respondents] nor SPV21 are parties to the [SPA], are they?

A. It makes no difference, it makes no difference because the [SPA] continues to go on not only the parties who were submitted to that [agreement], but its successors and assigns as well.

Q. Successors and assigns, did you say? Sorry.

A. Yes.

Q. Okay. Identify for me, please, first of all, where there has been a succession to the [SPA] by either SPV21 or the [Respondents]…… Do you say that there was a succession agreement pursuant to which SPV21 or the [Respondents] became parties to the SPA?

A. Yes. So [the SHA] article 1, then it has a definition of Company. May I read it?

Q. Well, let us all have the relevant paragraph in front of us,…….looking at the definition section …..

A. It's Company means Karachi Electric Supply Corporation Limited, a limited company incorporated under the laws of Pakistan and its permitted successors and assigns.

Q. Right.

A. KEL, the Company, KEL is the Company, for whosoever assumes its management or control or as a shareholder, that is [a successor].

Q. So let me understand your evidence. You are saying through that definition of the company, SPV21 and the [Respondents] became parties to the SPA? Have I got that right?

A. Maybe, maybe, maybe like that, but I said they are bound by [the SPA].

Q. How? That's what I'm exploring with you. How are SPV21 and the [Respondents] bound by [the SHA]? You have taken us to this definition, so please explain to us how the definition binds those other parties to this agreement.

A. See, I have cited Black's Law Dictionary to define who are the successors and who are the assigns of the company, in my report I have given quotation of Black's Law Dictionary that will be [relevant] to, but I will –

Q. We'll turn to Black's Law Dictionary in a moment. I just want to understand the propositions that you're making first….. So the propositions is that you say that [the Applicant] and the [Respondents] are successors to KEL; is that right?

A. They become successor, they become successor, whosoever succeeds, whosoever gets any right or interest in the company [KEL], he may be a successor in accordance with this definition of the company.

Q. So you say that the [Respondents] and SPV21 are bound by the terms of the SPA because they are successors to KEL?

A. Yes.

Q. Right. Right. That is not an explanation I think you've given in the joint statement or in your first report as to how they become bound?

A. It has been, I think.

Q. Well, you refer to the section in Black's Dictionary, the section in Black's Dictionary that I have been provided with is the definition of comity, which is –

A. It's Black's Law Dictionary which defines this successor in the context of company, whosoever assumes the control, management or gets shares in the company, he becomes a successor.

Q. That's your professional opinion as to how SPV21 and the {Respondents] come to be bound and parties to the SPA?

A. …… What I said is that whosoever assumes control, management or designee interest or right in the company is bound by the [SPA].

Q. I don't believe that's in your report or the joint statement either.

A. You see, that's my position. That's my view. Somebody could take a different view as well…….. My view is that whosoever, whosoever becomes a shareholder assumes

management or controls the company by subsequent events or the [unclear] of shares, he is bound by the [SPA].

Q. I understand that's the opinion you're now giving to his Lordship. My question is why does that opinion not appear in either your report or the joint statement, please.

A. This is my view and this is my opinion, and if it has escaped my notice while recording that opinion, yeah, I may -- it may have escaped my notice, but that is the legal position.

…….

JUDGE: So your proposition is if somebody becomes a shareholder in KEL and assumes the management and control of management of KEL, they are bound by the terms of the SPA.

A. Absolutely. Exactly. That's what I am saying.

Q. The suit in Pakistan pleads breaches of two contracts, the [SHA] and the [SPA]? Do you agree with that? …

A. Yes. Yes.

Q. Now, taking those in turn, the [SHA] is an agreement between the [Respondents] and SPV21.

A. Yes.

Q. And that governs the relationship between them as shareholders in KESP?

A. Subject to the provisions of the [SPA].

Q. You say that the [SHA] is subject to the [SPA]. Why so?

A. Because the principal agreement and the primary agreement is the [SPA] which continues to exist which has [not] been rescinded, which has not been declared void by any of the Court or by the parties. [It is] still in existence and … continue[s] to apply to the parties [and] to its successors.

Q. So we're back to the successor point, they are bound as successors, but only bound as successors if they have become shareholders in KEL?

A. Yes. Yes.

Q. And so if they have not become shareholders in KEL, they are not bound or parties to the SPA?

A. That's quite obvious."

[page 220]

A. … my position throughout has been that, number one, [the SPA] is the primary and principal agreement, whosoever comes as a shareholder or assume control or management of the KEL, which is a Pakistan-based company, is liable to be bound by the terms and conditions of the 2005 Agreement."

39. Justice Hussain was also asked about the impact of the privity of contract doctrine and he said this (see pages 219-221 of the transcript for day 1) (underlining added):

"Q. Now, let me ask you about privity of contract. You see what Mr. Shaukat says about that. Let's just explore it for a moment. The general rule is that only parties to a contract may sue on it and be sued upon it?

A. Yes.

Q. And there are some recognised exceptions as a matter of Pakistan Law to that rule; correct?

A. Yes.

Q. And I think from what you've said now you do not suggest that any of those exceptions are engaged here?

A. The definition KEL Company is one of the exceptions.

Q. Or, rather, it's not an exception, it's that you say that by becoming shareholders in KEL and thereby successors to KEL … SPV21 and the [Respondents] have become parties to the SPA?

A. That's not necessary to become parties. It's a question of applicability of the conditions of that argument. They are bound by the conditions of the agreement, the [SPA]. They may not be necessarily party to that, but by operation of law or by impression of this definition of company, KEL, they are bound by the conditions in terms of their agreement.

Q. …… Then let me just ask you this. Could you turn to paragraph 6.3 of your report….Because there you give a somewhat different explanation, I think, as to the position. There you say the [Respondents] were the original 100% shareholders of KSP when KEL was privatised, then they were deleted when ABRAAJ acquired the majority shareholding of KESP and then you rely on the waiver and consent provided by the Government of Pakistan. How, please, does that fit with the explanation you've just given about the [Respondents]and SPV21 becoming bound by the SPA by reason of becoming shareholders in KEL?

A. You see the definition of the company in the agreement itself is self-speaking. It includes the successors and the assigns."

40. On the issue of whether the Respondents had standing to sue the Applicant, Justice Hussain's evidence was as follows (see page 222 of the transcript for day 1):

> *"Q. Well, when you say any person who is affected by a breach of contract can bring a suit, you must mean, must you not, any person who is a party to the contract who can sue on that contract?*
>
> *A. It is my position that it means the same. There may be parties to the contract who are signatories to the [SPA], there may have been persons who later on joined the company as shareholder and become successor and assigns of the company or take part in the management or control of the company and they become liable to the terms and conditions contained in that agreement."*

41. Justice Hussain was also asked about his reliance on the legitimate expectations principle as a ground for standing and he said this (see pages 236-239 of the transcript for day 1):

> *"Q. Now, you then raise a new point that you don't raise in your report, and that's the point that in addition you say the [Respondents] you say are concerned, but they are also aggrieved, insofar as at the time of the acquisition of KEL, they were subject to a level of scrutiny by governments and regulators which Sage has clearly managed to evade, and you then refer to the case of Uzma Manzoor… Now, that is a judicial review case …..*
>
> *A. Yes. It is.*
>
> *Q. And the concept of legitimate expectations is a concept that arises in judicial review cases against governmental bodies?*
>
> *A. You see, I have little experience in the concept of legitimate expectation even in contractual matters is applicable.*
>
> *Q. So let me understand that. You say that the concept of legitimate expectation gives the [Respondents] rights under the SPA?*
>
> *A. Yes.*
>
> ……
>
> *Q. I thought what you were saying was not the legitimate -- the concept of legitimate expectation gives the [Respondents] rights under the SPA 2005, but that the concept of legitimate expectation gives rise to a cause of action against the Government of Pakistan, NEPRA and, I don't know, possibly SECP. Which is it?*
>
> *A. You see, whatever I thought on the basis of material before me I have written on and I have given my opinion. It is now ultimately for the Court to accept or reject that. I can't say anything over and above that.*
>
> *Q. But what -- forgive me – you have -- because in writing you have said that the concept of legitimate expectation –*
> *A. I said the concept of legitimate expectation can be pressed into service by a party concerned.*
>
> *Q. Yes. But it would appear for the purpose of the claims against the Government of Pakistan and NEPRA?*

A. Maybe so. Maybe so.

Q. You don't say here, as you have just now to His Lordship, that the concept of legitimate expectation can be used to acquire rights under the SPA.

A. Against not only the Government or government agencies, but against the individuals.

Q. Well, I suggest that that's wrong, the concept of legitimate expectations cannot give rise to contractual rights and you don't say so in this joint statement and I also suggest to you that the claim that's been brought by the [Respondents] in Pakistan is not a claim for judicial review, is it?

A. It may be your position or your knowledge of the law, but what I have written here, I stand by it."

The Applicant's submissions

Overview

42. The Applicant's position is that it is entitled to the relief claimed on a permanent basis because first there is no doubt that there has been a breach and a continuing breach of the SHA by the Respondents in commencing and continuing the Pakistan Proceedings and secondly there is no reason for declining to order the relief sought. The Applicant supported the reasoning set out in the Judgment and submitted that the provisional views I had formed as to the merits of the Applicant's case and claims could now be confirmed as justified after trial.

43. The only material development since the Interim Hearing had been the exchange of expert evidence on Pakistan law which did not, on the balance of that evidence, alter the fundamentals of the analysis as set out in the Judgment (and, if anything, provided further support for it). In terms of the issues, the Applicant said that the core issues remained as they were in the interim stage. First, whether the Pakistan Proceedings or elements of them fell within clause 25.2 of the SHA (as amended by the Second Deed). Second, on the basis that they did, whether the Court should grant the permanent injunctive relief sought. Third, the form of that relief in consequential orders.

44. The Applicant said that the propositions of Cayman law applicable to the application were not in dispute and had been correctly set out and summarised at [47] – [54] of the Judgment. The Applicant maintained its case that all of the claims against all of the parties in the Pakistan Proceedings fell within clause 25.2 and that it was entitled to injunctive relief as a result to

prohibit the Respondents from continuing the Pakistan Proceedings against all the parties currently joined to them.

45. The Applicant also argued that the Pakistan Proceedings were vexatious and oppressive. In its skeleton argument the Applicant relied on this argument only for the purpose of rebutting the Respondents' claim that there were strong reasons for refusing to grant the injunction sought by reason of the breach of the exclusive jurisdiction clause in the SHA (see [36](4)] of the Applicant's written submissions). However, during his oral submissions, Mr Chapman said (see page 84 of the transcript of the hearing on 3 April) that the Applicant maintained, as it had done in its written and oral submissions for the Interim hearing, its claim for an injunction on the basis of the alternative jurisdiction under which anti-suit injunctions may be granted even where there has been no breach of an exclusive jurisdiction clause. The Applicant argued that it was entitled to the same injunctive relief on the ground that the Pakistan Proceedings were vexatious in the sense described by Lawrence Collins LJ in *Elektrim v Vivendi Holdings* [2009] 22 Lloyd's Reports at [120]-[122].

46. In that case, Vivendi had a joint venture with Elektrim in relation to a company called Telco. Vivendi owned 51% and Elektrim owned 49% of Telco. Elektrim also owned a 48% interest in another company PTC in which Deutsche Telekom also had a substantial interest. Elektrim transferred its shares in PTC to Telco which Deutsche Telekom challenged. An arbitral tribunal held that Deutsche Telekom had validly exercised an option over Elektrim's shareholding in PTC. Vivendi commenced arbitration proceedings in London against Elektrim claiming that Telco still owned or was entitled to the PTC shares. The tribunal held in favour of Vivendi and that Elektrim had been in breach of the joint venture agreement. Separately, a subsidiary of Elektrim called Elektrim Finance had issued bonds to a trustee, Law Debenture, guaranteed by Elektrim. For the purpose of pursuing Vivendi's battle with Elektrim by indirect means a subsidiary of Vivendi (VH1) acquired a substantial holding of the bonds and commenced proceedings in Florida against Elektrim and the trustee alleging fraud against them (the claim against Elektrim being that it had secretly agreed to transfer the PTC shares to Deutsche Telekom for a fraction of its true value and had ignored the orders made by the London arbitrators). Elektrim (and the trustee) applied for an anti-suit injunction arguing *inter alia* that the Florida proceedings were oppressive. Lewison J (as he then was) agreed holding that the causal link between the alleged fraud and the claimed loss was fanciful, that the claim was bound to fail and that VH1 would not be prejudiced by the making of an injunction because there was no juridical advantage to it in bringing the Florida proceedings of which it would be unjustly deprived. On appeal, the Court of Appeal dismissed the appeal and Lawrence Collins LJ said this:

"82. Nor was there any substantial dispute on the principles to be applied on the alternative ground for an injunction in favour of Elektrim, or on the ground for an injunction in favour of the trustee. An injunction could be granted if the applicant could show that the pursuit of foreign proceedings was vexatious or oppressive. This presupposed that, as a general rule, the English court must conclude that it provided the natural forum for the trial of the action; and since the court was concerned with the ends of justice, account must be taken not only of injustice to the defendant in the foreign proceedings if the plaintiff was allowed to pursue the foreign proceedings, but also of injustice to the plaintiff in the foreign proceedings if he was not allowed to do so. So the court would not grant an injunction if, by doing so, it would deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him: see SNI Aérospatiale v Lee Kui Jak [1987] 3 All ER 510, [1987] AC 871.

83. The categories of factors which indicate vexation or oppression are not closed, but they include the institution of proceedings which are bound to fail, or bringing proceedings which interfere with or undermine the control of the English court of its own process, or proceedings which could and should have formed part of an English action brought earlier: see Dicey, Morris and Collins on the Conflict of Laws (14th edn, 2006) vol 1, pp 504–505 (para 12–073).

84. But an application for an anti-suit injunction should not be used as a means of obtaining a summary determination of the foreign claims in an English court, particularly where (as in the United States) material may turn up on discovery which may support a case which otherwise appears unlikely to succeed: see British Airways Board v Laker Airways Ltd [1984] 3 All ER 39 at 50, [1985] AC 58 at 86 and Midland Bank plc v Laker Airways Ltd [1986]1 All ER 526 at 534, [1986] QB 689 at 700. But if there are other factors which indicate oppression or vexation, the weakness of the case on the merits may be a further compelling factor.

85. In particular, an injunction may be granted to protect the process of the English court, and in particular to prevent the re-litigation abroad of issues which have been (or should have been) the subject of decision in England: see Masri v Consolidated Contractors International (UK) Ltd (No 3) [2008] EWCA Civ 625 at [83]–[88], [2008] 2 All ER (Comm) 1146 at [83]–[88].

……

"120. I accept that, in considering whether a cause of action in a foreign country is vexatious or oppressive on the ground that it is bound to fail, the English judge should not conduct a summary determination under English law principles without regard to the fact that the foreign system of pleadings may be more liberal, or that the foreign system of discovery may yield sufficient material to support allegations which in England should not be made without existing evidence. I also accept that an error or omission in a foreign pleading should not be considered fatal if it can be cured by amendment.

> 121. *But the inherent weakness of a claim, taken together with other matters, may be an important factor in the consideration of whether foreign proceedings are vexatious or oppressive. The English court is not exercising a summary jurisdiction. It is entitled to take a view in the round, and it is entitled to be sceptical about attempts to cure by potential amendment claims which on their face are hopeless (and, in this case, in some respects bogus). In my judgment, the judge was entitled to take the view that reliance on the press releases was plainly a cynical device to establish an independent cause of action in Florida, and that it was inherently incredible that Everest could have relied on a press release rather than on the awards themselves or on the advice of the bondholders' lawyers, Bingham McCutchen. The judge was fully entitled to take into account the weakness, and inherent implausibility, of the claim in the exercise of the discretion."*

47. The Applicant submitted that this is a case where the Court could be satisfied that not only were the Pakistan Proceedings brought in breach of clause 25.2 but also that they were vexatious and oppressive. The object of the Pakistan Proceedings was to stymie the Applicant's contractual rights under clause 5.7 of the SHA. The Pakistan Proceedings were clearly weak (on the balance of the expert evidence, other than a claim under the SHA as a matter of Pakistan law the Respondents did not have standing to bring any of the claims made) and the appropriate inference to be drawn was that they were being used as a device in an attempt to seek to avoid the requirements of the exclusive jurisdiction clause. Aggravating features of the proceedings were the fact that they made very serious allegations that were completely without foundation and that they sought to restrain the exercise of the Applicant's contractual rights.

The expert evidence

48. The Applicant submitted that Mr Shaukat's evidence should be preferred on all issues. Justice Hussain was an unsatisfactory witness. The Applicant relied on a number of points to support that latter view.

49. First, Justice Hussain gave his evidence from the offices of Mandviwalla & Zafar and in attendance with him, inappropriately and impermissibly, seeking to assist him with his evidence, was Mr Hasan Mandviwalla. Mandviwalla & Zafar is the law firm acting for the Respondents in the Pakistan Proceedings.

50. Secondly, Justice Hussain had based his evidence and opinions on a number of fundamental factual errors. In particular, he had failed to understand the relevant transaction which formed the basis of his opinion. At [4.5] of the Hussain Report he had described the Transaction as the sale of the majority interest in KESP, which was obviously incorrect, and had confirmed that that was

his understanding in his oral evidence. He had also thought that KESP had been incorporated to enable the Applicant to invest in KEL.

51. Thirdly, his legal analysis supporting his opinions was at least in parts incredible and became increasingly so as his evidence emerged and changed in his oral testimony. This was particularly so in relation to his entirely new view that the basis upon which the Respondents had standing to sue the Applicant under and the reason why the Applicant was bound by the SPA was because the Applicant was to be treated as a successor to KEL within the meaning of the definition of company in the SPA. Justice Hussain had during his cross-examination confirmed that it was now his view that whoever became a shareholder in KEL would be bound by the SPA. Not only was this a new view which Justice Hussain had not put forward in the Hussain Report, not only was it inconsistent with the opinion of Mr Shaukat but it was unsupported by the relevant Pakistan law authority relied on and was ultimately incredible. Justice Hussain's flawed and confused approach also put his general credibility and reliability as a witness in doubt. But critically neither the Applicant nor the Respondents were shareholders in KEL. There had been no transaction in the shares of KEL. In fairness to Justice Hussain, the Applicant said, when pressed he did accept that if the Applicant and the Respondents were not shareholders in KEL then they would not be bound by the SPA. Furthermore, Justice Hussain's evidence was also clearly incorrect when he had said that the SHA was not a separate agreement from the SPA and his suggestion in his oral evidence that the judicial review concept of legitimate expectations could ground standing for a breach of contract claim was wholly unconvincing. Another example of the unsatisfactory nature of Justice Hussain's evidence was his evasiveness on the test for the submission to jurisdiction in Pakistan.

52. In contrast, the Applicant submitted, Mr Shaukat was a measured and persuasive witness who clearly knew his material and the law well. He was, the Applicant argued, subject to an unsuccessful attempt to attack his expertise but as he had made clear, he is a senior practitioner who although no longer engaged in litigation before the local courts as an advocate still supervises teams responsible for dispute resolution and undertook arbitration work himself. It was to his credit that he had drawn to the Court's attention (see the discussion of this point below) an issue concerning the drafting of the prayer in the Applicant's application to recall or modify the injunction order made in the Pakistan Proceedings (see [89] – [[91] of the Shaukat Report) but had cogently concluded that ultimately there had not been a submission when the application was read as a whole.

53. When he came to be asked about the key issues, about the nature of the action pleaded in the Suit and whether the Respondents had standing to bring them, he remained absolutely consistent to the views expressed in the Shaukat Report in the Joint Memorandum.

Are the Pakistan Proceedings caught by clause 25.2?

54. The Applicant noted that, in deciding to grant the interlocutory injunction, I had not sought finally to determine the issue of whether there had been a breach of clause 25.2 of the SHA by reason of the commencement of the Pakistan Proceedings and had indicated that such a final determination would need to await the trial of the Summons and a review of the evidence adduced at trial, in particular the expert evidence of Pakistan law. In the Judgment, I had found that there was a high degree of probability that the Pakistan Proceedings were commenced and continued in breach of that clause and, the Applicant submitted, the Court could now be satisfied that this was the case on the balance of the evidence adduced at the trial.

55. The Applicant argued that a proper analysis of the expert evidence of Pakistan law filed by the parties served only to underscore the provisional view taken at the interim stage that the Pakistan Proceedings did fall within the scope of the exclusive jurisdiction clause. In particular, the Applicant argued, the expert evidence supported the analysis set out in the Judgment to the effect that the complaint and relief sought in the Suit was directed towards seeking to prevent the Applicant from exercising its rights under the SHA to cause KESP to appoint directors to the KEL board. The expert evidence had confirmed that, as I had found in the Judgment (at [84] and [85]) "*The Suit centrally concerns the action of the Applicant and is based on an asserted breach of the SHA*" and "*The primary relief sought in the Suit is directed to and against the Applicant*."

56. The expert evidence had also established that the claims made in the Pakistan Proceedings other than those against the Applicant (and Alvarez and Marsal) based on the SHA were without a proper foundation. Mr Shaukat's evidence had confirmed that (a) as non-parties to the SPA the Defendants did not have standing to bring a claim against the Applicant under, and that the Applicant was not bound by, the terms of the SPA; (b) given that section 33 of the Electric Power Act and regulation 14 of the Electric Power Regulation did not confer any rights upon the Respondents, they did not have standing to bring a claim for declaratory or injunctive relief under those provisions; (c) KESP had not acted in breach of the SPA and (d) there had been no violation of the Companies Act. It was noteworthy, the Applicant submitted, that the Privatisation Ministry and NEPRA had been joined as proper and necessary parties. Accordingly, they had not been joined because a claim *per se* was made against them and no relief was being sought against any

of them independent of the relief being sought in relation to the Applicant. Accordingly, it was clear that everything in the Pakistan Proceedings hinged on the claim against the Applicant. The Suit essentially concerned the actions of the Applicant and was based on an asserted breach of the SHA. The primary relief sought was directed to and against the Applicant and even included a direction that it comply with the SHA at prayer 4. All the claims in the Pakistan Proceedings depended on factual allegations regarding the conduct of the Applicant. No relief had been sought against either KESP or KEL.

57. The claims in the Pakistan Proceedings which assert a breach of, and seek relief in relation to, the SHA plainly clearly relate to a "*dispute arising out of or in connection with [the SHA]*". Furthermore, so are the claims in the Plaint which seek to prevent the exercise by the Applicant of its rights under the SHA (in particular the right to cause KESP to appoint directors to the KEL board). Accordingly, all the claims in the Pakistan Proceedings were covered by clause 25.2, even the claims for relief against parties other than the Applicant (and Alvarez and Marsal). There was no justification for construing clause 25.2 as excluding such claims where the subject matter of the claim related to a dispute arising out of or connected with the SHA because the relief sought affected and would prevent the exercise of rights under the SHA by the Applicant.

58. The Applicant submitted that it would make no difference to this analysis or its entitlement to an injunction even if there were to be an arguable basis for saying that the Transaction relied on by the Respondents had resulted in a breach by KESP of its obligations under the SPA. It would be a matter for the other parties to the SPA as to whether to bring a claim in respect of that breach. One would think, the Applicant said, that it was principally a matter for the Government of Pakistan being a counterparty to the SPA. The Applicant argued that the Respondents had sought to rely on a bootstrap argument to support their case that the Pakistan Proceedings were justified despite the terms of clause 25.2 by pointing to an alleged breach of another agreement (the SPA) to which neither they or the Applicant were parties (as an excuse or justification for bringing proceedings in flagrant breach of clause 25.2 of the SHA).

There were no strong reasons justifying a refusal to grant the permanent injunctive relief sought

59. The Applicant noted that at the Interim Hearing the Respondents had unsuccessfully relied on four matters which were said to constitute strong reasons against the grant of injunctive relief. They were: (a) the alleged delay in seeking injunctive relief; (b) the Applicant having submitted to the jurisdiction of the Pakistan Court; (c) the absence of prejudice to the Applicant if injunctive relief were not granted and (d) comity.

60. The Applicant submitted that the grounds on which the Court had rejected the Respondents' arguments remained good and justified their rejection after the trial. There was nothing in the expert evidence that justified a different conclusion.

61. Insofar as alleged delay was concerned, the Court's rejection of the Respondent's claim in the Judgment should be the end of that issue.

62. Similarly, the Court had rejected the argument that steps taken by the Applicant in Pakistan had meant that it had, as a matter of Cayman law, submitted to the jurisdiction of the Pakistan Court so as to disentitle it to relief from this Court. There was nothing in the expert evidence that altered or should alter that conclusion. While Justice Hussain had opined that in applying for relief from the Pakistan Court in seeking to set aside the Pakistan Interim Injunction against it and in seeking a stay, the Applicant had submitted to the jurisdiction, this was unpersuasive for the reasons given by Mr Shaukat.

63. Mr Shaukat had dealt with the issue at [89]-[91] of the Shaukat Report (in considering the approach under Pakistan law as to whether a party to an arbitration agreement seeking a stay of court proceedings had filed a statement or taken any other steps in the proceedings indicating that the right to invoke an arbitration clause had been intentionally abandoned in favour of court proceedings). He said this:

> *"89. Applying these principles to the case at hand, I note that the pleadings made before the High Court in the Referral Application and the Injunction Removal Application appear to be centred on the submission that the dispute between the parties is required to be resolved in accordance with Clause 25 (although reference has been incorrectly made to the unamended Clause 25 which contained a binding arbitration clause). Such submissions do not betray an intention to participate in the Pakistan Proceedings to the extent of the substantive adjudication of the claims as such submission seeks resolution of the dispute as per the SHA. However, there is one part of the Injunction Removal Application which is problematic. The prayer in such application states as follows:*
>
> > *It is prayed that this Hon'ble Court may be pleased to grant this application and recall/ modify the ad-interim order dated 21.10.2022 and allow nominations of Directors on the board of Defendant No.4 in proportion to the shareholding of the Defendant No.3. (Emphasis Added)*
>
> *90. This is problematic as the prayer can be interpreted in two ways. Under the first interpretation the emphasized portion can be read as a consequence of the recall/modification that has been sought whereby the nominations would be allowed as a result of the recall/modification. Under the second interpretation the*

> *emphasized portion can be read as a specific request to the High Court to make a direction positively allowing the nominations to be made to the board of KEL. Such an interpretation may entail a substantive determination of whether the nomination is allowed. The prayer in the Injunction Removal Application could have been worded so as to avoid this confusion, however, the current wording creates doubt as to the exact relief the Applicant is seeking and if such relief is a positive direction from the High Court, the seeking of such direction can be said to be a step in the proceedings.*
>
> *91. I note that the caselaw of the Supreme Court referenced above in relation to the taking of steps in proceedings places paramount importance on the intention of the parties. The reading of both applications of the Applicant as a whole suggests that the intention was not to seek a substantive determination from the High Court. In fact, it is expressly stated at paragraph 5 of the Injunction Removal Application that "if the [Other Shareholders] have any objections or reservations against the proposed directors of [the Applicant], it is bound to refer the matter for adjudication in accordance with Clause 25 of the [SHA]". Based on this, it would seem that the intention of filing the Injunction Removal Application was not to take a step in the proceedings and therefore the ambiguity in the prayer is likely to be resolved in favour of the first possible construction set out above."*

64. Moreover, as Mr McDonald had explained in his second affidavit, the Applicant was in substance contesting the jurisdiction of the Pakistan Court, relying on the provisions of the SHA. That being so, it was very difficult to see how, even as a matter of Pakistan law and procedure, the Applicant could be said to have submitted to (i.e. accepted) the jurisdiction of the Pakistan Court. But, critically, Pakistan law was not determinative on this issue. The question was whether this Court would consider, as a matter of Cayman law, a voluntary submission to the jurisdiction of the Pakistan Court had been made. The Plaintiff submitted that this was clearly not the case, as I had already found for the purpose of the granting of interlocutory relief, at [94] and [95] of the Judgment. There were no grounds for changing that conclusion for the purpose of granting the permanent relief sought at trial.

65. It was also wrong to say that the Applicant would not suffer any prejudice if injunctive relief was refused. Once again, this argument had already been considered and rejected by the Court (see [96] of the Judgment). Moreover, the position was stronger now than it was at the interim stage. At the interim stage it was said that temporary injunctive relief would not enable the Applicant to make its proposed appointments to the board of KEL and, that being so, failing to grant injunctive relief would not cause it to suffer any prejudice. That submission was rejected by the Court. As I had found, the Applicant was entitled to have the dispute with the Respondents determined in the contractually agreed forum. Moreover, a permanent injunction restraining the pursuit of the Pakistan Proceedings and requiring the Respondents to comply with their contractual obligations would or ought to have the effect of the Pakistan Proceedings being

discontinued and the Respondents complying with their obligations under clause 5.7 of the SHA so as to procure the necessary appointments to the board of KEL. The ongoing breaches of the Respondents are causing the delay in filling the vacancies on the board of KEL and causing prejudice. It should also be noted that, while not being dispositive of the issue of prejudice, a final resolution of the jurisdictional challenge in Pakistan was likely to take years (which the Applicant suggested was no doubt part of the Respondents' strategy, namely to bog down the Applicant in proceedings in Pakistan with a view to disrupting or blocking the Transaction).

66. The Applicant noted that the Respondents had argued that the Court should only at most consider granting an injunction to restrain proceedings against the Applicant (and Alvarez and Marsal) and that as a result some claims would or might continue in Pakistan. The Applicant's primary case was that there should be no claims left to continue in Pakistan since the Court should grant an injunction prohibiting the continuation of the Pakistan Proceedings against all parties but it submitted that even if some claims were permitted to continue, that would not constitute a strong reason not to enforce clause 25.2 as it applied to proceedings against the Applicant (and Alvarez and Marsal). As the discussion in Raphael at [8.12] made clear, even where there was a risk of multiple proceedings, the exclusive jurisdiction clause will still have considerable force and weight and will tend to be enforced, and that was all the more so where any risk of multiple proceedings arose from the voluntary acts of the contract breaker itself, which it plainly did in the present case. The Applicant relied on the decision of Nugee J in *Hamilton-Smith v CMS Cameron McKenna* [2016] EWHC 1115 (Ch) and the analysis of the authorities in Raphael at [8.12]).

67. In that sub-paragraph Raphael sets out the position as follows:

> *"The exclusive jurisdiction forum clause may cover only parts of an interconnected set of issues, so that enforcing it by injunction risks creating new problems with conflicting and overlapping proceedings continuing in different countries. Problems of this nature are capable of amounting to strong reasons against an injunction. It may be reasonable to suppose that serious problems due to conflicting and overlapping proceedings as a result of enforcing an exclusive forum clause are not something the parties would have had in mind at the time of agreeing the clause. Nevertheless, the exclusive forum clause will always have considerable force and may well be enforced even at the price of multiplicity of proceedings and this is the tendency of the recent case law [citing Hamilton-Smith and Nori Holding v Bank Otkritie Financial Corporation [2018] 2 Lloyd's Rep 80]. Further, if there would be inconsistent proceedings even if the injunction is refused, the risk of a multiplicity of proceedings if the injunction is granted is of less significance. Where the problems arise from the voluntary acts of the contract breaker in pursuing the foreign litigation, the courts have tended to give the risk of conflicting proceedings less weight [citing Hamilton-Smith again at [59], [62] and [71]]. Conversely, the interests of third-parties have been taken more seriously [citing Bouygues Offshore v Caspian Shipping*

*(Nos 1, 3, 4 and 5) [1998] 2 Lloyd's Rep 461 at 466 (CA), Donohue v Armco [2002] 1 Lloyd's Rep 425 (HL) (**Donohue**) at [16], [25] and [27] and Verity Shipping v NV Norexa (The Skier Star) [2008] 1 Lloyd's Rep 652 at [31]-[35]]."*

68. The Applicant also submitted that the other parties to the Pakistan Proceedings, in particular the Government of Pakistan or the local regulators would not be prejudiced by the grant of the injunction sought by the Applicant. The injunction would not prevent the Government of Pakistan or the regulators from acting to enforce local laws or to ensure that important public policy objectives and local interests were protected. The Applicant went further and submitted that looking at the responses that there have been to the Pakistan Proceedings from the other parties, it was reasonable to infer that a permanent injunction would be welcomed by those parties. KEL had challenged the Suit on the basis that the dispute concerned the SHA and the Privatisation Ministry had adopted a similar position. In the counter-affidavit dated 20 December 2022 filed in the Pakistan Proceedings on behalf of Privatisation Ministry the Privatisation Ministry identified three preliminary objections. These were that the cause of action relied on by the Respondents in the Pakistan Proceedings arose out of the SHA; that apparently no dispute existed as between the parties to the SPA and it remained to be seen whether the Pakistan Proceedings involved a claim that affected the rights of the Privatisation Ministry. The SECP's response to the Pakistan Proceedings (see [45(d)] of the Judgment) set out in the counter-affidavit dated 21 December 2022 sworn on its behalf referred to the news reports published on 12 and 20 October 2022 that "*a large part of the controlling stake in [KEL] had been acquired by [SVL]*", to KEL's announcement on PSX dated 20 October 2022 "*that changes have been consummated involving [the GP] being the fund manager, and [the Fund], being the owner of the Fund assets. In particular controlling interests in [the GP] and certain limited partnership interests in the Fund have been acquired by [SVL]*" and KEL's further announcements on the PSX of the same date and 24 October 2022 that the non-executive directors had resigned from KEL's board. It appeared, the Applicant said, that the SECP was content to rely on its statutory and other powers (and the Direction) and had not supported the Pakistan Proceedings or considered them necessary to protect its position.

The Respondent's submissions

In outline

69. The Respondents' submissions can be summarised as follows:

(a). the dispute evidenced by, and being litigated in, the Pakistan Proceedings does not engage the exclusive jurisdiction clause in the SHA.

(b). even if the Pakistan Proceedings (or part of them) were held to fall within the exclusive jurisdiction clause in the SHA, there were, in this case, strong reasons why the Court should not exercise its discretion to grant an anti-suit injunction. The Respondents relied on four main points:

(i). the Applicant had submitted to the jurisdiction of the Pakistan Court and in any event had acted in the Pakistan Proceedings inconsistently with the relief that it now sought from this Court.

(ii). the claims being litigated in the Pakistan Proceedings (even if they fell within clause 25.2 of the SHA) formed part of a wider set of claims which this Court cannot, or ought not to, interfere with. At least some of the claims in the Pakistan Proceedings would continue in any event, even if this Court granted the injunction sought by the Applicant. As a result, granting such an injunction would lead to the unwelcome result of different parts of the dispute being determined in different courts.

(iii). the Pakistan Proceedings had an intrinsic connection with Pakistan.

(iv). the Applicant was guilty of inexcusable delay in seeking the injunction.

(c). if (contrary to the Respondents' primary case) the Court decided to grant an anti-suit injunction, it must be confined in scope to (i) claims brought by the Respondents against the Applicant (and possibly KESP) and (ii) claims for, or that depend upon an allegation of, breach of the SHA.

70. The Respondents say that they have been kept in the dark and have not been properly informed about the Transaction and the related acquisitions to be made by SVL. This, they say, has given rise to real concerns (in particular as to the impact on KEL of the changes brought about by and in consequence of the Transaction) and this is relevant context to the action they have taken in Pakistan.

The key authorities and the applicable principles

71. The Respondents emphasised that the authorities made it clear that the Court had a real discretion to exercise in cases arising out of a breach of an exclusive jurisdiction clause. They relied in particular on the decision of the House of Lords in *Donohue*.

72. They noted that in *Donohue* Lord Bingham (at [24]) had referred with approval to the decision of Brandon J in *The Eleftheria* [1970] P 94 and his identification of some of the matters which would be relevant to the exercise of the discretion. Those matters included the country in which the evidence of the issues of fact was situated or more readily available and the effect of that on the relative convenience and expense of trial as between the English (Cayman) and foreign courts; whether the law of the foreign court applied and, if so, whether it differed from English (Cayman) law in any material respects; with what country either party was connected and how closely; whether the defendants genuinely desired a trial in the foreign country or were only seeking procedural advantages and whether the claimants would be prejudiced by having to sue in the foreign court, e.g. because they would be deprived of security for their claim, be unable to enforce any judgment obtained, be faced with a time-bar not applicable in England (Cayman), or for political, racial, religious or other reasons be unlikely to get a fair trial.

73. The Respondents argued that a factor that could justify a refusal to grant the injunction was the involvement in the foreign proceedings of other parties who were not bound by the jurisdiction clause and the fact that the foreign proceedings involved claims that did not fall within the clause. At [27] of *Donohue* Lord Bingham had pointed out that:

> *"The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions."*

74. At [28] of *Donohue* Lord Bingham had referred to the judgment of Rix J in *Credit Suisse First Boston (Europe) v MLC Bermuda* [1999] CLC 579 (***Credit Suisse***) at 595. This was a case where the judge did grant an injunction "*but only to restrain the prosecution of claims covered by the exclusive jurisdiction clause.*" *Donohue* itself was a case where it was held that the fact that granting an injunction would cause the litigation to take place in two different jurisdictions constituted strong reasons why an injunction ought not to be granted despite the existence of the exclusive jurisdiction clause.

75. The Respondents argued that the existence of overlapping claims and the potential for multiple sets of proceedings in different jurisdictions was an important factor for the purposes of exercise of the discretion (which was all the stronger where those proceedings include matters that could only sensibly be dealt with in another jurisdiction). They relied on the following passage from Briggs, *Civil Jurisdiction and Judgments* (7th ed.) (***Briggs***) at 28-21:

> *"A distinct element of public interest recognises that a court has a public duty to secure the proper administration of justice, and this may sometimes override the private interest of the parties in holding each other to an agreement on jurisdiction…The same point would arise if the material scope of the agreement were to be significantly narrow, so that the bringing of some claims did not fall within its range and would, even as between parties to the agreement, not involve a breach of its terms. As it cannot be correct that the parties may, by private agreement (otherwise than for arbitration), prevent the court from securing an orderly resolution of complex or multipartite disputes, the decision [in Donohue] is wholly rational, and marks a limit on the power of the parties to write the rules of civil litigation for themselves.*

76. But, the Respondents said, the matters relevant to the discretion were wide and various. The injunction applicant's conduct was relevant, and two aspects of such conduct were frequently invoked, namely delay and unconscionable conduct. In addition, submission to the foreign jurisdiction may provide a strong reason not to grant an injunction (e.g. *Schiffahrgesellschaft Detlev von Appen v Voest Alpine Intertrading (The Jay Bola)* [1997] 1 Lloyds Rep 179 at p.188 col. 2 to p.189 col. 1) and steps taken by the injunction applicant which were inconsistent with the exclusive jurisdiction clause being the sole forum for dispute resolution may also be a powerful factor against enforcement (citing Briggs at 28-05 where it is said that "*an applicant who has already submitted to the jurisdiction of a foreign court and asked for relief from it is liable to find that this is a substantial obstacle to his obtaining an antisuit injunction from an English court*.")

The expert evidence

77. The Respondents argued that it was important not to allow the disputes between the experts to assume a greater significance than was justified. The Respondents submitted that many of the disputes between them did not need to be resolved by the Court on this application.

78. Much of the expert evidence dealt with the merits of the claims made in the Pakistan Proceedings but, the Respondents argued, the Court on this application was unable and should not seek to resolve the disputes and decide, for example, whether the Respondents had standing to bring those claims as a matter of Pakistan law. These were matters for the Pakistan Court and this Court

was not engaged in a summary determination of those issues. As Lawrence Collins LJ had said in *Elektrim* at [84]:

> *"But an application for an anti-suit injunction should not be used as a means of obtaining a summary determination of the foreign claims in an English court, particularly where (as in the United States) material may turn up on discovery which may support a case which otherwise appears unlikely to succeed: British Airways Board v Laker Airways Ltd* [1985] AC 58, 86; *Midland Bank plc v Laker Airways Ltd [1986] QB 689, 700. But if there are other factors which indicate oppression or vexation, the weakness of the case on the merits may be a further compelling factor."*

79. In addition, the Respondents argued that, in any event, insofar as the Applicant was seeking to say that the claims in the Pakistan Proceedings were so hopeless as necessarily to be frivolous or vexatious, they had been unable to establish this on the evidence. On a number of points, Mr Shaukat had agreed that various of the issues were not open and shut arguments and had accepted that they were open to argument both ways even though he preferred one side of the argument. So, for example, in relation to questions of whether the Pakistan Court could hear claims under the Electric Power Act, Mr Shaukat had accepted that the issue was untested and open to argument. In relation to the Companies Act points, while Mr Shaukat did not go so far as agreeing that it was all open to argument, it was clear from the material that there were opposing points of view which were open to being tested in the Pakistan Court. Mr Shaukat had also accepted that it appeared arguable that indirect transfers of shares in KEL were caught under the relevant provisions of SPA. These disputes and issues had to be left to the Pakistan Court.

80. The Respondents relied on Justice Hussain's explanation and opinion as to the nature and merits of the claims in the Pakistan Proceedings. They submitted that his evidence was to be preferred to that of Mr Shaukat. The Respondents argued that Mr Shaukat's experience and expertise did not compare with that of Justice Hussain and that the weight to be given to his evidence was affected and reduced by the fact that he is not a litigation lawyer. Mr Shaukat had admitted that he had not been inside a Pakistan Court since around 2010, so that while he or those who assisted him in preparing his report had no doubt done a good job in looking matters up for the purposes of this case, Mr Shaukat did not bring his own personal expertise or experience to the process and especially in relation to what actually goes on inside a Pakistan Court. This, the Respondents said, was not a satisfactory basis for expert evidence.

81. But even if it were to prove to be the case that Mr Shaukat was right and Justice Hussain was wrong, that would not of itself demonstrate that the claims are so frivolous that they ought to be characterised as such by this Court and taken into account on that basis. The Respondents

submitted that although various criticisms were levelled at Justice Hussain, it had not been suggested to him or argued that he was not putting forward his genuine views as to how the claims worked. Evidence from a retired Supreme Court Justice to the effect that the claims in the Pakistan Proceedings were properly formulated and were sound in law was at least sufficient to establish that they were arguable. Even though there were few, if any points, of Pakistan law or procedure that the Court really needed to decide and choose between the opinions of the two experts, where that was necessary Justice Hussain's opinions and evidence was to be preferred.

82. The Respondent also submitted that the Applicant's criticism of the arrangements under which Justice Hussain gave his evidence and of Mr Hasan Mandviwalla being in the room with Justice Hussain were wholly unfair. The Respondents had before Justice Hussain gave his evidence identified who was in the room (Mr Mandviwalla is well known to those acting for the Applicant) and if there had been an objection it could have been made at that time but was not. Mr Mandviwalla could have been asked to leave the room. But in the absence of any objection being made at that time, the Applicant could have no cause for complaint. There was also no basis for the suggestion that those in the room were seeking to prompt or influence Justice Hussain.

The proper approach for characterising the Pakistan Proceedings and deciding whether they give rise a breach of clause 25.2

83. The Respondents' primary position was that the Court had to stand back and characterise the entirety of the dispute being litigated in the Pakistan Proceedings and ask the overarching question of whether the dispute so understood did or did not arise out of, or was connected with, the SHA. The Respondents said that it did not.

84. The Respondents' secondary case was that the Court was required to consider separately each claim made in the Pakistan Proceedings and decide whether the relevant claim related to a dispute arising out of, or connected with, the SHA. But even on that approach, all or virtually all of the claims made in the Pakistan Proceedings, when correctly characterised, did not relate to a dispute arising out of, or connected with, the SHA.

The construction and scope of clause 25.2 of the SHA

85. The Respondents made three main points. First, that the Pakistan Proceedings should be understood as involving and litigating a dispute regarding and relating to the transfer of control of KEL. That was not a dispute arising out of, or connected with, the SPA. Secondly, clause 25.2

did not, when properly interpreted, cover or prohibit proceedings against non-parties. It therefore did not prohibit the commencement of proceedings in Pakistan by the Respondents against the Applicant and the other defendants named in the Pakistan Proceedings.

86. Properly characterised, the true nature of the claims made in the Pakistan Proceedings was that they were claims to enforce various contractual, statutory and regulatory rights and obligations to prevent, or as a minimum to regulate and superintend, any transfer of control and or ownership of KEL. The basis for that was (almost entirely) the SPA.

87. This was confirmed by a review of the Plaint:

(a). it identified at [12]-[13] the key provisions of the SPA that were relied upon (namely, sections 5.2 and 5.3) and went on (at [14]-[15]) to identify the framework created by Section 33 and Regulation 14.

(b). the allegation at [18] included an allegation that the proposed transfer of beneficial ownership/board/management control was subject to the restrictions in the SPA.

(c). [25] alleged an attempt to "*bypass*" the regulatory framework in Pakistan. There were various other references to the need for approval of the regulators (e.g. [30], [31], [33]).

(d). [27], [31] and [33] alleged a disregard of the process of election of directors under s.159 of the Companies Act 2017.

(e). the SHA was referred to in the Plaint but as part of the background and the story by which the Applicant came into the picture. It was introduced at [16] and its provisions in relation to directors were referred to at [17]. The SHA was also referred to at [23] but only by way of explanation of what was in the letter dated 17 October 2022. It was right that [24] alleged a breach of section 9.4 of the SHA.

(f). [32] referred to change of control provisions under both the SPA and the SHA.

(g). as well as the emphasis on the regulatory framework, the Plaint was replete with references to the importance of KEL as an "*essential utility*" and a "*national asset*" (e.g. [8], [32], [33], [37]), identifying the centrality to the claims in the Plaint of the Pakistan statutory and regulatory system.

(h). the prayer for relief identified eleven separate items of relief sought (including costs and a catch-all provision at 11). Of those, only one (paragraph 4) expressly mentioned the SHA, doing so along with a reference to the finance agreements that were also alleged to regulate change of control. The other items were premised upon the various other allegations that were made in the main body of the Plaint and many of those other paragraphs expressly referred to the other bases for the claims (in a way that obviously excluded the SHA as a basis for the particular relief there sought) and some of them were directed entirely against defendants other than the Applicant (in particular [5] and [8]).

88. The Respondents submitted therefore that while the SHA was referred to in the Plaint, and an allegation of breach was made along with a request for an order that the Applicant perform its obligations under the SHA, it was not the key claim that was made. It was parasitic upon, or collateral to, the other central claims.

89. The Respondents submitted that this view was supported and explained by Justice Hussain's evidence. In the Hussain Report (at [7.1]), Justice Hussain had described the SPA as the "*fountain document*" whereas the SHA was "*secondary*." In Justice Hussain's opinion, the primary cause of action in the Pakistan Proceedings related to "*regulatory control and transfer restriction provisions under the SPA*". Similarly, in the joint memorandum, Justice Hussain had said that the "*principal breach*" alleged was of the SPA with the other breaches complained of being a consequence of, and emanating from, that breach (at issue 1 and 1(1)).

90. This characterisation was confirmed by the material filed in the Pakistan Proceedings, for example in the evidence filed by the Respondents in response to the Applicant's Section 4 Application. The Respondents' counter-affidavit dated 3 December 2022 (the ***Section 4 Counter Affidavit***) made it clear (at [6]) that the Respondents' "*primary contention*" in the Pakistan Proceedings was in respect of the alleged "*violations of the provisions of SPA 2005 particularly section 5.2 and 5.3*" (see also [6] of the Other Shareholders' Counter Affidavit referred to and quoted at [44] of the Judgment which is in identical terms***).**

91. Furthermore, as Justice Hussain's evidence established, the Respondents had the ability and standing as a matter of Pakistan law to bring the claims made in the Pakistan Proceedings, including the claims against the Applicant under the SPA and the various statutes relied on and to seek declaratory, injunctive and other relief in relation to them. The Respondents referred in particular to the summary of Justice Hussain's opinion in his commentary on issue 1(3) in the

Joint Memorandum. He had explained that, as indirect shareholders in KEL, the Respondents were able under Pakistan law to seek declaratory and other relief.

92. Therefore, the Respondents submitted, the Pakistan Proceedings did not centrally concern the SHA. The Respondents did not deny that the SHA, and the allegation of breaches of it, were part of the material that had been presented to the Pakistan Court, but the heart of the Pakistan Proceedings lay elsewhere, namely in the governmental and regulatory framework governing the transfer of interests in KEL, a structurally important energy company in Pakistan, and in the terms of the SPA pursuant to which part of that company had passed into private hands. On a proper construction of clause 25.2, the Pakistan Proceedings could not be treated as involving a dispute arising out of, or in connection with, the SHA. That would be to allow the tail of the references to the SHA in the Plaint to wag the dog of the real heart of the Pakistan claims.

93. The Respondents noted that the relief sought by the Applicant would result in the termination of the entirety of the Pakistan Proceedings. In order to justify its position in this respect, the Applicant would have to prove that clause 25.2 of the SHA covered not only claims between the parties to the SHA but also claims that one party might bring against third parties and that the clause was sufficiently wide in terms of subject matter to cover all of the issues raised in the Pakistan Proceedings. The Respondents submitted that the Applicant could not show that clause 25.2 of the SHA covered claims by the Respondents against third parties.

94. The starting point when interpreting an exclusive jurisdiction clause was that the clause extended only to litigation between the contracting parties (see *Credit Suisse* at 589-591 and *Team Y&R Holdings Hong Kong Ltd v Ghossoub Cavendish Square Holding BV* [2017] EWHC 2401 (Comm) at [52]). Whilst it was possible for a jurisdiction clause to extend to litigation with third parties, there were obvious difficulties with this, in particular in relation to reciprocity of obligation.

95. The Respondents relied on the judgment of Rix J in *Credit Suisse.* In that case, the defendant (MLC) had purchased Russian bonds from an English subsidiary of Credit Suisse (CS Europe, the plaintiff) in two separate transactions. Both purchases were agreed in New York with CS US, an American subsidiary of Credit Suisse acting as the plaintiff's agent. Clause 5.2 of the purchase agreements gave the English court jurisdiction to settle any disputes which arose "*out of or in connection*" with them. The purchases were financed by a series of repurchase transactions governed by a separate agreement (the repurchase agreement) between the plaintiff and the defendant. That agreement contained a non-exclusive English jurisdiction clause. A third

agreement between CS US and the defendant (the customer agreement) was governed by New York law but was silent on the question of jurisdiction. CS US, acting under powers contained in the customer agreement, liquidated assets held in the defendant's accounts after the defendant had failed to pay a margin call. CS US transferred the proceeds to the plaintiff who commenced proceedings against the defendant in England claiming sums outstanding on the repurchase transactions. The defendant subsequently commenced proceedings in New York against the plaintiff, CS US and a Swiss subsidiary of Credit Suisse which had issued the bonds, invoking claims touching upon all of the agreements. The plaintiff then applied to the English court for an injunction to enforce clause 5.2 of the purchase agreements. The defendant argued that clause 5.2 did not extend to claims brought against the plaintiff under the repurchase agreement or to claims against CS US and CSS and should not be enforced because New York was the more appropriate forum for the whole litigation. The plaintiff argued that the defendant should be restrained from pursuing the New York litigation if any part of it fell within clause 5.2 since London was as convenient a forum as New York for the whole litigation. Rix J held that the exclusive jurisdiction regime established by clause 5.2 did not extend to claims under the repurchase agreement or to claims against CS US and CSS. Although duplicate litigation was undesirable, the New York court was best placed to decide whether those claims should be stayed, and it was not therefore in the interests of justice to restrain the defendant from pursuing them in New York. However, there was no good reason not to enforce clause 5.2 since London was just as convenient a forum as New York for the conduct of the whole litigation. The defendant was therefore restrained from pursuing its proceedings in New York but only in so far as those proceedings fell within clause 5.2.

96. In *Credit Suisse*, the plaintiff submitted that clause 5.2 was capable of referring to, and should be taken as referring to, disputes not only between the plaintiff and the defendant, who were the parties to the agreement, but as between the defendant and other Credit Suisse affiliates of the plaintiff, particularly in view of the fact that the purchase agreements themselves made provision about such affiliates. However, Rix J had rejected that submission. He said as follows (at page 251-252) (underlining added):

> *"It might be thought that the answer to this question must be no, but Mr Milligan submits otherwise. He takes the following points: (i) that 'any disputes' in the opening line of cl 5.2 ('The courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement') is capable of referring to and therefore should be taken as referring to disputes not only between CS Europe and MLC but also between MLC and other CS affiliates, especially seeing that the purchase agreements themselves make provision about CS affiliates; (ii) that CS Europe, as the recipient of MLC's promise not to take proceedings against CS affiliates otherwise than in the courts of England, is entitled to vindicate MLC's promise by claiming an injunction; and (iii) that in any event CS US, even if not also CS Switzerland, can take direct advantage of cl 5.2*

because it made the deals as agent and even signed the GKO notes purchase agreement 'acting as agent for' CS Europe.

In my judgment points (i) and (iii) are bad, and point (ii) fails on the back of point (i).

As for point (i), it seems to me to be far-fetched to regard 'any disputes' as covering disputes between MLC and anyone other than MLC's contract partner under the purchase agreements, namely CS Europe. Clause 5.2 is part of a bilateral agreement between a seller and a buyer, and the disputes to which such an agreement may give rise are prima facie bilateral disputes. Indeed, it is I would have thought axiomatic that, at any rate in the absence of plain language to the contrary, a contract seeks neither to benefit nor to prejudice non-parties: even where such plain language is used, it is black-letter law that the non-party can himself neither take the benefit nor suffer the burden of the contract. In the present case there is nothing in the language of cl 5.2 to suggest that it is intended to have an ambit beyond the parties to the purchase agreements themselves. While it is true that the agreements mention CS affiliates, there is nothing in the express language of cl 5.2 to suggest that the clause is intended to bind MLC as to where it is entitled to sue such affiliates. It would be all the more surprising if nevertheless cl 5.2 did bind MLC to sue CS US in England when the contract which does govern MLC's and CS US's mutual relations, the customer agreement, does no such thing; on the contrary, it provides for New York law as the governing law."

97. The Respondents also relied on the judgment of Laurence Rabinowitz QC, sitting as a Deputy High Court Judge, in *Team Y&R Holdings Hong Kong Limited v Ghossoub Cavendish Square Holding BV* [2017] EWHC 2401 (Comm) (***Team Y&R***). The dispute related to an exclusive jurisdiction clause in a sale and purchase agreement under which Mr Ghossoub and Mr Makdessi had agreed to sell 47.7% of the shares in TYRH, a Hong Kong company, to a subsidiary of the WPP group. Clause 23.2 of that agreement provided that "*The English courts have exclusive jurisdiction to settle any dispute arising out of or in connection with this agreement and the parties submit to the exclusive jurisdiction of the English courts*." A dispute arose between Mr Ghossoub and WPP (the majority shareholders in TYRH) and Mr Ghossoub presented a petition to the Hong Kong Court (the ***HK Petition***) pursuant to section 724(1) of the Hong Kong Company Ordinance seeking relief for what was said to be the unfairly prejudicial manner in which the affairs of TYRH had been conducted. The respondents to the HK Petition were TYRH as a necessary party thereto and, among others, WPP plc. WPP applied in England for an anti-suit injunction. One of the issues in dispute concerned the proper construction and scope of the exclusive jurisdiction clause. Mr Rabinowitz summarised and dealt with Mr Ghossoub's submissions as follows:

"50. Mr Ghossoub advances the following argument: in circumstances where WPP appears to accept … that the English court lacks jurisdiction to grant relief in respect of a petition brought by a shareholder alleging the affairs of a Hong Kong company to have been conducted unfairly, it is most unlikely that the parties to the SPA would have intended that such a claim was required to be submitted "to the

exclusive jurisdiction of the English courts". Put differently, Mr Ghossoub's contention is that the parties should not be taken to have agreed to submit to the exclusive jurisdiction of the English court a dispute in respect of which the English court had no jurisdiction to grant a remedy.

……

52. I consider that there is force in the point made by Mr Ghossoub. In particular, I would accept that absent clear language to the contrary it is most unlikely that contracting parties will have intended to agree to submit to the English court a dispute in respect of which the English court would have no jurisdiction to resolve or grant a remedy.

98. The Respondents relied on this approach to the construction of an exclusive jurisdiction clause and submitted that it should be borne in mind when construing clause 25.2 in this case. It was necessary to ask whether that clause could properly be said to cover disputes against, for example, NEPRA or the Government ministries, which obviously could not be brought in England or the Cayman Islands.

99. The Respondents also relied on Mr Rabinowitz's summary at [82] of the principles to be applied when considering whether an exclusive jurisdiction clause should be interpreted as obliging a party to bring claims against non-parties in the chosen forum (underlining added):

"In light of the consideration given to this question by earlier authorities, it seems to me possible to make the following observations:

(1) Whether an exclusive jurisdiction clause should be understood to oblige a contractual party to bring claims relating to the contract in the chosen forum even if the claim is one against a non-contracting party, requires a consideration of the contract as a whole including not just the language used in the exclusive jurisdiction clause but also all other terms in the contract that may shed light on what the parties are likely to have intended.

(2) The principle that rational businessmen are likely to have intended that all disputes arising out of or connected with the relationship into which they had entered would be decided by the same court cannot apply with the same force when considering claims brought by or against non-contracting third parties. More particularly, whist it is well established that the language of an exclusive jurisdiction clause is to be interpreted in a wide and generous manner, the starting position in considering whether disputes involving a non-contracting third party might come within the scope of the clause must be that, absent plain language to the contrary, the contracting parties are likely to have intended neither to benefit nor prejudice non-contracting third parties.

(3) Where it is clear from the express terms that the contracting parties have turned their minds to the position of third parties and more particularly whether such third parties are to benefit or bear the burden of rights and obligations agreed between the contracting parties, the absence of any express language in the exclusive

jurisdiction clause that provides for the application of that term in relation to claims brought by or against third parties may be an indication that the clause was not intended either to benefit or prejudice such third parties.

(4) Where the exclusive jurisdiction clause is silent on the question, the fact that any provision in the contract dealing with third parties indicates an intention that third parties should not acquire rights as against the contracting parties by virtue of the contract, may be a further indication that the clause was not intended either to benefit or prejudice such third parties.

(5) Where a particular interpretation of the exclusive jurisdiction clause produces a material contractual imbalance because for example it results in one party to a dispute relating to the contract being subjected to an obligation to bring proceedings in the chosen jurisdiction in circumstances where the other party to the dispute is not similarly obliged, or where that interpretation would require a claim against a non-contracting third party to be brought in the agreed jurisdiction even where the chosen forum may not actually have jurisdiction over such a claim against that party, this too may be an indication that the clause was not intended to so apply because such a result is unlikely to be what the contracting parties as rational businessmen would have agreed.

(6) The fact that there is nothing in the contract that might indicate a rational limit in terms of the identity of non-contracting third parties whose rights and interests might be affected by the application of an exclusive jurisdiction clause might provide a further indication that the clause was only intended to affect the rights and interests of the contracting parties.

(7) It follows that where contracting parties intend that any claim relating to the contract be subject to the exclusive jurisdiction clause even where it is one brought by or against a non-contracting party, clear words should be used expressly setting out this intention, the parties to be affected and, if relevant, the manner in which submission of any non-contracting parties to the jurisdiction of the chosen court is to be ensured."

100. Mr Rabinowitz concluded that the scope of clause 23.2 did not extend to claims against non-contracting third parties and that Mr Ghossoub was not in breach of contract by virtue of his pursuit of the HK Petition against TYRH and WPP plc. He summarised his reasoning at [83] as follows (underlining added):

"How then do these observations apply to the SPA? More particularly, are WPP correct to contend that clause 23.2 requires that Mr Ghossoub pursue any claim he may have relating to or connected with the SPA in this jurisdiction even where the claim is one brought against non-contracting third parties, in this case TYRH, WPP plc and Y&R? As to this:

(1) As noted above, clause 23.2 provides that the English court is to "have exclusive jurisdiction to settle any dispute arising in connection with this agreement and the parties submit to the exclusive jurisdiction of the English courts". Whilst the opening words of the clause, by which the parties agree the English court should have "exclusive jurisdiction to settle any dispute arising in connection with this agreement", are in my view wide enough to apply to "any dispute" relating to the SPA regardless of the identity of the parties to that dispute, it is notable that the remainder of the clause is concerned only with the conduct of the parties to the SPA,

referring as it does to "the parties" submitting to the exclusive jurisdiction of the English court. The fact that the clause expressly considers only the position of the parties to the SPA, in my view provides a clear indication that the parties did not intend or anticipate that the clause would apply also to claims against non-contracting third parties over whom the jurisdiction of the English court might or might not extend.

(2) Even allowing for a wide and generous interpretation of the opening words in clause 23.2 (which are in my view directed towards identifying the scope of disputes to be covered, rather than the identity of the persons whose rights and interests are to be affected by the clause), there is nothing in the clause to rebut the prima facie starting point suggested by Rix J in Credit Suisse, namely that parties to a contract containing a dispute resolution clause are likely to intend only to regulate disputes between themselves and not disputes involving third parties. On the contrary, as already noted at (1) above, there is language in clause 23.2 that supports the conclusion suggested by that prima facie starting point.

(3) As in Morgan Stanley - and in contrast to the contracts under consideration in Donohue and in Winnetka - the SPA contains a term dealing with the position of third parties. Thus, as noted earlier, clause 21.11 provides that, "Except as otherwise expressly stated in this agreement, a person who is not a party to this agreement may not enforce any of its terms under the Contracts (Rights of Third Parties) Act 1999". It is thus clear that the parties to the SPA did consider how the provisions of the contract might affect third parties but notwithstanding this one finds no wording in the contract to suggest the parties thereto intended the position of third parties to be affected by the choice of jurisdiction provision. If anything, clause 21.11 suggests an intention that third parties should, save where the contrary expressly appears, be unaffected by anything contained in the SPA.

(4) The absence of any language to delineate in a rational way the identity of non-contracting third parties whose rights and interests might be affected by clause 23.2 were it to apply other than to the contracting parties –for example by limiting its application to claims brought by or against companies associated with or affiliated to the contracting parties - is a further indication that the parties did not intend clause 23.2 to have this wider application.

(5) So too, as noted above, the fact that if given this wider reach clause 23.2 might operate to compel claims against non-contracting third parties to be brought in England even where the English court had no jurisdiction in respect of such parties and might result in a situation in which one party to a dispute that might arise in connection with the SPA might be obliged by clause 23.2 to pursue that dispute in England but the other party to the same dispute would not be similarly obliged. This, as Teare J observed in Morgan Stanley, might be said to be anomalous and if the parties had intended so curious a result, one would have expected them to use clear words to indicate such an intention."

101. Applying the approach established by these authorities, the correct conclusion was that clause 25.2 did not extend to claims brought by the Respondents against anyone other than the other parties to the SHA. In this case, as in *Credit Suisse*, there was nothing in the language of clause 25.2 to suggest that it was intended to have an ambit beyond the parties to the SHA itself. It was inherently commercially unlikely that the parties would have agreed, or intended to agree, to bind

themselves to a clause whose scope went further than claims between the parties to the SHA. A clause that did so would be purporting to give exclusive jurisdiction over claims against entities which were not party to the agreement and over which the court would have no (or at least might not have any) jurisdiction. The parties to the SHA cannot have intended the clause to apply to any claim relating to the SHA against any other party. There was no reason to suppose that every potential party to such a claim would be subject to the jurisdiction of the Cayman or English courts (in the Pakistan Proceedings there were various defendants who clearly were not subject to the jurisdiction of either such court in relation to these matters, most obviously the Government of Pakistan and the Energy Ministry.) Accordingly, if the clause was to apply to claims against such parties, that would effectively amount to a contractual provision preventing parties to the SHA from suing those non-parties (whatever the cause of action and whatever the jurisdictional connections to another forum). It would constitute a complete exclusion of liability in favour of those non-parties. A clause whereby a party to a contract agrees not to sue the counterparty at all must be in clear terms – the law assumed a party did not give up such rights without clear words. *A fortiori* where it was said to be agreeing not to sue a non-party.

102. The Respondents noted that the Applicant had also argued that the Pakistan Proceedings themselves constituted a breach of the SHA (of clause 5.7) because those proceedings sought to prevent or interfere with the appointment of directors to the KEL board in breach of what the Applicant claimed was the Respondents' obligation to procure those appointments (but, the Respondents also noted, no application for separate relief in relation to clause 5.7 of the SHA, such as a mandatory injunction, was included in the Summons). However, the Respondents argued, the Applicant was unable to rely on clause 5.7 either to compel the Respondents to act, or in support of their submission that the Pakistan Proceedings should be restrained because, in so relying on clause 5.7, the Applicant would be seeking to take advantage of its own wrong, namely its own breach of contract, which it had committed by acting in breach of clause 9.4 of the SHA. The principle confirmed in *Alghussein Establishment v Eton College* [1988] 1 WLR 587 was that a party could not seek to enforce a contract or sue for breach when what they were doing was taking advantage of their own breach of contract. The party who sought to obtain a benefit under the continuing contract on account of his breach was just as much taking advantage of his own wrong as a party who relied on his breach to avoid a contract.

103. Clause 9.4 stipulates that the Applicant "*shall not permit nor take any action that would result in a change of Control*" (as defined in schedule 9 of the SHA) in respect of itself save for an Exit in accordance with clause 11 (which it had never been suggested the Transaction and related transactions constituted). The Respondents had made inquiries of the Applicant as to whether there had been a change of Control but had not received a satisfactory response. However, the

Applicant in correspondence had not denied that there had been a change of Control for the purpose of the SHA. Rather, the Applicant had said that it was not party to the Transaction and related transactions or taking any action in relation to those transactions. However, the Respondents argued that this was not the case although they faced the difficulty that they did not have full information about these transactions. But from what they knew, it appeared that whatever was being done in relation to these transactions was being permitted by the Applicant and it was possible that the Applicant had taken action to promote them. The Applicant's articles (article 9) stipulated that shares are transferrable subject to the consent of the directors, who may in their absolute discretion decline to register any transfer of shares without giving any reason. Accordingly, in order to complete the Transaction so that SVL becomes a member and the registered holder of the voting share in the Applicant, the directors of the Applicant will have to give their consent. The Respondents said that they did not know whether SVL had yet been registered as the member – if it had been, there had already been a breach of the SHA but if not there was an apprehended breach. In response to a question from me during his submissions, Mr Birt confirmed that the Respondents argued that, based on the evidence currently available, it could be said that there had been a change of Control because it was clear that there had been an agreement to sell the voting share, it appeared that the purchaser (SVL) was able to give instructions to the seller (AIML) as to how to vote the share, the voting share gave the power to direct (directly or indirectly) the management of the Applicant and *prima facie* such an agreement to sell and assign was specifically enforceable and gave the purchaser an interest in, or beneficial ownership of, the voting share to SVL. The definition of Control required a person to possess:

> *"directly or indirectly .. the power to direct, or cause the direction of, the management of [the Applicant] whether through the ownership of shares, voting securities, partnership or other ownership interests, agreement or otherwise provided that if one person owns directly or indirectly fifty per cent (50%) or more of the share capital, voting securities, partnership or other ownership interests of another person such person shall be deemed to Control such other person.."*

104. The Respondents submitted that the Applicant's breach of the SHA not only prevented it from relying on, and asserting a breach by the Respondents of, clause 5.7 but had a broader impact on the Applicant's application. The Applicant was asking the Court to assist it by exercising its discretion in circumstances where it was itself in breach of its obligations under the SHA. The Court should give this considerable weight when deciding whether to grant the injunction sought.

There are strong reasons justifying a refusal to grant the permanent injunctive relief sought

Submission to the jurisdiction of the Pakistan Court

105. First, the Respondents maintained their claim that the Applicant was to be treated as having submitted to the jurisdiction of the Pakistan Court or acted in the Pakistan Proceedings inconsistently with the relief that it now sought from this Court.

106. Males LJ in *SAS Institute Inc. v World Programming Limited* [2020] EWCA Civ 599 had said (at [114]) that the following passage in *Briggs*, Civil Jurisdiction and Judgments (6th Edition) at page 550 fairly summarised the applicable law (underlining added):

> *"No reported case holds, clearly and precisely, that an applicant will forfeit the right to ask for an injunction if he has already submitted to the jurisdiction of the foreign court. But if the applicant has taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction, it will be more difficult to persuade an English court that the respondent should now be restrained from continuing with those proceedings. … But the principle of the matter seems reasonably clear: an applicant who has already submitted to the jurisdiction of a foreign court should find that this is a substantial obstacle to his obtaining an anti-suit injunction from an English court."*

107. The Respondents accepted that this was an issue governed by Cayman and not Pakistan law. They submitted that the Applicant's steps in the Pakistan Proceedings had gone beyond a challenge to the jurisdiction of the Pakistan Court.

108. The Applicant had engaged with the domestic proceedings at a substantive level by way of their Order 39 Application. That application had to been seen in the context of their other application, the Section 4 Application. The Section 4 Application was the application they had brought to challenge jurisdiction. That was the application that sought a vacation of the Pakistan Interim Injunction on the basis of the arbitration clause and that, in it, the Applicant made all of their jurisdiction points. The Order 39 Application went further than that. It didn't seek the vacation of the Pakistan Interim Injunction but instead sought its recall or modification. It sought positive relief in relation to the appointment of the KEL directors. If all the Order 39 Application was doing was seeking dismissal of the Pakistan Proceedings on grounds of jurisdiction, why did it need to be made at all. So the starting point was to assume that the Order 39 Application was seeking to do something beyond challenging jurisdiction. Mr Shaukat's evidence was consistent with this view. He had explained that the Order 39 Rule 4 procedure had advantages for the party making the application, partly because it was an application made not only on the basis of a jurisdiction challenge but could also be made on any basis when what was sought was the discharge or variation of an interim injunction. Mr Shaukat said that a party to an application under Order 39 rule 4 could seek relief beyond just a discharge or vacation of the injunction – it

can seek modifications of the order. He said that the applicant gets a chance to set out its case. Furthermore, the Order 39 Application did not seek a vacation of the Pakistan Interim Injunction as the Section 4 Application did. It sought to recall or modify it. These matters, the Respondents argued, suggested an engagement with the substantive process in relation to the scope of the injunction which went beyond simply repeating the same challenge to the jurisdiction that had been made in the Section 4 Application.

109. Further, the Section 39 Application sought positive relief from the Pakistan Court. It asks (in the prayer) the Court to allow nominations on the KEL board in proportion to the shareholding of KESP. That was a clear request for substantive relief. It was obvious what the words in the prayer meant and why they had been included. They set out the relief being sought from the Pakistan Court. Mr Shaukat had been astute enough in his report to recognise that these words presented a problem for the Applicant and indeed had described the language in the prayer as problematic. The Respondents submitted that his attempts in his cross-examination to deal with the issue, though dogged, were ultimately ineffective. His suggestion that these words were a description of the consequence of the Recall application rather than a request for relief was not consistent with the clear words in the prayer. The Respondents asked hypothetically what would have happened had the Pakistan Court responded to the request in the prayer and granted the relief sought thereby permitting the board nominations to proceed. The Applicant would, they said, no doubt then be relying upon the order made by the Pakistan Court as against the Respondents (it was incredible to think that the Applicant would have said that they were not seeking such an order and invited the Pakistan Court not to make it).

110. Accordingly, the Respondents said, the Section 39 Application was the Applicant's attempt to engage with the substance of the Pakistan Interim Injunction and its scope and was not confined to raising issues at the jurisdiction level.

The risk of a multiplicity of proceedings and of inconsistent findings

111. The Respondents submitted that even if the Court were to grant a permanent injunction in relation to claims within the scope of clause 25.2, the Pakistan Proceedings will continue. That clause did not, as the Respondents had submitted, cover claims against third parties and any injunction could not do so. Accordingly, should proceedings subsequently be commenced in relation the SHA either in the Cayman Islands or in England, there would be a multiplicity of proceedings and an attendant risk of inconsistent findings.

112. The Respondents argued that the interests of justice were best served by the submission of the whole dispute to a single tribunal which was best fitted to make a reliable, comprehensive judgment on all the matters in issue. It would be contrary to the interests of justice to allow or encourage a procedure which permitted the possibility of different conclusions by different tribunals, perhaps on different evidence. The tribunal best suited to the task in this case was the Pakistan Court, being the only tribunal capable of being seized of the Pakistan statutory, regulatory and public interest aspects of the dispute, which were in reality the most fundamental aspects of it.

113. The discussion of the need to promote certainty in *Donohue* made it clear that there was a presumption in favour of one-stop shopping and it was open to the Court, even if the exclusive jurisdiction clause is engaged in relation to part of the dispute, to decline to grant an anti-suit injunction and to allow all the issues to be dealt with by the Pakistan Court. This course had been followed in *Team Y&R*. Mr Rabinowitz discussed this issue at [89]-[92] and [112]-[113] of the judgment:

> *"89. As already noted above, Lord Bingham in his classic formulation in Donohue of the English law response to a breach of an exclusive jurisdiction clause emphasised the fact that an English court in such circumstances should ordinarily be willing to exercise its discretion in favour of the grant an injunction to restrain the foreign proceedings unless the contract breaker is able to show 'strong reasons' why the foreign proceedings should be permitted to continue. See also, e.g., Star Reefers Pool Inc v JFC Group Co Ltd [2012] EWCA Civ 14, per Rix LJ at [25].*
>
> *90. It is important to observe that Lord Bingham, at this part of his speech in Donohue, was addressing the straightforward case where the foreign proceedings in breach of an exclusive jurisdiction clause involve only the contracting parties so that the interests of no other parties are involved. Reflecting this, Lord Bingham said, at [25], that "Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause."*
>
> *91. The position may however be otherwise where the interests of third parties are involved or indeed where the foreign proceedings include claims not within the ambit of the exclusive jurisdiction clause. Thus, at [27], Lord Bingham continued by observing that, "The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions." It is clear from Lord Bingham's consideration of the earlier authorities, as well as the approach taken by their Lordships in Donohue itself, that these matters might, but need not, constitute a strong reason for not granting injunction. See especially [27] to [36].*

92. *Mr Ghossoub, naturally enough relies on these passages from Lord Bingham's speech and the fact, as I have found, that the HK Petition will be allowed to continue in Hong Kong as against TYRH, WPP plc and Y&R and, indeed, against Cavendish in part as well, as constituting a strong reason for declining to grant the injunction. He also relies on other matters which he says constitute further strong reasons, in particular, (1) that the injunction would deprive him of what he says is his inalienable statutory right to bring a claim for unfair prejudice in Hong Kong and would leave him without an effective remedy for the complaints made in the HK Petition in circumstances where an English court would not have jurisdiction to entertain and grant relief in such a petition, TYRH being a Hong Kong company; and (2) that WPP has delayed unduly in seeking the anti-suit injunction and that this raises comity issues. I deal with each of these arguments below.*

……

112. *I come back therefore to the question whether Mr Ghossoub is able to identify any factor that either alone or in combination with other factors provides a strong reason why I should not grant an anti-suit injunction to restrain his continuing breach of clause 23.2 of the SPA in the manner I have described above.*

113. *In my view, having considered the matters referred to above, strong reason does exist for not granting injunctive relief. In particular:*

(1) It is plain that it is impossible to disentangle matters in a way that will ensure that the whole dispute can be resolved against all parties in this jurisdiction.

(2) This follows from the fact that there is no basis for restraining the HK Petition in so far as it is brought against TYRH, WPP plc and Y&R. Inevitably therefore, to require any part of that dispute to be litigated in England will bring about duplication and indeed the risk of conflicting decisions that might otherwise be avoided. I am of course conscious that there are already also proceedings in this jurisdiction in the form of the defaulting shareholder claim, but the allegations in those proceedings do not cover the same territory as the HK Petition and are focussed on a rather different dispute the resolution of which need not overlap with the matters the subject of the HK Petition.

(3) The fact that, as I have found and as WPP themselves accept, it must be for the Hong Kong court alone to determine whether or not there has in fact been unfair prejudice such as to entitle Mr Ghossoub to a remedy (and if so what remedy), and, further, that there are additional, albeit probably limited, aspects of the underlying disputes relied upon in the HK Petition which fall outside the scope of clause 23.2, are also matters of significance. This is because, even in relation to Cavendish, it is therefore inevitable that the dispute, or at least some parts thereof, will need to be substantively considered by the Hong Kong court.

(4) Whilst it is of course nonetheless possible to require Mr Ghossoub to bring to the English court for resolution those disputes arising in the context of the HK Petition which do come within the scope of clause 23.2 at the same time as the whole of the HK Petition as against the respondents other than Cavendish and parts of the claim against Cavendish are before the Hong Kong courts, this does not strike me as a desirable outcome.

> *(5) In particular, it seems to me to be preferable that the court that is ultimately to determine the HK Petition and consider whether relief is appropriate, viz. the Hong Kong court, should be able to do so after having itself adjudicated in relation to the underlying disputes with regard to all parties without having to wait until some of the matters likely to be relevant to its determination have been adjudicated upon by a (for it) foreign court."*

114. The Respondents submitted that this was a course that ought to be followed in the circumstances of this case.

Close connection between the disputes and Pakistan

115. The Respondents argued that there was another reason, related to the last one but going further than it, that constituted a strong reason (or was a significant factor to be taken into account in justifying) a refusal to grant an injunction in this case.

116. It was clear that the underlying centre of gravity of the dispute between the Respondents and the Applicant was in Pakistan. This was the case because KEL is a company of some public importance in Pakistan (given its role as energy supplier to over 22 million customers), that it is subject to regulation by the energy regulator, NEPRA, as well as to the control of the SECP. Furthermore, the SPA emphasised the role of the Pakistan Government in relation to national security interests. The fundamental issue in the Pakistan Proceedings concerned the control and ownership of KEL, which is a public limited company in Pakistan, subject to Pakistan statutes and regulations. It is also subject to the control of the Pakistan SECP (and the SECP's counter-affidavit in the Pakistan Proceedings has confirmed that the Transaction fell under its purview and that certain statutory reporting obligations applied to it). Although the parties to this injunction application (the Applicant and the Respondents) are incorporated in the Cayman Islands, the dispute in reality has very little to do with this jurisdiction. Moreover, four parties are directly connected with Pakistan because they are Pakistan Government departments or Pakistan regulatory authorities.

117. Although, in cases where there is an exclusive jurisdiction clause, it is often said there is no real role for considerations of comity, in the present case that was displaced by the connections between this dispute and the Pakistan regulatory, governmental and public interest matters.

Delay

118. The Respondents also maintained their case based on what they said was the unjustifiable delay by the Applicant in applying for injunctive relief in this jurisdiction.

119. The Applicant had made applications in the Pakistan Proceedings on 4 November 2022 seeking a recall or modification of the Pakistan Interim injunction, asking the Pakistan Court to allow its nominations of directors on the KEL board, and seeking a stay of the Pakistan Proceedings and a referral of the matter for arbitration (based on the superseded version of clause 25 providing for arbitration at the election of any party). Those were listed to be heard on 8 November (albeit that they went unheard on that date).

120. The Applicant did not issue the Summons in this jurisdiction until 24 November 2022. The Respondent said that while that delay was not, on its own, a very long period, it must be seen in the context of the applications that the Applicant had chosen to make in the Pakistan Proceedings before it sought any form of anti-suit relief in this jurisdiction. Time and costs in Pakistan were spent in considering those applications, and in continuing to deal with the Pakistan Proceedings before the Applicant chose to take action in this jurisdiction. That was a relevant matter to take into account. The point was also linked to the Respondents' submissions on comity (which the respondents argued, as I have noted, had a continuing relevance). The applications made in Pakistan by the Applicant had been part-heard and an injunction made now would render the parties' time, and the judicial time in Pakistan, spent on them wasted.

Comity

121. The Respondents did not include in their written submissions comity as a separate factor to be taken into account when considering whether (or as one of their four points in support of their argument that) there were strong reasons for refusing to grant the injunction. But they did make reference to the principle in various submissions and I have taken the need to take comity into account in my review of the Respondents' argument and the exercise of my discretion (see generally [76]-[[78] and [97] of the Judgment).

Discussion and decision

The issues

122. The applicable law was summarised at [47]-[53] of the Judgment and is not in dispute.

123. The Court must be satisfied that it is in the interests of justice to grant the injunction. Where there is an exclusive jurisdiction clause, ordinarily the court will restrain foreign proceedings brought in breach of such a clause so as to give effect to, and enforce, the contract, unless there are strong reasons not to do so. The justification for the grant of the injunction is that without it the applicant will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy.

124. As I noted at [53] of the Judgment, the first issue is whether the foreign proceedings constitute, in whole or in part, a breach of the exclusive jurisdiction clause. It is for the Applicant to establish that it is entitled to enforce the clause, that the Respondents are parties to, or in substance bound by, the clause, that the clause is binding, and that the foreign proceedings fall within the terms of the clause. The second issue is whether there are strong reasons for not granting the injunction. The burden of showing strong reasons falls on the Respondents.

125. I made a number of findings and reached various conclusions in the Judgment for the purpose of deciding the Applicant's application for an interlocutory (interim) anti-suit injunction. At [82] of the Judgment I noted that:

> *"I am satisfied that the Applicant has established a high probability that the Pakistan Proceedings were commenced in breach of clause 25.2 of the SHA. I am not in a position, nor do I consider that I need to, decide definitively the construction issue at this interim stage. That can and should be done at the trial of the Applicant's application. It is possible that the further evidence to be filed may have a bearing on the issue. For example, the characterisation of the Pakistan Proceedings may be affected by expert evidence of Pakistan law to be adduced at the trial."*

126. I must now reconsider the Applicant's case for, and the Respondents' opposition to, the granting of a permanent anti-suit injunction in light of all the evidence adduced by the parties, taking into account where relevant the new expert evidence, and the further submissions the parties have made.

127. The particular issues that arise are as follows:

(a). what is the proper approach to characterising the Pakistan Proceedings for the purpose of deciding whether they are covered by clause 25.2 of the SHA?

(b). what is the proper characterisation of the Pakistan Proceedings for that purpose?

(c). what is the scope and proper interpretation of clause 25.2 of the SHA?

(d). has the Applicant established that the Pakistan Proceedings or any part of them are covered by and subject to clause 25.2?

(e). does the Respondents' claim that the Applicant is in breach of the SHA affect the Applicant's entitlement to a permanent injunction?

(f). have the Respondents shown that the Applicant, as a matter of Cayman law, has acted in the Pakistan Proceedings in such a way that it is to be treated as having submitted to the jurisdiction of the Pakistan Court or as having acted inconsistently with the relief it now seeks, and that as a result, either when considered alone or when taken together with the other grounds relied on by the Respondents, there are strong reasons for not granting the injunction sought by the Applicant?

(g). have the Respondents shown that if the injunction sought is granted there will be a real and material risk of a multiplicity of proceedings and of inconsistent findings by relevant courts so as to establish, either when considered alone or when taken together with the other grounds relied on by the Respondents, that there are strong reasons for not granting the injunction?

(h). have the Respondents shown that the connection between the dispute being litigated in the Pakistan Proceedings and Pakistan and its significance and importance to the Government and regulatory authorities of Pakistan constitute (either when this factor is considered alone or together with the other grounds relied on by the Respondents) strong reasons for not granting the injunction?

(i). have the Respondents shown that the Applicant delayed in seeking injunctive relief from this Court to such an extent that there are (either when this factor is considered

alone or together with the other grounds relied on by the Respondents) strong reasons for not granting the injunction?

The expert evidence

128. I am satisfied that both experts were sufficiently and suitably qualified to give expert evidence on the issues of Pakistan law and procedure that arise in this case.

129. I found Mr Shaukat to be a reliable and helpful witness who set out his opinions, both in writing and orally during his cross-examination, clearly with supporting analysis and arguments. He dealt directly and candidly with points of difficulty and adopted a balanced and impartial approach. I reject the Respondents' assertion that his limited direct experience of litigation affected his ability to express reliable opinions on Pakistan law or procedure or on the likely decision which would be made by the highest court in Pakistan on the issues in dispute. He impressed me with his broad knowledge of the applicable law and practice.

130. Justice Hussain is a distinguished former senior judge with extensive judicial experience who has also held other significant appointments in the academic world and been appointed to other important positions in Pakistan. As a result, he is to be treated as having sufficient experience and expertise to provide an expert opinion on the points of Pakistan law and procedure in dispute and those opinions, in view of seniority and judicial experience, are, subject to reviewing their cogency and coherence, to be given substantial weight. Justice Hussain's written evidence (the Hussain Report and his commentary in the Joint Memorandum) was clearly and cogently expressed if not always fully argued. Unfortunately, however, his oral evidence in cross-examination was, in a number of key areas, unsatisfactory.

131. I do not accept the Applicant's criticism of the conditions in which Justice Hussain gave his evidence. The Applicant (as the Respondents pointed out) had the opportunity to object to the presence of Mr Hasan Mandviwalla in the room in which Justice Hussain gave his evidence but failed to do so. While on one occasion I did, to ensure that proper procedures were being followed, remind those in the room to ensure that in assisting Justice Hussain to locate documents to which he wished to refer they only respond to his requests to be given a particular document and not suggest responses for him to give, there was no evidence of any failure to act properly or to prompt Justice Hussain.

132. However, I do accept the Applicant's criticism of the adequacy and cogency of key parts of Justice Hussain's evidence. As the Applicant asserted, Justice Hussain misunderstood a number of key facts, in particular that there had been no transfer of the shares in KESP and that the Transaction (and the related transfers of limited partnership interests) only related to a shares in the Applicant. When this was brought to his attention, he failed to acknowledge the significance of the error or to explain why these factual errors did not affect or undermine his analysis of the impact of the Transaction (and the related transfers) on the SHA. His new analysis to the effect that shareholders of KEL would be bound by the SPA was unconvincing because he had not referred to or relied on it previously and because he was unable to provide a reasoned justification for his construction of the definitions in the SPA on which he relied. When pressed to provide such an explanation and justification, he refused to engage with the issue and repeatedly cut-off further discussion by saying that he had nothing further to add and that the Court would need to decide the point without further assistance. Justice Hussain was also unable to appreciate that his acknowledgement that his argument that shareholders of KEL were to be treated as bound by the SPA could not apply to the Applicant undermined his opinion that the Applicant was in fact bound by the SPA. Furthermore, while responding to the issues that the parties had formulated, he frequently went beyond the permissible bounds of expert testimony when addressing the construction of a contract governed by foreign law. Rather than addressing the principles of interpretation that would be applied by the Pakistan Court he gave his opinion on how the SPA was to be construed. It may be that, in the context of an application for an anti-suit injunction to enforce an exclusive jurisdiction clause when the Court is considering whether foreign proceedings are covered by the clause and interpreting that clause rather than directly construing the foreign law governed agreement, the usual rule is to be relaxed (and this was not a point on which the Applicant focussed) but it was a weakness of Justice Hussain's approach that he failed to adduce proper evidence of Pakistan law on the construction of contracts to assist the Court in forming its own view, to the extent relevant on this application, or to support his own opinion.

133. I am conscious that Justice Hussain was giving evidence late in the evening in Pakistan and that this may have affected him to some extent (although when asked by me he – robustly – indicated that he was content to continue). As a result, it would be wrong and I do not wish to be unduly critical of Justice Hussain, who as I have said is clearly a distinguished former judge and lawyer (who was at all times courteous when giving his evidence). But these difficulties do affect, and to my mind significantly weaken, the weight to be given to his opinion on the issues affected.

The approach to analysis and characterisation of the Pakistan Proceedings

134. As I noted at [53] of the Judgment, whether a foreign claim is covered by an exclusive jurisdiction clause involves a two-stage analysis. The first requires an analysis of the claims made and the nature of the foreign proceedings. The second requires an answer to the question "*does the clause, on its proper construction, extend to the foreign claim, characterised in accordance with the analysis conducted at the first stage?*"

135. The question arises as to whether, when at the first stage analysing and characterising what is being litigated before the Pakistan Court for the purpose of deciding whether the Pakistan Proceedings are covered by clause 25.2, the Court's focus should be on the overall nature of the claims being made in the Pakistan Proceedings or on the separate causes of action and material allegations on which the Respondents' various claims for relief in the Pakistan Proceedings are based (or on both aspects).

136. Mr Chapman, in his oral closing submissions, noted that both parties agreed that the task that the Court had to perform was one of essentially stepping back and seeking to characterise the dispute in the Pakistan Proceedings as a whole and then ask whether the dispute so characterised fell within the terms of clause 25.2. This is correct on the basis that, as I have noted above, this was also the Respondents' primary position. But the Respondents did also argue an alternative case, if this was not the right approach, based on a separate review of each claim made in the Pakistan Proceedings to decide whether the relevant claim related to a dispute arising out of, or connected with, the SHA.

137. The core question is whether the Pakistan Proceedings involve "*[a]ny dispute arising out of or in connection with [the SHA].*" The clause refers to a dispute, a non-technical term rather than, for example, a cause of action. The parties to the SHA agreed that such disputes must and can only be settled by the English or Cayman courts. Therefore, the Court is required to assess what dispute is, or if there is more than one, what disputes are, being litigated in, and raised by, the Pakistan Proceedings and then decide whether that dispute arises out of, or is connected with, or whether all or some of the disputes arise out of or are connected with, the matters agreed upon and covered by the SHA.

138. Where the foreign proceedings rely on and seek to litigate multiple claims (or causes of action) against multiple parties, the Court must assess whether they are based on and are the result of a single dispute or alternatively various different disputes. If the latter, then the Court must consider

each dispute separately and decide whether it arises out of, or is connected with, the matters agreed upon and covered by the SHA.

139. In forming a view as to the dispute or disputes being litigated in the foreign proceedings or to which they relate, the Court needs to examine all aspects of the foreign proceedings. Where there are multiple claims, the Court needs to assess each such claim and its factual and legal basis to determine what is in issue and whether the dispute to which that claim relates and which it seeks to settle is one covered by the exclusive jurisdiction clause (in this case therefore is a dispute arising out of or connected with the SHA).

140. This approach was adopted by Mr Rabinowitz in *Team Y&R*. At [53]-[64], he considered whether it followed from his decision that the parties to the SPA could not have intended the exclusive jurisdiction clause to cover the foreign proceedings (the unfair prejudice petition) because their chosen forum (England and Wales) could not deal with it, that the parties must also have intended that other disputes arising within those foreign proceedings, which the chosen forum would be able to deal with, were also not covered. He decided that this conclusion did not follow and that the exclusive jurisdiction clause should be interpreted (widely) so as to cover particular claims in the foreign proceedings where they related to or were connected with the SPA. He concluded that "*it would be wrong to treat the word "dispute" as it appears in that provision as limited so as to apply only to a consideration of the overall nature or type of the claim.*" Mr Rabinowitz said this (underlining and bold added):

> *"60. On the other hand, it is not clear to me that the presumption really can assist much in a case such as the present where the parties have in fact expressly agreed that the English court should have a wide exclusive jurisdiction over disputes arising but the Court is faced with a claim which, at least when looking at its overall nature, cannot have been intended to come within the provision for the reasons already identified.*
>
> *61. I turn back therefore to the question whether in seeking to characterise the dispute for the purposes of clause 23.2, one should focus only on the overall nature of the claim or whether, rather, it is appropriate also to consider the particular disputes that arise in the context of that overall claim.*
>
> *62. Approaching the question as one must, giving the language in clause 23.2 a wide and generous interpretation,* ***I consider that it would be wrong to treat the word "dispute" as it appears in that provision as limited so as to apply only to a consideration of the overall nature or type of the claim. Rather, it is my view that the fact that a particular dispute arises only as an aspect or element of that claim does not make it any the less a dispute for the purposes of clause 23.2. Not only does this interpretation appear to me to be in line with the language used by the parties in clause 23.2, it is also one that accords with commercial common sense. Were the position otherwise, it would be much open to abuse: it would allow a***

party to construct artificial forms for proceedings, when the real or substantial issues in dispute are plainly contractual, simply as a means of seeking to evade the application of the provision. That is most unlikely to have been what reasonable commercial parties would have intended.

63. Whilst I recognise that this might introduce, or perhaps exacerbate, the risk of bifurcation of proceedings and in this way appear to offend against the presumption in favour of 'one-stop shopping', I have already explained why in the context of the present case I do not find that presumption of much assistance; put shortly, where the express choice of the parties is, as here, for English jurisdiction, I consider it most unlikely that the presumption could have been intended to operate so as to increase, as it would here, the scope of matters taken away from that expressly chosen jurisdiction.

64. In short, whilst Mr Ghossoub is in my view correct to say that the parties could not have intended to be obliged to submit to the English court a petition for unfair prejudice in respect of which the English court would have no jurisdiction to entertain and provide a remedy, I nonetheless find that clause 23.2, properly interpreted, would cover within its scope disputes raised by the HK Petition that are related or connected to the SPA."

141. It seems to me that the comments made by Mr Rabinowitz at [62] that I have highlighted in bold are particularly apposite. The Court should where possible adopt a construction of the reference to a dispute which accords with commercial common sense and be astute to the risk of parties constructing artificial forms of proceedings which disguise the real issues in dispute in order to evade the exclusive jurisdiction clause.

142. Accordingly, it seems to me that the first task for the Court is to decide whether the Pakistan Proceedings litigate, raise or arise out of one or more disputes. Having done so, the Court must then consider the proper interpretation of clause 25.2 of the SHA (recognising that each exclusive jurisdiction clause has to be separately interpreted in the context of the whole agreement of which it is a part) and decide whether the dispute or each dispute arises out of, or is connected with, the SHA (and whether the clause covers proceedings against defendants who are not parties to the SHA).

143. This is the approach I followed in the Judgment in which I concluded, on the preliminary basis I have described, that the Pakistan Proceedings were litigating, raised and arose out of a single dispute, namely the dispute between the Respondents and the Applicant as shareholders of KESP as to the validity and effectiveness of the steps taken by the Applicant as shareholder of KESP to have new directors appointed to the KEL board. My approach and views can be seen in the following paragraphs from the Judgment (underlining added):

> *"83. "However, with that caveat, it seems to me that the Suit relates to and involves a "dispute arising out of or in connection with" the SHA. I have sought to analyse and assess the claims made in the Suit (as elaborated on in the Other Shareholders' Counter Affidavit and having regard to the other documents filed in the Pakistan Proceedings) as best I can, taking into account the fact that different pleading styles and procedural rules appear to apply and without the benefit of expert evidence on Pakistan law and procedure.*
>
> *……*
>
> *89. ……. the Suit appears to be designed to challenge and invalidate action which it is said was taken by the Applicant as a shareholder in KESP to have new directors appointed to the KEL board. It is said that the nominations to the board of KEL was done by the Applicant. This allegation must be that the KESP Letter was written pursuant to the Applicant's direction and the exercise of its rights under the SHA (in the KESP Letter the company secretary of KESP sought and purported to appoint, or perhaps to direct qua shareholder, the KEL board to fill the casual vacancies on the board by appointing, Mr. Chishty and Mr. Baur as directors of KEL). The complaint is (only) directed against the action of the Applicant. There is, as I have said, no relief sought against KESP and no application against KESP to withdraw the KESP Letter (even though the Other Shareholders' Counter Affidavit makes reference to KESP).*
>
> *90. It may be that the Other Shareholders can show that the Suit includes proper claims against the Privatisation Ministry, the Energy Ministry and NEPRA that are independent of and can continue even if the Other Shareholders are restrained from continuing the Suit as it relates to the Applicant. But based on my current understanding of the Suit, it appears that those claims are derivative of and dependent on the claims against the Applicant and is hard to see that the Other Shareholders have standing to bring them or that any claim to standing has been pleaded."*

The construction and effect of clause 25.2 of the SHA

144. As can be seen from the extract from his judgment set out above, the general approach to the construction of exclusive jurisdiction clauses was summarised by Mr Rabinowitz in *Team Y&R* at [56] of his judgment.

> *"WPP refers in this context to the general approach that English law adopts to the interpretation of exclusive jurisdiction clauses. This was succinctly summarised by Asplin J in Black Diamond Offshore Limited and Ors v Fomento De Construcciones y Contratas S.A. [2015] EWHC 1035 (Ch) where she said (at [19]): "There is no dispute that the relevant principles which apply to the construction of jurisdiction provisions can be derived from Donohue v. Armco Inc [2001] UKHL 64 and [2002] Ll Rep 45; Fiona Trust and Holding Corporation v. Privalov [2007] EWCA Civ 20, [2007] 2 Lloyd's Rep 267 and Satyam Computer Services Limited v. Upaid Systems Limited [2008] EWCA Civ 487 and [2008] 2 AE (Comm) 465 . It is accepted therefore, that jurisdiction clauses must be construed "widely and generously" with a presumption in favour of "one-stop shopping" for dispute resolution."*

145. I set out at [30] of the Judgment the key provisions of the SHA. There are some other provisions that are important to note.

146. The recitals make it clear that the SHA concerns, and is intended to regulate, the rights and obligations of the shareholders of KESP both in respect of KESP and also, because KESP is a substantial shareholder in KEL, in relation to KEL. Recital (D) states that "*The parties have entered into this agreement to regulate their conduct in relation to [KESP] and [KEL]*."

147. As originally drafted, the SHA sought to regulate and give to the Applicant the "*full management and control" of both KESP and KEL*" (see clause 5.1 before it was amended by the Second Deed). The Second Deed, dated 5 January 2021, however amended the governance arrangements and clause 5.1 was amended so as to provide that in future KESP's board would have management and operational control of KESP. But the new clause 5.7 was introduced which required the Applicant and the Respondents to "*procure that the directors of [KEL] be nominated or appointed by [KESP]*" so that five were nominated by the Applicant and four were nominated by the Respondents (with the chairman to be appointed by the KESP board). The Applicant and the Respondents were also obliged to procure that their nominees followed the instructions of the KESP board. The new clause 5.8 included provisions relating to the appointment of directors to the boards of subsidiaries of KEL.

148. The general prohibition on the transfer of (Class O) shares by the KESP shareholders remained unaltered from the first version of the SHA although there were amendments (in the Second Deed and the earlier deed of amendment dated 30 April 2009) to the various exceptions to that prohibition and the range of permitted transfers including amendments to when a transfer by the Applicant was permitted.

149. The Second Deed also introduced the exclusive jurisdiction provision in clause 25.2 and removed the obligation to arbitrate, substituting an option to arbitrate if all parties agreed.

150. Accordingly, the SHA was clearly intended to govern the relationship between the shareholders of KESP and how they exercised their rights and performed their obligations in that capacity. The SHA also dealt with the management of KEL and acknowledged that KESP's 71.5% (now 66.4%) shareholding in KEL was its key asset. Initially, the Applicant was given management powers in respect of KEL (as well as KESP). After the Second Deed, the Applicant no longer had direct management powers in respect of KEL but had the right (via KESP) to appoint

directors (and more directors than the Respondents) to the KEL board and to make appointments to committees of the boards of KELs' subsidiaries (thereby ensuring that the Applicant was able to ensure that individuals satisfactory to it were appointed to the KEL board and to exercise indirect oversight of the governance arrangements relating to the management of KEL and its subsidiaries). The SHA recognises, as it must, that KEL is an entity separate from KESP but it nonetheless deals with important aspects of KEL's management (appointments to the boards of KEL and its subsidiaries and to the audit and finance committees of the KEL board and its subsidiaries) by regulating the exercise of the rights and powers of KESP's shareholders to cause KESP to exercise its rights as majority shareholder in KEL. No reference is made in the SHA to the SPA or the other shareholders of KEL (including the Government of Pakistan) and it is clear that the terms of the SHA (and the rights granted by the SHA) are not made subject to, or dependent on, the terms of (or obligations imposed by) the SPA. Of course, KESP is a party to, and therefore bound by, the SPA. But the rights and obligations *inter se* of the shareholders of KESP are independent of, and not affected by, the terms of the SPA.

151. The SHA also deals with the restrictions affecting the ability of shareholders in KESP to transfer their KESP shares or to permit or take action that would result in a change of Control of the shareholder concerned save in the case of an Exit (see clauses 9.3 and 9.4 of the SHA). The SHA also contains warranties relating to the relationship between KESP and KEL (see 1.6 of schedule 8). In addition, in schedule 4 of the SHA, the Respondents and the Applicants agree (and KESP covenants) that certain reserved matters will only be undertaken with the consent of the Respondents and the Applicants including various very significant actions related to KEL. These include any alteration of the accounting policies or practices of KEL; the declaration of a dividend or payment out of distributable reserves ; any arrangement for a joint venture, partnership or other business organisation by KEL with a value in excess of US$500 Million; any change to the auditors of KEL; the solvent liquidation, winding-up or dissolution of KEL; the issuance by KEL of any debentures or loan stock or the entry into by KEL of any loan or guarantee; any merger or acquisition *of* KEL (or KESP) or any merger or acquisition *by* KEL (or KESP) with a value in excess of US$500 Million; the increase or decrease in the directors of KEL and the creation of any security interests over the shares in KEL.

152. The scope and subject matter of the SHA as so defined is relevant to, and influences the interpretation of, clause 25.2, in particular the meaning of the reference in that clause to *"Any dispute arising out of or in connection with [the SHA]*." It is reasonable to assume that a dispute that relates to the exercise by one of the parties to the SHA of their rights as a KESP shareholder (relating to KEL) granted by the SHA is a dispute which the parties intended to be covered by

clause 25.2 and is to be treated as "*arising out of or in connection with [the SHA]*." The right to nominate directors to the KEL board and to have the Respondents join with the Applicant in procuring that its nominees be appointed is a clear right granted by the SHA. It is also reasonable to assume that a dispute that relates to alleged changes in Control in the Applicant was intended to be covered by clause 25.2 and is to be treated as "*arising out of or in connection with [the SHA]*" since, as I have noted, the extent to which such a change of Control by the KESP shareholders is permitted is regulated by the SHA. It is clear that KEL is dealt with extensively by the SHA and that action taken by the KESP shareholders that relates to or affects KEL are intended to be regulated and governed by the SHA.

Does clause 25.2 cover proceedings brought by one party against non-parties?

153. Does clause 25.2 only cover proceedings commenced by the Respondents against parties to the SHA or does it extend to proceedings against non-parties? This is a question of contractual construction to be decided by considering the drafting of clause 25.2 and the terms of the SHA as a whole and applying the principles applicable to the interpretation of exclusive jurisdiction clauses set out in the relevant authorities.

154. The defendants to the Pakistan Proceedings are the Applicant, Alvarez and Marsal (in its capacity as manager of the Applicant), KESP, KEL, the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP. The Applicant and KESP are parties to the SHA, as are the Respondents. KEL is not a party but, as I have explained, is referred to in the SHA and aspects of its corporate governance and management (in so far as they relate to the control and exercise of KESP's powers as shareholder of KEL) are dealt with by the SHA. Alvarez and Marsal is not a party to the SHA but is, it appears, sued by reason of being a decision maker for the Applicant and is only referred to and linked with the Applicant (see, for example, the prayer which only seeks relief against both the Applicant and Alvarez and Marsal but not Alvarez and Marsal separately). Indeed, the Plaint assumes that Alvarez and Marsal is bound by the SHA (although the Respondents are presumably seeking an order against Alvarez and Marsal requiring it to exercise its rights and powers so as to direct the Applicant to perform its obligations under the SHA). The Privatisation Ministry, the Energy Ministry, NEPRA and the SECP are not parties to or referred to in the SHA.

155. KESP is, as I have said, a party to the SHA and so the objection to the claim for injunctive relief based on clause 25.2 not covering disputes with third parties does not arise. However, it will still be necessary to determine how it is affected by the Pakistan Proceedings and whether it is a party to a dispute covered by the SHA. I deal with this issue below.

156. As Mr Rabinowitz said (at [82], quoted above) in *Team Y&R*, while an exclusive jurisdiction clause is to be interpreted in a wide and generous manner, the starting position (as suggested by Rix J in *Credit Suisse*) in considering whether disputes involving a non-contracting third party might come within the scope of the clause is that, absent plain language to the contrary, the contracting parties are likely to have intended neither to benefit nor prejudice non-contracting third parties. As Mr Rabinowitz concluded, where contracting parties intend that any claim relating to the contract be subject to the exclusive jurisdiction clause even where it is one brought by or against a non-contracting party, clear words should be used expressly setting out this intention, the parties to be affected and, if relevant, the manner in which submission of any non-contracting parties to the jurisdiction of the chosen court is to be ensured. There are no such clear words in this case.

157. Mr Rabinowitz also noted a number of factors which are relevant to the construction of an exclusive jurisdiction clause in this context:

(a). where the exclusive jurisdiction clause is silent on the question, the fact that any provision in the contract dealing with third parties indicates an intention that third parties should not acquire rights as against the contracting parties by virtue of the contract, may be an indication that the clause was not intended either to benefit or prejudice such third parties. In this case, the SHA contains (in clause 18.3) a clause to the effect that third parties are not entitled to enforce any of the terms of the SHA under the Contracts (Rights of Third Parties) Act 1999.

(b). the fact that there is nothing in the contract that might indicate a rational limit in terms of the identity of non-contracting third parties whose rights and interests might be affected by the application of an exclusive jurisdiction clause might provide a further indication that the clause was only intended to affect the rights and interests of the contracting parties.

158. Dealing first with Alvarez and Marsal, it seems to me that clause 25.2 should be treated as covering the proceedings against them. They have been joined, as I have said, by reason of their relationship with the Applicant and are at all times twinned with the Applicant in the Plaint and should be treated as in the same position as the Applicant for the purpose of clause 25.2.

159. Dealing next with KEL, it seems to me that clause 25.2 should be interpreted as covering disputes involving KEL (and proceedings brought by a party to the SHA litigating such disputes) if and to the extent that the subject matter of the dispute (and those proceedings) comes within the clause.

As I have noted, various aspects of the corporate governance and management of KEL and its subsidiaries, and the relationship between KESP and KEL, is dealt with in the SHA. The exercise of KESP's rights as KEL shareholder to appoint directors to the KEL board is regulated by the SHA (as we have seen the Respondents and the Applicant are given the right to cause KESP to appoint directors to the KEL board) and the SHA imposes (see the amended clause 5.8) an obligation on the Respondents and the Applicant to use reasonable endeavours to procure that their nominees on the KEL board ensure that subsidiary boards include at least one director nominated by the Respondents and the Applicant and gives the Respondents and the Applicant the right to appoint at least one of their nominees to the audit and finance committees of those boards. In my view, in these circumstances the parties should be treated as having contemplated that their decision in January 2021 (when executing the Second Deed) to require that all disputes (arising out of in connection with the SHA) be dealt with by litigation in Cayman or England included and extended to proceedings against KEL (in particular since the revised arrangements with respect to the appointment of directors to the KEL board and those of its subsidiaries were included in and dealt with by the Second Deed). The disapplication by clause 18.3 of the Contracts (Rights of Third Parties) Act 1999 so as to prevent KEL (and other non-parties) from being able to enforce the terms of the SHA does not affect this conclusion. Clause 18.3 deals with a different issue.

160. The position of the other defendants in the Pakistan Proceedings is different. In my view, clause 25.2 cannot be treated as extending to *disputes* with them. There is nothing in the SHA which indicates that the parties had them in mind or intended to regulate disputes between parties to the SHA and the Pakistan Government and regulators. The principles of interpretation of exclusive jurisdiction clauses to which I have referred indicate that clear words would be needed to support an interpretation of clause 25.2 that covered disputes with the Pakistan authorities. Furthermore, following *Team Y&R*, it is significant for the purpose of construing clause 25.2 that it was likely to be difficult for disputes against the Pakistan authorities to be brought in England or the Cayman Islands (although not impossible if the conditions for leave to serve out could be satisfied, for example because one or more of them could be said to be proper and necessary parties to proceedings between the Applicant and the Respondents but on the facts of this case, it appears to be unlikely that leave to serve out would be granted).

161. I note that clause 25.2, unlike clause 23.2 in *Team Y&R*, does not refer to "*the parties*" submitting to the jurisdiction of the chosen fora. It is drafted without reference to the parties. This is an indication that the parties to the SHA did not intend to limit the effect of the clause to the parties. Having said that, I treat this as a factor of limited weight. In the absence of clear words making

it explicit that the disputes envisaged by clause 25.2 are to be treated as including disputes with non-parties, the mere omission of the reference to the parties in the exclusive jurisdiction wording is to be read as a matter of mere drafting style and not of substance.

162. But it is important to note that what is not covered is a *dispute* with the Pakistan authorities. It is possible that proceedings to which they are defendants can and should be treated as litigating or relating to a dispute between the Respondents and the Applicant so that their involvement is merely ancillary to a dispute between the contracting parties. It seems to me that clause 25.2 is to be treated as extending to such a case. Clause 25.2 focuses on and governs disputes and will preclude proceedings outside the chosen fora which litigate or relate to relevant disputes even if those proceedings incidentally join and involved non-contracting parties who are not in dispute with the parties to the SHA. Whether this is the case here depends on the proper analysis and characterisation of the Pakistan Proceedings as they apply to the Pakistan authorities, to which I now turn.

The analysis and characterisation of the Pakistan Proceedings

163. It is worth, for the purpose of identifying the dispute or disputes being litigated in the Pakistan Proceedings, starting with an overview of the key document in the Pakistan Proceedings that sets out that claims made by the Respondents. This is, as was accepted by all parties and both experts, the Plaint.

164. The Plaint (underlining and italics added):

(a). starts by *referring* to the SPA. It refers to the transfer restrictions in section 5.2 which apply to the shares held by KESP in KEL under which KESP agreed not to sell, transfer or assign any of those shares or to permit them to become subject to any lien. It also refers to section 5.3 which sets out the transfers which are permitted including a permission given to KESP following the third anniversary of the closing date "*directly or indirectly [to] sell transfer, encumber or otherwise dispose in any form or manner any of its legal or beneficial interest in all or any part of the Strategic Equity Stake*", that is shares constituting 51% or more of the shares in KEL (note that section 3.10(a) of the SPA states that that until that date, the KESP "*shall not directly or indirectly sell transfer encumber or otherwise dispose of in any form or manner any of its legal or beneficial interest in"* those shares).

(b). *refers* to Section 33 which is said to "*trigger an approval for any reorganisation of a utility company*" such as KEL and cover a merger, a major acquisition or sale of facilities, the expansion of the licensee's business and a reorganisation of the licensee's business structure.

(c). *refers* to Regulation 14.

(d). *refers* to the circumstances in which the Applicant was established and acquired shares in KESP and in which the SHA was entered into

(e). *refers* to the membership and appointment of the board of directors of KEL.

(f). *asserts that* "*the transfer of beneficial ownership/change in board or management control of [KESP] and consequently [KEL]*" is (i) subject to the transfer restrictions in the SPA and several change of control provisions in finance agreements (which are not identified) and (ii) triggers various mandatory regulatory approvals, relevant notifications and disclosures under Pakistan law.

(g). refers to what the Respondents then knew about the Transaction (and related transfers of limited partnership interests) and *asserts that what is contemplated [by the Transaction]* is "*the transfer of beneficial ownership/change in board or management control of a large part of [KESP] and consequently [KEL].*"

(h). *refers* to the AGM due to be held on 26 October 2022 and *asserts* that the notice of the AGM failed to refer to the proposed change of control resulting from the contemplated transfer of beneficial ownership/change in board or management control of a large part of [KESP] and consequently [KEL].

(i). *states* that the Respondents were unaware of the proposed transactions and transfers until they were reported in newspaper articles whereafter the Respondents made various enquiries.

(j). *asserts* that the Applicant is in breach of clause 9.4 of the SHA in attempting to transfer the beneficial ownership/effect a change in the board or management control of KESP "*in order to secure board and management rights*" in KEL.

(k). *refers to* the Respondents becoming aware that the Applicant has sent to KEL nominations to the board of KEL "*on the basis of the transaction ... entered into in order to hijack [KEL] bypassing the regulatory framework in Pakistan*."

(l). *asserts* that the process for electing directors under section 159 is being disregarded and that the Applicant is relying on its rights under the SPA to justify a "*gross violation of the .. laws of Pakistan* (see [27]).

(m). *refers* to the continued interest of Shanghai Electric Corporation in proceeding with its tender offer in relation to KEL.

(n). *refers* to the application by the AIML JOLs to this Court for permission to enter into the Transaction and related transactions which is said to have been an attempt to use "*offshore jurisdictions and complexed [sic] structures to disguise the transfer of the beneficial ownership/change in board and management control of the national asset in which [the Government of Pakistan] maintains ownership*."

(o). *asserts* that the transfer the beneficial ownership/effect a change in the board or management control of KEL is only permissible with the "*approval of Respondents (as shareholders) or the regulators in Pakistan*."

(p). asserts that the Applicant is seeking to use "*its contractual rights [under the SPA] to secretly transfer the beneficial ownership/effect a change in the board or management control of KEL outside Pakistan and evade Pakistani regulators*" and has acted in breach of section 159.

(q). *asserts that any change of control of KEL* has implications in Pakistan and "*triggers obligations under the shareholder agreements, disclosures and approvals in Pakistan and shall result in acceleration of finance facilities*" and that *the transfer the beneficial ownership/change in board or management control of KEL cannot be "unilaterally executed" by the Applicant "whose rights under [the SPA] and the [SHA] are restricted as regards change of control especially since the liquidators have been selected through a Cayman court*."

(r). *asserts* that the nomination and appointment of new directors to the board of KEL is only possible with the consent of the shareholders and regulators in Pakistan.

(s). *asserts* that the Applicant plans "*to hijack [KEL] via contractual arrangements that were entered into at the time of the Abraaj acquisition without taking on board the regulators in Pakistan*" and accordingly with the ultimate objective of appointing their nominees to the KEL board "*without any vetting exercise*."

165. As I noted at [41] of the Judgment, the relief claimed by the Respondents in the prayer to the Plaint is as follows (underlining and italics added):

(a). a declaration that "*all acts*" *of the Applicant* "*in relation to the transfer of beneficial ownership/change in board or management control"* of KEL are *"null and void.*"

(b). a declaration that the *nominations for the board of KEL made by the Applicant* are "*illegal and without lawful authority.*"

(c). a declaration that the *acts of the Applicant* "*in relation to the change of beneficial ownership/change in board or management control"* of KEL are in "*gross violation of section 33 [of the Act] and [Regulation 14]."*

(d). a direction that *the Applicant perform its obligations under the SHA* (and certain unspecified finance agreements) "*as regards the change of control provisions*."

(e). a direction *that the Privatisation Ministry, the Energy Ministry and NEPRA* "*monitor and regulate the affairs of [KEL] in accordance with ... the laws of Pakistan*."

(f). an order *restraining the Applicant* from "*transferring the beneficial ownership or making any changes in the board/management control of [KEL] without the Security Clearance of the Government of Pakistan.*"

(g). an order *restraining the Applicant* "*from acting in violation of the restrictions on transfer prescribed under [the SPA 2005]."*

(h). an order *restraining the Privatisation Ministry, the Energy Ministry and NEPRA from authorising* "*any transfer of beneficial ownership or change in the board/management control [implicitly by the Applicant] without the Security Clearance or in violation of Section 5.2 of the SPA 2005".*

(i). a permanent injunction *restraining the Applicant* "*from interfering with or in any manner attempting administration of affairs of [KEL]"*

166. The Plaint is the pleading and the core document setting out the Respondents' claims and the facts upon which they rely. There is also some further commentary from the Respondents in other documents filed in response to the Applicant's Filings, in particular in the Section 4 Counter Affidavit the Respondents. In [6] of the Section 4 Counter Affidavit, the Respondents stated that:

> *"Notwithstanding the breaches of the [SHA] by [the Applicant, Alvarez and Marsal and KESP] (obligations and rights of [the Respondents] and [the Applicant and KESP]) the Respondents' primary contention is in respect of the violations of the provisions of [the SPA] particularly sections 5.2 and 5.3 which is governed by the laws of [Pakistan]. It is respectfully submitted that until and unless [the Applicant, Alvarez and Marsal and KESP] do not adhere to the provisions of [the SPA] and observe the regulatory framework and the applicable laws of Pakistan in respect of the change of ownership/management control of [KEL], [the Applicant] cannot transact at its pleasure for the purpose of achieving a board concentration or beneficial ownership for which the rights of the [Respondents] would otherwise gravely be prejudiced*."

167. This summary of the facts asserted, claims made, and relief asserted in the Plaint clearly indicates (subject to taking into account the expert evidence to which I shall turn shortly) that the Pakistan Proceedings have been commenced because of the Transaction (and the related transfers of limited partnership interests to SVL) and relate to and arise out of a dispute (at least primarily) between the Respondents and the Applicant as to whether the Applicant is entitled, without obtaining the consent or approval of the Respondents and the Pakistan Government and regulatory authorities:

(a). to exercise its right to cause KESP to appoint its nominees to the KEL board (and to require the Respondents to procure, join in and support the making of such appointments).

(b) to permit itself to become, or to take any action that results in it becoming, subject to a change of Control.

168. The dispute is to be treated as being between the Respondents and the Applicant because the conduct complained of by the Respondents is that of the Applicant and the relief sought by the Respondents is primarily against the Applicant. There is an implicit complaint against the share transfer by AIML to SVL but there is no suggestion that there is a dispute with AIML (or that there could be in view of the contractual framework). The dispute is with the Applicant as a result

of the action it has taken in consequence of the Transaction (and related transfers of limited partnership interests), as to the effect thereof on the Applicant's obligations and rights under the SHA and on the right of the Applicant to give effect to such Transaction (and such other transfers) by changing and appointing Mr Chishty and others to the board of KEL.

169. The dispute between the Respondents and the Applicants arises out of, or is in connection with, the SHA because the challenge made by the Respondents relates to matters governed by the SHA. The Respondents, as I have noted, dispute and challenge the Applicant's right to cause KESP to appoint the Applicant's nominees to the KEL board and to allow or to put into effect an asserted change of Control of the Applicant. The Respondents seek to prevent such an appointment being made consequential upon the asserted change of Control. They also seek to enforce the Applicant's obligations under the SHA (as they relate to a change of Control).

170. It is true that the Respondents also seek to show that the Applicant is bound by, and has breached, the transfer restrictions in the SPA and has acted in breach of Section 33 and Regulation 14. The Respondents argue that its claims against the Applicant, based on the asserted breach of these provisions in the SPA and of these laws, relate to a dispute that is not covered by clause 25.2. But the facts on which these claims are based once again relate to action which is regulated and governed by the SHA. The action taken by the Applicant which is said to result in a breach of the SPA and these laws was either taken as a shareholder in KESP in reliance on, and pursuant to the SHA (the steps taken to appoint directors of KEL), or is itself governed by, and dealt with, in the SHA (the change of Control in respect of the Applicant). The Respondents agreed in the SHA that if they wished to complain about and challenge (dispute) the steps taken by the Applicant (i) in its capacity as a shareholder in KESP when exercising its rights in that capacity given or governed by the SHA (including the rights that relate to or affect KEL) or (ii) in relation to matters regulated and governed by the SHA, they must do so via proceedings in Cayman or England. In any event, even if the claims in the Pakistan Proceedings against the Applicant based on an asserted breach of the transfer restrictions in the SPA and of Section 33 and Regulation 14 cannot be treated as relating to a dispute arising out of the SPA, they arise in relation to a dispute in connection with the SHA.

171. For these reasons, the question of whether the Respondents' claims against the Applicant in the Pakistan Proceedings are to be treated as litigating and relating to a dispute between them, arising out of or in connection with the SHA, is to, and can, be determined primarily by reference to a review of the facts upon which those claims are based. The Pakistan law analysis of the causes of action is of secondary importance. But it does need to be addressed.

172. I have set out at length above Justice Hussain's evidence and opinions.

173. As regards the question of whether the Respondents had a proper basis for their claims based on a breach of the SPA, it appears in summary that Justice Hussain considers that as a matter of Pakistan law the Applicant is bound by the terms of the SPA, in particular the transfer restrictions contained in the SPA, that at least a transfer by the Applicant of its shares in KESP would be subject to those transfer restrictions and that, on the basis that there has been such a transfer, the Applicant was in breach of the SPA and the Respondents have standing to enforce the SPA and seek relief in the Pakistan Court in respect of such a breach.

174. His reasoning initially assumed that the Respondents had standing to enforce the SPA, to which they are not a party, because of the effect of the Waiver (see his commentary in the Joint Memorandum quoted above in which he said that the "*principle of Privity of Contract [did] not come into play as the provisions of [the Waiver] (being [a] continuation of SPA) are fully applicable to the shareholders of KESP, i.e. the Applicant and [the Respondents] and the same may be enforced by either of the Parties i.e., KESP or its shareholders."*). He then appears to have abandoned this (difficult to follow and unconvincing) explanation and instead relied on his interpretation of the reference to "*permitted successors and assigns*" in the definition of "Company" in section 1 of the SPA. That definition defines the Company for the purpose of the SHA as being KEL "*and its permitted successors and assigns*." During his cross-examination, Justice Hussain said that in his view "*whosoever gets any right or interest in the company [KEL], .. may be a successor in accordance with this definition of the Company.*" But, neither the Applicant nor the Respondents are shareholders in KEL and Justice Hussain did not explain how or why this wording in the SPA should be interpreted as covering a person who held shares in a shareholder in KEL. Indeed, it was implicit in much of Justice Hussain's analysis that the SPA should be interpreted when referring to KESP as including the Applicant (and the Respondents) as shareholders in KESP. It appeared as though he considered that the separate corporate entities and separate corporate identity of KESP and its shareholders could be ignored (and the corporate veil of KESP effectively pierced). This can be seen in his commentary in the Joint Memorandum dealing with the question of whether the Respondents had the right to make a claim for breach of the SPA (quoted above) where he said that *"The purpose of incorporating KESP was simply to create a special purpose vehicle for the [Respondents] and [the Applicant] to coexist to invest in KEL. The [Respondents] and [the Applicant] vis a vis KESP are joint shareholders with the Government of Pakistan. By prioritizing the SHA, the rights and obligations of the Government of Pakistan in KEL as per the SPA are compromised. While the SHA governs the relationship*

between the KESP shareholders, the entire constitution, functioning and working of KEL is under the SPA in which the Government of Pakistan is a party, and accordingly the same cannot be ignored…"

175. There is a reference in section 5.3 of the SPA, which is referred to in the Plaint and sets out when KESP is permitted to transfer its shares in KEL, to direct and indirect sales but Justice Hussain did not seek to and could not show that this drafting justified a construction of the SPA which resulted in the Applicant being bound by the transfer restrictions (which did not refer to indirect sales and by which in any event only KESP was expressed to be bound).

176. In my view, Justice Hussain never sought (or was unable) to identify the applicable legal principles or authorities which supported his view on these points and failed to provide a cogent explanation for his opinion. I also found his reliance on the legitimate expectations principle unpersuasive. It was unclear how the principle was said to apply in this case so as to give the Respondents a claim against the Applicant and once again there did not appear to me to be a cogent, let alone convincing, basis for Justice Hussain's view. Even giving due weight to Justice Hussain's standing and the need to avoid accepting evidence as to foreign law just because it fits and is consistent with the law and style of thinking under Cayman law, I prefer the evidence of Mr Shaukat on all of these issues. Mr Shaukat, for the reasons I have explained, adopted a different interpretation of the SPA and considered that the Applicant was not bound by the transfer restrictions in the SPA. I found his analysis to be clear and cogent and supported by the applicable law and authorities (in particular, with respect to Pakistan law on privity of contract). It seems to me that, as a matter of Pakistan law, it is at least likely that the Applicant is not bound by, or subject to, the transfer restrictions in and the other provisions of the SPA.

177. But even if Justice Hussain's view was correct, it would not in my view change the analysis of whether the Pakistan Proceedings involved the litigation of, and related to, a dispute arising out of, or connected with, the SHA. First, as the Applicant pointed out, Justice Hussain's analysis depended (at least to a significant extent) on there being a transfer by the Applicant of its shares in KESP. No such transfer has taken place. So even on Justice Hussain's main view, the Applicant cannot be bound by the SPA. Secondly, even if Justice Hussain is right that the Applicant is bound by the transfer restrictions in the SPA and that the Respondents are entitled to enforce the SPA, despite none of them being a party to it, the claims made against the Applicant in the Pakistan Proceedings are to be treated as covered by clause 25.2 since the acts complained of remain, for the reasons I have already explained, acts taken by the Applicant *qua* KESP shareholder in respect of matters regulated, covered and governed by the SHA.

178. Justice Hussain considered that the dispute in the Pakistan Proceedings revolved around the ultimate management and control of KEL and that the primary cause of action was in respect of the ultimate management control of KEL which is subject to regulatory control and the transfer restrictions in the SPA. He also considered that the SPA was "*a fountain document and the SHA [was] secondary to it whereby only the shareholders have rights and obligations inter se*." Mr Shaukat did not agree with Justice Hussain's view and considered that it was not relevant to the issues which the experts were asked to address. The issue for this Court when considering the scope of clause 25.2 is the meaning (interpreted in accordance with the principles of English law, which are on this application treated as the same as those applicable under Cayman law) of the terms used in the clause (in particular "*dispute*" and "*arising out of or in connection with*"), an assessment, in light of that meaning so ascertained, of what dispute is or disputes are being litigated in the Pakistan Proceedings and whether clause 25.2 so interpreted should be understood as covering it or them. The expert evidence on Pakistan law is to be taken into account for the purpose of the assessment of what is covered by, and the nature and elements of the cause or causes of action relied on in, the Pakistan Proceedings but is not determinative. It is not to be given any weight for the purpose of interpreting the SHA in general and the scope of clause 25.2 in particular. As I have explained, on my construction of the SHA, it is to be treated as covering the exercise of the rights and powers of the KESP shareholders with respect to KEL without reference, or being subject, to the terms of the SPA. On this basis, and for the purpose of this application, it seems to me that Justice Hussain's view, to the extent that it is relevant, is not right.

179. As regards the question of whether the Respondents had a proper basis for their claims based on a breach of Article 33, regulation 14 and section 159 of the Companies Act 2017 (although no relief was sought by reference to section 159) I found Mr Shaukat's analysis and explanation cogent and persuasive. I have noted his responses during his cross-examination but do not consider that these materially undermined his evidence or qualified his conclusions. On that basis, I conclude that it is likely that the Respondents' do not have, as a matter of the law of Pakistan, standing to bring proceedings against the Applicant (or Alvarez and Marsal) for a breach of contract or a cause of action recognised under Pakistan law based on Article 33 and regulation 14 (or section 159). But once again, even if that is not correct and the Respondents do have standing to bring and may assert a cause of action based on these provisions, these claims litigate and relate to a dispute covered by clause 25.2. The facts on which the claims are based namely the Transaction (and the related transfers of limited partnership interests) relate to steps taken in relation to and also by a shareholder of KESP, whose rights in that capacity are governed by the SHA and the challenge to (and dispute over the effects of) the Applicant's right to permit or give

effect to the Transaction (and the related transfers of limited partnership interests) engages the restrictions on changes in Control of the Applicant in, and is governed by, the SHA.

180. As regards KESP, no relief is sought against it in the Plaint. For that reason, it might be said that the Pakistan Proceedings are not litigating, and do not relate to, a dispute between the Respondents and KESP. But that would not be the correct approach. KESP is joined as a party and made a defendant to the Pakistan Proceedings in connection with (and as part of) the Respondents' dispute with the Applicants. In my view, in those circumstances, the proceedings against KESP are covered by clause 25.2. I would add this. It might be thought to be curious that the Respondents have not sought relief against KESP. It is the party to the SPA and if there is a proper basis for complaining about the effect of the Transaction (and the related transfers of limited partnership interests) on KEL and on the other shareholders of KEL, and of a breach of the SPA, it might be thought that KESP was the proper and primary defendant.

181. The Pakistan Proceedings also include the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP as defendants but there is no claim that they have acted in breach of any statutory duty or other obligation or have acted without complying with applicable standards or requirements (the Privatisation Ministry and NEPRA are expressly referred to only as a proper and necessary party as regards any transaction involving the transfer of ownership, board or management control in relation to KEL). Relief is sought against these defendants but only prospective relief requiring that they perform their statutory duties and do not consent to such transfer without the security clearance referred to in or other violation of clause 5.2 of the SPA being obtained.

182. In these circumstances, it seems to me that it is strongly arguable that there is no genuine or real dispute between the Respondents and these defendants (as the responses filed by the Pakistan authorities to the Pakistan Proceedings confirm) or that, if there is a dispute, it (or part of it) must be seen as ancillary to, and closely connected with, the dispute between the Respondents and the Applicant (which as I have held is to be treated as arising out of, or in connection with, the SHA).

183. Paragraph 5 of the prayer in the Plaint seeks an order that these defendants monitor and regulate the affairs of KEL and paragraph 8 seeks an order that they be restrained from authorising any transfer of beneficial ownership or change in the board/management control of KEL without the security clearance (referred to in) or in violation of section 5.2 of the SHA.

184. Having said that, the Respondents have identified a basis for a claim and applied for relief against the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP although the expert evidence did not address (or addressed only tangentially) the standing of the Respondents to bring proceedings and seek relief against the Pakistan authorities (the issues for the experts failed to raise this questions). But it is clear that at least the latter three parties have regulatory responsibilities with respect to KEL and that the first is of course a shareholder in KEL and party to the SPA. Furthermore, Justice Hussain's reference to, and reliance on, the legitimate expectation principle, particularly in the section dealing with issue 1(3) in the Joint Memorandum, appeared to me to provide a basis for standing to seek relief in respect (and in Cayman law terms, judicial review) of the decisions of the Pakistan authorities.

185. It seems to me that the right approach is to say that to the extent that the Respondents have a bona fide dispute with the Energy Ministry, NEPRA and the SECP regarding the exercise of their powers and the performance and enforcement of their duties in respect of KEL (and KESP if and to the extent it is subject to their powers), and a dispute with the Privatisation Ministry regarding the exercise by it of its contractual rights under the SPA, then that is a dispute with a non-party which is independent of the SHA (and therefore neither arises out of, or in connection with, it). Clause 25.2 does not apply to such a dispute and the Applicant does not have a contractual right to restrain the commencement or continuation of proceedings to litigate and which relate to that dispute.

186. As I have said, I regard it as a close call as to whether in this case the Respondents' claims against the Pakistan authorities can be regarded as genuinely being the result of a dispute with them because it looks as though the claims are, in reality, another (albeit indirect) means of litigating the dispute with the Applicant regarding the appointment of directors to the KEL board. However, on balance I have concluded, since disputes with the Pakistan authorities are not covered by the SHA and since the Respondents may have some basis under Pakistan law to seek relief against the Pakistan authorities, it is right to accept that the Respondents may have a dispute with the Pakistan authorities and that since the matter is before the Pakistan Court, which is best placed to adjudicate on this dispute, and since the exercise by the Pakistan authorities of their rights, both contractual and statutory (or regulatory), is a matter of considerable public interest and local importance and for them, it is right (having regard *inter alia* to the need to respect the comity principle) to leave it to the Pakistan Court and the Pakistan authorities to deal with the relief sought in the Pakistan Proceedings against them. If it turns out that KESP is not permitted to give effect to the Applicant's instructions to make appointments to the KEL board because of KESP's contractual obligations to the Privatisation Ministry or the regulatory requirements of Pakistan

law, the Applicant can have no complaint about action being taken thereunder by the Pakistan authorities because the terms of the SHA could never override those independent obligations of KESP (and KEL). If the Respondents have a right to require the Pakistan authorities to exercise their rights and powers as against KEL (and KESP) (and a real dispute with them concerning their exercise) then they may do so even if that prevents KESP from putting into effect and complying with the Applicant's instructions because the prohibitions and limitations on the exercise of KESP's rights as a KEL shareholder which the Respondents are seeking to enforce were always unaffected by the SHA and arose independently of it. If clause 25.2 was to go so far as preventing the Respondents from taking such steps, clear words should have been included.

187. However, to the extent that the Respondents seek to go further and apply for relief against Privatisation Ministry, the Energy Ministry, NEPRA and the SECP which seeks to raise issues concerning or require the Pakistan authorities to take action to prohibit the exercise by *the Applicant* of its rights under the SHA, in particular the appointment of directors to the KEL board or to restrain the Applicant from giving effect to Transaction (and the related transfers of limited partnership interests) as between itself, the Respondents and KESP, then they would be bringing proceedings to litigate a dispute with the Applicant in connection with the SHA in breach of clause 25.2. The Respondents would be using the claims made against the Pakistan authorities as a backdoor route for indirectly bringing claims covered by the SHA against the Applicant.

188. Following that approach, paragraph 5 of the prayer in the Plaint appears to be unobjectionable and should not be subject to any injunctive relief to be granted by this Court. Paragraph 8 is, at least as a matter of drafting, ambiguous. It is currently drafted very widely and could be understood, when reference is made (using the ambiguous language adopted by the Respondents throughout the Plaint) to "*any transfer of beneficial ownership or change in the board/management control of [KEL]*" as requiring the Pakistan authorities to adjudicate on the steps taken by the Applicant as a KESP shareholder. That language does not reflect the drafting of the SPA or the relevant statutes and regulations. If it were drafted so that an order was sought requiring the Privatisation Ministry as party to the SHA to exercise its rights thereunder against KESP to the extent that they have become exercisable and requiring the Energy Ministry, NEPRA and the SECP to exercise their respective regulatory powers in relation to KEL (and if relevant KESP) then it would in my view would be unobjectionable. The exercise by the Pakistan authorities of their rights, both contractual and statutory (or regulatory) is a matter of considerable public interest and local importance and for them, and not regulated by the SHA. But what would be objectionable, as I have said, is for *the Respondents* to use a claim against the Pakistan authorities which seeks to require them to act so as to interfere with the exercise of the Applicant's

rights and deal with matters covered by the SHA. Of course, it would be a different matter were the Pakistan authorities to do so on their own initiative and in light of their own view as to the scope and reach of their own rights and powers.

The relevance of the Applicant's claim that the Pakistan Proceedings interfere with its right to (cause KESP) appoint directors to the KEL board and the Respondents' claim that the Applicant is itself in breach of contract

189. The Respondents argued that the Applicant was not entitled to rely in its claim for injunctive relief on its claim that the Respondents were in breach of 5.7 of the SHA because it would then be seeking to take advantage of its own wrong, since, so the Respondent claimed, the Applicant was also in breach of clause 9.4 of the SHA (as it had claimed in the Pakistan Proceedings).

190. The Applicant submitted that the Respondents' claim that it was in breach of clause 9.4 did not affect its claim to injunctive relief. First, the Respondents had not argued that the Applicant's alleged breach prevented it from relying on clause 25.2. The Applicant's case in reliance on clause 25.2 was based on its claim that Pakistan Proceedings litigated and related to a dispute (or disputes) covered by the clause and not on the Respondents' alleged breach of clause 5.7. Clause 25.2 covered a dispute between the Applicant and the Respondents concerning the exercise of the Applicant's rights under the SHA including its right to cause KESP to appoint directors to the KEL board. The Pakistan Proceedings, the Applicant said, had resulted in a breach of the Respondents' obligations under clause 5.7 and the Respondents' flagrant disregard of their contractual obligations but that breach was not relied on for the purpose of showing that clause 25.2 was engaged and covered the Pakistan Proceedings.

191. The Applicant argued that if the Respondents wished to rely on a breach of the SHA by the Applicant, then they needed to bring a claim for breach of clause 9.4 in the proper jurisdiction. The Respondents were seeking to prevent the exercise of rights under clause 5.7 of the SHA by bringing the Pakistan Proceedings in breach of contract and then to respond to an application seeking relief for that breach by arguing that there had been a breach of clause 9.4, the very claim that they had not been prepared to bring in the proper jurisdiction.

192. I agree with the Applicant. The Applicant relied on the subject matter of the SHA – what it covered including its rights to appoint directors to the KEL board – and not on a breach of clause 5.7 the SHA. There is a dispute between the Respondents and the Applicant as to whether the Respondents have breached its obligations under clause 5.7 and whether the Applicant has breached its obligations under clause 9.4. That dispute is covered by clause 25.2 and must be

litigated in England or the Cayman Islands. Had the Respondents relied on and sought to establish the Applicant's breach of clause 9.4 as disentitling it to rely on clause 25.2, then they would have a basis for challenging the Applicant's application for an injunction but would need to do so in proceedings in one of the chosen fora (and the mere existence of a breach of another provision of the SHA would not necessarily have prevented the Applicant from relying on the exclusive jurisdiction clause in the SHA).

Strong reasons for refusing to grant an injunction

193. I now turn to consider whether the Respondents have established that, despite the Pakistan Proceedings having engaged, and, in the respects I have described, giving rise to a breach of clause 25.2 of the SHA, there are strong reasons for refusing to grant an injunction. I shall review each of the Respondents' arguments in turn.

Submission

194. As I have noted, both parties accepted that this was an issue governed by Cayman and not Pakistan law. Accordingly, the expert evidence on the law regarding submission to jurisdiction in Pakistan was not determinative or directly relevant. It can, however, assist, for the purpose of the Cayman law analysis, in assessing the significance and effect of steps taken by the Applicant in the Pakistan Proceedings.

195. There was no dispute that the test set out by Lord Justice Males in *SAS Institute Inc.* at [114] (set out above) was the right one. The question is whether the applicant has taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction. If it had done so, this would be a strong reason for refusing injunctive relief albeit not a decisive one.

196. In the Judgment, I concluded that the Applicant had only been doing what it could to resist the Pakistan Court's assumption of jurisdiction and had not conducted itself in a manner that was inconsistent with the contractual forum being the sole forum for the resolution of the parties' dispute.

197. The Applicant has made two applications in the Pakistan Proceedings, the Section 4 Application and the Order 39 Application.

198. In the Section 4 Application, the Applicant asserted that the Suit was "*not maintainable as it essentially [emanated] from a subject matter which if at all should have been referred for foreign arbitration between [the Respondents and the Applicant].*" The Section 4 Application referred to, and relied on, the old form of clause 25 and claimed that this clause meant that the Respondents and the Applicant were "*bound to resolve any disputes exclusively in terms of clause 25*." In the prayer, the Applicant sought an order that the Pakistan Court "*vacate the [Pakistan Interim Injunction] and stay [the Suit] and refer the matter for adjudication in accordance with clause .. 25 of the [SHA]*."

199. The Order 39 Application also starts by asserting that the Suit was "*not maintainable as it essentially [emanated] from a subject matter which if at all should have been referred for foreign arbitration between [the Respondents and the Applicant]"* and that "*the entire dispute [in the Suit] is governed by English law [and the SHA] and [that the Respondents and the Applicant] are "bound to resolve any disputes exclusively in terms of clause 25*." The Applicant then complains that, as a result of the Pakistan Interim Injunction, its appointment (via KESP) of directors to the KEL board has been put on hold so that the board is functioning without the proportionate representation envisaged by the SHA and asserts that it is entitled to make these appointments under the SHA and that, if the Respondents object to the Applicant doing so, they are bound to refer the matter for adjudication in accordance with clause 25 of the SHA. The Applicant claims at [6] that "*In view of the above, it is submitted that the Pakistan Interim Injunction may be recalled/modified thus enabling the [Applicant] and [KESP] to exercise its lawful right of nominating the proposed replacements of the board of [KEL].*" In [7], the Applicant avers that unless the Order 39 Applications was allowed and the Pakistan Interim Injunction recalled/modified and the Suit stayed and referred to adjudication in accordance with clause 25 of the SHA, the Applicant will be seriously prejudiced. In the prayer, the Applicant then states that it is prayed that "*the [Pakistan Court] be pleased to grant [the Order 39 Application] and recall/modify [the Pakistan Interim Injunction] and allow nominations of the Directors on the [KEL board] in proportion to the shareholding of [KESP].*"

200. The focus of the Respondent's case related to the Order 39 Application. The Order 39 Application, they said, went further than the Section 4 Application, which was the application by which the Applicant sought to challenge the Pakistan Court's jurisdiction based on the arbitration clause in the SHA. The Order 39 Application sought positive relief in relation to the appointment of the KEL directors and involved a step in the Pakistan Proceedings which went beyond a challenge to that court's jurisdiction. Mr Shaukat had recognised that the Order 39 Application

could be seen as having involved such a step and gone too far and his attempt to explain away the problem for the Applicant should not be accepted.

201. The Applicant however maintained that the Order 39 Application was in substance only contesting the jurisdiction of the Pakistan Court, in reliance on the provisions of the SHA, and that Mr Shaukat had properly concluded that the drafting of the application, including the wide wording in the prayer, was entirely consistent with this view. The Applicant submitted that this was the correct interpretation and analysis of the Order 39 Application which the Court should follow.

202. I accept the Applicant's submissions on this issue. In my view, the Applicant has not taken a step in the Pakistan Proceedings which goes beyond a challenge to that court's jurisdiction or conducted itself in a manner that was inconsistent with the contractual fora being the sole fora for the resolution of the dispute with the Respondents.

203. Mr Shaukat helpfully summarised in the Shaukat Report (at [99]) the nature of an application under Order 39 rule 4:

> *"Rule 4 of Order 39 of the Civil Code permits a court to "discharge, vary or set aside" an injunctive order and an application under this rule essentially allows the applicant an opportunity to approach the court and make submissions against an injunction already granted. In the case where only an ad-interim injunction has been granted the aggrieved party is in any case given the opportunity to file a reply and be heard by the court. Rule 4 of Order 39 of the Civil Code is ordinarily meant to apply to a situation where the aggrieved party does not have the opportunity to make such submissions. This is consistent with the caselaw on this provision which sees Rule 4 of Order 39 of the Civil Code as a means of apprising the court of altered circumstances after the grant of an injunction which merits the vacation or variation of the injunction. In the circumstances where the interim injunction application of the [Respondents] is pending in the Suit, the High Court will not be making any separate order on the Injunction Removal Application and will simply proceed to decide the interim injunction application. That being said, applications under Rule 4 of Order 39 of the Civil Code are often filed for strategic reasons in order to expedite the hearing of an interim injunction application. They allow litigants an opportunity to obtain a preliminary order on the application and create pressure on the party seeking the injunction. To this extent the Injunction Removal Application appears to have served its purpose."*

204. The Order 39, rule 4 jurisdiction relates to applications to discharge, vary or set aside an injunction. The application focuses on the injunctive relief granted by the court. A person who is made a party to proceedings in Pakistan in breach of an exclusive jurisdiction or arbitration clause and who is then made subject to an injunction, and who wishes to have the proceedings stayed and the clause enforced, is able and may need both to challenge the main proceedings and separately the injunctive relief granted pursuant to it. In this case, it appears to me, having regard

to the drafting and terms of the Order 39 Application and all the expert evidence, that the Applicant was using the Order 39 Application to challenge the granting of the injunction based on the Respondents' obligation to submit disputes to arbitration and the references to the Pakistan Court permitting the appointment of the Applicant's nominees as KEL directors to proceed should be seen as relief that would flow as a consequence of the application being successful and of a stay being granted and not as substantive relief sought to enforce the Applicant's right under the SHA to appoint the KEL directors. The drafting of the Order 39 Application, taken as a whole, makes it clear that the Applicant relies on the arbitration clause and wishes to have the dispute with the Respondents submitted to arbitration in accordance with the clause. It does not show that the Applicant wished (and had elected) to have its substantive rights and claims in relation to the appointment of the KEL directors be adjudicated and dealt with by the Pakistan Court.

205. Mr Shaukat had noted that there was some ambiguity in the drafting of the prayer and addressed the question of whether the references to the Pakistan Court allowing the appointment of the KEL directors to proceed should be understood as a statement that the Applicant sought relief based on clause 25 discharging the injunction so as to allow the appointment to proceed or relief adjudicating on, and enforcing, the Applicant's right to proceed with the appointment. He focused on the underlined words: "*the [Pakistan Court] be pleased to grant [the Order 39 Application] and recall/modify [the Pakistan Interim Injunction] and allow nominations of the Directors on the [KEL board] in proportion to the shareholding of [KESP]*" and said as follows at [99] of the Shaukat Report:

> "*90. This is problematic as the prayer can be interpreted in two ways. Under the first interpretation the emphasized portion can be read as a consequence of the recall/modification that has been sought whereby the nominations would be allowed as a result of the recall/modification. Under the second interpretation the emphasized portion can be read as a specific request to the High Court to make a direction positively allowing the nominations to be made to the board of KEL. Such an interpretation may entail a substantive determination of whether the nomination is allowed. The prayer in the Injunction Removal Application could have been worded so as to avoid this confusion, however, the current wording creates doubt as to the exact relief the Applicant is seeking and if such relief is a positive direction from the High Court, the seeking of such direction can be said to be a step in the proceedings.*"

206. So, Mr Shaukat recognised that there was some uncertainty but accepted at [97] of the Shaukat Report that "*The premise of both applications is the same, i.e., the subject matter of the Pakistan Proceedings ought to have been referred to foreign arbitration in accordance with Clause 25 of the SHA and that the [Respondents] have misled the High Court in obtaining the injunctive order.*" Furthermore, in his lengthy and extensive cross-examination on this issue, Mr Shaukat

made it clear that in his view, when the Order 39 Application was viewed as a whole, it could not be understood as seeking substantive relief as to the Applicant's rights to appoint the KEL directors or as being inconsistent with, or going beyond, the Applicant's application for a stay of the Pakistan Proceedings in reliance on clause 25. Because his cross-examination on this topic was so lengthy, I have included in an appendix to this judgment an extract from the hearing transcript which sets out Mr Shaukat's evidence in full, with key passages underlined. But the following extracts summarises his views:

> *"A. it's not just the prayer, it is the entire application, and the overall facts and circumstances as to what steps have been taken by the party in the entire proceedings and not just in [the Order 39 Application] so the judges would be considering, you know, all of the applications and the responses that have been filed, what sort of adjournments have been sought and whether there is a written statement that has been filed or not, so it will be the, you know, the entire totality of all of the steps that the party has taken and not just the particular prayer in one application in order to decide what was the real intention, so in that way, of course, the statements made by the Applicant in the application with respect to the facts and what the parties had agreed in the SHA and the exclusive jurisdiction clause or the arbitration clause because they had actually recently referred to the unamended Section 4 at that point in time, so the judge would have to consider all that to come to an opinion as to whether or not he should say that whether a step has been taken or not.*
>
> *Q. And when looking at trying to work out what the relief is that [the Applicant] is seeking at page 526 of the bundle, ... in your paragraph 91, having averted to the difficulties that you've discussed, you say that the intention - the possible – the ambiguity is like resolved in favour of your first possible construction. In other words, that these words are to be read as a consequence of the recall/modification that is sought....*
>
> *A. Well, you see, the step in the proceedings for me, the judgment is all about are they doing the bare minimum that they should be doing in order to protect their interest and the intention of the party is always to -- that the matter may be referred to the foreign court, so when I was -- so after highlighting the fact that this particular provision is problematic, but when I look at the applications and the content of the applications, the stress has always been by the Applicant that they were - that the matter might be referred to the foreign court. It could be - I could see as, you know, in my own personal opinion that when I'm reading the application, there was a very clear intention of not having these proceedings carried out over here, but rather to safeguard [their] interests and to request the Court to refer the matter to the foreign court. So in my personal judgment, I was leaning in favour of the fact that this is - should not be taken as a step in the proceedings, but the learned judge would be absolutely free in deciding either way.*
>
> *……*
>
> *Q. Yes. And can I just ask you to, further up the document, if you look at page 525, at paragraph 4, it talks about the nominations of the individuals that have been put on*

> *hold, it goes on to say the board is functioning without proportionate representation and the mandatory requirement of a woman director cannot be made either, and then in paragraph 5 it talks about Defendant No. 1 being entitled to nominate specifically agreed upon representation. Aren't those facts that it's wanting to put before the Court in favour of its full prayer for relief, in other words, it's not confined itself simply to narrating the relevant arbitration clause, it is trying to ask the Court to take notice of what it's done in relation to nominations so that it can grant relief in that respect as well?*
>
> *A. Well, this is all factual statements in support of the application. I don't know how these could be read as statements which would lead to the Court or would give the Court or which would suggest that the party is interested in having the matter adjudicated in Pakistan…"*

207. In my view, Mr Shaukat's analysis is cogent and reasonable and consistent with my own assessment and analysis of the impact and effect of the steps taken by the Applicant in the Pakistan Proceedings in general and of the Order 39 Application in particular.

The risk of a multiplicity of proceedings and of inconsistent findings

208. The Respondent submitted that, assuming that an injunction was not granted restraining the Pakistan Proceedings as a whole, there would be a multiplicity of proceedings and an attendant risk of inconsistent findings so that the interests of justice were best served by the submission of the whole dispute to a single tribunal which was best fitted to make a reliable, comprehensive judgment on all the matters in issue, and that tribunal was the Pakistan Court.

209. As Mr Rabinowitz said in *Team Y&R* at [90]:

> *"The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions." It is clear from Lord Bingham's consideration of the earlier authorities, as well as the approach taken by their Lordships in Donohue itself, that these matters might, but need not, constitute a strong reason for not granting injunction..."*

210. I have decided that, subject to my review of the Respondents' claims, there are no strong reasons for refusing to grant injunctive relief, the Respondents are in breach of clause 25.2 of the SHA as a result of having commenced and continued the Pakistan Proceedings against the Applicant, Alvarez and Marsal, KESP and KEL and therefore that the Applicant is entitled to a permanent injunction to restrain the Respondents from continuing the Pakistan Proceedings against those parties. I have also decided that the Respondents are not in breach of clause 25.2 of the SHA as

a result of having commenced and continued the Pakistan Proceedings against the Privatisation Ministry, the Energy Ministry, NEPRA and the SECP to the extent that the Respondents seek to require those parties to exercise their duties or powers in relation to KEL provided that the Respondents do not seek to challenge in the Pakistan Court (or seek relief that requires these parties to challenge) the steps taken by the Applicant as a KESP shareholder. It is in my view permissible for the Respondents to seek to enforce, to the extent that they have standing under Pakistan law and procedure to do so, the regulation of KEL by the Pakistan authorities and the enforcement by the Pakistan Government of KESP's obligations under the SPA, since compliance by KEL with its Pakistan law regulatory obligations and compliance by KESP with its own contractual obligations under the SPA are not matters covered by the SHA and do not involve a dispute between the Respondents and the Applicant arising out of, or in connection with, the SHA. But the proceedings in Pakistan commenced by the Respondents must not seek to challenge or seek relief that will interfere with the actions taken by the Applicant as KESP shareholders.

211. If, under the SPA or applicable Pakistan law, *KESP* is at least arguably prohibited from appointing (or *KEL* is unable to permit the appointment of) new directors to the KEL board without the approval of the Privatisation Ministry or without regulatory approvals or disclosures, then any dispute as to these matters, involving the interpretation of the SPA (governed by Pakistan law) and of the applicable local laws and regulations, can and should be dealt with by the Pakistan Court, which is best placed to do so.

212. There is, because of the corporate structure of the KESP-KEL group of companies, a dividing line at the KESP level. Above KESP is the territory occupied by the shareholders of KESP who have set out and regulated their rights and relationship in that capacity in the SHA, and KESP has agreed to act in accordance with the SHA. At and below the level of KESP is KEL and KESP's position as shareholder in KEL. KESP is bound to act in accordance with its obligations under the SPA (and its obligations under the SHA cannot relieve it of, or qualify its obligations under, the SPA) and KESP and KEL are bound to act in accordance with applicable Pakistan law. I see no serious difficulty in issues (disputes) relating to the rights and obligations (largely governed by English law although potentially affected by Cayman law) of the shareholders in KESP (a Cayman company) and of KESP's obligations to its shareholders (issues above the line) being determined by this Court/the English Court and issues (disputes) relating to the rights and obligations (governed by Pakistan law) of the shareholders in KEL and of KEL to its shareholders and the Pakistan authorities being determined by the Pakistan Court. The dispute regarding the proposed appointment of new directors to the KEL board raises separate issues (governed by different laws and involving different parties) at the two levels, namely as to the Applicant's right

as against the Respondents (and KESP) to make the appointment (in fact to cause KESP to make the appointments) and KESP's (and KEL's) right and obligations *as against the Privatisation Ministry (as KEL shareholder) and against the Energy Ministry, NEPRA and the SECP as regulators* to make and permit the appointment (without consent and approvals).

213. The different issues and disputes involving all the parties could be adjudicated by one court (namely the Pakistan Court) but it seems to me that there is no sufficiently substantial benefit to be derived from one court doing so or a need for one court to do so that would justify overriding the Applicant's contractual right to have the disputes relating to the SHA adjudicated in the agreed fora. In this case, as I have noted, there are distinct and separate issues governed by different agreements and different laws that arise in relation to the exercise of rights by, and changes of Control in respect of, the KESP shareholders which are governed by the SHA and in relation to the extent of KESP's obligations and the Privatisation Ministry's rights under the SPA (triggered by a change of control of any of KESP's shareholders or to appoint directors of KEL) – and also in relation to the extent of the obligations of KEL (and KESP) to regulators flowing from the appointment of new directors or a change of control of one of KESP's shareholders. Not only can these issues be dealt with separately so that there would be limited benefits to be derived from permitting one-stop shopping but there would be advantages in having the Cayman/English issues dealt with by this Court/the English Court and the Pakistan law issues dealt with by the Pakistan Court. The expert evidence adduced on this application suggests that there may be differences of approach or substance between the two legal systems so that such separate adjudication would be safer and sounder (and would avoid what also appears from the expert evidence to be a potential issue, namely of the local policy issues and importance of KEL affecting and possibly infecting the analysis of the position of the KESP shareholders above the line). This case is distinguishable from *Team Y&R* where Mr Rabinowitz found (at [113(2)] that there would a risk of duplication and conflicting decisions that otherwise might be avoided and *Donohue* in which the House of Lords found that core questions of fact would need to be decided by both the English and New York courts even if the injunction was granted (it was found that it would be necessary for any court determining the truth or falsity of the allegations against the defendant and his alleged co-conspirators to form a judgment on their honesty and motives and therefore there was a real risk of inconsistent judgments). The evidence also indicates that there may be material delays in Pakistan that will be prejudicial to the Applicant.

Close connection between the disputes and Pakistan

214. The Respondents argued that that the fundamental issue in the Pakistan Proceedings concerned the control and ownership of KEL and that the centre of gravity of the dispute between the Respondents and the Applicant was in Pakistan.

215. As will be clear from what I have already said, I disagree. I accept, as the Respondent says, that KEL is a company of public importance in Pakistan in which the Government of Pakistan is a shareholder and which is subject to regulation by the energy regulator, NEPRA, as well as to the control of the SECP. But the Pakistan Proceedings insofar as they relate to the Applicant are first and foremost about the rights and obligations of the shareholders of KESP. Of course, the dispute affects KEL because the Applicant is seeking to exercise its rights as against the Respondents and KESP to cause KESP to appoint its nominees to the KEL board. But as between the Applicant and the Respondent (and KESP) this is a matter regulated by the SHA. The position of KEL is subject to the separate regimes of the SPA and the regulatory law and rules of Pakistan.

216. The interests and position of the Pakistan authorities will be protected and not prejudiced by the granting of the injunction on the terms I propose. The Privatisation Ministry will be able to exercise its rights as shareholder in KEL and the Energy Ministry, NEPRA and the SECP will be able to maintain and perform their regulatory functions in relation to KEL and KESP. It will be a matter for them to decide whether to resist the Applicant's applications for relief against them requiring them to exercise their rights and perform those duties. It would certainly be wrong for this Court to seek to interfere with or fetter the actions of the Pakistan authorities by reason of the exclusive jurisdiction clause in the SHA which does not affect them. Even after the grant of the permanent injunction I propose to make, it will be open to the Government of Pakistan to bring any proceedings that it considers appropriate under the SPA, and it remains open to the other regulators to take whatever action they consider to be appropriate as regulators of KEL. The injunction will not in any material way cut cross those important public policy matters which the Pakistan authorities are bound to take very seriously.

217. It also seems to me that the Respondents are not prejudiced by the grant of the injunction on the terms I propose. As I said during oral argument during a discussion with Mr Chapman, if the Respondents have serious concerns regarding the impact of the Transaction (and the related transfer of limited partnership interests) and the apparent acquisition of control of the Applicant by Mr Chishty, and consider that the Applicant is in breach of clause 9.4 of the SHA and precluded from exercising its rights to procure the appointment of directors to the KEL board,

they have adequate remedies available to them because they can seek (or could have sought) relief in England or Cayman including injunctive relief .

Delay

218. I remain of the view that the timing of the application for injunctive relief in this jurisdiction does not constitute delay or otherwise constitute a strong reason justifying a refusal to grant the injunction.

219. As I said at [94] of the Judgment:

> *"As regards the Delay Point, I do not consider that the Applicant has acted in a way that would disentitle it or seriously weaken its claim to injunctive relief. It did not wait too long before seeking injunctive relief in this jurisdiction. The Summons was issued while the Pakistan Proceedings remained at an early stage and they remain at a relatively early stage. Save for the Pakistan Interim Injunction, no substantive relief has been granted and no decisions on substantive points in issue in the proceedings have been taken. No application has been (fully) heard or decision been made on the Applicant's Filings and challenge to the Other Shareholders' right to bring the Pakistan Proceedings."*

220. There has been no new evidence and nothing emerging from the expert evidence which requires me to change that view.

221. The Respondents acknowledged that the delay between the Applicant making the Applicant's Filings and issuing the Summons was under one month and not a lengthy period. I do not regard the fact that the Summons was only issued, and injunctive relief sought, after the Pakistan Interim Injunction was issued and after the Applicant had sought to challenge the Pakistan Court's jurisdiction based on clause 25.2 of the SHA as constituting relevant or impermissible delay.

222. As Mr Rabinowitz noted in *Team Y&R* at [109] (albeit on different facts of course):

> *"This is not therefore a situation such as for example that in Ecobank where no application for anti-suit relief was made until after judgment was given in the foreign (Togo) court. Nor is it comparable with the position in ADM Asia Pacific Trading where ADM had been aware of the foreign (Indonesian) proceedings for over two years and indeed participated in those proceedings for over a year before making the application for anti-suit relief."*

The Applicant's case based on the claim that the Pakistan Proceedings are vexatious and oppressive

223. As I have noted, the Applicant argued in oral submissions that the Pakistan Proceedings were vexatious or oppressive in the sense described by Lawrence Collins LJ in *Elektrim*. The Applicant

submitted that the Pakistan Proceedings were clearly weak (on the balance of the expert evidence, other than a claim under the SHA as a matter of Pakistan law the Respondents did not have standing to bring any of the claims made) and the appropriate inference to be drawn was that they were being used as a device in an attempt to seek to avoid the requirements of the exclusive jurisdiction clause.

224. It is unsatisfactory that the Applicant failed to renew and spell out in its written submissions that it was making a claim on this basis. As a result, the claim did not receive a full and proper review. The Respondents did not even deal with it in their written submissions although, as I understood it, they did not formally object to the Applicant relying on this alternative claim and jurisdiction.

225. There is of course a jurisdiction to grant an anti-suit injunction even in a single-forum case (no substantive proceedings have been commenced in the Cayman Islands – see Raphael at [5.26] and [5.27]) and there is no exclusive jurisdiction clause that applies to the relevant dispute. Where the Court has jurisdiction over a person who has commenced proceedings against a party in a foreign court, then the Court may issue an injunction to restrain the person from continuing with or commencing such foreign proceedings and the general basis upon which the Court will do so will be that it is inequitable for the respondent so to act. But the power to order an injunction is exercised with great caution. The Cayman Islands will need to be the natural forum for the resolution of the dispute (the Court will need to have a sufficient interest in, or connection with, the matter in question to justify intervention), the defendant's conduct should be unconscionable and analogous to an abuse of process, and the granting of an injunction needs to be required in the interests of justice (there will be such unconscionable conduct if the pursuit of foreign proceedings is vexatious or oppressive or interfere with the due process of this Court).

226. In exercising its jurisdiction to grant an injunction, regard must be had to comity and so the jurisdiction is one which, as I have said, must be exercised with caution. See, for example, *Cadre v Astra Asigurari* [2006] 1 Lloyd's Rep 560 which is cited in Raphael in footnote 20 to [5.07]. In that paragraph of Raphael, it is said that foreign proceedings can be vexatious or oppressive due to their nature or consequences and that duplicative foreign proceedings have been restrained where a weak appeal, which was likely to be expensive and protracted, was brought against a first instance decision to stay the foreign proceedings and England was the natural forum, where the aim of the foreign proceedings was to pre-empt proceedings in the natural forum and where the foreign proceedings were viewed as an illegitimate attempt to hijack the English court's determination of questions going to its own jurisdiction.

227. I have decided that the Pakistan Proceedings as they relate to the Applicant, Alvarez and Marsal, KESP and KEL are subject to the exclusive jurisdiction clause in the SHA and that injunctive relief should be granted to prevent the Respondents from continuing those proceedings. I therefore do not need to decide whether, had I found that clause 25.2 did not apply to the proceedings in respect of these parties, an injunction should have been granted on the alternative vexatious and oppressive ground.

228. As regards the Pakistan Proceedings as they relate to the Pakistan authorities, I have already decided that there are strong reasons, based on the significant connections of this aspect of the Pakistan Proceedings with local public interest and public policy as well as the involvement of entities of the Pakistan state (which may give rise to questions of public law), for leaving it to the Pakistan Court to decide on what is to be done with the claims and the Pakistan authorities to deal with the relief sought against them. While accepting that there is a strong argument that these claims are in substance an indirect means of litigating the dispute with the Applicant regarding the appointment of directors to the KEL board, and while there is no need for the Applicant to establish *in personam* jurisdiction over the Pakistan authorities, I am not persuaded that this view of the facts, or these concerns, are sufficient to justify the grant of an anti-suit injunction to prohibit the Respondents from pursuing their claims for relief against the Pakistan authorities. On the basis that these claims are not subject to clause 25.2, I do not consider that the Cayman Islands is the natural forum for adjudicating the dispute and the need for caution and to avoid overreach justifies a refusal to grant anti-suit injunctive relief in the circumstances of this case.

Preparing the draft order and consequential matters

229. I have not sought to review and amend the draft order filed by the Applicant but invite the parties to discuss and seek to agree the form of order to give effect to this judgment and also to deal with costs and any other consequential matters (which will include the Applicant's claim for damages which, as the Respondents submitted in their written submissions are best dealt with after the handing down of this judgment, and will require further submissions and possibly a further hearing). If the parties are unable to do so, they should file their respective proposed draft orders and brief submissions so that I can deal with settling the order on the papers. The parties should

provide the draft order or their respective proposed drafts and submissions within 14 days from the date on which this judgment is handed down.

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
20 July 2023

Appendix

Extract from the cross-examination of Mr Shaukat on the submission to jurisdiction issue

Q. *And am I right in thinking that an application under Order 39, Rule 4 doesn't have to be made on the basis of a jurisdiction clause or an arbitration clause, it's any application by which a party is seeking to discharge or vary an interim injunction?*

A. *Yes.*

Q. *Because there was another application filed at the same time, wasn't there? ... an application by [the Applicant] under Section 4 of the recognition of enforcement arbitration awards.*

A. *Yes.*

Q. *And that application was based on Section 25 of the SHA and that seeks ... [and] prays that the [Pakistan] Court may be pleased to grant this application and vacate the interim order and stay proceedings in the title suit and refer the matter to adjudication in accordance with the clause. So that's the relief that you saw premised on the arbitration clause as it was put at the time, isn't it?*

A. *Yes.*

Q. *And then the application, the [Order 39 Application], presumably that is not made simply to be duplicative of the arbitration application, it's made because you've then got the ability to be slightly more flexibility when you get to Court in the way that you said?*

A. *Well, the purpose of [the Order 39 Application] is to get an earlier hearing from the Court to try and modify the interim order which has been passed, so it's your first try because otherwise once the [applicant] has been put on notice, then the procedures and the formalities take a long time, so it's that one shot that you have to seek the indulgence of the Court and try and seek modification of the order if possible. So now when the [applicant] has already notice on there and the parties - so to me, Order 39/4 now will - is not going to serve any new purpose, it's just going to be heard together with 39/1-2 filed by the plaintiffs and it will be disposed of together.*

Q. *I see. And so if - just so I understand what you're saying about the process, when you say Order 39, Rule 4 is your first shot or your best chance of getting your foot in the door or however you put it, does that mean that that is an application that would be heard before the [Section 4 Application] or would they be heard at the same time?*

A. *Well, they could be heard at the same time. All applications which are filed depending on the timing, they are put up before the Court, and depending on which one was put up first, we can look at the timing, but if they're both there, then once the case is fixed, then both the applications could also be heard simultaneously. It could be one, it could be how the lawyer or the counsel puts them up, and ... So yes, they could be heard together, as well it could be that the first one would get listed*

first and the other one was filed subsequently after the hearing has been conducted, but on the same date, it's all possible like that.

Q. *... so if you wanted to get back before the Court - well, put it like this. Normally a respondent to an interim injunction has got the right to be heard at some point anyway because the application comes back to the Court even if they don't make any applications; that's right, isn't it?*

A. *Yes. But the chances of 39/1-2 getting heard .. are slim as opposed to 39/4.*

Q. *.. If you make your 39/4 application, you've got some leverage to get things heard more quickly?*

A. *That's right.*

Q. *And presumably [it is] the same if you make an application under Section 4 of the Arbitration Act, you put your application in, you can use that to move things along as well?*

A. *Yes. But over there, the focus is that, you know, whether the arbitration agreement is in place or not and the judge would normally [require notice be given to] and would like to hear from the other party as well as to [whether] the arbitration agreement is there or not and what their comments are, so 39/4 is your initial strike to modify the interim order which has been passed and, of course, the .... Section 4 application is where the judge would like to hear the other side as well and to see their comments as to whether there is a valid and binding arbitration agreement in place and, therefore, the proceedings should be stayed or not. So ... I guess that the counsel had decided to file both the applications around the same time.*

Q. *And as you said, the [Order 39 Application] allows you to be a bit more flexible noticing the difference in relief, that the Section 4 application just asks for a vacation and the Section 39 application asks for - it's got the recall or modify language?*

A. *39/4, you do have an advantage to set your case out in an application as well, so the judge again is not – he already has the case of the plaintiff in 39/1-2 and then 39/4 comes up, so you don't have to wait for rejoinders and he's able to modify the order if he's convinced with 39/4 on the first date of hearing as well. So yeah, I mean it could happen under 39/1-2 as well, but normally judges are keen on just giving orders and asking the parties to file affidavits and rejoinders.*

Q. *... So doing the 39/4 gives you a chance to have your say on the merits at this stage?*

A. *Yes. There is a chance to modify the order, that's your route to seek an urgent hearing, to seek a modification of the interim order.*

Q. *Yes. And then if we come to ... the second part of the prayer for relief refers, it says and allow nominations of directors on the board of KEL in proportion to the shareholding of KESP, and this is something that you addressed directly in your report at paragraph 90 and 91.... These are the words that you described as problematic, I think.*

A. *Yes.*

Q. And you identified two possible interpretations of paragraph 90. The first is that those words are just a consequence, you say, of the relief sought, and the second is that they can be read as a specific request to the [Pakistan} Court to make a positive direction, and you say entirely fairly that this could have been worded better to avoid confusion because the current wording creates some doubt as to the exact relief being sought.

A. Yes.

Q. And then you say in paragraph 91 you think a Pakistan Court would in seeking to work out which to follow would place paramount importance on the intention of the parties?

A. That is the test that the judge will apply to the situation.

Q. ..... It's just the [intention of the] party who files the application?

A. That's correct.

Q. And where do you say that documentation is to be derived from? Is it from the terms of the document alone?

A. Well, this is again the Court would be looking at the facts and circumstances and ... whether the prayer is something which the Court would feel that the intention of the party is for this Court to actually decide the entire issue and that whether - or is it that they will just do whatever is necessary, but the main purpose of making these applications before the Court was to - just to take the minimum, the bare minimum what they needed to do to protect themselves, but actually, of course, request the Court to stay the proceedings and refer the matter to the Court which has been granted jurisdiction. Now, it's not -- that's why I highlighted the provision. It's not easy for me to say with certainty as to what the judges would decide under the circumstances, it could go either way, but because of the fact that there has been this additional language that could go against the applicant as well, but at the same time, the other judge could consider that this is just a natural suggestion or prayer which is a consequence of, you know, recalling of the order or with some modification of the fact that the intention of the party has always been to - that the matter may be referred to the Court which has been granted exclusive jurisdiction. It's not - for me it wasn't easy to say that the Court will decide one way or the other, and that is why I highlighted that challenge that I was facing when I was looking at it.

……

[The Pakistan Court] will have to see the entire application for that; right? What is the - it's not just the prayer, it is the entire application, and the overall facts and circumstances as to what steps have been taken by the party in the entire proceedings and not just in [the Order 39 Application] so the judges would be considering, you know, all of the applications and the responses that have been filed, what sort of adjournments have been sought and whether there is a written statement that has been filed or not, so it will be the, you know, the entire totality of all of the steps that the party has taken and not just the particular prayer in one application

in order to decide what was the real intention, so in that way, of course, the statements made by the Applicant in the application with respect to the facts and what the parties had agreed in the SHA and the exclusive jurisdiction clause or the arbitration clause because they had actually recently referred to the unamended Section 4 at that point in time, so the judge would have to consider all that to come to an opinion as to whether or not he should say that whether a step has been taken or not.

Q. *And when looking at trying to work out what the relief is that [the Applicant] is seeking at page 526 of the bundle, ... in your paragraph 91, having averted to the difficulties that you've discussed, you say that the intention - the possible – the ambiguity is like resolved in favour of your first possible construction. In other words, that these words are to be read as a consequence of the recall/modification that is sought....*

A. *Well, you see, the step in the proceedings for me, the judgment is all about are they doing the bare minimum that they should be doing in order to protect their interest and the intention of the party is always to -- that the matter may be referred to the foreign court, so when I was -- so after highlighting the fact that this particular provision is problematic, but when I look at the applications and the content of the applications, the stress has always been by the Applicant that they were - that the matter might be referred to the foreign court. It could be - I could see as, you know, in my own personal opinion that when I'm reading the application, there was a very clear intention of not having these proceedings carried out over here, but rather to safeguard [their] interests and to request the Court to refer the matter to the foreign court. So in my personal judgment, I was leaning in favour of the fact that this is - should not be taken as a step in the proceedings, but the learned judge would be absolutely free in deciding either way.*

……

Q. *Yes. And can I just ask you to, further up the document, if you look at page 525, at paragraph 4, it talks about the nominations of the individuals that have been put on hold, it goes on to say the board is functioning without proportionate representation and the mandatory requirement of a woman director cannot be made either, and then in paragraph 5 it talks about Defendant No. 1 being entitled to nominate specifically agreed upon representation. Aren't those facts that it's wanting to put before the Court in favour of its full prayer for relief, in other words, it's not confined itself simply to narrating the relevant arbitration clause, it is trying to ask the Court to take notice of what it's done in relation to nominations so that it can grant relief in that respect as well?*

A. *Well, this is all factual statements in support of the application. I don't know how these could be read as statements which would lead to the Court or would give the Court or which would suggest that the party is interested in having the matter adjudicated in Pakistan. I mean, these are just in support of the application. If you look at the application and further down in the same paragraph, the Applicant is also saying that the plaintiffs cannot avoid or bypass the arbitration forum by joining unnecessary parties and giving semblance of this (indiscernible) when it has in fact nothing to do with the present dispute, and the fact that they've always referred to that the matter should be dealt with in accordance with Clause 25 has been, you know, said time and again in all of the applications, not only in the Section 4 Application, but also in [the Order 39 Application] so all of this would be seen...So*

I am saying that the application, yes, you are right in highlighting some of the provisions of our appointment of the directors, but at the same time, the Court will be looking into the entire application which makes references to Clause 25 of the agreement and the fact that the dispute needs to be resolved in accordance with Clause 25."

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 269 of 2022 (NSJ)

BETWEEN:

IGCF SPV 21 LIMITED

APPLICANT / PLAINTIFF

AND

AL JOMAIH POWER LIMITED AND DENHAM INVESTMENT LTD

RESPONDENTS / DEFENDANTS

ORDER

UPON the Originating Summons issued on 25 January 2023 ("**Summons**").

AND UPON the Originating Summons issued on 24 November 2023 (the "**First Summons**") and the costs thereof being reserved pursuant to the Court's order dated 31 January 2023 (the "**Interim Order**")

AND UPON reading the affidavits in the hearing bundle and the exhibits thereto and the Experts' Reports and Joint Memorandum

THIS ORDER was **FILED** by **BEDELL CRISTIN** of Suite 5305, 18 Forum Lane, P.O. Box 1990, Grand Cayman, KY1-1104, Cayman Islands, Attorneys-at-law for the Respondents/Defendants whose address for service is that of their said Attorneys-at-law.

AND UPON hearing Counsel for IGCF SPV 21 Limited (the **"Applicant"**) and Counsel for Al Jomaih Power Limited and Denham Investment Ltd. (together the "**Other Shareholders"**) at the trial of the Summons on 31 March and 3 April 2023.

IT IS HEREBY ORDERED that:

1. The Other Shareholders shall (whether by themselves or their agents) forthwith terminate or otherwise discontinue the proceedings commenced by them in the High Court of Sindh at Karachi, Pakistan by the Suit for Declaration and Permanent Injunction issued on 21 October 2022 (the "**Pakistan Proceedings**") against (i) the Applicant, (ii) Alvarez and Marsal, (iii) KES Power Limited and (iv) K-Electric Limited without any cost to the Applicant. For the avoidance of doubt, the Other Shareholders shall forthwith take steps to cause the order of the High Court of Sindh at Karachi, Pakistan in the Pakistan Proceedings dated 21 October 2022 to be set aside.

2. The Other Shareholders shall not (whether by themselves or their agents) commence or pursue, or procure or assist the commencement or pursuit of, any proceedings in connection with any dispute or disagreement under, arising out of, or relating to the Shareholder Agreement dated 15 October 2008 (as specifically amended by the Second Deed of Amendment to the Subscription Agreement and Shareholder Agreement relating to KES Power Ltd dated 5 January 2021) (the "**SHA**"), in any court or tribunal other than in either the Grand Court of the Cayman Islands or an English court.

3. The Other Shareholders may continue the Pakistan Proceedings against (i) the Government of Pakistan through the Secretary, Privatisation Commission, Ministry of Privatisation and Investment (ii) the Government of Pakistan through the Secretary, Ministry of Energy, Power Division (iii) National Electric Power Regulatory Authority and (iv) the Securities and Exchange Commission of Pakistan as defendants to the Pakistan Proceedings if and to the extent that the Other Shareholders only apply for and pursue relief that requires those defendants to the Pakistan Proceedings to exercise their duties, rights or powers in relation to K-Electric Limited or KES Power Limited in a manner that does not prevent the Applicant from exercising, or interfere with the exercise (whether before or after the date of this order) by the Applicant of, its rights under the SHA as a KES Power Limited shareholder.

THIS ORDER was **FILED** by **BEDELL CRISTIN** of Suite 5305, 18 Forum Lane, P.O. Box 1990, Grand Cayman, KY1-1104, Cayman Islands, Attorneys-at-law for the Respondents/Defendants whose address for service is that of their said Attorneys-at-law.

4. Save as specifically provided for by paragraph 3 of this order, the Other Shareholders are finally injuncted and restrained (whether by themselves or their agents) from continuing, pursuing, or taking any further steps in the Pakistan Proceedings.

5. The following additional issues shall be the subject of a further oral hearing before the Honourable Court to be heard as soon as practicable, subject to the availability of the Court:

   i. The Applicant's entitlement, if any, against the Other Shareholders for damages for breach of contract, the basis for assessing any such damages and the amount of any such damages;

   ii. The Applicant's claim for costs against the Other Shareholders and the basis of assessment of any such costs;

   iii. The Applicant's application for a payment on account of costs by the Other Shareholders and the amount of any such payment; and

   iv. The Respondents' application for a stay pending the determination of their appeal of this Order (the applications envisaged in sub-paragraphs (i) to (iv) are collectively referred to as the "**Applications**").

6. Paragraphs 1 to 4 inclusive of this order shall be stayed pending the hearing listed pursuant to paragraph 5 of this order or further order of the Court.

7. The time by which a party must file its Notice of Appeal in respect of this Order is extended to 14 days from the date on which a final order is made in respect of the Applications referred to in paragraph 5 above, pursuant to section 24(a) of the Court of Appeal Act (2023 Revision).

DATED the 16th day of August 2023

FILED the 16th day of August 2023

_____

THE HONOURABLE MR. JUSTICE SEGAL

JUDGE OF THE GRAND COURT

THIS ORDER was **FILED** by **BEDELL CRISTIN** of Suite 5305, 18 Forum Lane, P.O. Box 1990, Grand Cayman, KY1-1104, Cayman Islands, Attorneys-at-law for the Respondents/Defendants whose address for service is that of their said Attorneys-at-law.

IN THE CAYMAN ISLANDS COURT OF APPEAL ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CICA (Civil) APPEAL No. 0025 of 2023
(Formerly Cause No. FSD 0269 of 2022 (NSJ))

BETWEEN:

IGCF SPV 21 LIMITED

PLAINTIFF/RESPONDENT

AND

AL JOMAIH POWER LIMITED

AND

DENHAM INVESTMENT LTD

DEFENDANT/APPELLANTS

Before: **The Hon John Martin KC, Justice of Appeal**
The Hon Sir Richard Field, Justice of Appeal
The Hon Sir Anthony Smellie, Justice of Appeal

Appearances: **Stephen Rubin KC instructed by Laura Hatfield and Jonathan Stroud of Bedell Cristin Cayman Partnership for the Appellants**
Graham Chapman KC instructed by Conal Keane and Niall Dodd of Dillon Eustace Cayman for the Respondent

Heard: **25 March 2024 (with further written submissions on 12 April 2024)**

Draft circulated: **28 May 2024**

Judgment delivered: **2nd July 2024**

JUDGMENT

SMELLIE: JA

1. This is an appeal against an anti-suit injunction imposed by order of Hon. Mr Justice Segal ("***the Judge***") in response to an application by the Respondent ("***SPV21***"), restraining the Appellants from pursuing an action instituted by them in the Islamic Republic of Pakistan ("***the Pakistan Action***" and "***Pakistan***", respectively).

2. The Pakistan Action was issued before the High Court of Sindh Province (the "***Pakistan Court***") against SPV21, as well as against Messrs. Alvarez and Marsal as managers of SPV21 ("***the Managers***"), KES Power Limited ("***KESP***", about which more below), K-Electric Limited ("***KEL***"), the operating utility company majority owned by KESP (and about which more below as well), and certain Pakistan Government and State regulatory authorities, namely:

    (i) The Government of Pakistan (through the Secretary Privatisation Commission) (the "***Privatisation Ministry***");
    (ii) The Government of Pakistan, (through Secretary of Ministry of Energy "***Energy Ministry***", and the National Electric Power Regulatory Authority "***NEPRA***"); and
    (iii) The Securities and Exchange Commission of Pakistan (the "***SECP***").

3. In the Pakistan Action, the Appellants had obtained on 21 October 2022, an interim injunction against SPV21 and the Managers, prohibiting any changes to the Board of KEL ("***the Interim Injunction****").*

4. The anti-suit injunction is aimed at restraining the Appellants from acting upon the Interim Injunction and from further pursuing in the Pakistan Action claims against SPV21 itself and the Managers, KESP and KEL but, for reasons also explained by the Judge, not those pleaded against the Pakistan Government and State regulatory authorities. The Action was permitted to continue against the Pakistan Government and State regulatory authorities but only on terms which seek to ensure that it did not breach the terms of a shareholders' agreement which governs the relationship

between the Appellants, SPV21, KESP and KEL (further identified below as the "**SHA**") and which is central to this dispute.

5. SPV21's application for the anti-suit injunction was brought by way of Originating Summons dated 24 November 2022 ("***the Application***"). In his judgment dated 1 February 2023 ("***the Interim Judgment***"), the Judge granted SPV21 interim injunctive relief restraining the pursuit of the Pakistan Action, pending a trial of the Application which was heard on 31 March and 3 April 2023. The Judge set out in detail in the Interim Judgment the background to and the basis for SPV21's Application. This came to be incorporated by him in his judgment (the "***Main Judgment***"), along with his further reasons for granting the anti-suit injunction, following the trial during which the Judge had taken the testimony of witnesses, including expert witnesses who gave competing evidence on applicable Pakistani law. Finally, in a third judgment, the "***Consequentials Judgment***", the Judge explained the orders he made consequentially upon the final grant of the anti-suit injunction explained in the Main Judgment.

6. The focus of this appeal has therefore been upon the final anti-suit injunction and the reasoning given in support of it in the Main Judgment.

The Factual Background

7. Pursuant to a Shareholders' Agreement and Subscription Agreement dated 15 October 2008 (the "***SHA***" and "***Subscription Agreement***", respectively) the Appellants and SPV21 are the three shareholders in KESP which is a company incorporated under the laws of the Cayman Islands. Together the Appellants hold 46.2% and SPV21 53.8%, of the shares in KESP.

8. KESP is itself a very valuable company, being the majority shareholder as to 64.4% in KEL which is a utility company incorporated under the laws of Pakistan and listed on the Pakistan Stock Exchange. KEL is the sole or main supplier of electricity to Karachi, the capital and largest city of Pakistan, with a population of more than 20 million.

9. KEL was formerly in public ownership until 14 November 2005 when KESP acquired its 64.4% majority interest from the Government of Pakistan, pursuant to a Share Purchase and Subscription

Agreement of that date (the "**SPA 2005**"). The SPA 2005 is governed by the laws of Pakistan and provides in Clause 8.3, that the Courts of Pakistan shall have exclusive jurisdiction in relation to disputes arising in relation to it. The parties to the SPA 2005 were the President of Pakistan, KESP and two others, not including the Appellants themselves or SPV21.

10. KEL is an entity in which the Pakistan Government and State regulatory authorities also continue to have a national security interest, in light of its importance as a major utility company.

11. Prior to KESP acquiring its interest in KEL, the Appellants, who were then the original holders of the shares in KESP, were therefore required to obtain clearances and/or approvals from the Government of Pakistan, through the Privatisation Ministry and the SECP.

12. Clause 5.2 of the SPA 2005 provides that KESP, as the purchaser of shares in KEL, was precluded from selling or transferring any shares in itself to any person prohibited by the laws of Pakistan from acquiring them and that any transfer in breach of Clause 5.2 would be void.

13. Clause 5.3 of the SPA 2005 provides categories of exceptions to the restrictions of Clause 5.2. These are set out below as they came to be relied upon in the Plaint in the Pakistan Action by the Appellants.

14. A central issue raised by the Appellants in the Pakistan Action is whether a subsequent transfer by SPV21 of its shares, which it had come to acquire in KESP from the Appellants (then the Original Shareholders and acting with the certified approval of the Pakistan Government), is in breach of the restrictions imposed by Clause 5.2 of the SPA 2005 and to be regarded as invalid for failure to have obtained the certification required by Clause 5.3(b). The circumstances of that transfer will also be discussed below.

15. Abraaj Investment Management Limited (in official liquidation) ("***AIML***"), is the registered holder of the sole voting share in SPV21. SPV21 was incorporated in the Cayman Islands on 26 February 2008 by the Abraaj Group for the purpose of acquiring the majority interest in KESP, that interest which SPV21 came to acquire from the Appellants.

16. As already mentioned, on 15 October 2008, KESP, the Appellants and SPV21 entered into the SHA and the Subscription Agreement. The SHA and the Subscription Agreement govern the acquisition of the shares in KESP by SPV21 and the regulation of the parties' conduct in relation to both KESP and KEL, including in respect of the composition and appointment process to the Boards of Directors of both KESP and KEL.

17. Upon the execution of the SHA, the Appellants along with SPV21 became the shareholders of KESP, with each holding Class O shares, respectively in the proportions of 46.2% and 53.8% mentioned above.

18. On 30 April 2009 and 5 January 2021, KESP, SPV21 and the Appellants entered into deeds of amendment to the SHA and the Subscription Agreement (the "**First Amendment**" and "**Second Amendment**" respectively).

19. The SHA also contains a number of provisions relating, as between the parties, to the governance and management of KEL. Specifically, Clause 5.7 of the SHA (as amended by the Second Amendment) sets out a contractual framework governing the appointment of directors to the Board of KEL, providing as follows (with the Appellants identified in it as the "***Original Shareholders***" and SPV21 as "***Abraaj***"):

> "*Abraaj and the Original Shareholders shall procure that the directors of KESC [now KEL] to be nominated or appointed by the Company [KESP] shall comprise:*
> *(a) Five persons nominated by Abraaj (the Abraaj nominees); and*
> *(b) Four persons nominated jointly by the Original Shareholders (the "Original Shareholders' nominees").*

20. Clause 17.1 of the SHA further provides:

> *"Each of the parties (other than the Company) undertakes to the others that it will exercise all powers and rights available to it as a director, officer, employer or shareholder in the Company (or in any other Group Company) in order to give effect to the provisions of this*

agreement and to ensure that the Company complies with its obligations under the agreement".

21. As a result of the Second Amendment, the SHA also contains provisions regarding the jurisdictions in which the parties may issue proceedings in relation to disputes arising in relation to it. Paragraph 14 of Schedule 1 to the Deed of the Second Amendment states in this regard and also with central importance to the present dispute, that:

> "*Sub-clause 25.2 of the Shareholders Agreement shall be deleted in its entirety and replaced with the following clause 25.2:*
>
> > *"Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be settled by the English courts or the Grand Court of the Cayman Islands and those courts alone shall have exclusive jurisdiction to settle any such dispute*."

22. Prior to the Second Amendment, Clause 25.2 had required the parties to refer disputes arising under the SHA to arbitration.

23. Clause 25.1 of the SHA as amended further provides that the SHA shall be governed by English law.

24. In keeping with the SPA 2005 and in granting its certification, on 27 November 2008, the Government of Pakistan issued an irrevocable Waiver and Consent (the "***Waiver***") by way of acknowledgement and consent to the change of ownership in KESP (as the majority shareholder in KEL), resulting from SPV21's acquisition from the Appellants of its shares in KESP.

25. On 3 August 2022, AIML (acting by its Joint Official Liquidators (the "***AIML JOLs***")) entered into a transaction (the "***Transaction***") by which it agreed to sell its shares in SPV21 and certain other investments in other related Abraaj partnership entities to a British Virgin Islands registered

special purpose company called Sage Venture Group Limited ("***SVGL***"). SVGL is owned and/or controlled by a Mr Shaheryar Chishty.

26. The Transaction required sanction by the Grand Court of the Cayman Islands (qua the supervising court of AIML's liquidation). Sanction (subject to certain conditions being satisfied) was granted on the application of the AIML JOLs by the Judge, who also presided in that matter.

27. Although neither the Appellants nor SPV21 was a party to the Transaction or to that application, by way of further background, the AIML JOLs have explained through counsel that the Appellants, as the Original Shareholders in KESP, through their representative Mr Shan Ashary, were informed of the then ongoing negotiations with SVGL in the process of trying to facilitate a sale to a suitable third party. Indeed, on 4 August 2022, the Appellants had themselves submitted an offer for 50% of SPV2I's interest in KESP but ultimately this bid was refused by the AIML JOLs.

28. While SPV21 was not itself a party to the Transaction (which as explained above was between the AIML JOLs and SVGL), the Appellants, by letter dated 17 October 2022 from their lawyers Collas Crill, wrote to SPV21 in relation to the Transaction, objecting to the transfer to SVGL and citing Clause 9.4 of the SHA which is in the following terms:

> "*Abraaj undertakes and agrees that save for an Exit in accordance with clause 11 hereof, it shall not permit nor take any action that would result in a change of Control of Abraaj, provided that Abraaj shall be deemed not to be in contravention of this clause in circumstances where (notwithstanding a change of Control of Abraaj), Abraaj remains managed by a member of the Abraaj Group*."

29. The letter of 17 October 2022 (having cited Clause 9.4 as above) continued by way of elaboration of the Appellants' concerns as follows:

> "4.… *The change of control obligation in Clause 9.4 is an obligation of fundamental importance to our clients. In circumstances where SPV21 holds a majority equity interest in KESP, any change of control of SPV21 will result, in turn, in a change of control of KESP itself. This has potentially wide-ranging ramifications for KESP, its subsidiary companies and its business…*

The Proposed Transaction

5. *We are aware that the liquidators of [AIML] are actively considering a transaction that would, if completed, result in a change of control of SPV21 (Proposed Transaction). It is our understanding that the Proposed Transaction would pass control of SPV21 to a newly incorporated special purpose vehicle with an apparently unproven financial record called [SVGL]. You will be aware that on 26 September 2022, we wrote to AIML putting it on notice that any such transaction would trespass our client's (sic) rights under Clause 9.4 of the SHA. We have not received any satisfactory response to that letter. We further understand that AIML has since proceeded with an application to the Court, seeking sanction for the Proposed Transaction with [SVGL]. It is therefore our understanding that AIML seeks to advance the Proposed Transaction with [SVGL], notwithstanding the obligations arising under the SHA.*

6. *This letter puts SPV21 (and all other parties whose actions may encourage or facilitate an infringement of our clients' rights) on notice that our clients oppose an(y) change of control of SPV21 in the strongest terms. Such a change of control would be a clear breach of Clause 9.4 of the SHA and would give rise to serious risk to our clients, to KESP and to KESP's subsidiary companies. We expect and require that SPV21 will refuse to register any change to its shareholding, direct or indirect, and/or any change to its register of members that would result in a change of control of the company…*

7. *Our clients will exercise all available means to enforce their rights under the SHA and reserve the right to take action to do so, without further notice to you."*

30. On or around 21 October 2022, the Appellants issued the Pakistan Action[1]. This was done on the *ex parte* basis, without notice to SPV21. The Pakistan Action was apparently brought in response,

[1] Entitled "Suit for Declaration and Permanent Injunction". The copy in the Court Bundle at Vol 2 of 3 page 198-215 is undated but it is immediately followed at page 216 by a copy of the Interim Injunction made in the Pakistan Action which is dated 21.10.2022.

most proximately, to an attempt on 19 October 2022 by SPV21 to cause KESP to appoint two new directors to the Board of KEL, purportedly in accordance with SPV21's contractual rights under Clause 5.7 of the SHA, following the Transaction. As the Judge noted at [13] of the Interim Judgment, on 19 October 2022, the company secretary of KESP wrote to the board of directors of KEL stating that:

> "*We hereby appoint [Mr Chishty] and Darin Baur to be the representatives of [KESP] on the Board of Directors of [KEL]. The appointment shall take effect from the date of this nomination letter, being 19 October 2022*."

31. The obtaining by the Appellants of the Interim Injunction in the Pakistan Action to prevent those appointments in turn is said by counsel on behalf of SPV21 to have led to SPV21 bringing the Application for the anti-suit injunction.

32. The Appellants' Suit for Declaration and Permanent Injunction (for short "***the Plaint***") in the Pakistan Action, states inter alia, at paragraph 12 that:

> "*The transfer of beneficial ownership/change in board or management control of the Defendant No. 4 (K-electric [ie: KEL] is subject to Transfer Restrictions as detailed in the Share Purchase Agreement dated November 14, 2005* [ie: the SPA 2005]."

33. Paragraph 13 of the Plaint goes on to invoke the aforementioned restrictions in the SPA 2005 as follows:

> "*Section 5.3 of the Share Purchase Agreement further states that any change of control is conditional on national security clearance being obtained which is at the sole discretion of Defendant No. 5 (GoP), whom the Defendant No.4 (K-electric) was acquired from in 2005.*

Section 5.3 states as follows:

a) *Permitted transfers:* *The Purchaser may make the following transfers at any time following the Closing Date:*

(i) Subject to the national security interests of Pakistan (as such interests shall be determined in the sole discretion of the (Government of Pakistan)), and in compliance with the provisions of section 5.3(c), a transfer to an Affiliate (as defined in Clause 1.1) of the Purchaser (ie: of KESP) and complies with the detailed requirements in Clause 5.3 (c) of the SPA 2005.

(ii) Where a transfer is required by any Law of Pakistan, by the operation of the Laws of Pakistan or by order of a court, tribunal or governmental authority or agency with appropriate jurisdiction.

(b) *Additional Transfers. The Purchaser may directly or indirectly sell, transfer, encumber or otherwise dispose in any form or manner any of its legal or beneficial interest in all or any part of the Strategic Equity Stake after the expiration of the 3rd (third) anniversary of the Closing Date, provided that prior to such transfer/transaction, the Purchaser shall have obtained the Seller's certification stating that the proposed transfer/transaction does not affect the national security interests of Pakistan, which certification shall not be unreasonably withheld. The Purchaser may directly or indirectly sell, transfer, encumber or otherwise dispose in any form or manner any of its legal or beneficial interest in all or any part of the Equity Stake (other than the Strategic Equity Stake [*defined in Article 1 as 51% of the ordinary shares carrying full voting rights*] which shall be governed by the immediately preceding sentence) after the expiry of the 1st (first) anniversary of the Closing Date, provided that prior to such transfer/transaction, the Purchaser shall have obtained the Seller's certification stating that the proposed transfer/transaction does not affect the national security interest of Pakistan.*"

34. While there are the foregoing and various other references to the SPA 2005 in the Plaint, reliance by the Appellants expressly upon the provisions of the SHA in the Pakistan Action also appears

throughout the Plaint. At paragraphs 16, 17, 22, 23, 24, and 32, the Appellants allege in various ways breaches of the SHA and more specifically in paragraph 31, that "*the Defendants 1 and 2 [viz: SPV21 and the Managers] in connivance with one another are seeking to use their contractual rights to secretly transfer the beneficial ownership/effect a change in the board and management control of Defendant No.4 [viz: KEL] outside Pakistan and evade Pakistani regulators, as a result of which [SPV21 and the Managers] have taken proactive steps and already nominated directors to constitute part of the board of directors of [KEL] with blatant disregard of section 159 of the Companies Act 2017.* "

35. Further, in the Prayer to the Plaint at [4], it is prayed specifically that the Pakistan Court "*Direct [SPV21 and Messrs Alvarez and Marshall] to perform its obligations under the Shareholders Agreement [ie: the SHA] and the Finance Agreements as regards the change of control provisions*."

36. Paragraph 5 of the Plaint seeks an order from the Pakistan Court to "*Restrain [SPV21] and [the Managers] from transferring the beneficial ownership or making any changes in the board/management control of [KEL] without the Security Clearance of the Government of Pakistan*."

37. Paragraph 7 seeks an order to "*Restrain the [Privatisation Ministry], [the Energy Ministry] and [NEPRA] from authorizing any transfer of beneficial ownership or change of control in [KEL] without the Security Clearance or in violation of section 5.2 of the [SPA 2005]*."

38. However, noticeably absent from the Plaint is any reference to Clauses 25.1 or 25.2 of the SHA, those which (pursuant to the Second Amendment) respectively provide that the SHA shall be governed by English law and submit disputes under the SHA to the exclusive jurisdiction of the English or Cayman Islands courts.

39. It is explained on behalf of SPV21 by Mr Casey McDonald, its sole director[2], that after other attempts to settle the dispute enjoined in the Pakistan Action had failed, SPV21 issued two applications on 3 November 2022 within the Pakistan Action. The first, pursuant to section 4 of the

[2] In his Second Affidavit filed on 10 January 2023 in these proceedings.

Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011, (the "***Section 4 Application***" and "***2011 Act***", respectively), questions whether the Pakistan Court has jurisdiction to entertain the Plaint and invites the Pakistan Court to stay the proceedings under it, vacate its Interim Injunction which, inter alia, seeks to restrain the change in composition of the Board of Directors of KEL, and refer the matter for arbitration in accordance with Clause 25 of the SHA (as then mistakenly thought to be appropriate notwithstanding the terms of the Second Amendment referring disputes to the exclusive jurisdiction of the English or Cayman courts).

40. SPV21's second application, brought pursuant to Order 39 Rule 4 of the Pakistan Civil Procedure Code ("***the Order 39 Application***" and "***PCPC***" respectively), invites the Pakistan Court to modify or recall its Interim Injunction and allow for the nominations of directors to the Board of KEL, in proportion to the shareholding in KESP.

41. As will be discussed below by way of examination of one of the Appellant's main grounds of appeal, the Appellants came to argue unsuccessfully before the Judge that the Order 39 Application and/or the Section 4 Application amounted to a submission by SPV21 to the jurisdiction of the Pakistan Court such as, in principle, to justify the refusal of SPV21's Application for the anti-suit injunction.

42. On 8 December 2022, the Appellants filed in the Pakistan Action replies to SPV21's Order 39 Application and Section 4 Application.

43. However, as Mr Casey McDonald also explains in his second affidavit, the Interim Injunction remains in force and was last extended by the Pakistan Court at a hearing on 15 December 2022.

44. In the Pakistan Action, SPV21 continues to rely upon what it asserts is a contractual breach by the Appellants in relation to Clause 25.2 of the SHA (as amended by the Second Amendment), as well as upon its continuing challenge to the jurisdiction of the Pakistan Court, in relation to the dispute which has arisen with the Appellants in relation to the SHA.

The Proceedings before the Judge

45. At the trial, SPV21 identified the core issues as those which were addressed in the Interim Judgment, viz: first, whether the Pakistan Action, or elements of it, fell within the remit of the exclusive jurisdiction provisions of Clause 25.2 of the SHA (as amended by the Second Amendment). And further, on the basis that they did, whether the Court should grant the permanent anti-suit injunctive relief as a proper restraint against the Appellants acting in breach of those contractual obligations imposed by the SHA. SPV21 argued that all the claims against all of the parties in the Pakistan Action fell within Clause 25.2 and accordingly it was entitled to injunctive relief to prohibit the Appellants from continuing the Pakistan Action against all the parties then currently joined to it.

46. SPV21 argued (as summarized at [42] to [47] of the Main Judgment) that it was entitled to the anti-suit injunction on a permanent basis because first, there was no doubt that there had been a breach and continuing breach of the SHA by the Appellants by their commencement and continuation of the Pakistan Action, and secondly, that there was no reason in principle for the refusal of the relief sought, as the anti-suit injunction would only properly restrain the Appellants from pursuing the Pakistan Action in breach of the contractual obligations under the SHA.

47. They relied on the fact that that had been the provisional view taken by the Judge in the Interim Judgment and that the only material development since then had been the exchange of expert evidence on Pakistan law which did not, on proper analysis they submitted, alter the basis for the conclusions in the Interim Judgment (and if anything, provided further support for it).

48. SPV21 also argued that the Pakistan Action was vexatious and oppressive and that this was a further basis for rejecting the Appellants' opposition to the grant of injunctive relief. As the Judge also noted, Mr Chapman KC maintained on behalf of SPV21 that it was entitled to relief on the basis of this alternative jurisdiction under which anti-suit injunctions may be granted, even where there had been no breach of an exclusive jurisdiction clause. In support of this proposition, he cited and relied upon the dictum of Lawrence Collins LJ (as he then was), in ***Elektrim v Vivendi Holdings*** [2009] 22 Lloyd's Report at [82] – [85] and [120] – [122].

49. In that case Lawrence Collins LJ delivered, inter alia, the following dictum upon an application for an injunction to restrain proceedings in the United States (at [82]-83]:

> "*82… An injunction could be granted if the applicant could show that the pursuit of foreign proceedings was vexatious or oppressive. This presupposed that, as a general rule, the English court must conclude that it provided the natural forum for the trial of the action; and since the court was concerned with the ends of justice, account must be taken not only of injustice to the defendant in the foreign proceedings if the plaintiff was allowed to pursue the foreign proceedings, but also of injustice to the plaintiff in the foreign proceedings if he was not allowed to do so. So the court would not grant an injunction if, by doing so, it would deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him: see* ***SNI Aerospatiale v Lee Kui Jak*** *{1987] 3 All ER 510, [1987] AC 871.*
>
> *83. The categories of factors which indicate vexation or oppression are not closed, but they include the institution of proceedings which are bound to fail, or bringing proceedings which interfere with or undermine the control of the English court of its own process, or proceedings which could have formed part of an English action brought earlier: see* ***Dicey, Morris and Collins on the Conflict of Laws*** *(14th edn, 2006) vol 1, pp 504-505 (para 12-073).*"

50. Mr Chapman argued in this regard that the Pakistan Action was vexatious and oppressive, not only because it was brought in breach of Clause 25.2 of the SHA but also because its objective was to stymie SPV21's contractual rights under Clause 5.7 of the SHA. The Pakistan Action was clearly weak (on the balance of the expert evidence, other than a claim under the SHA, as a matter of Pakistan law the Appellants did not have standing to bring any of the claims made as they were not parties to the SPA 2005) and so the appropriate inference to be drawn was that the claims were being used as a device in an attempt to avoid the requirements of the exclusive jurisdiction provisions of Clause 25.2. Aggravating features of the Pakistan Action were the fact that very serious allegations were made against SPV21 and the Managers in particular that were completely without foundation, and that in making them the Appellants sought to restrain the exercise of SPV21's contractual rights.

The Arguments for the Appellants before the Judge

51. As set out by the Judge at [69] and following of the Main Judgment, the Appellant's position was that:

(a) The dispute in the Pakistan Action does not engage the exclusive jurisdiction clause (Clause 25.2) in the SHA.

(b) Even if the Pakistan Action (or part of it) were held to fall within Clause 25.2, there were, in this case, strong reasons why the court should not exercise its discretion to grant an anti-suit injunction. The Respondent relied on four main points:

(i) SPV21 had submitted to the jurisdiction of the Pakistan Court [by its institution of the Order 39 and/or the Section 4 Applications] and in any event had acted in the Pakistan Action inconsistently with the relief that it sought by way of the anti-suit injunction from the Court.

(ii) the claims being litigated in the Pakistan Action (even if they fell within Clause 25.2 of the SHA) formed part of a wider set of claims which the Cayman Court cannot, or ought not to, interfere with. At least some of the claims in the Pakistan Action would continue in any event, even if the Cayman Court granted the injunction sought by SPV21. As a result, granting such an injunction would lead to the unwelcome result of different parts of the dispute being determined in different courts with conflicting outcomes.

(iii) the Pakistan Action had an intrinsic connection with Pakistan. In this regard, as appears from [78] of the Main Judgment, the Appellants also argued before the Judge that the Court on the present application was unable and should not seek to resolve the disputes joined in the Pakistan Action and decide, for example, whether the Appellants had standing to bring those claims as a matter of Pakistan law. These were matters for the

Pakistan Court and the Cayman Court was not engaged in a summary determination of those issues. As Lawrence Collins LJ had also stated in ***Elektrim*** (above) at [84]:

> "*But an application for an anti-suit injunction should not be used as a means of obtaining a summary determination of the foreign claims in an English court, particularly where (as in the United States [where the action sought to be injuncted was brought]) material may turn up on discovery which may support a case which otherwise appears unlikely to succeed:* ***British Airways Ltd*** *[1986] QB 689, 700. But if there are other factors which indicate oppression or vexation, the weakness of the case on its merits may be a further compelling factor [for the grant of the injunction]."*

Further in regard to (iii), the Appellants also argued (as the Judge records at [79] of the Main Judgment) that, in any event, insofar as SPV21 was seeking to say that the claims in the Pakistan Action were so hopeless as necessarily to be frivolous or vexatious, they had been unable to establish this on the evidence. The Appellants submitted that on a number of points SPV21's expert witness had agreed that various of the issues were not open and shut arguments and had accepted that they were open to arguments both ways even though he preferred one side of the argument.

(iv) that SPV21 was guilty of inexcusable delay in seeking the anti-suit injunction.

52. By way of elaboration on their four main points set out above, the Appellants also argued that the existence of overlapping claims, including those which did not fall within the exclusive jurisdiction clause and involved other parties not bound by the exclusive jurisdiction clause, was a strong reason for refusing the anti-suit injunction, citing here the dictum from Lord Bingham on behalf of the

House of Lords in ***Donohue v Armco*** [2001] UKHL 64 at [27]; [2002] 1 Lloyd's Rep 425(HL) at [27]:

> "*The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions*".

53. The Appellants submitted below, as they did on this appeal, that in this case, given that there would be parallel proceedings involving over-lapping issues in the Pakistan Action, the risk of inconsistent decisions and outcomes to result from the grant of the anti-suit injunction was very real.

54. The Appellants also relied however, upon an alternative argument. It was that, if (contrary to the Appellants' primary case) the court decided to grant an anti-suit injunction, it must be confined in scope to (i) claims brought by the Appellants against SPV21 (and possibly KESP) and (ii) claims for, or that depend upon an allegation of, breach of the SHA. On this basis, they proposed to the Judge, following the handing down of the Main Judgment, that they should be allowed to proceed with an amended Plaint in the Pakistan Action which, while still enjoining SPV21 along with the Pakistan Government and State regulatory authorities, would not plead any reliance upon the provisions of the SHA. This proposal was refused by the Judge in an order dated 16 August 2023, for reasons given earlier in a further Directions Ruling by email on 14 August 2023. (the "***August Directions***").

55. Finally, the Appellants further submitted that they had been kept in the dark and had not been properly informed about the Transaction and the related acquisitions to be made by SVGL. This, they said, had given rise to real concerns (in particular as to the impact on KEL of the changes brought about by and in consequence of the Transaction) and that this is relevant context to justify the claims they have brought in the Pakistan Action.

The Expert Evidence

56. Following the handing down of the Interim Judgment, an order was made by the Judge on 30 January 2023 setting out the resulting terms and giving directions in preparation for the trial, among other matters for the filing of expert evidence in relation to relevant issues of Pakistan law (allowing for one expert for each side). Both experts came to testify and were cross-examined at the trial.

57. The competing expert evidence came from SPV21's expert, Mr Bilal Shaukat (a licensed advocate and managing partner of RIAA Barker Gillette, a law firm in Karachi) and the Appellants' expert, Justice Syed Zahid Hussain (a former Judge of the Supreme Court of Pakistan and former Chief Justice of the Lahore High Court). As did the Judge, I will refer to them respectively herein as **Mr Shaukat** and **Justice Hussain**.

58. A first issue for the Experts was as to the nature of the proceedings in the Pakistan Action.

59. Given the fact that neither SPV21 nor the Appellants were party to the SPA 2005, obvious questions of privity of contract, and hence lack of standing in the Appellants to bring the Pakistan Action by reliance upon the SPA 2005, arose for consideration for determining their real motives in bringing that Action. Were they genuinely able to rely upon a claim under the SPA 2005 or were they merely invoking the SPA 2005 along with the SHA in the Pakistan Action in a frivolous and vexatious way, in order to litigate their grievances with SPV21 (or SVGL as its successor to membership in KESP) which fell properly within the remit of the SHA (rather than within the SPA 2005) and so within the exclusive jurisdiction of the English or Cayman Islands courts?

60. Other related questions also arose about the Appellants' standing to sue in Pakistan, given that the provisions of the Pakistan Companies Act and Electric Power Act (and Regulations made thereunder) cited in the Plaint affect, *ex facie* and respectively, only the relationships between the shareholders in KEL (viz: KESP, the Pakistan Government and other minority holders not including either the Appellants or SPV21) and the relationship between KEL and its State regulators (again, not including the Appellants or SPV21).

61. Having regard to the factors raised by the Appellants and identified immediately above at [51] to [53], and having regard also to the Appellants' argument that SPV21 had submitted to the jurisdiction of the Pakistan Court, the four issues (and sub-issues) for the experts to opine upon came to be as set out by the Judge at [11] of the Main Judgment as follows:

> "*(a) How do the Pakistan Proceedings [ie: the Pakistan Action] fall to be characterized?*
>
> *(i) what causes of action, recognizable as a matter of Pakistan law, are pleaded in the Suit [ie: the Plaint]?*
>
> *(ii) Identify and explain the principles of Pakistan law, whether statutory or otherwise, which govern or are applicable to those causes of action.*
>
> *(iii) Without limit to the above, do the plaintiffs in the Pakistan Proceedings have standing to pursue those causes of action or any of them and, if so, which and on what basis or bases?*
>
> *(iv) Do the Other Shareholders (ie: the Appellants) have any right to make a claim under the SPA 2005?*
>
> *(v) Would (SPV21) or KESP be acting in breach of Pakistan law or the terms of the (SPA 2005) by seeking to give effect to a direction by (SPV21) under the SHA relating to the board of directors of KEL? If so, what right, if any, would the plaintiffs in the Pakistan Proceedings have to bring a claim in respect of the same?*
>
> *(b) Has (SPV21) submitted to the jurisdiction of the High Court of Sindh in Karachi, Pakistan and, if so, on what ground(s) has it done so and what is the effect of any such submission to the jurisdiction?*
>
> *(c) What are the laws and principles applicable to the two applications brought by (SPV21) in the Pakistan Proceedings [ie: the Order 39 and Section 4 applications] and what is the likely outcome of those applications?*
>
> *(d) (i) When is a decision on the two applications brought by (SPV21) likely to be rendered by the High Court of Sindh?*

(ii) What are the routes of appeal following any such decision and the likely timing(s) if those routes are pursued?"

62. While there were areas of agreement between the Experts, there was fundamental disagreement between them on the issues of privity of contract in relation to the SPA 2005 (and hence disagreement as to the Appellants' standing to sue under the SPA 2005 in the Pakistan Action and how that impacted on the nature of those proceedings), as well as in relation to the issue whether SPV21 had submitted to the jurisdiction of the Pakistan Court by dint of having brought the Order 39 and/or the Section 4 Applications.

63. Given the terms of the Grounds of Appeal (set out below) and in light of the arguments as they developed before this Court, there is no need to recite in detail the competing evidence of the Experts which, as opinions on the meaning and effect of foreign law, is regarded in English/Cayman law as questions of fact[3]. The Judge's assessment of and findings in relation to them, like all his findings of fact in the case, are not challenged by the Appellants, although challenge is made to his assessment of the effect of some of the facts found[4].

64. It will therefore suffice for the purposes of the appeal to set out the Judge's findings on the Expert evidence, as summarised from [128] – [133] of the Main Judgment (references to "**the SPA**" being to the SPA 2005), as follows:

"*128. I am satisfied that both experts were sufficiently and suitably qualified to give expert evidence on the issues of Pakistan law and procedure that arise in the case.*

129. I found Mr Shaukat to be a reliable and helpful witness who set out his opinions, both in writing and orally during his cross-examination, clearly with supporting analysis and arguments. He dealt directly and candidly with points of difficulty and adopted a balanced and impartial approach. I reject the (Appellants') assertion that his limited direct

[3] A matter of long-standing principle. See for instance, ***Castrique v Imrie*** (1869-70) LR 4 HL 414; ***King v Brandywine Reinsurance Co*** (UK) Ltd [2005] EWCA Civ 235 at [67]; Phipson on Evidence, 20th Ed 33-392; 33-93
[4] See [11] of the Appellants written submissions.

experience of litigation affected his ability to express reliable opinions on Pakistan law and procedure or on the likely decision which would be made by the highest court in Pakistan on the issues in the dispute. He impressed me with his broad knowledge of the applicable law and practice.

130. Justice Hussain is a distinguished former senior judge with extensive judicial experience who has also held other significant appointments in the academic world and had been appointed to other important positions in Pakistan. As a result, he is to be treated as having sufficient experience and expertise to provide an expert opinion on the points of Pakistan law and procedure in dispute and those opinions, in view of seniority and judicial experience, are, subject to reviewing their cogency and coherence, to be given substantial weight. Justice Hussain's written evidence (the Hussain Report and his commentary in the Joint Memorandum) was clearly and cogently expressed if not always fully argued. Unfortunately however, his oral evidence in cross-examination was, in a number of key areas, unsatisfactory.

131. I do not accept (SPV21's) criticism of the conditions in which Justice Hussain gave his evidence…

132. However, I do accept (SPV21's) criticism of the adequacy and cogency of key parts of Justice Hussain's evidence. As (SPV21) asserted, Justice Hussain misunderstood a number of key facts, in particular that there had been no transfer of shares in KESP and that the Transaction (and related transfers of [AIML] limited partnership interests) only related to a (sic) shares in (SPV21). When this was brought to his attention, he failed to acknowledge the significance of the error or to explain why these factual errors did not affect or undermine his analysis of the impact of the Transaction (and the related transfers) on the SHA. His new analysis to the effect that shareholders of KEL would be bound by the SPA [(to which they were not parties)] was unconvincing because he had not referred to or relied on it previously and because he was unable to provide a reasoned justification for his construction of the definitions in the SPA on which he relied. When pressed to provide such an explanation and justification, he refused to engage with the issue and

repeatedly cut-off further discussion by saying that he had nothing further to add and that the Court would need to decide the point without further assistance. Justice Hussain was unable to appreciate that his acknowledgement that his argument that shareholders of KEL were to be treated as bound by the SPA could not apply to (SPV21), undermined his opinion that (SPV21) was in fact bound by the SPA. Furthermore, while responding to the issues that the parties had formulated, he frequently went beyond the permissible bounds of expert testimony when addressing the construction of a contract governed by foreign law. Rather than addressing the principles of interpretation that would be applied by the Pakistan Court he gave his opinion on how the SPA was to be construed. It may be that, in the context of an application for an anti-suit injunction to enforce an exclusive jurisdiction clause when the Court is considering whether foreign proceedings are covered by the clause and interpreting that clause rather than directly construing the foreign law governed agreement, the usual rule is to be relaxed (and this is not a point on which (SPV21) focused) but it was a weakness of Justice Hussain's approach that he failed to adduce proper evidence of Pakistan law on the construction of contracts to assist the court in forming its own view, to the extent relevant on this application, or to support his own opinion.
133…"

The Issues before the Judge as identified by him in the Main Judgment

65. These were as summarised at [123] to [127] of the Main Judgment, introduced by a brief summary also of the law applicable to the grant of an anti-suit injunction which, although to be examined in more detail below, had helpfully set the framework for the Judge's deliberations and so will be included here. No issue was taken before this Court as to the accuracy of the framing of the issues as they are to be identified according to the factual background and applicable legal principles:

"*123. The Court must be satisfied that it is in the interests of justice to grant the injunction. Where there is an exclusive jurisdiction clause, ordinarily the court will restrain foreign proceedings brought in breach of such a clause so as to give effect to, and enforce, the contract, unless there are strong reasons not to do so. The justification for the grant of the*

injunction is that without it the applicant will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy.

124. As I noted at [53] of the (Interim Judgment) in relation to the issues for the Experts, the first issue is whether the foreign proceedings constitute, in whole or in part, a breach of the exclusive jurisdiction clause. [As settled in ***Donohue*** *(above) and to be more fully considered below] it is for (SPV21) to establish that it is entitled to enforce the clause, that the Respondents are parties to, or in substance bound by, the clause, that the clause is binding, and that the foreign proceedings fall within the terms of the clause. The second issue is whether there are strong reasons for not granting the injunction. The burden of showing strong reasons falls on the (Appellants).*

125. I made a number of findings and reached various conclusions in the [Interim] Judgment for the purpose of deciding (SPV21's) application for an interlocutory (interim) anti-suit injunction…

126. I must now reconsider (SPV21's case for, and the (Appellants') opposition to, the granting of a permanent anti-suit injunction in light of all the evidence adduced by the parties, taking into account where relevant the new expert evidence, and the further submissions the parties have made.

127. The particular issues that arise are as follows:

(a) what is the proper approach to characterizing the Pakistan Proceedings for the purpose of deciding whether they are covered by Clause 25.2 of the SHA?
(b) what is the proper characterization of the Pakistan Proceedings for that purpose?
(c) what is the scope and proper interpretation of clause 25.2 of the SHA?
(d) has (SPV21) established that the Pakistan Proceedings or any part of them are covered by and subject to clause 25.2?

(e) *does the (Appellants') claim that (SPV21) is in breach of the SHA affect (SPV21's) entitlement to a permanent injunction?*

(f) *have the (Appellants) shown that (SPV21), as a matter of Cayman law, has acted in the Pakistan Proceedings in such a way that it is to be treated as having submitted to the jurisdiction of the Pakistan Court or as having acted inconsistently with the relief it now seeks, and that as a result, either when considered alone or when taken together with the other grounds relied on by the (Appellants), there are strong reasons for not granting the injunction sought by (SPV21)?*

(g) *have the (Appellants) shown that if the injunction sought is granted there will be a real material risk of multiplicity of proceedings and of inconsistent findings by relevant courts so as to establish, either when considered alone or when taken together with other grounds relied on by the (Appellants), that there are strong reasons for not granting the injunction?*

(h) *have the (Appellants) shown that the connection between the dispute being litigated in the Pakistan Proceedings and Pakistan and its significance and importance to the Government and regulatory authorities of Pakistan constitute (either when this factor is considered alone or together with the other grounds relied on by the (Appellants)) strong reasons for not granting the injunction?*

(i) *have the (Appellants) shown that (SPV21) delayed in seeking injunctive relief from this Court to such an extent that there are (either when this factor is considered alone or together with the other grounds relied on by the (Appellants) strong reasons for not granting the injunction?"*

The Judge's Conclusions

66. After a detailed and careful analysis of the expert evidence and relevant legal principles (including his earlier summary of these at [15] – [29] and [47] – [54] of the Interim Judgment), and having summarized the contents of the Plaint in the Pakistan Proceedings at [164) of the Main Judgment, the Judge arrived at the following central conclusions:

(i) On the question of the approach to analysis and characterization of the Pakistan Proceedings, he noted the following uncontroversial proposition at [134]: "*whether a foreign claim is covered by an exclusive jurisdiction clause involves a two-stage analysis. The first requires an analysis of the claims made and the nature of the foreign proceedings. The second requires an answer to the question "does the clause on proper construction, extend to the foreign claim, characterized in accordance with the analysis at the first stage?*"; and at [137] he noted that:

> "*the core question is whether the Pakistan Proceedings involve "[a]ny dispute arising out of or in connection with the [SHA]. The clause refers to a dispute, a non-technical term rather than, for example, a cause of action. The parties to the SHA agreed that such disputes must and can only be settled by the English or Cayman courts. Therefore, the Court is required to assess what dispute is, or if there is more than one, what disputes are, being litigated in, and raised by, the Pakistan Proceedings and then decide whether that dispute arises out of, or is connected with, or whether all or some of the disputes arise out of or are connected with, the matters agreed upon and covered by the SHA*".

(ii) Following the approach taken by the English High Court in ***Team Y& R Holdings Hong Kong Limited v Ghossoub Cavendish Square Holding BV*** [2017] EWHC 2041 (Comm), per Deputy Judge Laurence Rabinowitz KC at [62], the Judge accepted that he should where possible adopt a construction of the reference to a dispute which "*accords with commercial common sense and be astute to the risk of parties constructing artificial forms of proceedings which disguise the real issues in dispute in order to evade the exclusive jurisdiction clause*".

(iii) He concluded that the Pakistan Proceedings do not seek any relief against KESP. This is a matter which he found at [180] to be "*curious*", because "*if there is a proper basis for complaining about the effect of the Transaction (and the related transfers of limited partnership interests) on KEL and on the shareholders of KEL, and of a breach of the SPA, it might be thought that KESP was the proper and primary defendant."*

(iv) As regards the claims advanced in the Pakistan Proceedings against the government agencies, the Judge found at [182] and [186] that " *it is strongly arguable that there is no genuine or real dispute between the [Appellants] and these defendants (as the responses filed by the Pakistan authorities to the Pakistan Proceedings confirm)*" and that *"it is a close call as to whether in this case the [Appellants'] claims against the Pakistan authorities can be regarded as genuinely being the result of a dispute with them because it looks as though the claims are, in reality, another (albeit indirect) means of litigating the dispute with [SPV21] regarding the appointment of directors to the KEL board*."

(v) However, of importance to his ultimate decision [at 227] to restrain the pursuit of the Pakistan Proceedings as against SPV21, the Managers, KESP and KEL, while not also declaring them to be merely frivolous or vexatious and his decision not to restrain them in their entirety, allowing them to continue as against the Pakistan authorities, the Judge continued at [186], in these terms: " *... on balance I have concluded, since disputes with the Pakistan authorities are not covered by the SHA and since the [Appellants] may have some basis under Pakistan law to seek relief against the Pakistan authorities, it is right to accept that the [Appellants] may have a dispute with the Pakistan authorities and that since the matter is before the Pakistan Court, which is best placed to adjudicate on this dispute, and since the exercise by the Pakistan authorities of their rights, both contractual and statutory (or regulatory), is a matter of considerable public interest and local importance for them, it is right (having regard inter alia to the need to respect the comity principle) to leave it to the Pakistan Court and the Pakistan authorities to deal with the relief sought in the Pakistan Proceedings against them. If it turns out that KESP is not permitted to give effect to [SPV21's] instructions to make appointments to the KEL board because of KESP's contractual obligations [under the SPA 2005] to the Privatisation Ministry or the regulatory requirements of Pakistan law, [SPV21] can have no complaint about action being taken thereunder by the Pakistan authorities because the terms of the SHA could never override those independent obligations of KESP (and KEL). If the [Appellants] have a right to require the Pakistan authorities to exercise their rights and powers as against KEL (and KESP) (and a real dispute with them concerning their exercise) then they may do so even if that prevents KESP from putting into effect and complying with [SPV21's] instructions*

because the prohibitions and limitations on the exercise of KESP's rights as a KEL shareholder which the [Appellants] are seeking to enforce were always unaffected by the SHA and arose independently of it. If clause 25.2 was to go so far as preventing the [Appellants] from taking such steps, clear words should have been included."

(vi) And, continuing in terms which reveal the Judge's reasoning leading to these conclusions, he explains at [187] – [188] the practical dividing line of the potential impacts of the Pakistan Proceedings: " *However, to the extent that the [Appellants] seek to go further and apply for relief against (the) Privatisation Ministry, the Energy Ministry, NEPRA and the SECP which seeks to raise issues concerning or require the Pakistan authorities to take action to prohibit exercise by [SPV21] of its rights under the SHA, in particular the appointment of directors to the KEL board or to restrain [SPV21] from giving effect to the Transaction (and the related transfers of limited partnership interests) as between itself, the [Appellants] and KESP, then they would be bringing proceedings to litigate a dispute with [SPV21] in connection with the SHA in breach of clause 25.2. The [Appellants] would be using the claims made against the Pakistan authorities as a backdoor route for indirectly bringing claims covered by the SHA against [SPV21]. Following that approach, paragraph 5 of the prayer in the Plaint appears to be unobjectionable and should not be the subject of any injunctive relief to be granted by this Court. Paragraph 8 is, at least as a matter of drafting, ambiguous. It is currently drafted very widely and could be understood, when reference is made (using the ambiguous language adopted by the [Appellants] throughout the Plaint) to "any transfer of beneficial ownership or change in the board/management control of [KEL]" as requiring the Pakistan authorities to adjudicate on the steps taken by [SPV21] as a KESP shareholder. That language does not reflect the drafting of the SPA or the relevant statutes and regulations. If it were drafted so that an order was sought requiring the Privatisation Ministry as party to the SHA to exercise its rights thereunder against KESP to the extent that they have become exercisable and requiring the Energy Ministry, NEPRA and the SECP to exercise their respective regulatory powers in relation to KEL (and if relevant KESP) then it would in my view (be) unobjectionable. But what would be objectionable, as I have said, is for the [Appellants] to use a claim against the Pakistan*

authorities which seeks to require them to act so as to interfere with the exercise of [SPV21's] rights and deal with matters covered by the SHA."

67. Those conclusions are important both as they relate to the Judge's view of the Pakistan Proceedings as involving an impermissible breach of the contractual obligations imposed by the SHA and his later conclusion (at [213]) that the anti-suit injunction, in the terms which he imposed to restrain such breaches, would not create a real risk of a multiplicity of proceedings resulting in inconsistent decisions or outcomes. This latter issue ultimately became, as will be explained below, one of the two focal grounds of appeal (the other being SPV21's putative submission to the jurisdiction of the Pakistan Court) and so it is convenient here to set out the Judge's reasoning on this issue of the identified risk from [212] and [213]:

"*212. There is, because of the corporate structure of the KESP-KEL group of companies, a dividing line at the KESP level. Above KESP is the territory occupied by the shareholders of KESP who have set out and regulated their rights and relationship in that capacity in the SHA, and KESP has agreed to act in accordance with the SHA. At and below the level of KESP is KEL and KESP's position as shareholder in KEL. KESP is bound to act in accordance with its obligations under the SPA (and its obligations under the SHA cannot relieve it of, or qualify its obligations under, the SPA) and KESP and KEL are bound to act in accordance with applicable Pakistan law. I see no serious difficulty in issues (disputes) relating to the rights and obligations (largely governed by English law although potentially affected by Cayman law) of the shareholders in KESP (a Cayman company) and of KESP's obligations to its shareholders (issues above the line) being determined by this Court/the English Court and issues (disputes) relating to the rights and obligations (governed by Pakistan law) of the shareholders in KEL, and of KEL to its shareholders and the Pakistan authorities being determined by the Pakistan Court…*

213. The different issues and disputes involving all the parties could be adjudicated by one court (namely the Pakistan Court) but it seems to me that there is no sufficient substantial benefit to be derived from one court doing so or a need for one court to do so that would justify overriding [SPV21's] contractual right to have the disputes relating to the SHA

adjudicated in the agreed fora. In this case, as I have noted, there are distinct and separate issues governed by different agreements and different laws that arise in relation to the exercise of rights by, and changes of Control in respect of, the KESP shareholders which are governed by the SHA and in relation to the extent of KESP's obligations and the Privatisation Ministry's rights under the SPA … Not only can these issues be dealt with separately so that there would be limited benefits to be derived from permitting one-stop shopping but there would be advantages in having the Cayman/English issues dealt with by this Court/ the English Court and the Pakistan law issues dealt with by the Pakistan Court. The expert evidence adduced on this application suggests that there may be differences of approach or substance between the two legal systems so that such separate adjudication would be safer and sounder (and would avoid what also appears from the expert evidence to be a potential issue, namely of the local policy issues and importance of KEL affecting and possibly infecting the analysis of the position of the KESP shareholders above the line). This case is distinguishable from ***Team Y&R*** *(above) where Mr Rabinowitz found (at [113](2)] that there would be a risk of duplication and conflicting decisions that otherwise might be avoided and* ***Donohue*** *(also above**)** in which the House of Lords found that core questions of fact would need to be decided by both the English and New York courts even if the injunction was granted (it was found that it would be necessary for any court determining the truth or falsity of the allegations against the defendant and his alleged co-conspirators to form a judgment on their honesty and motives and therefore there was a risk of inconsistent judgments). The evidence also indicates that there may be material delays in Pakistan that will be prejudicial to [SPV21]."*

68. This last sentence is a reference to the Judge's acceptance, at [20] of the Main Judgment, of Mr Shaukat's evidence to the effect that, if the Pakistan Proceedings were allowed to proceed to trial in their present form of pleadings*, "there is unlikely to be a judgment by the Pakistan Court for five years or more."*

69. As to whether SPV21 should be regarded as having submitted to the jurisdiction of the Pakistan Court and so rendered itself undeserving of injunctive relief to restrain the Appellants' pursuit of

the Pakistan Proceedings, the Judge made a number of key findings on the basis of the case law as it was then presented to him, beginning at [194] of the Main Judgment:

> "***Submission***
>
> *194. As I have noted, both parties accepted that this was an issue governed by Cayman law and not Pakistan law. Accordingly, the expert evidence on the law regarding submission to jurisdiction in Pakistan was not determinative or directly relevant. It can, however, assist, for the purpose of the Cayman law analysis, in assessing the significance and effect of steps taken by [SPV21] in the Pakistan Proceedings.*
>
> *195. There was no dispute that the test set out by Lord Justice Males in* ***SAS Institute Inc. v World Programming Ltd*** *[2020] EWCA Civ 599 at [114] [(citing and approving the position as summarized in* ***Briggs, Civil Jurisdiction and Judgments*** *(6th Ed) at page 550)](set out above) was the right one. The question is whether the applicant has taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction. If it had done so, this would be a strong reason for refusing injunctive relief, not a decisive one.*
>
> *196. In the (Interim) Judgment, I concluded that [SPV21] had only been doing what it could to resist the Pakistan Court's assumption of jurisdiction and had not conducted itself in a manner that was inconsistent with the contractual forum being the sole forum for the resolution of the parties' dispute.*
>
> *197. [SPV21] has made two applications in the Pakistan Proceedings, the Section 4 Application and the Order 39 Application….*
>
> *200. The focus of the (Appellants') case related to the Order 39 Application. The Order 39 Application, they said, went further than the Section 4 Application, which was the application by which (SPV21) sought to challenge the Pakistan Court's jurisdiction based on the arbitration clause in the SHA. The Order 39 Application sought positive relief in*

relation to the appointment of the KEL directors and involved a step in the Pakistan Proceedings which went beyond a challenge to that court's jurisdiction. Mr Shaukat had recognized that the Order 39 Application could be seen as having involved such a step and gone too far and his attempt to explain the problem for [SPV21] should not be accepted.

201. SPV21 however maintained that the Order 39 Application was in substance only contesting the jurisdiction of the Pakistan Court, in reliance on the provisions of the SHA, and that Mr Shaukat had properly concluded that the drafting of the application, including the wide wording of the prayer, was entirely consistent with this view. [SPV21] submitted that this was the correct interpretation and analysis of the Order 39 Application which the Court should follow.

202. I accept [SPV21's] submissions on this issue. In my view, SPV21 has not taken a step in the Pakistan Proceedings which goes beyond a challenge to that court's jurisdiction or conducted itself in a manner that was inconsistent with the contractual fora being the sole fora for the resolution of the dispute with the (Appellants).

203. Mr Shaukat helpfully summarized in the Shaukat Report (at [997]) the nature of an application under Order 39 rule 4:

> *"Rule 4 of Order 39 of the Civil Code permits a court to "discharge, vary or set aside" an injunctive order and an application under this rule essentially allows the applicant an opportunity to approach the court and make submissions against an injunction already granted. In the case where only an ad-interim injunction has been granted the aggrieved party is in any case given the opportunity to file a reply and be heard by the court. Rule 4 of Order 39 of the Civil Code is ordinarily meant to apply to a situation where the aggrieved party does not have the opportunity to make such submissions. This is consistent with the caselaw on this provision which sees Rule 4 of Order 39 of the Civil Code as a means of apprising the court of altered circumstances after the grant of an injunction which merits the vacation or variation of the injunction. In the circumstances where the interim injunction*

application of the [Appellants] is pending in the Suit, the High Court will not be making any separate order on the Injunction. That being said, applications under Rule 4 of Order 39 of the Civil Code are often for strategic reasons in order to expedite the hearing of an interim injunction application. They allow litigants an opportunity to obtain a preliminary order on the application and create pressure on the party seeking the injunction. To this extent the Injunction Removal Application [ie: Order 39 Rule 4 Application] appears to have served its purpose."

204. The Order 39, rule 4 jurisdiction relates to applications to discharge, vary or set aside an injunction. The application focuses on the injunctive relief granted by the court. A person who is made a party to proceedings in Pakistan in breach of an exclusive jurisdiction or arbitration clause and who is then made subject to an injunction, and who wishes to have the proceedings stayed and the clause enforced, is able and may need both to challenge the main proceedings and separately the injunctive relief granted pursuant to it. In this case, it appears to me, having regard to the drafting and terms of the Order 39 Application and all the expert evidence, that [SPV21] was using the Order 39 Application to challenge the granting of the injunction based on the (Appellants') obligation to submit disputes to arbitration and the references to the Pakistan Court permitting the appointment as KEL directors to proceed should be seen as relief that would flow as a consequence of the applications being successful and of a stay being granted and not as substantive relief sought to enforce [SPV21's] right under the SHA to appoint the KEL directors. The drafting of the Order 39 Application, taken as a whole, makes it clear that [SPV21] relies on the arbitration clause and wishes to have the dispute with the (Appellants) submitted to arbitration in accordance with the clause. It does not show that [SPV21] wished (and had elected) to have its substantive rights and claims in relation to the appointment of the KEL directors be adjudicated and dealt with by the Pakistan Court."

70. After further analysis, including of the further evidence given by Mr Shaukat on this issue, the Judge concluded as follows:

> "207. *In my view, Mr Shaukat's analysis is cogent and reasonable and consistent with my own assessment of the impact and effect of the steps taken by [SPV21] in the Pakistan Proceedings in general and of the Order 39 Application in particular*."

71. On the appeal, the Appellants have not sought to suggest that the Judge was wrong to have arrived at that conclusion on the issue of submission to the Pakistan Court, on the basis of the evidence before him and the case law as it was presented to him. Instead, the Appellants now argue that the Judge's conclusion that SPV21 had "*not taken a step in the Pakistan Proceedings which goes beyond a challenge to the court's jurisdiction or conducted itself in a manner that was inconsistent with the contractual fora*" was plainly wrong as a matter of Cayman law because the Judge misdirected himself by failing to apply the rule in ***Henry v Geoprosco*** [1976] 1 QB 726 (CA). This rule would apply such that, in summary, simply by having applied by way of the section 4 Application for a stay in Pakistan in favour of an arbitration under the contract between the parties - the SHA - or for relief pursuant to Order 39 rule 4 of the CPC, SPV21 must be regarded as having submitted to the jurisdiction of the Pakistan Court.

72. Although ***Henry v Geoprosco*** was not cited to or argued before the Judge, this Court must now accordingly deal with the argument as framed within the grounds of appeal (item (iii) below) presented by the Appellants as follows from their written submissions at [27]:

> "(i) *whether the Pakistan Proceedings as a whole were sufficiently concerned with the SHA to fall within clause 25.2 so as to justify granting any anti-suit injunction or one as wide as was granted.*
>
> *(ii) whether the Learned Judge by granting the anti-suit injunction in relation to the SHA matter while permitting the remainder of the Pakistan Plaint to proceed created a real risk of inconsistent findings between the Cayman Court and Pakistan Court and was thus plainly wrong to do so.*

(iii) whether the Learned Judge was plainly wrong in finding that the Appellants had not established strong reasons for refusing to grant an anti-suit injunction as SPV21 had submitted to the jurisdiction of the Pakistan court having sought a stay of the Pakistan Proceedings in favour of arbitration made pursuant to section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 and sought relief from the Pakistan Court under Order 39 of the local rules.

(iv) whether, alternatively, the Learned Judge was plainly wrong to prevent the Appellants from continuing to prosecute the Pakistan Proceedings against SPV21 in the Amended Form along the lines of the formulation proposed by the Appellants with their written submissions dated 3 August 2023, i.e., deleting [from the Plaint] references to and reliance upon the SHA and the Appellants' rights as a KESP shareholder."

The Appellants' Arguments on Appeal

73. While it appeared, from their Ground (i) (above) and the Appellants' written submissions in support, that they would argue as their primary case that the Pakistan Action did not engage the exclusive jurisdiction clause in the SHA, but was instead primarily and overwhelmingly concerned with enforcement of the SPA 2005, this argument was abandoned by Mr Rubin KC at the start of the hearing. As he said then: "…*I am not going to argue that the exclusive jurisdiction clause was not breached by the bringing of the Plaint in Pakistan. I will however, refer to the same material when I come to suggest to you when you exercise your discretion afresh … that you should take account of how relatively sparse the reference to the (SHA) are in that dispute ...The first point I'm going to deal with therefore, is I'm going to say that the judge erred in exercising his discretion by granting an anti-suit injunction in this case … he failed to recognize…the inevitable risk of inconsistent findings, as a result of his Directions… that the Judge never actually got to grips with the core issue in this matter, which was the risk of inconsistent findings of fact as to whether there had or had not been a change of control of SPV21, but [it was] core to his decision." [emphases added]*

74. Accordingly says Mr Rubin, the Court of Appeal can, in light of the Judge's putative error, look at the matter afresh and exercise its discretion anew, to allow the Pakistan Action to proceed on the basis of the Appellants' proposed amendment to the Plaint.

75. The abandonment of the Appellants' primary case was, in my view, only realistic, in light of the ample support from the factual background for the Judge's determination that the Pakistan Action was clearly being pursued in breach of the SHA.

76. The latter argument was developed by Mr Rubin on the assumption that as SPV21 has not confirmed whether or not its ownership has actually been transferred to SVGL, there is in fact a dispute to be resolved in the Pakistan Action, as well as in any separate action under the SHA to be brought before the Cayman (English) Court, as to whether there has in fact been a change of control, and hence, he submits, the risk of parallel proceedings leading to inconsistent outcomes.

77. As evidence of the existence of a dispute framed in those terms in Pakistan, Mr Rubin points to the Appellants' reply in the Pakistan Action to SPV21's Order 39 rule 4 Application. There, by way of the counter-affidavit of Mr Shan Ashary[5] - the Appellants' authorized representative in those proceedings - the Appellants oppose SPV21's application for the discharge of the Interim Injunction. Mr Ashary avers in the main and essentially that (i) the SPA 2005 falls within the exclusive jurisdiction of the Pakistan Court and that SPV21 has "*taken steps in the Pakistan Action*" dealing with a dispute under the SPA 2005 amounting to submission to the jurisdiction of the Pakistan Court[6] (to be addressed below as one of the grounds of appeal) and (ii) that SPV21, through its "*Administrators*" (ie. the Managers) by seeking to bring about a change in the directorship of KEL are "*acting way beyond their mandate as administrators and attempting to obviate the regulatory process in Pakistan*".

78. It is in this regard that the putative change of control of SPV21 itself is asserted to be of pivotal importance in the Pakistan Action and could, according to Mr Rubin, lead to a clear risk of inconsistent verdicts, in that: *"One jurisdiction may decide that there has not been a change of*

[5] See pp 1241-1254 of Volume 2 of 3 of the Ancillary Bundles filed on the appeal where the undated, unsigned and unpaginated copy cited by Mr Rubin KC appears.
[6] See for instance, item D under the heading "Preliminary Legal Objections" and top of page 1248 of Volume 2 of 3.

control in Cayman terms, and another jurisdiction may decide that there has been in Pakistan terms".

79. In support of this proposition, further excerpts from Mr Ashary's counter-affidavit were cited by Mr Rubin[7]:

> "*There appears to be no transparency in terms of disclosure of the Cayman Court decision nor any clarity as regards the source of funds of transaction proposed by the Defendants No 1-2 (ie SPV21 and the Managers). Moreover, Defendant No. 4 (K-Electric, i.e: KEL) is an essential utility and cannot be handed over by the administrators without reference to the Defendant No 5 (GoP) and regulators. It is apprehended that the Defendants No 1-2 are trying to enter into a transaction for the disposal of the national asset without considering the implications in Pakistan, i.e. putting the national asset i.e. the Defendant No. 4 (K-Electric) even more at risk…*
>
> *It is clear that the use of the offshore structures to manipulate the board [of KEL] is to the detriment of the (Appellants) given that Defendant No.1 [SPV21] in connivance with prospective buyers are trying to gain material control in governing and managing the affairs of the Defendant No.4 (K-Electric). The transfer of beneficial ownership/change in board or management control of the Defendant No. 4 (K-Electric) is inter alia subject to Transfer Restrictions and National Security Clearance as detailed in Section 5.2 and 5.3 of the SPA 2005. Therefore, the question of applicability of clause 25 of the Share Holders Agreement [(the SHA)] does not arise. The instant suit has been rightly and competently filed before the proper forum and this Hon'ble Court has ultimate jurisdiction to adjudicate upon the controversy*." [emphasis added]

Discussion on Grounds 1 and 2

80. As Mr Rubin accepted, the Judge correctly identified the applicable legal principles governing the grant of anti-suit injunctions based upon a breach of an exclusive jurisdiction clause. While some

[7] Taken from pp 1249 to 1250 of volume 2 of 3 of the Ancillary Bundles

of these are already cited above, a further succinct summary of the main principles is to be found at [48] of the Interim Judgment in these terms:

> "*In **Argyle Funds**, Field JA in the Court of Appeal in this jurisdiction summarized (at [23]) the basis of the Court's jurisdiction to grant, and the core features of the approach to be adopted by the Court when considering an application for, an anti-suit injunction based on an asserted breach of an exclusive jurisdiction clause. He noted that:*
>
> > "*The judge correctly identified S. 11 of the Grand Court Law (2015 Revision) and S. 37(1) of the English Senior Courts Act 1981 as providing the jurisdiction of the Grand Court to grant the anti-suit injunction applied for. Citing the decision of Cresswell J. in Origami Partners 111 LP v Pursuit Capital Partners (Cayman) Ltd (11), the Aggeliki Charis Cia. Maritima S.A. v Pagnan S.p.A….and Donohue v Armco Inc. he correctly held that the jurisdiction was discretionary and would not be exercised in favour of an injunction as a matter of course but if proceedings were started in breach of a binding arbitration clause or exclusive jurisdiction clause the court would ordinarily enforce the contract between the parties unless there were strong reasons for not doing so*."

81. From this summary of the principles, it is important here to emphasise that in each case a discretion falls to be exercised and the Court must be satisfied, on the basis of its assessment of the facts, that it is in the interest of justice to grant the injunction. While the Court would ordinarily grant the injunction to restrain a breach of an exclusive jurisdiction clause, the Court will refuse to grant an injunction where there are "*strong reasons*" to do so.

82. The reference to "*strong reasons*" was established as the proper formulation of the test for refusal by the House of Lords in ***Donohue*** (above) and later endorsed by the Supreme Court of the UK in ***AES Ust Kamenogorsk Hydropower LLC V Ust-Kamenogorsk Hydropower Plant JSC*** [2013] 1 WLR 1889 per Lord Mance at [25].

83. That cited here by Mr Rubin - the risk of multiplicity of proceedings and inconsistent outcomes - was also recognized by the Judge as potentially providing "*strong reasons*," based upon his acceptance of the relevant case law, for the refusal of an injunction.[8] However, in the exercise of discretion he discounted that risk for the reasons he explained as set out, in part, above.

84. ***Donohue*** (above), was itself a case in which it was held that the fact that the granting of an injunction would cause the litigation to take place in two different jurisdictions constituted "*strong reasons*" why an injunction ought not to have been granted, despite the existence of an exclusive jurisdiction clause. At [26]- [28], Lord Bingham identified and discussed various cases in which the courts had declined, as a matter of discretion, and on various grounds, to grant an anti-suit injunction. Of relevance to the present issue, he stated at [27] (as already quoted above at [52] herein but of such importance as to be repeated here):

> "*The authorities show that the English court may well decline to grant an injunction or a stay, as the case might be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions.*"

85. Mr Rubin also invited the Court to note the further treatment of this subject by the authors of ***Briggs, Civil Jurisdiction and Judgments*** (7th Ed. 2021) at [28-21] (in the section headed "*The exercise of discretion: comity, and the public interest*"):

> "*A distinct element of public interest recognizes that a court has a public duty to secure the proper administration of justice, and this may sometimes override the private interest of the parties in holding each other to an agreement on jurisdiction… The same point would arise if the material scope of the agreement were to be significantly narrow, so that the bringing of some claims did not fall within its range and would, even as between parties to the agreement, not involve a breach of its terms. As it cannot be correct that the parties may, by private agreement (otherwise than for arbitration), prevent the court from securing*

[8] See [47] – [53] of the Interim Judgment and [209] – [213] of the Main Judgment

an orderly resolution of complex or multipartite disputes, the decision [in Donohue] is wholly rational, and marks a limit on the power of the parties to write the rules of civil litigation for themselves."

86. In the context of this case, the practical implications of these principles revolve, as Mr Rubin acknowledged, around the fact that the interests of other parties who are not parties to the SHA are involved in the Pakistan Action. This, as Mr Rubin expressly notes at [37] of the Appellants' written submissions, is the case here where the Government and state regulatory agencies of Pakistan are "*central to the Pakistan Action*". It is as a possible result of their involvement in the Pakistan Action that what may turn out to be a valid and effective change of ownership/control in this jurisdiction may be deemed invalid and ineffective in Pakistan. Hence, he posits, the risk of inconsistent and conflicting outcomes.

87. But none of this can be said to have escaped the Judge in his careful assessment of the evidence or in his reasoning and exercise of discretion (as explained from [212] – [213] of the Main Judgment set out above), leading to the order which he eventually made restraining the pursuit of the Pakistan Action by any reliance upon the SHA (which binds the present parties), even while permitting it to proceed as it might involve the Pakistan Government and State regulatory agencies as parties to the SPA 2005 or as enforcers of Pakistan law and regulators relating to KEL.

88. The result is that any dispute as between the parties to the SHA, over the validity of change of ownership and/or control of SPV21 and consequential rights to instruct KESP in relation to the nomination of directors to the board of KEL, remains subject to the exclusive jurisdiction of the English/Cayman Courts in keeping with the parties' bargain under Clause 25.2. And any dispute, as between the parties to the SPA, as to whether the approval of the Pakistan Government and/or regulatory authorities is required for the putative change of ownership or control (which the Judge sensibly and properly on the facts assumed to have occurred) treated as a matter for the Pakistan Court. Indeed, this is implicitly admitted in the words in emphasis above at [79] from Mr Ashary's counter-affidavit, filed in response to SPV21's Order 39 r 4 Application in the Pakistan Action.

89. Moreover, as Martin JA reminded Mr Rubin during the hearing, by reference to the reasoning painstakingly explained in the Main Judgment and as in part set out above, the Judge looked at the issue of control as it related differently at the KESP level and at the KEL level. In other words, assuming as the Judge did, that there has been a change of ownership/control by dint of the sale of SPV21 to SVGL, any dispute as between the present parties at the KESP/SPV21 level about its validity or effectiveness, would clearly be covered by the exclusive jurisdiction clause. The distinctly different issue, as to whether that change of ownership/control requires and should receive at the KEL level the imprimatur of the Pakistan authorities, is that which, by dint of the Judge's final order remains properly enjoined between the Appellants and the Pakistani authorities before the Pakistan Court and can be resolved without conflicting with or contradicting any eventual outcome before the English/Cayman Court. This would be so even if the result in Pakistan for SPV21 (and presumably SVGL) is that - as the Appellants would seem to desire - it is prevented from taking its seats on the board of KEL. But that, as the Judge observed at [186] of the Main Judgment (see as quoted above) is a risk of which SPV21 (or SVGL) must be aware and must be regarded as willing to take. It is not the kind of risk of unfairness to other parties as the result of a multiplicity of proceedings and inconsistent decisions which in my view, could justify overlooking the Appellants' breach of the contractual obligations of the SHA and interfering with the Judge's exercise of discretion, based upon his unchallenged findings of facts in the case.

90. One is of course, also mindful of the guidance from Lord Justice Millet (as he then was), given in ***Aggeliki Charis Compania v Pagnan (The Angelic Grace)*** (above, at [96]) and also cited with approval by Field JA in ***Argyle Funds*** (also above), that:

> "*The justification for the grant of the injunction in either case (ie: to restrain a breach of an arbitration agreement or breach of an exclusive jurisdiction clause) is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy…*"

In this case, other than a bald statement at [37] of the Appellants' written submissions that "*SPV21 anyway can bring a claim in damages if denied an injunction*" (citing ***Donohue*** (above) at [47] per

Lord Hobhouse), there was no real examination of this issue and so no basis for concluding that damages would, if recoverable, be an adequate remedy for SPV21.

Discussion on Ground 3 - Submission to the Jurisdiction of the Foreign Court

91. As mentioned already, here too there was a change of tack by the Appellants.

92. Mr Rubin acknowledged that the Judge correctly directed himself at the trial that when considering whether there has or has not been a submission to the jurisdiction of a foreign court, under Cayman/English conflict of laws rules, the Cayman Court approaches the matter on the basis of what is or is not a submission under Cayman law, not, as in this case, Pakistan law. See the Main Judgment at [64] and [194] and ***Banco Mercantil Del Norte SA v Cabal Peniche*** 2003 CILR 343 at [19] per Levers J and ***Rubin v Eurofinance S.A*** [2013] 1 AC at [161].

93. However, says Mr Rubin, in making his assessment of whether there had or had not been a submission in Pakistan by SPV21, the Judge, even while following the settled English case law from ***SAS Institute Inc*** (per Sales LJ (above) had held erroneously at [202] of the Main Judgment (see above and repeated here) that:

> "*the Applicant has not taken a step in the Pakistan Proceedings which goes beyond a challenge to the court's jurisdiction or conducted itself in a manner that was inconsistent with the contractual fora.*"

94. This was plainly wrong as a matter of Cayman law says Mr Rubin, because the Judge misdirected himself by failing to apply the proper rule, the rule in ***Henry v Geoprosco***. Had he directed himself according to that rule, the Judge would have been bound to conclude that simply by applying for a stay in Pakistan in deference to an arbitration as then thought to be required under the contract between the parties [the SHA], SPV21 had submitted to the Pakistan jurisdiction with the consequence that this Court should now regard SPV21 as obliged to continue to submit to the jurisdiction of the Pakistan courts in the Pakistan Action to its conclusion on the merits.

95. This Court must therefore grapple with the question whether ***Henry v Geoprosco*** (above) (hereinafter "***Geoprosco***") represents the law of this jurisdiction on this issue of submission. The first important thing to note is that ***Geoprosco*** was not a case about whether a party should be granted an anti-suit injunction by way of enforcement overseas of an exclusive jurisdiction (or arbitration) clause. It was a case about an alleged submission to the jurisdiction of a foreign court (a Canadian Court in Alberta), for the purpose of deciding whether an injunction should be granted in England against the recognition and enforcement of a judgment obtained from the Canadian Court, despite an agreement between the parties for reference of their disputes to arbitration. Thus, the main question for the Court, as identified by Lord Roskill at the outset of the judgment (at 731C) involved the: "*circumstances in which the English courts will permit a plaintiff, who has obtained a judgment against a defendant in a country to which the Foreign Judgments (Reciprocal Enforcement) Act 1933 does not apply, to enforce that judgment by action against the defendant in the English courts*."

96. By way of further context, Geoprosco International Ltd had also applied unsuccessfully by their motion to the Alberta Court to divest itself of the jurisdiction it undoubtedly had by granting an order setting aside the service out of the jurisdiction upon them in Jersey (where the company was registered), on the ground that the affidavit in support of the application for service out was defective and Canada was not the forum conveniens; alternatively, staying the Canadian proceedings under section 4 (1) of the Alberta Arbitration Act or on the ground that the arbitration clause was of the Scott v Avery type the effect of which was that no cause of action could accrue until arbitration proceedings and been undertaken.

97. The English Court of Appeal held, in terms which are now long superseded by modern statutory provisions in England[9], that the defendants' application for a stay of proceedings in the Alberta

[9] The Civil Jurisdiction and Judgments Act 1982, (the "**CJJA**") section 33 (1) which provides under the heading," *Certain steps not to amount to submission to jurisdiction of overseas court: (1) For the purposes of determining whether a judgment given by a court of an overseas country should be recognized or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely –*

(a) *to contest the jurisdiction of the court;*

(b) *to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;*

(c) *to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.***"**

Court in deference to the arbitration clause was "*in our judgment clearly a voluntary submission*" to the jurisdiction of the Alberta Court - per Lord Roskill at 750-751, delivering the judgment of the Court.

98. After an extensive consideration of the existing English authorities, Lord Roskill (at p.750) addressed the particular question of the effect of the defendant Geoprosco Ltd's arguments deployed upon their application for the stay of proceedings in Alberta:

> "*That submission [that the arbitration clause was a Scott v Avery clause[10]] involved the defendants submitting that when the plaintiff began the proceedings in Alberta he had no accrued cause of action. Such a defence could in this country have been raised by way of a plea in bar and not dealt with by way of an application for a stay. Had it been dealt with in this way and decided against the defendants, we cannot think that it could thereafter have been argued that there was not a voluntary submission "on the merits". We do not see that it makes any difference that the defendants raised it on an application for a stay. In either event the defendants would be voluntarily asking the court to adjudicate on the merits of that part of their defence. Having done that and having lost, they are bound by the result.*
>
> *This conclusion upon the effect of the defendants' application for a stay is enough to determine this appeal in favour of the plaintiff, for all else apart in this case, that application for a stay was in our judgment clearly a voluntary submission.*"

99. Notwithstanding that ***Geoprosco*** was a case about an alleged submission to the jurisdiction of a foreign court for the purpose of considering, in respect of an application to enforce its judgment, the grant of an anti-enforcement injunction, as opposed to an anti-suit injunction, Mr Rubin argues for its adoption and application on the basis that subsequent decisions of the English courts treat the test on submission as the same for each type of injunction, most notably, ***Rubin v EuroFinance*** (above) at [160] per Lord Collins:

[10] Viz: one which firstly, creates an obligation to arbitrate and secondly, creates a condition precedent to a party's right to bring an action in court that it must have previously arbitrated the dispute: ***Scott v Avery*** [1843-1860] All ER Rep 1 HL.

> *"The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have "taken some step which is only necessary or only useful if" an objection to jurisdiction " has been actually waived, or if the objection has never been entertained at all": Williams & Glyn's Bank plc v Astro Dinamica Cla Naviera SA [1984] 1 WLR 438, 444 (HL) approving Rein v Stein (1982) 66 LT 469, 471 (Cave J).*
>
> *The same general rule has been adopted to determine whether there has been a submission to the jurisdiction of a foreign court for the purposes of the rule that a foreign judgment will be enforced on the basis that the judgment debtor has submitted to the jurisdiction of the foreign court… : … Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader) 1996 2 Lloyds Rep 585, 601 …" [emphases added]*

100. It should be noted, however, that ***Geoprosco*** was not mentioned in ***Rubin v Eurofinance*** and that the cited passage discusses the general rule adopted to determine the issue of submission, as it might relate both to the enforcement of a judgment of an English or foreign court. And so, even if one were to adopt the assimilation to anti-suit injunctive relief proposed by Mr Rubin, we would see, I believe from the words in emphasis above, a logically different outcome than would arise from the approach taken in ***Geoprosco*** itself.

101. This is necessarily so because it could hardly be said, in the usual case, that an application to a foreign court for a stay in favour of arbitration or to enforce an exclusive jurisdiction clause could "*only (have been) necessary or useful if an objection to the jurisdiction of the foreign court has actually been waived, or if the objection has never been entertained at all*." Indeed, that formulation of the test seems the antithesis of the hard and fast rule from ***Geoprosco,*** where, as cited above, one sees that submission on the merits is deemed to have occurred from the very fact of the bringing of an application for a stay (or for that matter a mere appearance to challenge or protest against jurisdiction[11]) before the foreign court, no question of the party's volition or assumed intention to waive or not waive its objection being a necessary part of the inquiry.

[11] As was found to be sufficient for submission to the jurisdiction of the Manx Court in ***Harris v Taylor*** itself: [1915] 2 K.B 580 (at 587, 589-590 and 591)

102. But that basis for not adopting Mr Rubin's argument for assimilation aside, it is clear, as Mr Chapman KC submits, that in discussing ***Harris v Taylor*** (above), the case which was regarded as compelling the Court in ***Geoprosco*** to reach the decision they felt confined to reach, Roskill LJ said (at 746C) that "*It can fairly be said that Harris v Taylor is not a decision the underlying principles of which should be extended.. So far as this court is concerned it is a binding authority on that subject (of what constitutes a submission to jurisdiction).*" And, in describing (at 746 G - 747B) the three propositions which emerged from the case law by which the court was bound, Roskill LJ was very careful to explain that each of those principles applied in respect of the context of the enforcement of a judgment of a foreign court. There is no suggestion that the principles apply to any other situation, including an application for anti-suit relief.

103. Mr Rubin also submits that the rule in ***Geoprosco*** represents the common law and thus remains effective in Cayman (and many, if not all other common law jurisdictions) where no statutory intervention similar to section 33 of CJJA has taken place. For this proposition he cited four cases in particular requiring of comment now:

(i) The most authoritative is ***Trendex Trading Corporation v Credit Suisse*** [1982] AC 679. (HL) There, at 705, Lord Roskill alone referred to ***Geoprosco***, in what was the second of two leading and concurring judgments (the first given by Lord Wilberforce). The case dealt with whether or not a stay of an action brought in England should be granted, upon Credit Suisse's application, relying upon an exclusive jurisdiction clause in favour of determination of the dispute by a Swiss Court and notwithstanding that the action was derived from what, as a matter of English (but not Swiss) law, was a champertous and therefore void assignment of a litigation claim. Lord Roskill referred to ***Geoprosco*** simply because it was cited by counsel in support of an argument that, not only the question of the champertous nature of the assignment had been engaged before the English courts but also the question of Credit Suisse's submission to the jurisdiction of the English court, a proposition which was rejected by Lord Roskill as untenable. There was no discussion of ***Geoprosco*** specifically as to whether or not it correctly stated the common law on submission for the purposes of enforcement of foreign judgments,

let alone the common law on submission as the concept might relate to the grant of an anti-suit injunction.

(ii) ***Tracomin SA v Sudan Oil Seeds Co Ltd*** [1983] 1 Lloyd's Rep 560; [1983] 1 ALL ER 404, where Staughton J, considering whether the defendant had submitted to jurisdiction in England, applied section 33 of the CJJA which had come into effect during the course of the hearing. He commented, in terms strictly to be regarded as *obiter dicta*, that had section 33 not come into effect, he would have been bound by the decision in ***Geoprosco*** and therefore would have held, contrary to his decision as compelled by section 33, that the defendant had voluntarily submitted to the jurisdiction. While, as Mr Rubin also noted, Staughton J's decision was upheld on appeal during conjoined hearings of cross-appeals[12], there was no reference to ***Geoprosco*** in the judgment of Sir John Donaldson M.R. dismissing that appeal, although the report of the judgments on the appeals indicate that it was cited to the Court. Unsurprisingly, the judgment of Donaldson M.R. turned only upon the meaning and effect of sections 32 and 33 of the CJJA.

(iii) In ***Pan Ocean Co Ltd v China-Bae Group Co Ltd*** [2019] 1 CLC 699 (Comm) at [44], Christopher Hancock QC sitting as a High Court Judge observed that the English rules on what amounted to submission to the jurisdiction of a foreign court had been "*modified*" by section 33 of the CJJA but were, before modification, as decided in ***Geoprosco.*** He therefore accepted that as a matter of Singaporean law, such an application to enforce an arbitration agreement "*clearly is a submission as a matter of Singaporean law"*, as there was no evidence of an equivalent to section 33 CJJA in that jurisdiction.

Here too however, it appears that the observations of the court must be regarded as having been made *obiter* because, as shown at [39] of the judgment, the question for Mr Hancock QC, as he there confirmed, was whether applying English (not Singaporean) principles of law there had been a submission to the jurisdiction of the Singaporean Courts. This, on top of the fact that the deemed submission to the

[12] ***Tracomin S.A. v Sudan Oil Seeds Ltd*** [1983] WLR 1026

Singaporean Court had not been the result merely of an application there for a stay, but (as revealed at 735 F-G) had been after a contested trial of the jurisdiction dispute all the way up to an appeal before the Singaporean Courts. That dispute was ultimately determined on its merits against the Claimant who was, on that basis, and as agreed between the experts on Singaporean law, deemed to have submitted to the jurisdiction there. The situation was therefore miles away from the territory covered by ***Geoprosco*** and even further away from any proper basis for the criticism of the anti-suit injunctive relief granted on the facts of the present case.

(iv) Mr Rubin also relies on the judgment of Carr J (as she then was) in the English case of ***Strategic Technologies Pte Ltd v Procurement of the Republic of China Ministry of National Defence*** [2020] 1 WLR 3388. I have found both Mr Rubin's submissions and Mr Chapman's response to be very helpful. However, Mr Chapman's analysis, which I accept, accords with my own reading of the case. It was a case involving (inter alia) the question whether a judgment obtained against the defendant[13] in Singapore was enforceable in the Cayman Islands by a judgment obtained here (and then whether the Cayman judgment was enforceable in England). Thus, a case involving the enforcement of a foreign judgment, not an anti-suit injunction, and this explains why ***Geoprosco*** arose for discussion.

104. In the case, an application had been made by the Republic of China Ministry of National Defence ("**MND"**) in Singapore which sought a stay of the proceedings pending arbitration or alternatively, on grounds of *forum non conveniens*. The MND's application was supported by a 15-page affidavit "*in which, among other things, the merits of the claimant's ["**ST's**"] claim as well as the factual basis of the [injunctive relief sought by ST] was challenged*" and the jurisdiction of the Singapore Courts was not challenged[14]. The Singapore Courts granted a stay for arbitration (not on the *forum non conveniens* grounds) but MND, quite remarkably, declined to arbitrate, and the case then proceeded in Singapore to judgment by default in favour of ST.

[13] The Ministry of National Defence of the Republic of China (Taiwan) (the "MND")
[14] Per Carr J, at [2020] 1 WLR 3388, [11]-[13]

105. Thus, this was a very different type of case from the present, one in which there could have been no doubt that the defendant MND had submitted to the jurisdiction of the Singapore Courts, and having regard to steps later taken in Cayman - including the entering into of a consent judgment by which it had agreed to payment of the sum of the Singapore judgment (plus accrued interest) from funds held in a Cayman bank account which it had managed to restrain in another action - had also clearly submitted to the jurisdiction of the Cayman Grand Court.

106. Despite that history, before the English Court MND resisted registration of the Cayman judgment under section 9 of the Administration of Justice Act 1920. In considering the question of registration, Carr J had to consider whether the Cayman Grand Court had had jurisdiction over MND as the judgment debtor. In this context, MND contended that the Cayman Grand Court was not a court of competent jurisdiction for the purpose of recognizing the Singapore judgment. This turned on "*whether or not, as a matter of Cayman law, the MND submitted or agreed to submit to the jurisdiction of the Singapore court*" (as noted at [88] of Carr J's judgment). This was including (but not only) because MND had applied for a stay of the proceedings in Singapore in deference to arbitration.

107. In her very careful discussion of the relevant case law[15], including ***Geoprosco,*** Carr J noted at [89] that:

> "*It was common ground: (i) that whether a defendant in the foreign proceedings had submitted to the jurisdiction of the Singapore court, was a matter to be decided by the Grand Court applying Cayman law; (ii) the Grand Court follows English law, unless there is good reason not to; (iii) there is no statute in Cayman that is the equivalent to sections 32 and 33 of the CJJA"* [emphases added].

108. After summarizing the parties' legal experts' evidence as to the law of Cayman on submission for the purposes of recognition and enforcement of foreign judgments, Carr J stated as follows:

[15] Even while her judgment was overruled before the Court of Appeal on whether, as she found, the English Administration of Justice Act allowed for the registration of a second judgment (the Cayman Judgment) in England, her analyses and findings were otherwise undisturbed.

"*101. It makes sense to start the analysis by considering Henry v Geoprosco … Both experts were clear that the Cayman Grand Court will follow English law unless there is good reason not to do so. As a Court of Appeal decision that has never been judicially overturned and was cited without adverse comment in Trendex [1982] AC 679*[16]*, it appears to be an authoritative statement of the common law position in England. It was negatived in English law by the introduction of sections 32 and 33 of the CJJA but there is no statutory equivalent in Cayman. Henry v Geoprosco is a decision that has been criticized in the textbooks and in other common law jurisdictions. But I note that the Court of Appeal was well aware of the criticism that its decision was likely to generate. (Thus, for example, it referred (at p 747d) to the comment in Dicey that the position being adopted [ie: as developed in Harris v Taylor (above)] was "revolting to common sense"). It expressed its conclusions as being required by a long line of authority, including Harris v Taylor (above).*

102. If this was a question of English common law it would be clear that the MND submitted to the jurisdiction of the Singapore Court without more by virtue of its application to stay the proceedings. [emphasis added].

103. However, the exercise in which I am engaged is to determine, as a matter of fact, what Cayman law is on this question. I accept the evidence of Mr Kish [(MND's expert)] that a Cayman Grand Court would consider Banco Mercantil [2003] CILR 343 and Masri [2010] 1 CILR 265. However, it is striking that Henry v Geoprosco is not referred to in either of those cases and I do not accept that Henry v Geoprosco can (or would) simply be disregarded. The key question is to understand whether the judgments of Levers J (in Banco Mercantil) and Jones J (in Masri) introduced an additional requirement to those set out in rule 43 of Dicey.[17]

[16] Earlier, Carr J (at [96]) expressly rejected the opinion of ST's expert that the "*House of Lords decision in Trendex Trading Corpn v Credit Suisse (above) referred to Henry v Geoprosco with approval*", going on to clarify there that "*the House of Lords did no more than refer to Henry v Geoprosco without disapproval*" .

[17] As paraphrased at [49]: "*At common law the English courts will recognize a common law action and register a foreign judgment in certain circumstances. A prominent feature will be that the foreign court should be a court of competent jurisdiction".*

104. I find that the effect of these judgments is not to have introduced such an additional requirement and that there is under Cayman law no separate prerequisite that a defendant should have substantively contested the substantive merits (through service of a defence and beyond) in a foreign jurisdiction before it will be found as a matter of Cayman Law to have submitted to that foreign jurisdiction. That is not part of the ratio in either Banco Mercantil (in which the defendant had only contested the jurisdiction of the court and it was clear had done nothing to contest the merits) or Masri (where the question for the Court related to the status of a receivership order of an English court) …

105. In light of the evidence I have heard, I find that Cayman law requires the court to look objectively at all the circumstances in the round to determine whether there has been a submission to the jurisdiction of the foreign court. Such submission can take place without a full contest on the merits.

106. Adopting that approach, I am quite satisfied that the MND submitted to the jurisdiction of the Singapore court as a matter of Cayman law.

107. Here, there was much more than a mere application by the MND for a stay. None of the events described below is necessarily on its own sufficient, but, taken together, they undoubtedly are:

(i) The MND entered an unqualified memorandum of appearance (in the Singapore action) on 8 July 1998.

(ii) The MND did not challenge jurisdiction by the deadline (of 22 July 1998) for challenging jurisdiction (under the Singapore Rules of Court).

(iii) On 7 August 1998 the MND applied by summons for orders not only for a stay pending arbitration or on the ground of ***forum non conveniens*** *but also for an extension of time for service of a defence and for discharge of the injunction that had been obtained by ST and an enquiry as to damages…*

(iv) On 12 August 1998 the MND filed a lengthy affidavit in support of its summons of 7 August 1998, which included evidence going to the substantive merits of ST's claim.

(v) The MND was partially successful in its applications, being granted the stay it sought pending arbitration. Its applications for discharge of the injunction and enquiry as to damages appear to have been refused on the merits.

(vi) On 29 January 1999 the MND's solicitors gave notice that they had ceased to act, giving an alternative address for service (within Singapore). It is hard to see how providing an address for service of proceedings or applications is consistent with disputing the jurisdiction of the Singapore court at that stage."

109. I am unable to accept Mr Rubin's submission that on the basis of Carr J's careful analysis it can be said that "*The English Court has found as a fact that Cayman law would apply the principle stated in Henry v Geoprosco as representing the common law*." Carr J did not so conclude, but instead held (as set out above but worth repeating here) that:

> "*In light of the evidence I have heard, I find that Cayman law requires the court to look objectively at all the circumstances in the round to determine whether there has been a submission to the jurisdiction of the foreign court. Such a submission can take place without a full contest on the merits*".

110. I consider that to be an entirely acceptable proposition and suitable for endorsement by this Court, especially in light of Carr J's enumeration of the several factors (going beyond a mere application by MND for a stay in Singapore without perhaps a full contest on the merits) which she regarded as amounting to submission to the jurisdiction there.

111. But that does not address full square the question whether ***Geoprosco*** should be followed in its holding that an application for a stay is, *ipso facto*, a basis for a finding of submission to a foreign court. I consider that the opportunity now presented to this Court should be taken to clarify the position.

112. In my view ***Geoprosco*** should not be regarded as representing the law of Cayman, either on submission for the purposes of the recognition and enforcement of foreign judgments, or on

submission to a foreign court as a consideration for the grant of an anti-suit injunction. My reasons are the following:

(i) As a decision of the English Court of Appeal, while of highly persuasive and respectable value, it is not binding on our Courts. Our Courts will depart where, as Carr J correctly noted (above), "*there is good reason to do so*."

(ii) While not overruled in England, as the foregoing review of the cases show, nor has it been expressly approved or applied by the House of Lords.

(iii) Having been "*negatived*" there (see per Carr J above) by Parliament by the passage of section 32 and 33 of the CJJA, not only is it no longer to be followed in England but its policy must have been regarded as unsound.

(iv) The Court of Appeal itself in ***Geoprosco*** had recognized the tautology of its reasoning – (why should a party merely by applying to a foreign court for a stay on the basis that it ought not to exercise jurisdiction over the proceedings in question because of an exclusive jurisdiction or arbitration clause be regarded as having submitted to its jurisdiction for all purposes of an action?) – but felt constrained to follow a settled, albeit doubtful, line of case authority.

(v) As Carr J observed (above) the case has been the subject of justified widespread criticism by judges, textbook writers and academics.

(vi) Even if a different view might be taken of its value as precedent in relation to submission in cases of recognition and enforcement of foreign judgments (the issue upon which it turned), I would not regard it as to be extended further to apply to a case like the present, involving the question of submission to a foreign court for the purposes of deciding whether it is proper to grant an anti-suit injunction. In this regard, I am satisfied that the proper test is as was accurately identified and applied by the Judge and as noted at [69] above, following, respectively ***Argyle Funds*** (per Field JA) and ***SAS Institute Inc*** (per Males LJ), in turn approving of the passage from ***Briggs, Civil Jurisdiction and Judgments*** (also above, at p550). As the Judge also notes at [195] of the Main Judgment, that test was accepted by the parties as the right test.

(vii) As this Court noted in ***Argyle Funds*** per Field JA (above at [80]), section 11 of the Grand Court Act provides, in effect, that subject to local laws, the Grand Court shall possess and exercise the like jurisdiction within the Islands which is vested in or capable of being exercised in England by the Senior Courts of England. It therefore arose for consideration at the hearing whether, in the context of the discussion on ***Geoprosco*** and in light of the advent of section 33 of the CCJA in England, the Grand Court should be regarded as having been able to exercise its jurisdiction by reference to section 33 of the CCJA as negating the rule in ***Geoprosco.***

While I am indebted to counsel on both sides for their industry in researching and providing detailed submissions on this issue, I do not think it is necessary to pronounce a view on it, in light of the reasons given above for departing from the rule. One bit of clarity emerging of note in this regard, however, is that it will be open to the Grand Court, when considering the adoption here of English non-binding but potentially persuasive case law going to the exercise of jurisdiction, to consider whether that case law has been doubted, whether by having been nullified or superseded by legislation in England, or otherwise.

113. At risk of over-extending an already lengthy judgment, I think it is also worth noting as fit for purpose in light of the debate enjoined on this appeal and the many leading cases there cited, the following passages from "***Raphael: The Anti-Suit Injunction***" 2nd ed 8.22 – 8.23, at p196:

> "8.22. *A voluntary submission to the jurisdiction of the foreign court may, in appropriate circumstances, amount to strong reason why a contractual injunction should not be granted [(eg: one based upon an exclusive jurisdiction clause)]. However, only a submission that would be truly voluntary from the perspective of English law will have a powerful effect, and if the injunction claimant has been doing what he can to resist the foreign court's assumption of jurisdiction, then any submission is less likely to be held against him. The foreign procedural framework may sometimes make submission unavoidable. Further, if the foreign court considers that a submission to its jurisdiction has been made, due to some merely technical step in the foreign proceedings, which the*

English court would not regard as a voluntary submission, then this is likely to be given less weight.

8.23 If the injunction claimant behaves in a way which is inconsistent with the contractual forum being the sole forum for dispute resolution, such as himself starting proceedings in the non-contractual foreign court, this can be a powerful factor against enforcing an exclusive forum clause. However, foreign proceedings whose purpose was only to obtain security for the main proceedings, or which are commenced merely to obtain protection against potential limitation difficulties, are not inconsistent with treating the contractual forum as the primary forum for resolution of the parties' substantive disputes."

114. Applying this learning to the circumstances of the present case, it cannot be said that the Judge was wrong in principle to regard SPV21's Order 39 and Section 4 Applications as genuine attempts "*to do what it can to resist the (Pakistan Court's) assumption of jurisdiction*" and as not being "*inconsistent with treating the contractual forum as the primary forum for resolution of the parties substantive disputes.*"

115. On the basis of all the foregoing, ***Geoprosco*** provides no basis, in my view, for interfering either with the Judge's conclusions in law or his exercise of discretion, in granting and continuing the anti-suit injunction in terms, as finally expressed, in the final Order and further explained in the August Directions.

116. It follows, in my view, that there is no proper basis for entertaining the alternative approach proposed by the Appellants in their **Ground 4**, which was not proposed to the Judge for consideration, inter partes, during the trial. Moreover, as the Judge noted in his email response of 14 August 2023 (the August Directions), a reformulation of his final order in the Amended Form along the lines of the formulation proposed by the Appellants with their written submissions dated 3 August 2023, (ie, deleting from the Plaint references to and reliance upon the SHA and the Appellants' rights as a KESP shareholder, even while allowing the Pakistan Action to continue against SPV21, the Managers, KEL and KESP) was not a disposition sought at the trial. It would therefore be *"(in)appropriate at this stage for the Court to seek to settle disputed amendments to*

pleadings in a foreign court (which in the absence of the agreement of all parties would require expert evidence and detailed further submissions), which in my view would not be consistent with the (O)verriding (O)bjective in view of the cost and delay involved."

117. For all of the foregoing reasons, I would dismiss the appeal.

Field JA:

118. I agree

Martin JA:

119. I also agree. The appeal is accordingly dismissed. Unless the Appellants file written submissions in opposition within 10 days of the date hereof, the Respondents shall have their costs of the appeal to be taxed on the standard basis, if not agreed. In the event the Appellants file such submissions, the Respondents will have 10 days thereafter to file written submissions in response. The court would then deal with the question of costs on the basis of the written submissions.

Michaelmas Term
[2025] UKPC 54
Privy Council Appeal No 0005 of 2025

JUDGMENT

IGCF SPV 21 Limited (Respondent) *v* Al Jomaih Power Limited and another (Appellants) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Sales
Lord Hamblen
Lord Leggatt
Lord Burrows
Dame Janice Pereira

JUDGMENT GIVEN ON
24 November 2025

Heard on 6 October 2025

Appellant
Iain Quirk KC
Leigh Mallon
(Instructed by Bedell Cristin and Steptoe International (UK) LLP)

Respondent
Graham Chapman KC
Scott Allen
(Instructed by Dillon Eustace)

LORD HAMBLEN:

1. The central issue in this appeal is when a party will be held to have submitted to the jurisdiction of a foreign court as a matter of Cayman Islands law.

2. The issue arises in the context of an application by the respondent for an anti-suit injunction restraining the appellants from pursuing proceedings commenced against the respondent in Pakistan. The appellants contend that no such injunction should be granted in circumstances in which the respondent has submitted to the jurisdiction of the Pakistan court.

3. The appellants submit that Cayman law reflects the common law of England and Wales as it stood in 1975, following the decision of the Court of Appeal in *Henry v Geoprosco International Ltd* [1976] QB 726 ("*Geoprosco*"). They describe the "rule" in *Geoprosco* in the following terms:

> "… where a defendant voluntarily appears before a foreign court to invite the court not to exercise its jurisdiction (under its own local laws) it will have submitted to the jurisdiction. This includes applying for relief (interim or otherwise) in the foreign proceedings, or applying for a stay in those proceedings in favour of another jurisdiction."

4. That rule was reversed in England and Wales by section 33 of the Civil Jurisdiction and Judgments Act 1982 (see para 38 below). There has been no equivalent legislation in the Cayman Islands and the appellants accordingly submit that the rule in *Geoprosco* still applies.

5. The Court of Appeal of the Cayman Islands held that *Geoprosco* should not be held to represent the law of Cayman and that there is good reason not to follow it. It decided that in all the circumstances the judge had been correct to conclude that there had been no submission to the jurisdiction of the Pakistan court by the respondent and it upheld his decision to grant an anti-suit injunction. The appellants contend that it was wrong so to conclude.

The factual background

6. The appellants and the respondent are shareholders in KES Power Ltd ("KESP"), a company incorporated in the Cayman Islands. The respondent holds 53.8% of the shares

and the appellants hold 46.2%. KESP in turn holds a 66.4% interest in K-Electric Limited ("KEL"), a valuable Pakistan incorporated utility company.

7. KEL is a company of national importance in Pakistan and is subject to statutory and regulatory control. KEL was publicly owned by the Government of Pakistan until it was partially privatised in 2005. The privatisation process was in part governed by a Share Purchase Agreement dated 14 November 2005 ("SPA"). Pursuant to the SPA, KESP acquired a majority shareholding in KEL from the Government of Pakistan. The SPA is governed by the laws of Pakistan and provides for the courts of Pakistan to have exclusive jurisdiction (clause 8.3).

8. On 26 February 2008, the respondent was incorporated in the Cayman Islands by the Abraaj Group, a private equity firm, for the purpose of acquiring an interest in KESP on behalf of itself and on behalf of the Infrastructure and Growth Capital Fund ("IGCF").

9. On 15 October 2008, KESP, the appellants and the respondent entered into a Shareholders' Agreement ("SHA") and a Subscription Agreement by which the respondent became a shareholder in KESP. The SHA and the Subscription Agreement govern the acquisition of the shares in KESP by the respondent and the regulation of the parties' conduct in relation to both KESP and KEL, including in respect of the composition and appointment process to the respective boards of both KESP and KEL. The SHA is governed by English law (clause 25.1).

10. On 30 April 2009, the SHA was amended by way of a Deed of Amendment. On 5 January 2021, the SHA was further amended by way of a further Deed of Amendment ("Second Deed of Amendment"). Clause 25.2 as amended by the Second Deed of Amendment is an exclusive jurisdiction clause and requires the parties to litigate any disputes before the courts of England and Wales or the Grand Court of the Cayman Islands ("Grand Court").

11. Abraaj Investment Management Limited (in official liquidation) ("AIML") is the registered shareholder of the sole voting share in the respondent. On 3 August 2022, AIML agreed to sell its share to a British Virgin Islands registered special purpose company called Sage Venture Group Limited ("Sage").

12. In October 2022, the respondent appointed new directors to the board of KESP and attempted to appoint new directors to the board of KEL. It is the respondent's position that the appointments were made in accordance with its contractual rights under the SHA. The appellants were concerned that a change of control of the respondent had occurred, or was occurring, which would in turn give rise to a change of control of KESP and/or KEL and contended that any such change of control, including by way of the attempted

appointments to KEL, was in breach of certain agreements, including the SPA and the SHA, and which in turn could affect the national security interests of Pakistan.

13. On 21 October 2022, the appellants obtained an ex parte interim injunction against the respondent in the High Court of Sindh in Pakistan ("the Pakistan Proceedings") which prohibited any changes to the board of KEL ("the Interim Injunction").

14. On 3 November 2022, the respondent issued two applications in the Pakistan Proceedings ("the Pakistan Applications"). The first application was issued pursuant to section 4 of the Pakistan Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 to challenge the jurisdiction of the Pakistan Court to grant relief and in which a stay of the Pakistan Proceedings in favour of arbitration was sought ("the Section 4 Application"). The second application was issued pursuant to Order 39 Rule 4 of the Pakistan Civil Procedure Code and sought to recall or modify the Interim Injunction to allow for the nomination of directors to the board of KEL in proportion to the shareholding in KESP ("the Order 39 Application"). The Pakistan Applications are yet to be determined and the Interim Injunction remains in force.

15. In response to the Pakistan Proceedings, the respondent filed proceedings in the Grand Court on 24 November 2022 applying for an anti-suit injunction to restrain the appellants from continuing the Pakistan Proceedings against the respondent and from acting upon the Interim Injunction.

16. On 20 July 2023, Segal J delivered judgment in favour of the respondent and found that the appellants were contractually bound by the SHA to litigate any relevant disputes with the respondent before the courts of the Cayman Islands or the courts of England and Wales. On 16 August 2023, Segal J made an order which granted the respondent an injunction restraining the appellants from continuing the Pakistan Proceedings. The appellants appealed.

17. On 2 July 2024, the Court of Appeal, Smellie JA (Martin and Field JJA agreeing), delivered judgment dismissing the appeal.

18. On 10 January 2025, the Court of Appeal granted the appellants leave to appeal to the Privy Council.

The judgment of Segal J

19. Before the judge, it was common ground that the relevance of a submission to the jurisdiction of a foreign court to the grant of an anti-suit injunction in relation to

proceedings before that court is fairly summarised in *Briggs, Civil Jurisdiction and Judgments*, 6th ed (2015) at p 550, approved by Males LJ in *SAS Institute Inc v World Programming Limited* [2020] 1 CLC 816 at para 114. It is there stated:

> "No reported case holds, clearly and precisely, that an applicant will forfeit the right to ask for an injunction if he has already submitted to the jurisdiction of the foreign court. But if the applicant has taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction, it will be more difficult to persuade an English court that the respondent should now be restrained from continuing with those proceedings. … But the principle of the matter seems reasonably clear: an applicant who has already submitted to the jurisdiction of a foreign court should find that this is a substantial obstacle to his obtaining an anti-suit injunction from an English court."

20. It was therefore common ground that the issue of submission depended on whether the respondent had "taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction" and the judge so directed himself (at para 195).

21. It was also common ground that this was an issue governed by Cayman rather than Pakistan law, but that expert evidence on the law regarding submission to jurisdiction in Pakistan can assist, for the purpose of the Cayman law analysis, in assessing the significance and effect of steps taken in the Pakistan Proceedings (at para 194). Both sides called such evidence.

22. The focus of the appellants' case before the judge was on the Order 39 Application. It was submitted that this sought positive relief in relation to the appointment of the KEL directors and thereby involved a step in the Pakistan Proceedings which went beyond a challenge to that court's jurisdiction.

23. The judge, however, accepted the respondent's case, supported by their expert, Mr Shaukat, that the Order 39 Application was in substance only contesting the jurisdiction of the Pakistan Court, in reliance on the provisions of the SHA (see paras 201-202). The judge found as follows (at para 204):

> "In this case, it appears to me, having regard to the drafting and terms of the Order 39 Application and all the expert evidence, that the [respondent] was using the Order 39 Application to challenge the granting of the injunction based on the [appellants'] obligation to submit disputes to arbitration and the references to the Pakistan Court permitting the appointment of

> the [respondent's] nominees as KEL directors to proceed should be seen as relief that would flow as a consequence of the application being successful and of a stay being granted and not as substantive relief sought to enforce the [respondent's] right under the SHA to appoint the KEL directors. The drafting of the Order 39 Application, taken as a whole, makes it clear that the [respondent] relies on the arbitration clause and wishes to have the dispute with the [appellants] submitted to arbitration in accordance with the clause. It does not show that the [respondent] wished (and had elected) to have its substantive rights and claims in relation to the appointment of the KEL directors be adjudicated and dealt with by the Pakistan Court."

24. He summarised the evidence and analysis of Mr Shaukat (at paras 205-206) and found it to be "cogent and reasonable and consistent with my own assessment and analysis of the impact and effect of the steps taken by the [respondent] in the Pakistan Proceedings in general and of the Order 39 Application in particular" (at para 207). He concluded that the respondent "has not taken a step in the Pakistan Proceedings which goes beyond a challenge to that court's jurisdiction or conducted itself in a manner that was inconsistent with the contractual fora being the sole fora for the resolution of the dispute with the [appellants]" (at para 202).

25. The appellants did not cite or rely upon *Geoprosco* before the judge.

Geoprosco

26. In *Geoprosco*, Mr Henry, a Canadian, resident in Alberta, brought proceedings in the Supreme Court of Alberta, against the defendant, Geoprosco International Ltd, a Jersey company, seeking damages for wrongful dismissal in breach of a service agreement entered into in Canada. It was not in dispute that the Alberta court had jurisdiction to order service out of the jurisdiction, but Geoprosco sought to set aside service out on the grounds that the affidavit in support of the motion was defective and that Canada was not the forum conveniens; alternatively, it sought a stay of proceedings on the ground of the arbitration clause in the service agreement. Geoprosco's application was dismissed and on appeal that decision was upheld by the Court of Appeal of Alberta. Thereafter Geoprosco took no further part in the proceedings and Mr Henry obtained judgment in default. He then sought to enforce that judgment in England. Whether Geoprosco was bound by the judgment depended on whether it had submitted to the jurisdiction of the Canadian Court. The Court of Appeal (Roskill LJ with whose judgment Cairns and Browne LJJ agreed) held that Geoprosco had so submitted. The core reasoning of the judgment is accurately summarised in the headnote as follows:

> "…since the defendants had voluntarily appeared before the Canadian court to invite it not to exercise the discretion which it possessed under its own law to allow service out of the jurisdiction they had submitted to the jurisdiction of the Supreme Court of Alberta and were, accordingly, bound by the judgment…"

27. The Court of Appeal considered that it was bound to follow the earlier Court of Appeal decision in *Harris v Taylor* [1915] 2 KB 580. In that case, the plaintiff, Mr Harris, sought to enforce in England a judgment of the Isle of Man High Court in his favour whereby he had recovered damages from the defendant, Mr Taylor, for criminal conversation with the plaintiff's wife and for the loss of her society. The plaintiff had issued his writ in the Isle of Man and had sought and obtained leave to serve that writ out of the jurisdiction on the defendant in England. The defendant entered what was described as a "conditional" appearance and sought to set aside the service upon him on three grounds: first, that the rules of the Isle of Man High Court did not authorise service out of the jurisdiction upon him; secondly, that no cause of action arose within the jurisdiction of that court; and, thirdly, that he was never domiciled in the Isle of Man but was always domiciled in England. The defendant's application was dismissed, he played no further part in the action and judgment in default was given against him. It was held by Bray J, and affirmed on appeal, that the judgment was enforceable because the defendant had voluntarily submitted to the jurisdiction of the Isle of Man High Court.

28. Roskill LJ set out what he considered was decided in that case in the following terms (at p 738G-H):

> "It seems to us of crucial importance, when considering the ratio decidendi of *Harris v Taylor* [1915] 2 KB 580 to observe, first, that the Isle of Man High Court had by its own local law jurisdiction over the defendant; secondly, that that court had a discretion whether or not to exercise that jurisdiction over the defendant; thirdly, that that court having heard a plea by the defendant that it could not and should not do so decided both that it could and should exercise that jurisdiction; fourthly, that it was not argued in the English action that that decision was in any way wrong by the local law, and, fifthly, that the defendant, having voluntarily invited the Isle of Man High Court, by the appearance which he made, to adjudicate upon his submission that that jurisdiction of that court could not and should not be exercised over him and having lost, had voluntarily submitted to the jurisdiction of that court so that thereafter the defendant could not be heard to say that that court did not have jurisdiction to adjudicate upon the entirety of the dispute between him and the plaintiff."

29. Roskill LJ noted that the decision in *Harris v Taylor* had been "much criticised" and that it had been "strongly and frequently criticised by writers or editors of textbooks of great distinction" (at p 735E-F). As stated in the first edition of *Dicey* on *The Conflict of Laws* (1896) ("*Dicey*"): "A defendant who appears only to protest against the jurisdiction of a Court manifestly does not submit himself to it" (p 376). The first edition of *Cheshire* on *Private International Law* (1935) ("*Cheshire*") was to similar effect: "On principle it would seem that appearance limited to a protest against the foreign jurisdiction cannot properly be said to constitute submission" (p 494). To the extent that *Harris v Taylor* decided otherwise, both leading textbooks were highly critical of it. The first edition of *Cheshire* stated that it "reduces to an absurdity the underlying principle upon which the English doctrine of the [sic] jurisdiction has always been rested" (p 495). The ninth edition of *Dicey* (1973) referred to it as being "revolting to common sense" (p 996).

30. Despite these trenchant criticisms, Roskill LJ considered that the court was bound to follow *Harris v Taylor*. He concluded that it supported the following proposition of law (at p 747A):

> "The English courts will enforce the judgment of a foreign court against a defendant over whom that court has jurisdiction by its own local law (even though it does not possess such jurisdiction according to the English rules of conflict of laws) if that defendant voluntarily appears before that foreign court to invite that court in its discretion not to exercise the jurisdiction which it has under its own local law."

31. Applying that statement of law to the facts of the case, the Court of Appeal held that Geoprosco had submitted to the jurisdiction of the Canadian Court by:

> (1) Applying for a stay under section 4(1) of the Arbitration Act of Alberta, coupled with the submission that the arbitration clause was a *Scott v Avery* clause (ie a clause which provides that no action shall be brought until an arbitration award has been made) (p 750A-C).
>
> (2) Applying to set aside the order for service out on the ground that the affidavit in support of the motion was defective (the "second" ground) and that Canada was not the forum conveniens (the "third" ground) (p 750D-E). At p 734E Roskill LJ described these grounds as inviting "the Supreme Court of Alberta to divest itself of the jurisdiction which [the defendant] accepted that that court possessed".

32. The Court of Appeal also held that neither *Harris v Taylor* nor any other case had decided "whether where a defendant appears in a foreign court solely to protest against

the jurisdiction of that court (whether or not by its own local law that court possesses such jurisdiction) and such protest fails and judgment is then given against him, such appearance under protest amounts to a voluntary submission to the jurisdiction of that court" (p 747B-C). The court therefore drew a distinction between challenges to the existence of jurisdiction and to the exercise of an admitted jurisdiction.

33. The drawing of such a distinction led to immediate criticism. For example, Lawrence Collins, in an article entitled "Harris v Taylor Revived" (1976) 92 LQR 268, commented as follows:

> "[None of the original judgments in *Harris v Taylor*] draws the distinction, which in *Henry v Geoprosco International* was said to be so crucial to the decision in *Harris v Taylor*, between a protest against the *existence* of jurisdiction and its *exercise*" (p 276).

> "…in any event it is not a realistic distinction. Even in the case of a protest against the English jurisdiction, there is no clear distinction between the existence and exercise of jurisdiction. …The true basis of the decision in *Harris v Taylor* is that the defendant was treated as having entered a conditional appearance in the foreign court which became unconditional when his challenge to its jurisdiction failed, and that such an unconditional appearance is a submission. … That reasoning is fallacious, because in deciding what is a submission in the international sense the English court should not be influenced by what amounts to an appearance in domestic English procedural law. … The distinction between the existence and exercise of jurisdiction is blurred in English law and unknown in many systems and does not provide a rational basis for a rule of private international law" (pp 285 to 287).

34. The tenth edition of *Cheshire* (1979) stated that the distinction "cannot be sensible" and that it "bisects jurisdictional issues" (p 640). The latest fifteenth edition (2017) maintains that criticism and describes it as "illogical", "unjustifiable" and leading to "the absurd result that, in certain circumstances, a defendant who appeared before a foreign court to protest that it had no jurisdiction over him would be deemed to have submitted to that court's jurisdiction" (p 534).

35. The Board agrees with these criticisms. The distinction is not only difficult to draw but it is also both unrealistic and irrational. If the substance of an application is a challenge

to the jurisdiction of a court, it should not matter whether that challenge is to the existence or to the exercise of that jurisdiction. Both amount to a protest against the assumption of jurisdiction. A classic example of the falsity of the distinction is an application for a stay of proceedings in favour of arbitration. This is clearly a protest against rather than an acceptance of jurisdiction. Such a challenge does not deny that the court has jurisdiction. It asserts that, in the light of the parties' agreement to arbitrate, the court should exercise its jurisdiction to stay the proceedings before it. The same applies where a stay is sought in favour of proceedings before another court because of a jurisdiction clause.

36. The drawing of fine distinctions such as these had already been subject to pointed criticism by the Court of Appeal in *In re Dulles' Settlement (No 2)* [1951] Ch 842. As Denning LJ stated at p 850:

> "I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all."

37. The widespread criticism of the decision in *Geoprosco* led to its reversal by statute in section 33 of the Civil Jurisdiction and Judgments Act 1982 ("the CJJA"). When introducing the substantive Bill in Parliament Lord Hailsham LC explained the need for this provision as follows:

> "Further down, Clause [33] reverses the law of England and Wales and Northern Ireland as stated by the Court of Appeal in a case called *Henry v Geoprosco*, decided in [1975], on which my predecessor received representations from the two branches of the legal profession. As I mentioned earlier, one of the grounds on which the jurisdiction of a foreign court will be recognised for the purposes of enforcement here is that the parties submitted to the jurisdiction. But of course the question then arises as to what is submission to the jurisdiction and, as stated in *Henry v Geoprosco*, the law stretches the idea of implied submission too far. In that case it was held that a defendant who appeared in a foreign court to argue that that court should not entertain the case should, if the contention were rejected, be treated as having submitted to the jurisdiction.

> Clause [33] will now prevent this." (Hansard (HL Debates), 3 December 1981, col 1133)

38. Section 33 of the CJJA provides:

> "(1) For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely—
>
> (a) to contest the jurisdiction of the court;
>
> (b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;
>
> (c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings."

39. Other common law countries have adopted legislation to similar effect to section 33 of the CJJA: see, for example, sections 7(5) and 11 of the Foreign Judgments Act 1991 (Australia); the Reciprocal Enforcement of Foreign Judgments Act 1959 (as amended) (Singapore); section 1E of the Protection of Businesses Act 99 of 1978 (as inserted by the Protection of Businesses Amendment Act 1987) (South Africa); and section 4 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46) (Hong Kong).

40. In some other common law jurisdictions, there has been no legislation but the courts have declined to follow *Geoprosco*. A striking example of this is the 2012 British Virgin Islands decision of Bannister J in *Star Reefers Pool Inc v JFC Group Co Ltd* (unreported) 2 April 2012 in which he stated:

> "6. There are obiter dicta of the English Court of Appeal to the effect that an appearance under protest solely for the purpose of challenging the jurisdiction of a foreign Court is not to be

treated by the English Court as a submission to the jurisdiction of that Court. (fn: *Henry v Geopresco International Ltd* [1976] 1 QB 726 at 748F. The Court of Appeal did not explain what form such an application would take). There is clear English Court of Appeal authority that an appearance for the purpose (whether solely or in addition to a challenge to the jurisdiction of the foreign Court) of persuading the foreign Court that it should not exercise jurisdiction over the defendant will amount to a voluntary submission. (fn: *Harris v Taylor* [1915] 2 KB 580, 587; *Henry v Geopresco* (supra) at 747A, 750 C-D) There are also English Court of Appeal obiter dicta to the effect that if a defendant appears conditionally in order to persuade the foreign Court to set aside its order permitting service upon him outside its jurisdiction and that application fails, he will be treated as having submitted to its jurisdiction, apparently on the grounds that in applying to set aside an order for service out the applicant is inviting the Court to exercise a discretion. (fn *Henry v Geopresco* (supra) at 748G and 747E)

7. These authorities and dicta are no longer part of the law of England, having been abrogated by the United Kingdom Civil Jurisdiction and Judgments Act 1982. No such legislation exists here in the BVI. Ms di Iorio submits that the cases referred to in the preceding paragraph, although not binding on me, comprise highly persuasive authority and that I should apply them in applications made here under the Act. If I do, there can be no doubt that JFC's application to Andrew Smith J for a stay on forum grounds will be caught by the second of the two propositions which I have extracted from those authorities.

8. So far as the researches of Ms di Iorio have been able to establish, there is no authority dealing with the topic in this jurisdiction. I have come to the conclusion that I should not follow these decisions here. The reason is that they have now become dead letters in the jurisdiction in which they previously applied and that for me to apply them here, where they are not binding, would be to introduce into the law in this jurisdiction an archaic rule which would throw English and BVI practice and procedure out of alignment…In my judgment it would be a retrograde step and contrary to the spirit of these provisions of our legislation, for me to introduce into the law of the BVI rules which ceased to be part of the law of England thirty years ago.

> 9. Asking a foreign Court to set aside an order for service out on jurisdictional grounds or to divest itself of jurisdiction on forum grounds cannot, except by resort to the most pedantic logic, be seen as a submission to the jurisdiction of that Court. No litigant would by the light of nature regard that as being the case…."

41. The courts of Bermuda have adopted a similar position to those of the BVI – see the decision of the Court of Appeal of Bermuda in *Kader Holdings Company Limited v Desarrollo Inmobiliario* [2013] CA (BDA) 13 CIV, in which the *Star Reefers* decision was referred to approvingly by Bell (Acting JA) who stated (at para 24):

> "It seems to me sensible that the position in Bermuda should mirror that in England [as amended by section 33 of the CJJA], as well as that in other common law jurisdictions, and for my part I do not understand the rationale for applying any different test. I therefore turn to consider the different cases as set out in *Dicey, Morris & Collins*."

42. The appellants were not able to point to a single common law jurisdiction in which the rule in *Geoprosco* has been followed.

The decision of the Court of Appeal

43. Before the Court of Appeal, the appellants did not challenge the conclusion of the judge on submission to the jurisdiction on the basis of the evidence and the agreed legal position before him. They now contended, however, that that agreed legal position was wrong and that a contrary decision should be reached because of the rule in *Geoprosco*. The Court of Appeal summarised the position as follows (at para 71):

> "On the appeal, the Appellants have not sought to suggest that the Judge was wrong to have arrived at that conclusion on the issue of submission to the Pakistan Court, on the basis of the evidence before him and the case law as it was presented to him. Instead, the Appellants now argue that the Judge's conclusion that SPV21 had 'not taken a step in the Pakistan Proceedings which goes beyond a challenge to the court's jurisdiction or conducted itself in a manner that was inconsistent with the contractual fora' was plainly wrong as a matter of Cayman law because the Judge misdirected himself by failing to apply the rule in *Henry v Geoprosco* [1976] 1 QB 726 (CA). This rule would apply such that, in summary, simply

> by having applied by way of the section 4 Application for a stay in Pakistan in favour of an arbitration under the contract between the parties - the SHA - or for relief pursuant to Order 39 rule 4 of the CPC, SPV21 must be regarded as having submitted to the jurisdiction of the Pakistan Court."

44. The court did not accept that *Geoprosco* reflected Cayman law on submission to the jurisdiction but held that in any event it should not be followed. As the court stated at para 112:

> "In my view *Geoprosco* should not be regarded as representing the law of Cayman, either on submission for the purposes of the recognition and enforcement of foreign judgments, or on submission to a foreign court as a consideration for the grant of an anti-suit injunction. My reasons are the following:
>
> > (i) As a decision of the English Court of Appeal, while of highly persuasive and respectable value, it is not binding on our Courts. Our Courts will depart where… '*there is good reason to do so*.'
> >
> > (ii) While not overruled in England, as the foregoing review of the cases show, nor has it been expressly approved or applied by the House of Lords.
> >
> > (iii) Having been '*negatived*' there…by Parliament by the passage of section 32 and 33 of the CJJA, not only is it no longer to be followed in England but its policy must have been regarded as unsound.
> >
> > (iv) The Court of Appeal itself in *Geoprosco* had recognized the tautology of its reasoning – (why should a party merely by applying to a foreign court for a stay on the basis that it ought not to exercise jurisdiction over the proceedings in question because of an exclusive jurisdiction or arbitration clause be regarded as having submitted to its jurisdiction for all purposes of an action?) – but felt constrained to follow a settled, albeit doubtful, line of case authority.

> (v) …the case has been the subject of justified widespread criticism by judges, textbook writers and academics."

45. The court concluded that the judge had identified and applied the proper test and that there was no error in his approach or conclusion. As stated at para 114:

> "…it cannot be said that the Judge was wrong in principle to regard SPV21's Order 39 and Section 4 Applications as genuine attempts '*to do what it can to resist the (Pakistan Court's) assumption of jurisdiction*' and as not being '*inconsistent with treating the contractual forum as the primary forum for resolution of the parties substantive disputes.*'"

Is the Court of Appeal decision wrong?

46. In order to succeed on the appeal, the appellants need to show that the Court of Appeal was wrong to determine that *Geoprosco* should not be followed and to persuade the Board that *Geoprosco* is, and should be, Cayman law. This is ambitious.

47. It is well established and was not in dispute that the Cayman courts may decline to follow English court decisions where there is good reason to do so. Relevant authorities were considered in detail by Doyle J in *In the Matter of HQP Corporation* Limited [2023] (2) CILR 203 (at paras 24 to 38, and 70 to 73 in respect of the Cayman Islands, and paragraphs 39 to 69 in respect of other common law jurisdictions). At para 70(3) he set out, by reference to case law, a number of examples of what may constitute good reason. It is striking that a number of them apply in this case, such as:

(1) "(f) if the English decision has been abandoned or invalidated by the UK Parliament or not followed in other great common law courts such as the High Court of Australia".

(2) "(i) where the English decision has been 'much criticized' and can be said to 'affront common sense and any sense of justice'.

(3) "(j) where it is undesirable to 'cling to obsolete English common law cases which have ceased to be authoritative in England and Wales'".

Other potentially applicable reasons are "(e) there is some 'compelling reason' not to follow it…such as the reasoning being 'fundamentally flawed'" and "(n) if the English decision is obviously wrong or otherwise not persuasive".

48. In their written case, the appellants sought to support the reasoning in *Geoprosco* on the basis that otherwise the defendant has it both ways. If the defendant succeeds in a challenge to the jurisdiction before the foreign court, then that is the end of matter; but even if the challenge fails the defendant is left free to raise a jurisdictional objection at the enforcement stage. That is, however, true of every case in which a defendant decides to challenge jurisdiction rather than playing no part in the proceedings. *Geoprosco* recognises, however, that a challenge to the existence of jurisdiction is not a voluntary submission. The argument therefore proves too much. In any event, a decision by a foreign court that it has and should exercise jurisdiction under its own law should not and does not mean that a judgment in the exercise of that jurisdiction is binding as a matter of domestic law.

49. In their oral submissions, the appellants changed their case yet again. They argued that all that *Geoprosco* decided was: (i) a challenge to jurisdiction is not a submission, (ii) it is not necessary to join issue on the merits for there to be a submission, and (iii) a stay application may be a submission if it goes beyond a challenge to jurisdiction (as, for example, where a *Scott v Avery* clause is relied upon). The question is simply whether there has been a challenge which goes beyond one to jurisdiction. In this connection, it was submitted that a forum conveniens challenge does not do so (although *Geoprosco* clearly decided otherwise) and that the application which did so in this case was the Order 39 application, not the stay application (although both were contended to fall foul of the rule in *Geoprosco* before the Court of Appeal and in the appellants' written case). The Order 39 Application sought to allow the respondent to appoint directors and should be regarded as a positive step in the proceedings. The judge had erred in failing to so conclude and had wrongly focused on whether the application involved joining issue on the merits.

50. The Board rejects this revised case. It is premised on a wrong interpretation of *Geoprosco* and what it decided. It is also contrary to the general understanding of what *Geoprosco* decided, the basis upon which legislative steps have been taken to reverse it, and the appellants' own case hitherto. Having made one volte-face in these proceedings by advancing an entirely new case before the Court of Appeal, the appellants now seek to do so again. This is not how appellate litigation should be conducted. The decision in *Geoprosco* turned on the false distinction between challenges to the existence and to the exercise of jurisdiction. No such distinction should be drawn.

51. In this case, the judge found that no steps were taken in the Pakistan proceedings which went beyond a challenge to jurisdiction. The Order 39 Application was to be seen as seeking relief that would flow as a consequence of a successful challenge to the

jurisdiction rather than as a claim for substantive relief (see para 204). Contrary to the appellants' submission, the judge did not direct himself that going beyond a challenge to the jurisdiction involves a joining of issue on the merits. There is no basis for going behind what the judge found and the findings which he made mean that there was no submission to the jurisdiction, even on the appellants' revised case.

52. Even if *Geoprosco* would otherwise represent the common law of Cayman, the Court of Appeal had good reason not to follow it and gave cogent reasons for not doing so. They did not err in law. Their decision was justifiable and indeed correct. *Geoprosco* has rightly been reversed in England and Wales and, by statute or case law, it has been reversed or not followed in other common law jurisdictions. It should form no part of Cayman law.

What amounts to a submission to jurisdiction?

53. So far, the Board has been focusing on what Cayman law is not; it will now address what Cayman law is.

54. The Board considers that Cayman law on submission to jurisdiction should reflect what the law now is in England and Wales. As was common ground, the relevant principles were set out by Lord Collins in his judgment in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 ("*Rubin"*):

> "159. The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have 'taken some step which is only necessary or only useful if' an objection to jurisdiction 'has been actually waived, or if the objection has never been entertained at all': *Williams & Glyn's Bank plc v Astro Dinamico Cia Naviera SA* [1984] 1 WLR 438, 444 (HL) approving *Rein v Stein* (1892) 66 LT 469, 471 (Cave J).
>
> 160. The same general rule has been adopted to determine whether there has been a submission to the jurisdiction of a foreign court for the purposes of the rule that a foreign judgment will be enforced on the basis that the judgment debtor has submitted to the jurisdiction of the foreign court: *Adams v Cape Industries plc* [1990] Ch 433, 459 (Scott J) and *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 96-97 (Thomas J); see also *Desert Sun Loan Corpn v Hill* [1996] 2 All ER 847, 856 (CA); *Akande v Balfour Beatty Construction Ltd* [1998] IL Pr 110; *Starlight International Inc v Bruce* [2002]

> IL Pr 617, para 14 (cases of foreign judgments) and *Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader)* [1996] 2 Lloyd's Rep 585, 601 (a case involving the question whether the party seeking an anti-suit injunction in support of an English arbitration clause had waived the agreement by submitting to the jurisdiction of the foreign court).
>
> 161. The characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on English law. The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts."

55. As Lord Collins made clear, the same general rule applies regardless of the context in which the issue of submission to the jurisdiction of the foreign court arises. The rule is the same in anti-suit injunction cases as it is in enforcement cases – see Lord Collins' citation in para 160 of *Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader)* [1996] 2 Lloyd's Rep 585, 601 ("*The Eastern Trader*"), an anti-suit injunction case.

56. The general rule can be expressed in positive rather than negative terms. In the *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 96-97 ("*Akai*") case, also cited in para 160 of *Rubin*, Thomas J put it as follows (at p 97 LHC):

> "A step that is not consistent with or relevant to the challenge to the jurisdiction or obtaining a stay will usually be a submission to that jurisdiction."

57. It is the conclusion of the Board that the law of Cayman is as stated in *Rubin*.

58. The judge found that no step had been taken which went beyond a challenge to jurisdiction. That means that the respondent did not take any step which was only necessary or only useful if it was waiving an objection to jurisdiction. As both courts below held, there was no submission to the jurisdiction of the Pakistan court. If so, then the basis of the appellants' challenge to the decision to grant an anti-suit injunction falls away.

Conclusion

59. For all the reasons set out above, the Board will humbly advise His Majesty that the appeal be dismissed.

Neutral Citation Number: [2025] CIGC (FSD) 113

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 237 of 2023 (IKJ)

BETWEEN

(1) ABRAAJ SPV 108 LIMITED
(2) ABRAAJ SPV 127 LIMITED

AND

IGCF SPV 21 LIMITED

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 262 of 2023 (NSJ)

BETWEEN

(1) SHAN-E-ABBAS ASHARY
(2) AL-JOMAIH POWER LIMITED
(3) DENHAM INVESTMENTS LTD

AND

(1) KES POWER LIMITED
(2) IGCF SPV 21 LIMITED
(3) KP CORPORATE DIRECTOR LIMITED
(4) MARK SKELTON LIMITED
(5) SHAHERYAR ARSHAD CHISHTY
(6) SAMEER ARSHAD CHISHTY
(7) DARIN DANIEL BAUR
(8) ADEEB AHMAD

Appearances:	**Mr Niall Dodd, Mr Conal Keane and Mr Alan Quigley of Dillon Eustace Cayman** **Mr Iain Quirk KC instructed by Mr Jonathan Stroud and Ms Vered Mazin of Bedell Cristin** **Ms Clare Stanley KC instructed by Mr Barnaby Gowrie, Ms Jamie Brislane and Ms Lauren Vernon from Walkers (Cayman) LLP]**
Before:	**The Honourable Justice Segal**
Heard:	**4 November 2025**
Draft Ruling:	**14 November 2025**
Final Ruling:	**28 November 2025**

NOTE OF RULING

Introduction

1. On 4 November 2025, I heard an application (the ***Discovery Application***) by the Second and the Fourth to Eighth Defendants (the ***SPV 21 Defendants***) in FSD 262 of 2023 (the ***Ashary Proceedings***) seeking orders relating to what they claimed to be the defective discovery conducted to date by the plaintiffs in the Ashary Proceedings (the ***Ashary Plaintiffs***). I set out below, with brief reasons, the decisions I have made in relation to the Discovery Application and attach the form of order that I intend to make.

2. I also heard applications for case management directions in relation to the further procedural steps to take place up to the trial of both the Ashary Proceedings and FSD 237 of 2023 (the ***SPV 21 Proceedings***) and as regards the conduct of and date for listing the trial(s) in both actions. I also set out below, once again with brief reasons, the decisions I have made.

3. At the hearing, Mr Niall Dodd of Dillon Eustace appeared for the SPV 21 Defendants and IGCF SPV 21 Limited (***SPV 21***) as the defendant in the SPV 21 Proceedings, Mr Iain Quirk KC appeared for the Ashary Plaintiffs (instructed by Bedell Cristin) and Ms

Clare Stanley KC appeared for Abraaj SPV 108 Limited and Abraaj SPV 127 Limited (the ***Abraaj Parties***) (instructed by Walkers (Cayman) LLP).

The Discovery Application

4. I reject the submission that Mr Stroud's First Affidavit (***Stroud 1***) is inadmissible. GCR O.41, r.5(2) permits an affidavit to be sworn by an attorney for the purpose of being used in an interlocutory proceeding which contains statements of information and belief with the sources and grounds, thereof. In my view, Stroud 1 complies with this sub-rule.

5. However, in my view the account given by Mr Stroud in Stroud 1 of the discovery exercise and process conducted by the Ashary Plaintiffs and their legal advisers in response to the questions raised by the SPV 21 Defendants is insufficiently particularised. The SPV 21 Defendants have raised, in particular in Dillon Eustace's letter dated 23 July 2025 to Bedell Cristin (the ***Dillon Eustace Letter***), a number of legitimate concerns regarding the adequacy of the discovery process which required a response which adequately explained the process that had been used and the grounds on which those conducting the discovery exercise believed it to be compliant with the obligations of the Plaintiffs under GCR O.24 and the Discovery Protocol.

6. The SPV 21 Defendants had identified six main issues:

   (a). The small number of emails and documents relating to the Critical Period which suggested that emails had been omitted and an insufficient number of emails had been discovered.

   (b). The failure to list emails from Steptoe indicated that there were missing documents.

   (c). The fact that all emails disclosed appeared to have been sent to or by Mr Ashary indicated that only his email server had been searched and that the servers of the other custodians listed in the Discovery Protocol had not been searched.

(d). The assertion of privilege in relation to a large proportion of the listed documents (123 documents had been withheld) was insufficiently particularised and overly broad.

(e). A number of documents which were said to be subject to common interest privilege and which had been withheld as a result had in fact already been discovered in the related SPV21 Proceedings.

(f). The discovery exercise had been undertaken on the assumption that the limited pool of documents that had been collected for the purpose of discovery in the English proceedings (the ***English Proceedings***) was sufficient for the purposes of the Cayman proceedings and would contain all documents relevant to, and to be discovered in, the Cayman proceedings.

7. In my view, Mr Stroud's evidence in response was inadequate.

(a). While, as Mr Quirk pointed out, there is no requirement for evidence in relation to the discovery process to be given by the responsible partner in the Cayman Islands law firm on record in the proceedings, I would usually expect that partner to swear the relevant affidavit as the senior attorney with responsibility for overseeing the discovery process. The responsible attorney at the relevant firm, which I take to be the partner or lead partner dealing with the matter, has a duty to the court to ensure that as far as is possible full and proper disclosure of all relevant documents is made. Where issues are reasonably raised about the conduct of discovery that partner should step-up and provide to the court a full and clear account of what has been done and explain not only that they are satisfied but why they are satisfied that the discovery exercise has been properly conducted. I take Mr Keane's Fourth Affidavit to be a good example of a reasonably detailed account of the discovery process.

(b). Mr Quirk for the first time at the hearing explained that there was a good reason why in this case the responsible partner had not given evidence. This was because GCR O.41, r.5(3) stipulated that an affidavit should not be sworn by an attorney who appears as advocate in the cause or matter. Mr. Quirk said that the responsible

partner at Bedell Cristin (Ms Hatfield) had decided that it would not be appropriate for her to swear the requisite affidavit because she might need to appear in the proceedings including on this application if for any reason Mr. Quirk was unable to do so. I accept that this is a good and sufficient reason but in my view, this should have been explained to the SPV 21 Defendants and the court at an early stage when the SPV 21 Defendants first raised a concern about the responsible partner at Bedell Cristin having failed to give evidence.

(c). The Cayman Islands attorney (partner) at the law firm on record in the proceedings remains subject to the duty I have referred to even where an onshore law firm is actively involved in the proceedings and playing a key co-ordinating role for the attorneys/law firms' common client. The Cayman attorney cannot abdicate his/her responsibilities by simply leaving the discovery process to the onshore law firm and accepting the results without investigation or some checking. I accept, as Mr Quirk submitted, that the level of involvement of the Cayman attorneys will depend on the circumstances of the case and what is reasonable in those circumstances having regard to the justifiable need to adopt a proportionate approach to avoid unnecessary expense and duplication of work (and to act in accordance with the overriding objective). But the Cayman attorneys need, at a minimum, at the outset to review the proposed design and operation of the discovery process and satisfy themselves that it is in accordance with the (distinct and separate) requirements of the law and procedural rules of this jurisdiction and subsequently to review the output and results of the process (if appropriate only in general terms and at a high level by interrogating and questioning the onshore law firm that has run the mechanics of the discovery process) to the same purpose.

(d). Mr Quirk said this during his oral submissions (see page 90 of the transcript):

> *"One is that what is reasonable will of course depend on the circumstances of the case. Where what is happening is that there is an international law firm which is carrying out that exercise, and an international law firm which has been involved throughout and over the multitude of different disputes, and your Lordship will have seen that in other contexts, then the degree to which it is reasonable to rely on that entity to conduct the search is different to if one was simply relying on a lay client in a foreign jurisdiction. That sentiment is expressed in the cases that are cited at paragraphs 28 and 29 of my learned friend's skeleton, the cases of Renova and Attorney General v*

> *Carbonneau are making exactly that point. It's an obvious point. But bearing that in mind, it was reasonable for Bedell to rely on Steptoe, to run those search terms, to review for relevance, and to filter for privilege. And there was nothing, I suggest, that was improper about that in any sense. What's then said in Mr Stroud's witness statement, affidavit, I'm sorry, is that there was a full and proper discovery review exercise undertaken by Steptoe on behalf of the plaintiffs. Those are his words. I'm quoting from his [affidavit]at paragraph 26. Now, my learned friend says: well, there's nothing behind that to tell me − to explain why on what basis that was reached. But we're dealing here with two very well-established law firms, very experienced lawyers on both sides on both sides, i.e. Steptoe and Bedell, and ordinarily, one would take at face value the assertion made that Mr Stroud at Bedell had satisfied himself that a full and proper discovery review exercise was undertaken. But, my Lord, I would go further than that and say,*
> *given that what is relied − how this was conducted was by an international law firm, i.e. Steptoe, the degree to which there needed to be hand−holding by Bedell was very much less than would be required if, as I say, it was a lay client in a far−flung destination, and that the court can have confidence in the confirmation which is given by Mr Stroud, unless there were reasons to doubt it. And in the present case, I submit there are absolutely no reasons to doubt that what he says is correct at all."*

(e). The main problem is that Mr Stroud's evidence strongly indicates that in this case Bedell Cristin simply handed over the design and running of the discovery process to Steptoe. He said at [9] that "*Given that Steptoe had already collected the Plaintiffs' documents in the English Proceedings and was undertaking a related exercise in parallel it was sensible and efficient for Steptoe to also undertake the discovery exercise in these Proceedings*." He made the same point using the same language at [10]: "*Steptoe are familiar with these Proceedings and Leigh Mallon (Mr Mallon), the Partner at Steptoe with day-to-day conduct of a number of related disputes, has previously filed four affidavits in these Proceedings. Steptoe had access to their own Relativity platform to undertake the document review. It was therefore sensible and efficient for the discovery exercise to be undertaken by Steptoe to avoid the duplication of work and costs*." Mr Stroud does refer at [1] to the "*discovery exercise [being] overseen*" by Steptoe and at [26] to the discovery review process to be "*led by Steptoe*" but he nowhere identifies and explains the involvement of anyone from his firm in the process and in my view gives the clear impression that he is merely reporting back on what has been done by Steptoe and what Steptoe have been allowed to get on with, without any oversight or active involvement from Bedell Cristin (Mr Stroud goes on to report on what he has been informed by Steptoe: see e.g. [27]). If, in fact, attorneys from Bedell Cristin had

had a role in checking that the process was properly designed and operated, then he should have said so.

(f). It is also noticeable that despite being the partner in the onshore law firm with direct responsibility for the discovery process and despite having previously filed affidavits in these proceedings, as Mr Stroud noted, Mr Mallon did not himself file an affidavit setting out what had been done and the involvement of Bedell Cristin.

8. As regards the first issue, based on what he had been told by "*the Plaintiffs*" (he did not identify precisely with whom he had spoken on particular topics), Mr Stroud said that the small number of emails discovered relating to the Critical Period was unsurprising given that the Plaintiffs "*do not ordinarily exchange a large number of emails in the course of their business …. particularly … in periods of urgency in which phone calls and in person meetings are more efficient*"; that the Second Plaintiff is a special purpose vehicle; that the Plaintiffs do not have the benefit of well-preserved mailboxes equivalent to those maintained by employees of large professional firms, such as A&M (the SPV 21 Defendants' first and third nominated custodians as set out in the Discovery Protocol are employed by A&M) and the fact that the SPV 21 Defendants had discovered only six internal communications for the Critical Period from outside of the mailboxes of the A&M custodians. He also said that the Plaintiffs were only able to "*search the documents held by the Plaintiffs' custodians listed in the Discovery Protocol to the extent that those documents are in the possession, custody or control of the Plaintiffs [so that they could not] for example, obtain access to personal e-mail accounts or accounts held in respect of third-party companies*." I must confess to finding this explanation opaque and unclear but Mr Quirk during his oral submissions clarified the issue. A number of the Plaintiffs' custodians (as identified in the Discovery Protocol) were not employed by any of the Plaintiffs so that they were unable to compel them to deliver up and produce relevant documents. Many of these custodians are only employees or officers of KESP. But in the absence of further details identifying who had said what to Mr Stroud and particulars to support why so few emails had been discovered (for example a confirmation from a relevant named individual that they had not sent any or many emails during the Critical Period and if there were limitations or deficiencies in the email systems maintained by the Plaintiffs as compared with those maintained by firms such as A&M what they were) these general explanations are not helpful or persuasive. The same can be said for the

unparticularised reference to the apparent problems in being able to compel or obtain the delivery up of documents from the custodians who, as I understand it, the Plaintiffs had themselves identified and agreed should be included in the Discovery Protocol. There is no explanation as to why they were included without obtaining a prior confirmation that they would provide documents or what requests had been made to them and what responses had been received and whether there was any arrangement which any of the Plaintiffs could have relied on to press the custodians to produce documents.

9. There was no explanation as to why emails from Steptoe had not been listed.

10. Mr Stroud also did not explain which custodians had been asked to provide documents and which had done so. He did say that "*the Plaintiffs confirm that they have obtained and provided discovery of all documents within their possession, custody or control"* and gave a brief summary of the process followed by Steptoe. At [27] of Stroud 1 he said that "*I am informed by Steptoe that the Steptoe team reviewed a total of 3,832 documents for relevance, privilege and confidentiality in the process of preparing the Plaintiffs' discovery. I am informed by Steptoe that each document was reviewed at first instance by a member of the Steptoe team. I am informed by Steptoe that documents that were coded as relevant to an Issue for Discovery were then re-reviewed for relevance, privilege and confidentiality by a member of the Steptoe team. I am similarly informed that every document from the review set was reviewed manually, without the assistance of active learning models or any form of technology-assisted-review. In co-ordination with Bedell, the Plaintiffs' document production was completed by Steptoe's internal e-discovery team. In light of Steptoe's experience with the Proceedings and its familiarity with the Plaintiffs' obligations to provide discovery in the Proceedings, it was reasonable for Bedell to not re-review the production in advance of producing it to the SPV 21 Defendants*." This is helpful but once again of limited assistance because of the failure to provide particulars. Mr Stroud does not say precisely who gave him this information, how the custodians were approached and by whom, what the custodians were asked to provide, whether *all* the custodians were asked to provided documents/emails, which custodians provided access to all their relevant documents/emails and which did not and where they did not provide all their documents/emails, why not and what response they provided. It is helpful to compare Mr Stroud's approach with that of Mr Keane. First, he was the partner responsible for overseeing the discovery process and he confirmed that

he had overseen each and every step in the process. His views were not second hand. Secondly, he explained each of the main steps that had been taken (see [9]-[16] of Keane 1). I note in particular his confirmation (at [12]) that the independent tech team "*were given unrestricted access to the relevant inboxes by the SPV 21 Defendants' custodians and copied all emails within the inboxes and databases to the Relativity Workspace*."

11. As regards privilege issues, the SPV 21 Defendants have raised a number of reasonable and legitimate questions which need to be, but which have not yet been, answered. Dillon Eustace pointed out in the Dillon Eustace Letter that 123 documents had been withheld on the basis of privilege and/or confidentiality. Mr Quigley in Quigley 2 said that the Plaintiffs had withheld 87 of the documents listed in Tab 1 (entitled "*Document List*") of the Excel spreadsheet scheduled to the Plaintiffs' List and 53 of the documents listed in Tab 2 (entitled "*TBC-Lit Priv*"). Where privilege was relied on, the spreadsheet just identified the type of privilege claimed (litigation privilege, attorney-client privilege and common interest privilege). The sender and recipient of the email was identified together with the subject line of the email.

12. Dillon Eustace also set out at some length a number of concerns as to the justification for the privilege claims. In particular, (a) litigation privilege had been claimed in respect of internal emails sent in December 2022 and an email from Mr Farooki to Mr Ashary dated 25 January 2023 when the English Proceedings had not been commenced until March 2023 and these proceedings had only been commenced in September 2023; (b) emails dated 2 December 2022, 12 December 2022, 6 June 2023 and 30 May 2023 from Mr Farooki to Mr Ashary had been withheld on the basis of attorney-client privilege when neither were legal advisers; (c) some of the emails between Mr Hutchison/EY and the Plaintiffs/their representatives sent in June and July 2023, which had been withheld on the basis of common interest privilege and were relevant in these proceedings, had already been discovered in the SPV 21 Proceedings: (d) an email from Mr Farooki to Mr Ashary dated 13 May 2023 had been withheld on the basis of confidentiality, which alone did not justify a refusal to discover the document; (e) internal emails sent on 19 September 2022 had been withheld on the basis of attorney-client privilege and litigation privilege but none of the parties were lawyers and the emails were sent well in advance of the commencement of the English or these proceedings; (f) an email from Mr Farooki to Mr Ashary dated 16 December 2022 had been withheld on the basis of litigation

privilege and confidentiality and once again this was sent well in advance of the commencement of the English or these proceedings and confidentiality was insufficient on its own to justify the email being withheld; and (h) an email sent by Mr Sakowski of EY on 17 December 2022 had been withheld on the basis that it was a without prejudice communication but it was unclear how a communication sent well in advance of the commencement of the English Proceedings could have been sent for the purpose of negotiations. Dillon Eustace had noted that documents had been withheld in their entirety rather than redacted and asked for confirmation that each of the 123 documents had been reviewed and that Bedell Cristin were satisfied that there was a proper basis for withholding the entirety of each of the documents concerned.

13. But I do agree with Mr Quirk that the Plaintiffs' claim that Mr Stroud's evidence indicated that the discovery exercise had been undertaken on the basis that only the pool of documents collected for the purpose of discovery in the English Proceedings would be searched as part of the discovery process in the Cayman proceedings is unjustified. I do not read Mr Stroud as saying this. But Mr Stroud has not helped himself or the Plaintiffs by only providing a generalised and incomplete account of the discovery process that the Plaintiffs did adopt and implement.

14. In these circumstances, further explanations by, and confirmations from, the Ashary Plaintiffs and their legal advisers regarding the discovery process are required. In my view the following is required:

(a). The responsible partner (which I take to be Mr Mallon) or another partner at Steptoe (the ***Steptoe Partner***) should review (the ***Review***) the discovery process already undertaken, without the need to redo all of it, in order to check and satisfy himself/herself that the discovery process has been adequate for the purpose of identifying all documents which the Ashary Plaintiffs are required to discover in these proceedings and properly conducted so as to ensure that, so far as possible, no documents subject to the Ashary Plaintiffs' discovery obligations have been omitted.

(b). The Steptoe Partner should then (within 21 days of the date of the order made to give effect to this Ruling or such other date as may be agreed by all parties or

ordered by the Court) swear and file an affidavit (or make an affirmation) (the ***Steptoe Affidavit***) confirming that the Review has been completed and describing the main steps taken by Steptoe on behalf of the Plaintiffs for the purpose of fulfilling the Ashary Plaintiffs' obligation to give discovery in accordance with GCR O.24, r.1(1) and the Discovery Protocol and in particular shall:

(i) confirm that each of the Ashary Plaintiffs' custodians (listed at numbers 8 to 15 at paragraph 3 of the agreed Discovery Protocol) was contacted and asked to provide access to their email accounts and other relevant databases;

(ii) indicate whether each of those custodians provided such access and as regards those custodians who declined to give such access, set out their explanation for declining to do so and what steps the Ashary Plaintiffs took by way of a response and assess whether there was a basis for requiring those custodians to provide such access;

(iii) as regards the emails or other documents to which the Ashary Plaintiffs were given access, explain the total number of emails that were collected before any review or filtering and explain the review process adopted in sufficient detail to enable the SPV 21 Defendants to understand whether the emails and documents were uploaded to a document management system for review, what search terms and filters were used to review the emails or other documents or otherwise how the emails or other documents were searched for relevance (including relevance to the Discovery Issues) and how many documents were identified as being relevant before being filtered for privilege; and

(iv). confirm the process by which the emails or other documents were reviewed for the purpose of identifying which documents (and which parts of documents) were privileged.

(c). The responsible partner at Bedell Cristin, the Plaintiffs' Cayman attorneys on record in the Ashary Proceedings, should swear and file an affidavit (or make an

affirmation) (the ***Bedell Cristin Affidavit***) within 7 days of the filing of the Steptoe Affidavit confirming:

(i). the steps that she/he or colleagues in Bedell Cristin have taken to supervise the discovery process conducted by Steptoe and to check that it is appropriate and sufficient having regard to the rules governing discovery in this jurisdiction and in particular to check that it is sufficient and adequate for the purpose of identifying all documents which the Ashary Plaintiffs are required to discover in these proceedings and has been properly conducted so as to ensure that, so far as possible, no documents subject to the Ashary Plaintiffs' discovery obligations have been omitted; and

(ii). that having undertaken such supervision and taken such steps, and after having received a report from Steptoe as to the result of the Review, she/he is satisfied that the discovery process as explained and conducted by Steptoe was, and is, appropriate and sufficient having regard to the rules governing discovery in this jurisdiction and sufficient and adequate for the purpose of identifying all documents which the Ashary Plaintiffs are required to discover in these proceedings and for ensuring that, so far as possible, no documents subject to the Ashary Plaintiffs' discovery obligations have been omitted.

15. If as a result of the Review, or comments and input from Bedell Cristin, the Ashary Plaintiffs conclude that they need to amend the discovery previously given, they must file and verify (within 14 days of the filing of the Bedell Cristin Affidavit) an amended list of documents and if they conclude that they need to amend their claims to privilege in respect of the whole or part of such documents (and that some documents may be discovered with the privileged parts redacted) they will amend their privilege claims.

16. The SPV 21 Defendants also sought an order that the Ashary Plaintiffs make and serve a list of the documents which are, or have been, in their possession, custody or power relating to their alleged communications and relationship with Mr Arif Naqvi since 1 July 2022. The SPV 21 Defendants argued that the alleged relationship between Al Jomaih Power Limited and Denham Investments Ltd (together the ***Original Shareholders***) and Mr Naqvi was relevant to the Ashary Proceedings because it assisted in establishing the

Original Shareholders' (and Mr Ashary's) motives for challenging the decision making of the KESP board in relation to whether to instruct Fieldfisher as English solicitors for KESP to advise on the English Proceedings against KESP commenced by Sage Venture Group Limited (***Sage***) and AIML (and the decision making of the sole director of the corporate director of SPV 21 to exercise SPV 21's power to remove KP Corporate Director Limited (***KPC***) as a director of KESP).

17. The SPV 21 Defendants' concern was that the Ashary Plaintiffs had been acting in conjunction with and with a view to promoting their separate interests and the interests of Mr Naqvi by seeking improperly to oppose, interfere with and challenge the transaction (the ***Sage Transaction***) between Sage and the JOLs of AIML pursuant to which Sage agreed to purchase the sole voting share in SPV 21, AIML's 75.5% shareholding in IGCF GP and AIML's rights in respect of a debt said to be payable by KESP to AIML (the ***KESP Payable***). It is accepted by all parties that the Sage Transaction has resulted in a dispute, manifested in multiple sets of proceedings, between AIML/Sage/SPV 21 and the Original Shareholders (*the* ***Sage Dispute***) of which the Ashary Proceedings are said to be an example. The core dispute in the Ashary Proceedings relates to the decision making of the KESP board (and of the sole director of the corporate director of SPV 21) in relation to the removal of KPC and whether to instruct Fieldfisher as English solicitors for KESP to advise on the English Proceedings to recover the KESP Payable. The SPV 21 Defendants claimed that there was evidence that the Ashary Plaintiffs' approach to the question of whether KESP was liable to pay the KESP Payable and as to how to respond to the English Proceedings changed after the asserted meeting and discussions with Mr Naqvi. Further, the existence and nature of discussions between the Original Shareholders and Mr Naqvi were clearly relevant to issue 5 identified in the Discovery Protocol, namely "*What was the understanding and belief of the Original Shareholders' [KESP] directors as at 12-19 June 2023 as to i. whether the KESP Payable was a debt due and owing by KESP; ii whether there was a valid defence to the claim brought against KESP in the English Proceedings; iii what was in the best interests of KESP?*"

18. To establish that the Original Shareholders had been in discussions with Mr Naqvi the SPV 21 Defendants primarily relied on an email dated 13 May 2023 from Mr Farooki (who is the Chief Portfolio Manager of Al Jomaih Power Limited and who had been a

KESP director nominated by Al Jomaih Power Limited) to Mr Ashary (the ***May Email***). They also relied on the fact that Steptoe was acting for both the Original Shareholders and Mr Naqvi in the proceedings in England relating to the KESP Payable. The SPV 21 Defendants accepted that the May Email had been discovered by the Ashary Plaintiffs and was part of an email chain between Mr Ashary and Mr Farooki that started with an email from Mr Ashary forwarding an email from Mr Skelton dated 11 May 2023 headed "*Without Prejudice and subject to contract*." In that email Mr Skelton had said that he was setting out an outline "*of a comprehensive [Sage/Original Shareholders/SPV21/KESP] Settlement … [provided] in good faith toward reaching a solution for KESP and [K-Electric] where all the shareholders are aligned in creating value at KE and at KESP*." In the May Email, Mr Farooki discussed his understanding of the "*game plan*" of the Sage/AIML/SPV 21 group and that a "*legal battle*" would be needed. Mr Farooki referred to his "*meeting with AN*" and to the fact that a strategy paper was being formulated.

19. The SPV 21 Defendants' position had been set out, in particular, in Mr Skelton's First Affidavit (see [49]-[65]). Mr Skelton said that the May Email was evidence and demonstrative of ulterior motives on the part of the Ashary Plaintiffs and that they had not been acting and had not brought the Ashary Proceedings to promote the interests of KESP. Mr Skelton said that the motivation of both the SPV 21 Defendants and the Ashary Plaintiffs was in issue. This was because the Statement of Claim in the Ashary Proceedings put in issue the purpose of, and motivation behind, (a) the action taken by Mr Skelton as chairman of the KESP board, SPV 21's removal of KPC and appointment of Mr Ahmad, and (b) the decision made by the Fourth to Eighth Defendants to vote against the appointment of Fieldfisher to advise KESP. The Ashary Plaintiffs claimed that the SPV 21 Defendants were acting "*to secure an ulterior advantage as against the Original Shareholders in relation to the Sage Dispute and to improperly apply pressure to the Original Shareholders generally [to settle the Sage Dispute]* …" ([80] of the Statement of Claim). The Ashary Plaintiffs had asserted that the SPV 21 Defendants were acting for an improper purpose. The SPV 21 Defendants argued that the Ashary Plaintiffs' case was based on claims that (a) the only proper course of action in the circumstances having regard to the interests of KESP was to appoint English solicitors because there were, or could be, grounds for defending the English Proceedings and disputing KESP's liability to pay the KESP Payable, and (b) that they (the Ashary Plaintiffs) believed that

there were such grounds and that this is why they wished KESP to instruct Fieldfisher and why they were acting for a proper purpose. At [46] of the Statement of Claim, the Ashary Plaintiffs had averred that they believe that "*KESP has a bona fide defence to any claim to the [KESP Payable]*." Evidence that the true and real reason for the appointment of Fieldfisher and seeking to defend the English Proceedings was to gain leverage in, and for the purpose of conducting, the Sage Dispute would contradict and undermine this claim.

20. The SPV 21 Defendants argued that the Ashary Plaintiffs were required to discover the May Email because it was at least a train of enquiry document that might lead to a train of inquiry that would identify other documents containing information which may enable the SPV 21 Defendants to advance their own case and damage the Ashary Plaintiffs' case.

21. The Ashary Plaintiffs said that (a) it was impermissible for the SPV 21 Defendants to rely on the May Email since it was privileged and had been discovered in error, such that privilege had not been waived – and that without such evidence the SPV 21 Defendants had no, or an insufficient, basis for their claim that there had been discussions or a relationship between the Original Shareholders and Mr Naqvi, and (b) in any event, the SPV 21 Defendants had embarked on a fishing expedition since the existence of any such relationship was not relevant to any issue in the Ashary Proceedings so that the Ashary Plaintiffs did, and could not have, an obligation to disclose documents in their possession, custody or power relating to such discussions or relationship. The focus of the Ashary Proceedings was on the motives and state of mind of the SPV 21 Defendants whose actions were being challenged and not on the motivation and state of mind of the Ashary Plaintiffs. Any discussions between the Original Shareholders and Mr Naqvi, if they had taken place, regarding the wider dispute with Sage, were irrelevant and could not shed light on why the SPV 21 Defendants had done what they did.

22. The Ashary Plaintiffs argued that the May Email was protected by litigation privilege and had been produced in discovery in error. In Bedell Cristin's letter dated 30 October 2025 to Dillon Eustace, Bedell Cristin said that:

> *"2. ..... The [May Email was] sent for the stated purpose of suggesting legal proceedings be commenced. It was also sent at a time when the proceedings between SPV 21 and [the Original Shareholders] in relation to SPV 21's application for an anti-suit injunction from [this Court] had already commenced. Therefore [the May Email] was plainly made for the sole or dominant purpose of conducting existing and contemplated litigation and so is protected by litigation privilege.*
>
> *4. The [Ashary Plaintiffs] did not intend to waive that privilege ... [The May Email] was inadvertently disclosed by mistake by way of not being redacted prior to the email chain (of which it is part) being produced as part of discovery ..."*

23. The Ashary Plaintiffs said that the SPV 21 Defendants' application was based on pure speculation. They had not established that there was a basis for concluding that the Original Shareholders had been in discussions with Mr Naqvi (the May Email had only referred to "*AN*" and it was not established who that was) or that any such discussions would have touched on, or related to, conduct and action which was the subject of the Ashary Proceedings. Mr Naqvi had not been referred to in the Statement of Claim and had only been mentioned in passing in the background section of the SPV 21 Defendant\s' Defence. Mr Naqvi's name was not included in the keywords in the Discovery Protocol because he was irrelevant to the issues in dispute.

24. It seems to me that the Ashary Plaintiffs' claim of litigation privilege is unsustainable. It is well established that it is not enough for a party to show that proceedings were reasonably anticipated or in contemplation. They must also show that the relevant communication was for the dominant purpose of either enabling legal advice to be sought or given and/or seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated litigation. The exchange between Mr Farooki and Mr Ashary in the May Email, certainly in the parts that record Mr Farooki's meeting with AN, was clearly not made for any such purpose. Mr Farooki was confirming his view that negotiations were not going to produce the desired result, that litigation was going to be necessary and that his discussions with AN had confirmed (given him further impetus on) this approach. I can see that a document which set out Steptoe's advice as to litigation strategy or was produced for the purpose of providing input to Steptoe in connection with the development by Steptoe of advice on litigation strategy would be protected at least by litigation privilege (and perhaps also legal advice privilege) but that is not the position here.

25. The Ashary Proceedings raise a number of key factual disputes and issues. In particular, what if any restrictions or implied terms qualified SPV 21's right to remove a KESP director it had previously nominated (and appoint Mr Ahmad) and was the purported removal of KPC by SPV 21 (and appointment of Mr Ahmad) on 18 June 2023 effected in breach of any such restrictions or terms because SPV 21's causative or predominant purpose was to secure an ulterior advantage in the Sage Dispute; was the 19 June meeting a valid meeting of the KESP board, was Mr Skelton entitled to vote the proxies he held and was the Fieldfisher Resolution passed; and did the SPV 21 Defendants act in breach of their duty as KESP directors by voting against the Fieldfisher Resolution because it was "*plainly in KESP's interests to appoint lawyers to advise and represent it in the English Proceedings*" ([76.1] of the Statement of Claim).

26. I can see the force of the Ashary Plaintiffs argument that the focus of the Ashary Proceedings is the motives and state of mind of the SPV 21 Defendants whose actions were being challenged and not on the motivation and state of mind of the Ashary Plaintiffs. But, as I have noted, the Ashary Plaintiffs have asserted that it was plainly in the interests of KESP to obtain legal advice as to, and probably to defend, the English Proceedings and the SPV 21 Defendants have disputed and put in issue whether the Ashary Plaintiffs' justification for this view and their position was reasonable and genuinely held. The SPV 21 Defendants say that, while they cannot plead to the internal beliefs of the Ashary Plaintiffs, they are not aware of the Ashary Plaintiffs ever having suggested that there was a *bona fide* defence to the claim in respect of the KESP Payable or that there could be such a defence. It is implicit in this defence that the SPV 21 Defendants assert that the claim that there was a *bona fide* defence to, and a proper basis for, defending the English Proceedings could not have been genuinely made and that the Original Shareholders' directors must have been acting for some other purpose when voting for the Fieldfisher Resolution and their challenge to the conduct of the SPV 21 Defendants is therefore flawed. The SPV 21 Defendants also assert that the Original Shareholders have maintained a campaign of interference with the Sage Transaction and it is at least implicit in their defence that the actions of the Original Shareholders and their directors in relation to the Fieldfisher Resolution and the removal of KPC were part of this campaign and not based on a *bona fide* view as to what was in KESP's interests. Evidence that the Original Shareholders were acting with Mr Naqvi and that Mr Naqvi wished to challenge or interfere with the Sage Transaction would provide some evidence

to support the SPV 21 Defendant's defence and challenge to the Ashary Plaintiffs' claim that there was a proper basis, and that they believed there was a proper basis, for KESP to defend the English Proceedings.

27. The May Email does not contain evidence that the Original Shareholders discussed with Mr Naqvi the subject matter of the Ashary Proceedings (the decision making by the KESP board regarding the English Proceedings or the KESP Payable), that Mr Naqvi sought to influence the decision making and actions of the Original Shareholders or that an arrangement or agreement was reached as to what action the Original Shareholders should take nor does it indicate the timeframe within which discussions took place. I also accept that the reference to *"AN"* could be to someone other than Mr Naqvi although that seems inherently unlikely. But it does indicate that representatives of at least one of the Original Shareholders were probably discussing with Mr Naqvi the dispute with Sage and the need for litigation against Sage and those who were controlled by, or acting for, it. It is possible to infer that they probably discussed what steps might, or should be, taken and how to conduct and cooperate in managing the dispute. The discussions that took place around the time of the KESP board meetings in June 2023 might well throw light on the Ashary Plaintiffs' reasons for wishing to resist and defend the English Proceedings and whether they considered at the time that there was a *bona fide* basis for doing so.

28. It therefore seems to me that the SPV 21 Defendants are right to say that the May Email constitutes a chain of inquiry email and that it should be disclosed together with other related documents which it is reasonable to suppose will probably contain relevant information which will directly or indirectly enable the SPV 21 Defendants to damage the Ashary Plaintiffs' case and advance their own. It seems to me that the standard of proof of relevance in *Peruvian Guano* is satisfied in relation to some documents. The SPV 21 Defendants have sought an order requiring the Ashary Plaintiffs to make and serve a list of the documents which are or have been in their possession, custody or power relating to correspondence, communications and involvement with Mr Naqvi since 1 July 2022 with an affidavit verifying this list. The date range and the scope of the required discovery seem to me to be too wide and disproportionate in light of the issue which the SPV 21 Defendants have legitimately identified and raised. In my view, the Ashary Plaintiffs should be required to discover (and provide a list of) documents recording or relating to any discussions which they or those acting for them had with Mr Naqvi in the

period of April-June 2023 regarding the need for or action to be taken to enable KESP to defend any proceedings to enforce the KESP Payable, and to influence or direct the decision making as to the composition of the KESP board, for the purpose of, or as a means for, challenging or interfering with the implementation of the Sage Transaction and the exercise of Sage's direct or indirect rights in relation to SPV 21. I am not satisfied that wider discovery is justified having regard to the ultimate relevance of Mr Naqvi's possible involvement or necessity for the fair disposal of the Ashary Proceedings. It also seems to me important not to permit the SPV 21 Defendants to engage in a fishing expedition looking for documents which might be used in, and for the purposes of, the wider Sage Dispute to embarrass or prejudice the Ashary Plaintiffs.

The SPV 21 Proceedings – discovery issues

29. In the SPV 21 Proceedings, the Abraaj Parties sought, by way of a case management direction pursuant to GCR O.25, r.3(h), an order in effect declaring that five issues (the ***Additional Issues***) were properly to be treated as issues in dispute in the SPV 21 Proceedings (despite the fact that the annex to the Court's discovery order dated 7 April 2025 (the ***April Order***) setting out the agreed categories of documents by reference to which discovery was to be made did not specifically include categories that referred to such further issues) and that SPV 21 now be required to file and serve a further list of documents relevant to these issues (the ***Additional Issues***). The Abraaj Parties argued that discovery of documents relevant to the Additional Issues was clearly required by the April Order which preserved SPV 21's general discovery obligations under GCR O.24.

30. The first Additional Issue was whether or not Sage has had an indirect and derivative controlling stake in SPV 21. The Abraaj Parties submitted that was an issue in dispute on the pleadings. In [32] of the Amended Statement of Claim, it was averred that "*Since [August 2022] ... Sage has controlled SPV 26, and through that ownership, it has had control of SPV 21 ...*" In the Amended Defence at [23] it was said that *"... Sage does not control SPV 21 ...*" and at [24.3] that "*It is denied that Sage has acquired a majority interest in IGCF Fund*."

31. The second Additional Issue was whether SPV 21 had acted or is acting in the interests of the general partner of IGCF and/or Sage. At [51(b)] of the Amended Statement of

Claim it is averred that the true purpose of the removal of KPC was "*To replace KP Corporate Director with a person who would vote against the ... Resolution, and/or would prefer the interests of Sage to those of KESP*." This was put in issue in the Amended Defence at [39.2].

32. The third Additional Issue was whether Mr McDonald, the sole director of the corporate director of SPV 21, had acted on the instructions of Mr Skelton and/or other persons acting in the interests of Sage. This was in the pleadings in the Amended Reply at [24].

33. The fourth Additional Issue was whether the purported removal was made in furtherance of the interests of IGCF SPV 26 and/or Sage. In the Amended Statement of Claim at [52(a)], it is averred that removal was made for that purpose and SPV 21 joined issue with that claim at [40] of the Amended Defence.

34. Finally, the fifth Additional Issue was what considerations SPV 21 took into account in removing KPC including whether it considered the interests and wishes of IGCF GP, SPV 26 and/or Sage. This is dealt with at [52(d)] of the Amended Statement of Claim and denied at [40] of the Amended Defence.

35. The Abraaj Parties submitted that discovery on the Additional Issues was clearly required pursuant to the April Order which required that the Parties make discovery "*in accordance with the agreed categories of documents annexed at Schedule 1 of this Order [the **Agreed Categories of Documents**] and otherwise in accordance with [GCR] Order 24 ..... in relation to any additional issues in dispute in the SPV 21 Proceeding*." Schedule 1 had made it clear that the parties remained subject to the general discovery obligations pursuant to GCR O.24. The Abraaj Parties argued that the Additional Issues were clearly "*additional issues in dispute*." They were issues that arose on the face of the pleadings and were highly material to the dispute and discovery was necessary for fairly disposing of the SPV 21 Proceedings. While it was open to SPV 21 to attenuate its discovery obligations, it should have made an application under GCR O.24, r.8 but it had failed to do so. The terms of the April Order required discovery of the documents relevant to the Additional Issues and no application had been made by SPV 21 to amend it.

36. SPV 21 said that the Abraaj Parties' application was very late and had been made without a proper application supported by evidence being filed. It should therefore be dismissed for that reason alone. In any event, they argued that SPV 21's discovery in relation to what SPV 21 referred to as "*issues*" 8-10 in the Agreed Categories of Documents already covered and had produced documents responsive to the Additional Issues. Further, the Additional Issues were improperly formulated to justify an order for further or specific discovery.

37. SPV 21 referred to issues 8-10. Issue 8 covered "*All documents including communications, exchanged between [SPV 21] and/or its director and/or Casey McDonald and/or Mark Sketon and/or Sage and/or AsiaPak and/or KESP Directors regarding the KESP Receivable*" (including various sub-categories). Issue 9 covered "*all documents including contemporaneous notes and memoranda relating to any of the following: (a) the 12 June Board Meeting; (b) the 19 June Board Meeting; (c) any meetings and/or telephone calls regarding the 12 June and/or 19 June meetings; (d) any meetings and/or calls relating to the [English Proceedings], the appointment of lawyers in England in respect of the [English Proceedings or the claim relating to the KESP Payable], the removal of [KPC] and/or any other of the SPV 21 Directors and/or KESP Directors; (e) the approach of the [Original Shareholders] and/or the [Original Shareholders' directors] in respect of the [English Proceedings] the KESP Payable and or the 12 June/19 June meetings*" (and issue 9 referred to various documents which were non-exhaustively to be treated included). Issue 10 covered "*all documents … relating to any arrangements and/or agreements between Casey McDonald and/or Mark Skelton and/or Sage and/or AsiaPak and/or between any of the directors appointed to the [KESP board] by SPV 21 in relation to the agenda of the 12 June and/or 19 June meetings, the voting arrangements at such meetings, the removal of [KPC], [the English Proceedings] and/or the KESP Receivable*."

38. SPV 21 also submitted that as regards the first Additional Issue, the question of a hypothetical and generalised control of SPV 21 was not relevant to the SPV 21 Proceedings. The key question for determination in the SPV 21 Proceedings was whether SPV 21 had been entitled to remove KPC and all of the documents relating to that issue had already been discovered. As regards the second Additional Issue, SPV 21 argued that this was not an issue for discovery. It was formulated as a general question and was not

limited to the issues in the SPV 21 Proceedings or any of the specific actions of SPV 21 referred to in the pleadings. The issue was so widely drafted that it was impossible to identify which documents would fall within its scope. The third Additional Issue suffered from the same difficulty and was incapable of being an issue for discovery as it was too vague. It was once again impossible to identify which documents would be responsive and covered. SPV 21 submitted that it had already discovered the communications between Mr McDonald, Sage, AsiaPak, Mr Skelton and the SPV 21 nominees so that no further discovery was necessary or appropriate. As regards the fourth and fifth Additional Issues, they were questions rather than discovery issues which were to be answered on the basis of the documents which demonstrated why the power was exercised to remove KPC. Such documents had already been discovered.

39. The basis for, and timing of, the Abraaj Parties' request that discovery be given by reference to the Additional Issues was first set out in Walkers' letter to Dillon Eustace dated 16 October 2025. Dillon Eustace replied on 21 October 2025, and Walkers responded on 26 October 2025. I have noted the points raised in the correspondence.

40. In their letter of 16 October, Walkers said that they were raising these matters at that point because they had "*only recently become aware of the existence of specific, highly relevant documents which [SPV 21] ought to have discovered* ...". Walkers said that they had "*recently been provided with*" the documents (but did not say when or how or respond to a question from Dillon Eustace as to who had given the documents to the Abraaj Parties as they were confidential). These documents were side letters to the SPA between AIML and Sage which related to how the sole voting share in SPV 21 was to be held following the closing of the Sage Transaction and included an obligation on AIML to exercise any rights relating to that share and generally deal with that share in accordance with Sage's written instructions. The Abraaj Parties said that these documents were clearly relevant to Sage's control of SPV 21 which was an issue in the SPV 21 Proceedings. Walkers noted that they had previously proposed that a further category of documents (category 11) be added to the Agreed Category of Documents which would have catered for and covered the Additional Issues, but that SPV 21 had not agreed to its inclusion. Walkers requested that SPV 21 now make further discovery by reference to category 11. Category 11 is drafted differently from the drafting of the

Additional Issues in the draft order filed by the Abraaj Parties but covers the same subject-matter.

41. Dillon Eustace had, in addition to complaining of the lateness of the request, argued that facts and details relating the acquisition of the voting share in SPV 21 were not relevant to the core issues in the SPV 21 Proceedings. The principal issue was how the parties acted, and their entitlement to act as they did, in relation to decision making by, and the appointment of, directors to the board of KESP. The factual references to Sage and the Sage Transaction in the pleadings were merely by way of background. They also said that the communications between the directors of KESP including Shaheryar Chishty, Sameer Chishty and Darin Baur had been discovered and were responsive to category 11.

42. It is clear that the Court has the power to make the order sought by the Abraaj Parties. GCR O.25, r.3(h) requires the Court when hearing a summons for directions to "*consider (if necessary of its own motion) whether any order should be made or direction given in respect of ..... orders pursuant to O.24 relating to discovery*." There is no need for a separate application to be filed.

43. This does not mean that the Abraaj Parties were absolved from filing affidavit evidence at least to the extent that they relied on factual matters in support of their application. The Abraaj Parties argued, as I understand it, that identifying the Additional Issues simply required a review of the pleadings so that evidence was not required. However, there are clearly factual disputes as to the extent to which it is necessary to require SPV 21 to give further discovery by reference to the Additional Issues in view of the documents that it has already discovered.

44. There is also a factual question as to whether the Abraaj Parties can justify the lateness of the application they have made by reference to the facts and circumstances surrounding their recent acquisition of the side letters. No evidence has been adduced in relation to this.

45. Despite this, it seems to me that, insofar as the Abraaj Parties have raised and identified a gap in SPV 21's discovery to date which needs to be filled at this stage in order to

ensure that all documents that need to be produced for disposing fairly of the SPV 21 Proceedings have been discovered, the Court should make a suitable order. It is clearly important that any disputes and open issues relating to discovery are dealt with at this stage since the Court is now being asked to give directions to trial and disputes regarding discovery at a later stage will only cause disruption to the procedural timetable to be laid down and additional cost.

46. It seems to me that one of the important issues in the SPV 21 Proceedings is who made the decision on behalf of SPV 21 to cause SPV 21 to remove KPC, the reason why those making the decision on behalf of SPV 21 chose to do so and the facts and matters they took into account when making that decision, and what they understood to be the purpose and benefits of removing KPC. It is clearly relevant to an assessment of these facts and matters whether those making decisions and acting on behalf of SPV 21 included Sage (for example because it was able to give directions in relation to the sole voting share in SPV 21) and whether Mr McDonald, SPV 21's sole director, acted and considered that he was required to act or make decisions on behalf of SPV 21 in accordance with directions from, and the wishes of, Sage. It is clear that the pleadings put in issue the question of whether SPV 21 was at the relevant time under the "*control*" of Sage and whether those making decisions for, and on behalf of, SPV 21 acted on instructions from Sage or those acting for it or with a view to promoting the interests of Sage.

47. The further issues in my view can be formulated as follows, in a manner that more succinctly and precisely reflects the issues in dispute as identified in the pleadings (the ***New Sage Issue***): *Did Sage have and exercise control (directly or indirectly) of SPV 21 so as to require or cause SPV 21 (or its director) to remove KPC and did Mr McDonald as the sole director of SPV 21 act (when making decisions for SPV 21 in relation to the removal of KPC) on the instructions of Sage or any person acting for or on behalf of Sage, or for the purpose of benefitting and in order to benefit or in the interests of Sage.* I do not consider that it is necessary or appropriate to use the five separate paragraphs proposed by the Abraaj Parties since they are too broad and imprecise, and the relevant issues can be stated more briefly. I do not see that there should or can be any real problems for SPV 21 in identifying which, and working out whether, documents in its possession, custody or power are relevant to the issues as so expressed.

48. In my view, it is in the circumstances necessary and appropriate to direct that SPV 21 give discovery by reference to the New Sage Issue so as to discover all documents including emails and other communications in its possession, custody or power which relate to the New Sage Issue, to the extent not already discovered. SPV 21 should not be required to provide further discovery of documents already listed and produced. Since no evidence was adduced at the CMC as to precisely which of the documents already listed and produced by SPV 21 could properly be said to be responsive to the New Sage Issue and as to the extent to which there are further documents still to be produced, it will (at least in the first instance) be for SPV 21 and its counsel to review the discovery made to date and decide whether it is necessary to add further documents to SPV 21's list of documents. SPV 21 and the Abraaj Parties should seek to agree the date by which SPV 21 is to complete this further review and provide its updated list (and further production of documents if new documents are listed). The Abraaj Parties proposed 2 December 2025 in their draft order but before determining whether this is appropriate, I would wish to hear from SPV 21 as to how long it considers it needs. I hope that the parties can reach agreement on this issue without the need for a further decision by the Court but if they prove unable to reach agreement on dates within 7 days of the date of the order made to give effect to this judgment, they should write to the Court to explain what each proposes and I shall determine the issue.

49. I also accept and consider, in light of correspondence with the parties after this Ruling was distributed in draft, that documents should be discovered, in response to [48] of the Amended Statement of Claim, that relate to the issue of whether Mr Skelton encouraged Mr McDonald to act so as, or gave directions to him (a) to ensure that Mr Hutchison caused KPC to vote against the Proposed Resolution or (b) to pressure or cause KPC to vote against the Proposed Resolution or (c) to use KPC as a pawn in the disputes between Sage and the Original Shareholders. These documents appear to be already covered by issue 10 ("*All documents, including correspondence by email and text and all call notes relating to any arrangements and/or agreements between Casey McDonald and/or Mark Skelton …… in relation to the agenda of 12 June and/or 19 June meetings, the voting arrangements at such meetings, the removal of KP Corporate Director, the English Claim and/or the KESP Receivable*"). However, I can see that it might be said that the reference to "*arrangements*" does not, on a narrow reading, cover encouragement or directions to act in a particular manner in relation to voting on the

Proposed Resolution and therefore I will permit the following wording to be added at the end of issue 10 by way of clarification (the : "*For the avoidance of doubt this category of documents shall include all documents (including correspondence by email and text and call notes) which relate to any encouragement or directions given by Mr Skelton to Mr McDonald in relation to voting at the 12 June or 19 June meetings including any encouragement or instructions to put pressure on Mr Hutchison or KPC, or to procure KPC, to vote against the Proposed Resolution."* SPV 21 should also be directed to give discovery by reference to issue 10 as so clarified, once again though only to the extent that it has not already discovered the relevant documents.

Joint or separate trials and the procedural timetable to trial

50. It does seem to me that, on balance, a joint trial is justified in the circumstances. There is clearly a substantial albeit not a complete overlap as regards the events which fall to be considered and as to the key witnesses who will need to give evidence and be cross-examined at trial. While the details of the evidence and the identity of the witnesses is not yet finally settled, it is clear and there appears to be general consensus as to who the key witnesses will be (in particular Mr Skelton, Mr McDonald, Mr Hutchison and Mr Ashary) and that their evidence will be needed in, and relevant to, both sets of proceedings. There will be considerable savings of costs and Court time if the two sets of proceedings are tried together although it will also be necessary, as the parties have already contemplated, to structure the trial so as to allow the separate issues to be dealt with appropriately so that the parties who are not involved need not attend that part of the trial. There should be no difficulties in achieving this.

51. As I understand it, there was no opposition to a joint trial although the Abraaj Parties wished to reserve the right to apply for a separate trial of the SPV 21 Proceedings if the timetable to a joint trial was not observed and there were further delays in the Ashary Proceedings.

52. I agree that it would be of assistance to all parties if a trial window could now be settled to identify the dates on which it is expected that the trial will take place. This will involve some guesswork because it will not be possible to be definitive regarding the trial time estimate and the precise dates for the listing until all the evidence has been filed and it is

clear that all pre-trial procedural matters are agreed but it currently seems as though the consensus is that a joint trial will require no more than up to ten days (8 sitting days and 2 pre-reading days). I suggest that an 11-day estimate is used out of an abundance of caution for current purposes. I am currently available either in May 2026 during the weeks commencing 4 and 11 May or July 2026 in the weeks commencing 20 and 27 July 2026. I do not consider that there is a material difference between these dates. I would like the parties to discuss and seek to agree the procedural timetable for the filing of witness statements and for the PTR/CMC (I agree that this should occur roughly six weeks before the projected start of the trial). It seems to me that if the procedural timetable shows, as it seems to me that it should, that the two sets of proceedings will be ready for trial in May, then an 11-day window in the dates I have given should be adopted. I appreciate that this is likely to give Mr Chapman KC difficulties because of his other commitments and this is very unfortunate but if that turns out to be the case the SPV 21 Defendants and SPV 21 will have sufficient time to instruct an alternative leader and thereby minimise the prejudice they will suffer. Every effort would need to be made to ensure that the joint trial could take place within the agreed/settled window although if problems and delays occur there should be liberty to apply and revisit the timetable and I accept that the Abraaj Parties should be able to apply for a separate trial of the SPV 21 Proceedings if there are material delays in the Ashary Proceedings and such a trial could be held much earlier.

Forms of order

53. I would be grateful if the parties could discuss and seek to agree forms of order to give effect to the decisions I have made, including in relation to costs. If agreement is not possible, the parties should file their proposed draft orders with the Court within 14 days of the date on which this judgment is handed down and I will then decide the open issues on the papers.

The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands
28 November 2025

Neutral Citation Number: [2025] CICA (Civ) 20

IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

Civil Appeal No. 0008 of 2025
(Formerly FSD 2025-0037 (JAJ))

BETWEEN:

(1) AL JOMAIH POWER LIMITED

-AND-

(2) DENHAM INVESTMENT LTD

Plaintiffs/Appellants

-and-

(1) IGCF SPV 21 LIMITED

(2) KES POWER LIMITED

Defendants/Respondents

BEFORE:

The Right Hon. Sir John Goldring, President
The Hon. Sir Richard Field, JA
The Hon. Sir Michael Birt, JA

Representation

Mr Iain Quirk, KC, Ms Laura Hatfield, Mr Jonathan Stroud and Ms Vered Mazin for the Appellants
Mr Graham Chapman, KC, Mr Conal Keane, Mr Niall Dodd and Mr Alan Quigley for the First Defendant
The Second Defendant was not represented and did not appear

Heard: **18 September 2025**

Draft Judgment circulated: **24 November 2025**

Judgment delivered: **05 December 2025**

JUDGMENT

Sir Michael Birt, JA

1. This is an appeal by Al Jomaih Power Ltd and Denham Investment Limited ("the Appellants") against the decision of Asif J ("the judge") on 9 June 2025 to dismiss the Appellants' application for an interim injunction against the Respondents, IGCF SPV 21 Limited ("SPV 21") and KES Power Limited ("KESP"), both of which are companies incorporated in the Cayman Islands. The judge gave a short ex tempore judgment at the conclusion of the hearing but delivered further reasons in a judgment dated 31 July 2025 ("the Judgment").

The factual background

2. In what follows, I have drawn upon the helpful summary in the Judgment and upon the agreed background and chronology prepared by the parties.

(i) The ownership structure

3. K-Electric Limited ("KEL") is a company incorporated in Pakistan which is the sole or main provider of electricity to the residents of Karachi, which has a population of over 20 million people. It is accordingly a company of national importance in Pakistan.

4. In 2005, KEL, which had previously been owned by the government of Pakistan, was partially privatised. KESP acquired a majority of the shares in KEL pursuant to a share purchase agreement with the government of Pakistan ("the SPA 2005"). At the time, KESP was wholly owned by the Appellants. KESP owns 66.4% of the shares in KEL. Of the remaining shares, 24.36% is owned by the government of Pakistan and the balance of 9.24% is publicly listed on the Pakistan stock exchange.

5. In 2008, the Appellants entered into a joint venture concerning their indirect interest in KEL with the Abraaj Group, which was a private equity group of companies. They did this by selling some of their shares in KESP.

6. The chosen vehicle for the Abraaj Group's acquisition of its interest in KESP was SPV 21. With the approval of the government of Pakistan given on 27 November 2008, the Appellants sold 50% of their shares in KESP to SPV 21 for a capital contribution commitment of US$361m and a premium of US$50m pursuant to a subscription agreement dated 15 October 2008. As the judge pointed out at [12] of the Judgment, SPV 21 in fact owns 53.8% of the shares in KESP with the balance of 46.2% being owned by the Appellants, but there was no evidence before the judge as to how this adjustment of ownership between the Appellants and SPV 21 from 50% came about and it is not relevant for present purposes.

7. At the time of the sale of the shares in KESP by the Appellants to SPV 21, the Appellants and SPV 21 (together with KESP itself) entered into a shareholders' agreement dated 15 October 2008 to regulate their conduct in relation to KESP. The agreement was subsequently amended in 2019 and 2021 and I refer to the agreement as amended as "the KESP SHA". The KESP SHA made provision for the appointment process for the board of directors of both KESP and KEL and also included the following provisions which are relevant to this appeal:

(i) Clause 9.4

> ***"[SPV 21] undertakes and agrees that save for an Exit in accordance with clause 11 hereof, it shall not permit nor take any action that would result in a change of Control of [SPV 21], provided that [SPV 21] shall be deemed not to be in contravention of this clause in circumstances where (notwithstanding a change of Control of [SPV 21]), [SPV 21] remains managed by a member of the Abraaj Group."*** [emphasis added]

(ii) Clause 17.1

> ***"Each of the parties (other than [KESP]) undertakes to the others that it will exercise all powers and rights available to it as a director, officer, employee or shareholder in [KESP] (or in any other Group Company) in order to give effect to the provisions of this agreement and to ensure that [KESP] complies with its obligations under this agreement."***

(iii) Schedule 9 – Interpretation

> ***"Control means, with respect to any person, the possession, directly or indirectly, of the power to direct, or cause the direction of, the management of that person, whether through ownership of shares, voting securities, partnership or other ownership interests, agreement or otherwise, provided that if one person owns, directly or indirectly, fifty per cent (50%) or more of the share capital, voting, securities, partnership or other ownership interests of another person, such person shall be deemed to Control such other person and Controlled and under common Control shall be construed accordingly."***

8. At the time of the KESP SHA, SPV 21 was wholly owned by IGCF General Partner Limited ("IGCF GP"), in its capacity as general partner of the Infrastructure and Growth Capital Fund LP, an exempted limited partnership registered in the Cayman Islands. In 2014, following a restructuring of the share capital of SPV 21, IGCF SPV 26 Limited ("SPV 26"), a wholly owned subsidiary of IGCF GP, acquired an ownership stake in SPV 21. The majority owner of IGCF GP was Abraaj Investment Management Limited ("AIML") which was the investment manager for a number of private equity funds and their related structures within the Abraaj Group.

9. The current share capital of SPV 21 also consists of a sole voting share ("the Voting Share"), which is registered in the name of AIML.

(ii) The Sage transaction

10. The Abraaj Group, including AIML, collapsed in 2018 amid allegations of fraud and mismanagement by Mr Arif Naqvi, who was the founder and CEO of the Abraaj Group, and his associates. The Grand Court appointed provisional liquidators over AIML on 18 June 2018 and on 11 September 2019, it was placed in official liquidation.

11. The liquidators of AIML ("the JOLs") appointed Mr Casey McDonald as an independent professional director of two Abraaj entities which held successive corporate directorships of SPV 21. Then, on 31 May 2020, the JOLs appointed Mr McDonald directly as the sole director of SPV 21, replacing the Abraaj entity which had until then been the director of SPV 21, and of which Mr McDonald was a director.

12. Mr McDonald is a chartered accountant with over 20 years' experience and a professional director regulated by the Cayman Islands monetary authority amongst others. He has a focus on appointments

to the boards of distressed funds and investment vehicles and has acted as a court appointed fiduciary in this jurisdiction and other jurisdictions.

13. On 3 August 2022, the JOLs caused AIML to conclude a share and asset purchase agreement with Sage Venture Group Limited ("Sage"). Sage is a BVI company which is ultimately beneficially owned and controlled by Mr Shaheryar Chishty, through AsiaPak Investments Limited. Sage is not part of the Abraaj Group and has no connections with it. The relevant details of the transaction ("the Sage Transaction") are that in return for a payment of US$18 million and additional consideration if certain conditions were satisfied within 36 months:

    (i) Sage bought 75.5% of the shares in IGCF GP from AIML (and has subsequently acquired the remaining shares from the other shareholders of IGCF GP);
    (ii) Sage bought a debt from AIML of approximately US$41m said to be owed by KESP to AIML for consultancy services provided, although there is a dispute between the parties as to whether the debt is genuine;
    (iii) Sage agreed to buy the Voting Share from AIML.

14. The Sage Transaction followed a process during the summer of 2022 under the auspices of the JOLs. In the course of that process, a company associated with the Appellants was invited to submit an offer for the Voting Share or for a purchase of equity in SPV 21 and did so on 4 August 2022, but by then AIML had already agreed to sell to Sage, so the offer did not progress.

15. The JOLs sought sanction from the Grand Court to complete the Sage Transaction. On 14 October 2022, the Grand Court permitted the JOLs to cause AIML to enter into the Sage Transaction provided that the JOLs satisfied themselves that the transaction would not breach the terms of the relevant agreements concerning KESP and AIML or KEL's obligations to its lenders.

16. On or about 14 October 2022, Sage and the JOLs entered into two side letters concerning the Sage Transaction. The second side letter ("the Side Letter") is of particular significance for the present proceedings. In it, AIML and Sage noted at recital (A) that the Appellants had asserted that the transfer of the Voting Share to Sage would constitute a change of control of SPV 21 within the meaning of clause 9.4 of the KESP SHA. In the body of the Side Letter, Sage and AsiaPak acknowledged that they were on express notice of this claim asserted by the Appellants in relation to clause 9.4 and the Side Letter went on to provide, so far as relevant, at clause 4 as follows:

> ***"…To the extent that the legal title to the sole Voting Share in SPV 21 cannot be transferred by [AIML] to [Sage]:***
>
> ***(i) The parties acknowledge and agree that the equitable interest in the sole Voting Share in SPV 21 will be transferred from [AIML] to [Sage] on Completion;….***
>
> ***(ii) [AIML] agrees to hold the sole Voting Share for [Sage] as its nominee and to exercise any rights attaching to that share, and to generally deal with the sole Voting Share in accordance with [Sage's] written instructions…"***

Sage also agreed to indemnify the JOLs against any legal fees and expenses incurred in connection with the transfer to Sage of the Voting Share in SPV 21. It is unclear whether the Grand Court was informed of the content of the Side Letter when granting its approval on 14 October 2022 to the JOLs entering into the Sage Transaction.

17. It remains the position that the Voting Share is still registered in the name of AIML and that accordingly Sage only has the beneficial ownership of the Voting Share. However, pursuant to the Side Letter, the JOLs have committed to exercising the rights conferred by the Voting Share in accordance with the instructions of Sage. They have reached this agreement in full knowledge of the terms of clause 9.4.

18. On 18 October 2022, SPV 21 resolved to nominate Mr Chishty, his brother Sameer Chishty and Darin Baur, his business associate, as directors of KESP.

19. The next day, 19 October 2022, which was only five days after the date of the Side Letter and the sanction granted by the Grand Court, KESP's company secretary wrote to KEL indicating that KESP was appointing Mr Chishty and Mr Baur as KESP's nominated directors of KEL with immediate effect. The Appellants assert that this was done without the knowledge or consent of KESP's board of directors. They also contend that the inevitable inference, despite the assertion by Mr McDonald as to his independence, is that these appointments were made pursuant to the acquisition of control of SPV 21 by Sage / Mr Chishty.

(iv) Proceedings in Pakistan

20. Two days later, on 21 October 2022, the Appellants commenced proceedings in the High Court of Sindh at Karachi, Pakistan against SPV 21, the government of Pakistan, certain regulatory agencies and others, seeking declarations and a permanent injunction to restrain SPV 21 from appointing any directors to KEL ("the Pakistan Proceedings"). On the same day, the Appellants applied for, and obtained, an ex parte injunction restraining SPV 21 from making any changes to the composition of KEL's board of directors ("the Pakistan Injunction"). On 4 November 2022, SPV 21 applied to set aside the Pakistan Injunction and stay the Pakistan Proceedings. That application was due to be heard on 20 February 2024 but was adjourned and there was no information before the judge as to whether that hearing took place and, if it did, any outcome. It appears there has been other activity in Pakistan, both in the proceedings commenced by the Appellants, where other interested parties have sought to be joined, and in separate proceedings started by others.

(v) The Cayman anti-suit proceedings

21. SPV 21 took the view that the Appellants' action in commencing the Pakistan Proceedings was a clear breach of the jurisdiction provision in clause 25.2 of the KESP SHA which provided that the Grand Court and the English courts had exclusive jurisdiction to determine any dispute arising out of or in connection with that agreement. Initially, SPV 21 invited the Appellants to discontinue the proceedings in Pakistan and to commence a claim in either the Grand Court or the High Court of England and Wales. When the Appellants refused, SPV 21 commenced proceedings against the Appellants in the Grand Court on 24 November 2022 seeking an anti-suit injunction to restrain the Appellants from pursuing the Pakistan Proceedings and requiring them to apply to set aside the ex parte injunction they had obtained. Segal J in the Grand Court granted an interim anti-suit injunction on 30 January 2023 and, following a final hearing, gave judgment on 20 July 2023 holding that the Appellants were in breach of clause 25.4 of the KESP SHA and confirming the interim anti-suit injunction, which ordered the Appellants forthwith to terminate or otherwise discontinue the Pakistan Proceedings against SPV 21 and certain other defendants (but not the Government of Pakistan or the regulatory authorities). However, he stayed that injunction pending the Appellants' appeal to the Court of Appeal. The Court of Appeal dismissed that appeal on 2 July 2024.

22. The Appellants sought permission to appeal to the Judicial Committee of the Privy Council on the question whether SPV 21 had submitted to the jurisdiction of the High Court of Pakistan. They also applied to the Court of Appeal for a stay of the anti-suit injunction pending their intended appeal or

pending determination of an application to be made by the Appellants to the Grand Court for an injunction in terms similar to the ex parte injunction they had obtained in Pakistan.

23. On 10 January 2025, the Court of Appeal gave the Appellants permission to appeal to the Privy Council but refused their application for a stay pending that appeal. However, the Court of Appeal stayed the anti-suit injunction for up to 5 months upon an undertaking by the Appellants to apply to the Grand Court for an injunction to replace the Pakistan Injunction *"without delay"*. The draft of the Court of Appeal's judgment had apparently been provided to the parties on 27 November 2024, so that the Appellants were aware from that date that they needed to apply to the Grand Court promptly for an injunction.

24. The appeal to the Privy Council was limited to the question whether SPV 21 submitted to the jurisdiction of the High Court in Pakistan by making its application to that court to challenge jurisdiction. It did not involve any challenge to the finding of Segal J and this court that the Appellants acted in breach of clause 25.4 of the KESP SHA in commencing and pursuing the Pakistan Proceedings. The Privy Council dismissed the appeal on 24 November 2025.

25. The stay on the anti-suit injunction has since been further extended until the determination of the present appeal.

The present proceedings

26. Despite the Appellants undertaking to the Court of Appeal to do so *"without delay",* they had not commenced a claim before the Grand Court for an injunction by 12 February 2025, prompting SPV 21's attorneys to challenge them on this. On 24 February 2025, SPV 21 filed a Notice of Motion before the Court of Appeal seeking to lift the stay of the anti-suit injunction on the ground that the Appellants had failed to comply with their undertaking to the Court of Appeal. This appears to have prompted the Appellants into action and on 26 February 2025 they filed the writ and statement of claim in the current proceedings together with a summons for an interlocutory injunction. In very broad outline, as summarised by the judge, the respective cases before him were as follows.

27. The Appellants asserted that since 14 October 2022, Sage had become the majority owner and effectively controlled SPV 26 which in turn was the majority owner of SPV 21; that Sage had acquired beneficial ownership of the Voting Share and was therefore in control of SPV 21; and that

by reason of his beneficial ownership of Sage, Mr Chishty had become the indirect majority owner and effective controller of SPV 21.

28. They submitted that this amounted to a *"change of Control"* within the meaning of the KESP SHA and was a breach of clause 9.4. They sought an interim injunction, and a permanent injunction following trial, to restrain SPV 21 from permitting or taking any action that would involve SPV 21 acting in breach of clause 9.4 of the KESP SHA. They complained that Sage and Mr Chishty's aim was to use their control of SPV 21 to further their own interests at the expense of the Appellants and that this would lead to uncompensatable damage to the Appellants, justifying the grant of an interim injunction.

29. The terms of the interim injunction sought by the Appellants before the judge ("the Original Injunction"), which for all practical purposes were the same as the terms of the permanent injunction sought in the statement of claim, were as follows:

> ***"1. [SPV 21] shall not implement and/or act on the direct or indirect instructions of [Sage] and/or [Mr Chishty], or their agents or associates, or cause or procure the same to occur;***
>
> ***2. [KESP] shall not assist with or procure the appointment of any persons connected to [Sage] and/or [Mr Chishty] or any of their agents or associates to the board of [KEL];***
>
> ***3. [SPV 21] shall not, by itself and/or by its servants or agents, or by any director appointed by it to [KESP] permit or take any action that would result in a change of control as defined in the [KESP SHA] ("Control") by [Sage] and/or [Mr Chishty], whether directly or indirectly;***
>
> ***4. [SPV 21] shall forthwith cease to permit itself to be Controlled by Sage and/or [Mr Chishty], whether or indirectly;***
>
> ***5. [SPV 21] shall withdraw all instructions seeking to appoint or support the appointment of [Mr Chishty] and [Mr Darin Baur] as directors of [KEL]. Further, [SPV 21] shall not seek to appoint any other person as directors of [KEL] to whom [the Appellants] object;***
>
> ***6. [SPV 21] shall not register any transfer of the sole [Voting Share] in [SPV 21] without the written agreement of [the Appellants]; and***
>
> ***7. [SPV 21] shall not, without the consent of [the Appellants], in any way permit and/or take any action that results in Control of [SPV 21] by [Sage] and/or***

[Mr Chishty] or any other person (other than a member of the Abraaj Group) as defined in the [KESP SHA]."

30. The Appellants asserted that they were pursuing this relief in order to protect their investment in KEL. They asserted that if relief was not granted, Mr Chishty, through Sage and SPV 21, would implement changes to KEL that could severely and irremediably harm its operations and the Appellants' interests in KEL. They asserted that SPV 21 was unlikely to suffer any prejudice if relief was granted, so that the balance of convenience was firmly in favour of ordering an injunction in the terms sought.

31. The judge summarised the overarching contentions of SPV 21 that the Appellants were not entitled to the interim injunctive relief sought as follows:

(i) The relief sought by the Appellants went far beyond any contractual rights in favour of the Appellants in the KESP SHA. The Appellants were seeking to restrain SPV 21 from the exercise of its contractual rights, rather than to prevent breaches of its contractual obligations.

(ii) The Appellants had failed to show that they would suffer substantial damage if the injunction were not granted, still less irremediable damage.

(iii) Damages would be an adequate remedy for any breaches of the Appellants' rights.

(iv) There was no serious issue to be tried on the Appellants' claim for permanent injunctive relief. Accordingly, the Appellants should not be granted interim injunctive relief.

(v) The Appellants had been guilty of egregious delay in bringing their claim and had done so with unclean hands. They had delayed for over two years, during which period they had themselves deliberately breached and remained in continuing breach of the KESP SHA on which they sought to rely and had ignored findings by the Grand Court and the Court of Appeal that they were in breach of it. The court should not reward the Appellants' behaviour by a discretionary exercise of its equitable jurisdiction in their favour.

The Judgment

32. It was common ground before the judge that the applicable principles when considering the grant of an interim injunction are those set out in the well-known case of *American Cyanamid Co v Ethicon* [1975] AC 396 at 408-409. The judge considered that these were helpfully summarised by Mangatal J in *Xie Zhicun v XiO GP Ltd* (Unreported 09/06/17) at paragraph 101 in the following terms:

> ***"(a) Is there a serious issue to be tried; do the Plaintiffs have a real prospect of succeeding in their claim for permanent injunctions at the trial?***
>
> ***(b) If there is a serious issue to be tried, will the Plaintiffs be adequately compensated by damages for the loss they would have sustained as a result of the Defendants continuing to do that which it was sought to be enjoined, and are the Defendants in a position to pay the damages?***
>
> ***(c) If damages would not provide an adequate remedy for the Plaintiffs, if the Defendants were to have succeeded at trial, would they be adequately compensated under the Plaintiffs' undertaking as to damages? I bear in mind, that as Lord Hoffmann said at paragraph 17 of NCB v Olint:***
>
> > ***"In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy."***
>
> ***(d) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of the balance of convenience arises.***
>
> ***(e) Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.***
>
> ***(f) The Court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."***

33. Having set out in some detail the submissions of the parties on the issues which had to be considered when applying the *American Cyanamid* test, the judge's conclusions can be summarised as follows.

(i) No serious issue to be tried

34. SPV 21 had argued that, as it was not a party to the Sage Transaction, which was between the JOLs of AIML and Sage, there was no serious issue to be tried as to whether it had permitted or taken any action which had resulted in the change of control of SPV 21 to Sage and whether it had therefore acted in breach of clause 9.4 of the KESP SHA.

35. The judge rejected that contention. He referred to contemporaneous documents which could support a finding that SPV 21 did facilitate the completion of the Sage Transaction by issuing documents required for the transaction to go forwards. In particular, the transaction required a form of charge over SPV 21's shares and a negative pledge to be given by SPV 21 in favour of AIML. The judge

explained at [95] that the form of charge required SPV 21 to provide certain documents to enable the charge to be executed, including a memorandum signed by SPV 21's director that the charge was endorsed on SPV 21's register of members, an executed notice of charge and an executed letter of undertaking and confirmation, again to be signed by SPV 21's director, and all in the form annexed to the form of charge. Similarly, SPV 21 had to execute the negative pledge and there was no suggestion before the judge that it had not been provided by SPV 21. Accordingly, the judge held that there was a serious issue to be tried as to whether SPV 21 had breached clause 9.4 by permitting or taking action that would result in a change of control of SPV 21.

36. However, the judge held that, as set out in *Zhikun*, the correct question was whether there was a serious issue to be tried that a plaintiff would obtain the relief it was seeking at trial; thus in the present case, the question was whether there was a serious issue that the court would grant a permanent injunction in the terms sought or in broadly similar terms.

37. The judge held at [100]-[103] that the orders sought went well beyond what would be appropriate as a remedy for a breach of clause 9.4 by SPV 21 and impermissibly strayed into granting the Appellants additional rights which were not to be found in the KESP SHA. He also held that there were real problems with the ability of the court to enforce any orders that were made in the terms proposed. For example, the order sought at paragraph 4 of the Original Injunction was to direct SPV 21 forthwith to cease to permit itself to be controlled by Sage and/or Shaheryar Chishty, whether directly or indirectly. The judge concluded that this did not make clear what SPV 21 was meant to do or not to do in order to comply. He said there were similar difficulties with the scope, meaning and enforceability of the other paragraphs in the relief sought.

38. He considered whether there was an irreducible minimum that might be ordered by way of final injunction, for example if the orders were limited to paragraph 1 of the Original Injunction (as set out at paragraph [29] above). However, he concluded that even this would be unworkable. For example, what would happen if the instructions that were given to SPV 21 by Sage were clearly in SPV 21's best interests or in the best interests of KESP or KEL? An order in the terms sought by the Appellants would require SPV 21's director not to accede to such directions and arguably to be in breach of his or her fiduciary duties.

39. Accordingly, he was not satisfied that there was a serious issue to be tried as to whether the Appellants would achieve the relief which they were seeking in the proceedings. That meant that the Appellants failed in their application. However, the judge went on to consider the other matters listed in *American Cyanamid* and, although he did not specifically say so, this must implicitly have been in case he was found to be wrong in his conclusion that there was no serious issue to be tried.

(ii) Likelihood of uncompensatable loss or damage to the Appellants

40. The judge noted that if no interim injunction was granted and if the Pakistan Proceedings were withdrawn, SPV 21 would be able to appoint additional directors of KEL up to its maximum number of four directors. There are five independent directors and the Appellants are entitled to appoint four directors, making a possible total of thirteen directors. Thus, even if SPV 21 were to appoint four directors, including Mr Chishty and Mr Baur, neither Sage nor Mr Chishty would be able to control the way in which KEL carried on its business. They would only be able to influence its management to the extent that at least three other directors agreed that their proposals were in KEL's best interests. The judge held that he was entitled to conclude that all directors, but in particular the five independent directors, would exercise their judgment in the best interests of KEL according to their fiduciary duty to KEL. In those circumstances, he did not see how Sage and Mr Chishty would be able to drive through decisions that they wanted in respect of KEL against the wishes of the Appellants' nominated directors and the independent directors. They would only be able to achieve a particular course of action if at least three other directors agreed with them. He accordingly held that there was no real risk of damage to the Appellants' interests that would be caused by refusing the injunction sought.

41. He further held that, to the extent that the Appellants were to suffer any damage to their interests in KEL, such damage should be easily quantifiable as a result of KEL being a publicly listed company and accordingly they could be compensated by an award of damages.

(iii) Likelihood of uncompensatable loss or damage to SPV 21

42. The judge noted that at present, because of unfilled positions, SPV 21 has two directors of KEL out of the current complement of ten directors. If an injunction was granted, this would remain the position. If no injunction were granted, SPV 21 could increase its directors to four but the Appellants could also increase their directors from the current number of three to four. Thus, if no injunctions

were granted, SPV 21 would have four out of thirteen directors as compared with two out of ten at present (which would remain the position if an injunction were granted).

43. The judge concluded that this was not a matter of significant difference in terms of influence and ability to exercise decision-making powers. Accordingly, he held that SPV 21 had not satisfied him that it was likely to suffer uncompensatable loss if an injunction in the Appellants favour were to be granted.

(iv) Delay and unclean hands

44. In the light of his ruling on uncompensatable loss on each side, the judge did not consider the question of the balance of convenience. However, he did go on to consider the question of delay and unclean hands on the part of the Appellants.

45. In the context of the equitable maxim *'he who seeks equity must do equity',* he considered the English decision of *Chappell v Times Newspapers Ltd* [1970] 1 WLR 482. This was a case where publishers, following a threat of industrial action by a trade union, stated that they would regard any employee who took industrial action as having terminated his employment. Five individual employees instituted proceedings seeking an interim injunction to restrain the publishers from terminating their employment.

46. Megarry J found on the evidence that, if they were called upon by the trade union to take further industrial action, the individual plaintiffs would do so. In these circumstances, he held as follows at 495A-D:

> ***"There is a general principle which lies enshrined in the maxim "he who seeks equity must do equity". That maxim, like the other maxims of equity, is not to be construed or enforced as if it were a section in an Act of Parliament; but it expresses in concise form one approach made by the court when the discretionary remedy of an injunction is sought. If the plaintiff asks for an injunction to restrain a breach of contract to which he is a party, and he is seeking to uphold that contract in all its parts, he is, in relation to that contract, ready to do equity. If on the other hand he seeks the injunction but in the same breath is constrained to say that he is ready and willing himself to commit grave breaches of the contract at the behest of a body or person (whether his union or not) engaged in an active campaign of organising the repeated commission of***

such breaches, then it seems to me that the plaintiff cannot very well contend that in relation to that contract he is ready to do equity. One may leave on one side any technicalities of law or equity and simply say, in the language of childhood, that he is trying to have it both ways: he is saying "You must not break our contract but I remain free to do so"."

47. In the Court of Appeal, Lord Denning M.R. said this at 502A-E:

> ***"There is another point which seems to me decisive. These men are saying that the publishers are about to break the contract of employment. But it is plain that they are not ready and willing to perform their own side of it. It has long been settled both at common law and in equity that in a contract where each has to do his part concurrently with the other, then if one party seeks relief, he must be ready and willing to do his part in it. You will find the common law so stated in Smith's Leading Cases, 13th ed. (1929) vol.2 p.10: notes to Cutter v Powell (1795) 6 Term. Rep. 320. You will find the equity stated in Measures Brothers Limited v Measures [1910] 2 Ch. 248 where Sir H H Cozens-Hardy M.R. said at p.254:***
>
> ***"I prefer to base my judgment upon the ground that the plaintiffs, who are seeking equitable relief by way of injunction, cannot obtain such relief unless they allege and prove that they have performed their part of the bargain hitherto and are ready and able also to perform their part in the future."***
>
> ***The principle was stated by Lord Radcliffe more recently in Australian Hardwoods Pty. Ltd v Commissioner for Railways [1961] 1 WLR 425, 432-433:***
>
> > ***"….where the agreement is one which involves continuing or future acts to be performed by the plaintiff, he must fail unless he can show that he is ready and willing on his part to carry out those obligations, which are, in fact, part of the consideration for the undertaking of the defendant that the plaintiff seeks to have enforced."***
>
> ***In this case it seems to me impossible for any of the plaintiffs to say that he is ready and willing to perform his part of the contract when on the statement of his union, the National Graphical Association (which he has never disavowed) he may be called upon, or other members of his union may be called upon, to take industrial action so as to bring great losses to their employers. Not being ready and willing to do their part, they cannot call on the employers to continue to employ them. They are seeking equity when they are not ready to do it themselves.***
>
> ***This is enough to decide the case."***

The judge also quoted passages from the judgments of Stephenson LJ (at 504E-G) and Lane LJ (506E-G) in the Court of Appeal which were to like effect.

48. The judge held that the Appellants' position was analogous to that of the plaintiffs in *Chappell* because they had deliberately chosen to commence proceedings in Pakistan in clear breach of clause 25.2 of the KESP SHA and they had taken no steps to discontinue those proceedings and discharge the ex parte injunction obtained in Pakistan despite both Segal J and this court concluding that they had acted in breach. For the reasons set out at [121], the judge found on the evidence that the Appellants had made a deliberate decision not to bring proceedings in the Cayman Islands or in England and Wales but to sue in Pakistan instead.

49. The judge therefore held at [123] that, even if he had not already concluded that he should dismiss the summons, he would have refused to grant the Appellants the interim injunction which they sought as a matter of the exercise of his discretion on the ground that they did not come to the court with clean hands.

50. The judge also considered the question of the Appellants' delay in bringing the proceedings before the Grand Court. He noted that the Appellants had known since at least 1 February 2023, when Segal J granted the interim anti-suit injunction, that they might have to concede the Pakistan Injunction but they had done nothing to commence the proceedings for an injunction in the Grand Court until 26 February 2025, more than two years later. Furthermore, although having undertaken to the Court of Appeal that they would commence proceedings *'without delay'*, they did not do so until 26 February.

51. The judge held that this represented substantial unexplained or unjustified delay in commencing the proceedings. He noted that the question of delay was complicated by the existence of the Pakistan Injunction and the fact that Segal J and the Court of Appeal had granted stays of the anti-suit injunction. He found therefore that the Appellants delay in commencing the current action was not so plain and obvious that it was sufficient on its own to justify refusing to give the Appellants the relief which they sought, but it was significant in the overall balancing exercise and weighed in favour of refusing to exercise his discretion to grant the requested interim injunction. In effect, as he said at [127.4], the delay provided an additional supporting reason to refuse to exercise the court's discretion in the Appellants' favour.

Grounds of appeal

52. The Appellants submit that the judge erred in dismissing their application for an interim injunction. In broad terms, they raised three grounds of appeal in their skeleton argument:

(i) The judge was wrong to find that there was no serious issue to be tried because the relief sought by the Appellants was too wide and was unworkable. Alternatively, if he was of that view, the judge could and should have narrowed the terms of the injunction sought so as to hold the ring pending trial rather than dismissing the application altogether.

(ii) The judge was wrong to find that the Appellants should be denied relief because of unclean hands and delay in circumstances where the anti-suit injunction had been stayed both by Segal J and by this court.

(iii) The judge was wrong to hold that damages would be an adequate remedy for the Appellants.

53. I shall consider each of these but first it is important to recall the approach of an appellate court to a discretionary decision at first instance. A decision as to whether to grant an interim injunction and the associated issue of whether any hands are sufficiently unclean to deny relief are quintessential discretionary decisions on which judges may reasonably reach different conclusions.

54. In *Scully Royalty Limited v Raiffeisen Bank International Limited* [2022] (1) CILR 118, this court said at [53]:

> ***"It is well established that a decision whether to grant an interlocutory order such as a freezing order is a discretionary decision for the first instance judge and an appellate court may only interfere on limited grounds as set out, for example, in Hadmore Productions Limited v Hamilton [1983] 1 AC at 220A-E (per Lord Diplock). It is not sufficient that the members of the appellate court would have exercised their discretion differently."***

55. It is worth recalling the observation of Lord Diplock in *Hadmore,* referred to in *Scully,* which was in the following terms:

> ***"An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with***

> ***it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it is one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."***

56. As an example of the need for appellate restraint, Mr Chapman referred us to the case of *Abdule v Commissioner of Police of the Metropolis* [2016] 1 WLR 898, which concerned a decision of the High Court not to strike out a claim for failure to comply with certain procedural rules. On appeal, Lewison LJ, with whom Kitchin and Moore-Bick LJJ agreed, made clear that he would have reached the opposite decision to the High Court judge. Thus, at [24] he said:

> ***"Let me say at once that if I had been the first instance judge I would have accepted [counsel for the appellant's] submissions. I would have given more weight to the lamentable history of delay in progressing this case, the apparent incompetence of the claimant's solicitors, and the loss of the trial date, but that is not the question for an appeal court."***

However, the Court of Appeal went on to dismiss the appeal on the basis that it was within the discretionary range of decisions open to the judge below.

Clean Hands

57. Although Mr Quirk dealt with this as the second of his three grounds, I propose to consider it first. That is because, as will be seen, the decision on this ground is determinative of the whole appeal.

(a) Submissions

58. As described at paras 44-49 above, the judge held that, quite apart from the other matters which he considered, he would have refused to grant the interim injunction in any event on the ground that the Appellants did not come to the court with clean hands because of their breach of clause 25.2 of the KESP SHA in commencing and then not discontinuing the Pakistan Proceedings against SPV 21.

59. The Appellants submitted that there was no proper foundation for the judge's conclusion, which was one he was not entitled to reach. I would summarise their arguments as follows.

60. First, the judge criticised the Appellants for commencing and then not taking any steps to discontinue the Pakistan Proceedings despite the decision of Segal J and this court that in doing so they were in breach of clause 25.2 of the KESP SHA. But that was to ignore the fact that Segal J and this court had granted a stay of the anti-suit injunction and the judge was wrong to find that this did not excuse the Appellants' failure to discontinue the Pakistan Proceedings. Contrary to the judge's view, the facts of this case were not analogous to the facts in *Chapell*. In that case, the applicants sought specific performance of a contract while being in breach of the same contract. By contrast, in this case this court in its decision of 10 January 2025 had effectively permitted the continuation of the Pakistan Proceedings by virtue of the stay of the anti-suit injunction.

61. Secondly, the judge's conclusion that the Appellants came with unclean hands could not be justified in circumstances where, in its judgment of 10 January 2025, this court had specifically granted a stay of the anti-suit injunction for five months in order to enable the Appellants to obtain an order from the Grand Court in similar terms to the Pakistan injunction concerning the appointment of directors to KEL. It could not be a case of unclean hands for the Appellants not to withdraw the Pakistan Proceedings when this was expressly envisaged by the stay granted by this court.

62. Thirdly, the fact that the Appellants commenced the Pakistan Proceedings in breach of contract should not bar them for all time from seeking equitable relief; to so hold would mean that in any case where a party started in the wrong jurisdiction and an anti-suit injunction was granted, that party would be barred from obtaining any equitable remedy in the proper court. There was no authority to support such a proposition and it could not be correct.

(b) Discussion

63. There are in fact two relevant equitable maxims. The first is *'he who seeks equity must do equity'*. The second is *'he who comes into equity must come with clean hands'*. The judge referred to the case of *Chappell* (which was concerned with the first maxim) but then spoke exclusively of *'clean hands'*, which relate to the second maxim. However, I do not think that this is significant and no point was raised on it before us. The two maxims are very similar in meaning and the only difference is that the first maxim could be said to be looking to the future whereas the second maxim looks more to the past (see Snell's Equity, 32nd edition at 5-015).

64. This aspect of the judge's decision was *par excellence* an exercise of discretionary judgment. When considering application of the 'clean hands' equitable maxim, a judge has to assess the nature and gravity of any lack of clean hands on the part of an applicant and decide whether the applicant's conduct is sufficient to deny equitable relief which would otherwise be granted to him. It is therefore a classic example of where an appellate court must bear in mind the need for restraint as outlined at paras 53-56 above.

65. I am not sure that I would necessarily have reached the same conclusion as the judge on the facts of this case. But that is not the test. I am quite satisfied that the judge's decision was well within the band of reasonable decisions open to him and cannot possibly be categorised as being plainly wrong. I reach that view for the following reasons:

(i) The judge found at [121] that the Appellants consciously considered whether they should comply with clause 25.2 of the KESP SHA and bring proceedings in the Cayman Islands or in England and Wales and made a deliberate decision not to, and to sue in Pakistan instead. This was therefore not an inadvertent or innocent breach; it was a deliberate and conscious breach of contract.

(ii) The Appellants then contested the existence of any breach of contract on their part before Segal J and subsequently before the Court of Appeal despite the clear wording of clause 25.4. They could at any stage have accepted that they were in breach and begun proceedings in the Cayman Islands, but they chose not to until in effect forced to do so.

(iii) It was perfectly open to the judge to conclude that the fact that the Cayman courts have granted a stay of the anti-suit injunction does not excuse the Appellants' failure to withdraw the Pakistan Proceedings. The grant of a stay simply means that there is no order in force to the effect that the Appellants must discontinue the Pakistan Proceedings. But a stay does not

prevent the Appellants from withdrawing the Pakistan Proceedings voluntarily. Indeed, there has been nothing to prevent the Appellants from withdrawing the Pakistan Proceedings (and thereby bringing their breach of contract to an end) at any time since October 2022. The fact that they have not done so even in the period since the decision of the Grand Court (and subsequently this court) that they were in breach of contract suggests that they wish to hold on to the fruits of their breach of contract as long as possible.

(iv) Nor does the decision of this court on 10 January 2025 bear the weight which the Appellants seek to place on it. The fact that this court agreed to a stay in order to give time for an application to be made to the Grand Court does not mean that it was approving or blessing a continued breach of contract. As already stated, it has been a voluntary decision on the part of the Appellants not to withdraw the Pakistan Proceedings.

(v) I accept that the facts of this case are not wholly analogous to the case of *Chapell*, but they are substantially analogous. In that case, the plaintiffs sought the equitable remedy of a decree of specific performance despite reserving the right to break the contract of employment in the future. Because the case was concerned with future conduct, the Court of Appeal focused on the first maxim, namely that *'he who seeks equity must do equity'*. In the present case, while not specifically reserving the right to break the KESP SHA in future, the Appellants seek the equitable remedy of an interim injunction to prevent SPV 21 from breaching the KESP SHA whilst having committed and then remaining in breach themselves both at the time of the hearing before the judge and at the date of this appeal; thus having unclean hands.

(vi) I do not accept Mr Quirk's submission that the judge's decision to deny relief on the facts of this case means that any party who breaches an exclusive jurisdiction term in a contract by suing in the wrong jurisdiction will thereafter be barred from obtaining equitable relief in the correct jurisdiction because he would be treated as having unclean hands. That is for two reasons. First, such matters are very fact specific and will depend upon the circumstances surrounding the breach of contract by the applicant as well as the alleged breach of contract by the defendant. The judge's decision only relates to the facts of this particular case. Secondly, I read the judge's decision as dealing only with the question of interim relief. If a time comes after trial when the alleged breach of contract by SPV 21 is found to be proved (rather than merely being a serious issue to be tried as at present), the court will then have to reconsider the balance of equity and fairness in the light of the then proven breach of contract

by SPV 21 and decide whether any unclean hands on the part of the Appellants are such that at that stage they should be denied equitable relief for such proven breach.

(vii) Putting these matters together, it was in my view entirely open to the judge to conclude that the Appellants were seeking equitable relief when they had unclean hands and that their conduct was sufficient to justify denial of the equitable relief of an interim injunction.

66. The judge made clear that his decision on this issue was a standalone ground for dismissing the Appellants' application for an interim injunction. It follows that the decision to uphold the judge on this issue means that the appeal must be dismissed regardless of the outcome of the two other grounds of appeal. It is not therefore strictly necessary to deal with those two grounds, but I shall do so briefly in case it is of assistance in the future.

(i) No serious issue to be tried

(a) Submissions

67. In his skeleton argument, Mr Quirk emphasised the judge's conclusion that there was a serious issue to be tried as to whether SPV 21 had breached clause 9.4 by reason of actions which it had taken to assist the change in control as summarised by the judge at [95] (see paragraph 35 above). In those circumstances, an interim injunction should be granted to preserve the status quo pending the outcome of the trial.

68. His skeleton argument essentially made four key points in support of the appeal. First, if the judge was of the view that the relief sought by the Appellants went beyond what would be appropriate as a remedy for any breach of clause 9.4 by SPV 21, he should have considered, in consultation with counsel at the hearing, whether a narrower form of relief would be appropriate in order to maintain the status quo. The judge had not raised with counsel any concerns as to the width or extent of the relief which the Appellants were seeking.

69. Secondly, the judge was wrong to find that even an order limited to paragraph 1 of the Original Injunction (see para 29 above) would be unworkable. The directors of SPV 21 would not be in breach of their duties by complying with any court order. Furthermore, in the interim period pending trial, if directions were given by Sage which the directors of SPV 21 considered they should follow despite the interim injunction, they could always seek permission and/or variation from the court.

70. Thirdly, the judge was wrong to conclude that the relief sought by the Appellants could not be enforced by the court or was otherwise unworkable as a matter of permanent relief. On analysis, each paragraph of the injunction would not prove difficult or uncertain for the court to enforce or for SPV 21 to comply with.

71. Fourthly, the judge was wrong to conclude at [98], in reliance on the summary of Mangatal J in *Zhikun*, that he had to look in detail at the relief that was sought by the Appellants and consider whether there was a serious issue that the court would grant a permanent injunction in the terms sought or in broadly similar terms if the Appellants were successful in proving a breach of clause 9.4 at trial. The purpose of interim relief was simply to maintain the status quo pending trial and it was entirely plausible that any final relief granted would differ from interim relief granted earlier in the proceedings. In any event, there was a serious issue to be tried as to the relief sought by the Appellants given the court's power to order a narrower form of relief if it deemed appropriate.

72. No suggestion as to the terms of any narrower injunction were put forward by the Appellants in their skeleton argument; it was simply stated at [53] that the Appellants remained open to a narrower form of order which met the essential purpose of preventing a perpetuation of the unlawful change of control in SPV 21 pending the conclusion of a trial.

73. However, the day before the hearing of the appeal, the Appellants submitted a draft order containing narrower injunctive relief which is what they sought this court to order if it allowed the appeal (p26 of the transcript). In other words, they were no longer seeking an order in the terms of the Original Injunction. The terms of the draft order ("the Amended Injunction") were as follows:

> ***"(a) SPV 21 shall not implement and/or act on the instructions of [Sage] and/or [Mr Chishty];***
> ***(b) KESP shall not assist with or procure the appointment of Mr Chishty or Mr Daran Baur to the board of [KEL];***
> ***(c) SPV 21 shall withdraw all instructions seeking to appoint Mr Chishty or Mr Daran Baur as directors of KEL;***
> ***(d) SPV 21 shall not register any transfer of the sole voting share in SPV 21 without the express consent of the Appellants."***

As can be seen, these four paragraphs are essentially simplified versions of paragraphs 1, 2, 5 and 6 of the Original Injunction.

74. In his oral submissions, Mr Quirk focused exclusively on the argument that the judge should have raised with counsel his concerns about the width of the interim injunction sought and, if he felt that the relief sought was too wide, should have granted narrower relief. The Amended Injunction now sought by the Appellants was very much narrower and met the concerns of the judge if they were valid. In essence, the injunction simply sought to prevent SPV 21 from putting into effect a change of control which, on the Appellants' case, had come about as a result of a breach of clause 9.4 by SPV 21. There was therefore a serious issue to be tried as to whether a permanent injunction in such terms would be granted at trial.

75. Mr Chapman submitted that the judge had applied the correct legal test and had reached a discretionary decision which was reasonably open to him; indeed, he had reached the correct decision.

76. Mr Chapman pointed out that, in their skeleton argument below, the Appellants at [44] had themselves cited the passage from *Zhikun* quoted above as articulating the *American Cyanamid* test. It was not therefore open to them on appeal to argue that the judge had applied the wrong test.

77. The judge was also correct to hold that the relief sought before him went beyond what would be appropriate as a remedy for a breach by SPV 21 of clause 9.4 and strayed into granting the Appellants additional rights which were not to be found within the KESP SHA. He was also correct to find that the injunctions were in certain respects overbroad and unworkable.

78. An important consideration was that this was not a more common situation where a party to a shareholders' agreement seeks to transfer shares in breach of a negative covenant in the agreement prohibiting him from transferring his shares or only allowing him to do so subject to compliance with certain conditions. Clause 9.4 dealt with control of one of the parties to a shareholders' agreement. The parties to the Sage Transaction were Sage and the JOLs. Neither of them was party to, or bound, by the KESP SHA and clause 9.4 in particular. Control of SPV 21 had passed to Sage / Mr Chishty as a result of the Sage Transaction coupled with the Side Letter. It was not open to the court to undo or prevent a transaction between two parties who were not bound by the KESP SHA. In the circumstances, there was no serious issue that an injunction in effect preventing the Sage Transaction

from being put into effect would be granted at trial and it went beyond what the Appellants were entitled to.

79. Furthermore, Mr Chapman submitted that it was not open to the Appellants to seek at this late stage an injunction in narrower terms than they sought before the judge. SPV 21 had at all relevant times made the point that the injunction went beyond what was permissible and could not be effectively enforced. He had dealt with this at [45]-[49] of his skeleton argument and in his oral submissions before the judge in some detail; see pp129-131, 140, 159-160, 165, 173-175, 190 (using the bundle numbering) of the transcript of the hearing before the judge.

80. Despite this, at no stage in their skeleton argument or in oral submissions (whether in opening or in reply) before the judge did the Appellants address this issue; they simply maintained their application for an interim injunction in the wide terms of the Original Injunction.

81. Mr Chapman further submitted that even in their skeleton for this appeal, the Appellants did not put forward a narrower form of injunction; they simply suggested that they would be open to a narrower form of order. It was only the day before the hearing of the appeal that the Appellants came forward with the suggested wording contained in the Amended Injunction. It was, submitted Mr Chapman, not acceptable in the face of the objections from SPV 21 to say nothing to the judge indicating that a narrower form of injunction could be considered and then protest when the judge did not raise the point himself before reaching his decision.

82. Mr Chapman also submitted that, even if this court was now willing to consider the narrower draft order, it suffered from the same defects as the original order sought. The Sage Transaction was between two entities who were not party to the KESP SHA and SPV 21 had a contractual right under the KESP SHA to nominate directors to KEL without having to obtain the consent of the Appellants. Thus paragraphs (a), (b) and (c) of the Amended Injunction still prohibited SPV 21 from exercising its contractual rights and granted the Appellants rights which went beyond those which it had under the contract.

(b) Discussion

83. In my judgment, the judge was correct, applying the observation of Mangatal J in *Zhikun,* to consider whether there was a serious issue to be tried not only as to whether SPV 21 was in breach of contract,

but also as to whether the court would grant a permanent injunction at trial. It seems to me that the summary by Mangatal J is consistent with *American Cyanamid* itself where, immediately before the well known passage where he explained the balancing process to be followed in considering whether to grant an interim injunction, Lord Diplock said at 408B:

> ***"So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."*** [emphasis added]

In other words, the court will not proceed to consider the balance of convenience if there is no real prospect (i.e. serious issue to be tried) of the plaintiff succeeding in his claim for a permanent injunction at trial.

84. However, it must always be borne in mind that some flexibility must be allowed when considering the degree of precision of the terms of any injunction which might be granted at trial. In some cases, a judge may consider that, if successful at trial, a plaintiff will be granted some of the injunctive relief sought in the statement of claim but not all of it. This does not mean that no interim injunction may be granted. It simply means that the judge will tailor the terms of the interim injunction so as to be consistent with his view of the general nature of any permanent injunction that may be granted, but the terms of an interim injunction may well not be in identical form to any likely permanent injunction.

85. In my judgment, the judge was correct in this case to find that paragraph 4 of the Original Injunction – *"SPV 21 shall forthwith cease to permit itself to be Controlled by Sage and/or Mr Chishty, whether directly or indirectly"* – was not capable of clear enforcement. Disobedience of an injunction is punishable as a contempt of court. It is essential therefore that the terms of an injunction are clear and that the recipient of an injunction knows with clarity what he has to do or not do in order to comply with the injunction.

86. Given that the Sage Transaction was between Sage and the JOLs and that it was not within SPV 21's power to reverse the control acquired by Sage / Mr Chishty by virtue of the Sage Transaction and the Side Letter, I agree with the judge that it is very difficult to know what SPV 21 was meant to do or not to do in order to comply with paragraph 4. Mr Quirk submitted that paragraph 4 meant simply

that SPV 21 must cease permitting its management to be directed by Sage and/or Mr Chishty. But that is already dealt with in paragraph 1 of the Original Injunction. If Mr Quirk is correct, paragraph 4 is unnecessary and adds nothing. In my judgment, the judge was entitled to read the paragraph as meaning more than this but also to be uncertain as to what exactly it did mean.

87. However, I consider that the judge erred in considering that there were similar difficulties with the scope, meaning and enforceability of the other paragraphs of the Original Injunction. The only other paragraph which he specifically considered in the Judgment was paragraph 1, which simply restrains SPV 21 from implementing and/or acting on the direct or indirect instructions of Sage and/or Mr Chishty or their agents or associates or cause or procure the same to occur. I accept Mr Quirk's submission in his skeleton that this is clear enough and that obeying an injunction could not amount to a breach of fiduciary duty on the part of a director of SPV 21. I further agree that, if necessary, SPV 21 could refer back to the court for directions.

88. I also consider that paragraphs 2, 5 and 6 – which in simplified form are replicated in (b), (c) and (d) of the Amended Injunction – do not go beyond what might reasonably be ordered following trial.

89. One has to recall the background to the Appellants' claim. There can be no doubt that there has been a change of control of SPV 21 from the Abraaj Group to Sage / Mr Chishty as a result of the Sage Transaction and the Side Letter. The judge found that there is a serious issue to be tried that, by various actions it took, SPV 21 facilitated this change of control and had therefore acted in breach of clause 9.4. Furthermore, by use of the Side Letter, steps have been taken to deliberately circumvent the restriction in clause 9.4. In those circumstances, it seems to me that there is at least a serious issue to be tried as to whether, following success at a trial, the court would grant a permanent injunction to restrain SPV 21 from acting upon the change of control which, on this hypothesis, would only have been obtained as a result of its own breach of contract. An injunction restraining appointment of Mr Chishty and Mr Baur as directors of KEL and restraining SPV 21 from acting on the instructions of Sage and / or Mr Chishty would, it seems to me, be a perfectly possible remedy following such a breach of contract.

90. Mr Chapman submitted that an injunction in such terms was to go beyond the contractual rights conferred on the Appellants under the KESP SHA and was to interfere with the contractual right of SPV 21 to appoint directors to KEL. However, where such an appointment was only being made

because of SPV 21's own breach of contract enabling control to be passed to Sage / Mr Chishty, I do not see that an injunction restraining such appointment goes beyond the contractual rights conferred by the KESP SHA. It simply restrains SPV 21 from giving effect to its own breach of contract.

91. As can be seen therefore, had the Appellants originally applied for an injunction in the form of the Amended Injunction, I consider that it would have been plainly wrong to find that there was no serious issue to try as to whether a permanent injunction in those terms would be granted at trial.

92. However, the Appellants did not apply for an injunction in that form. They applied for an injunction in the wide terms of the Original Injunction. They are critical of the judge for not raising with counsel during the hearing the possibility of a narrower injunction if he had concerns about the terms of the Original Injunction. They submit that it was too late for him only to consider whether a narrower form of injunction was possible when he retired to consider and then announced his decision.

93. I accept that many judges might well have raised the issue with counsel during the hearing but in my view the Appellants' criticism is not justified. As pointed out at para 79 above, Mr Chapman in both his skeleton and oral submissions before the judge made forceful submissions to the effect that the terms of the Original Injunction were too wide and went beyond what was permissible. It was therefore clearly an issue which the judge would have to consider. Yet, apart from a limited concession in their oral reply to the effect that paragraph 3 of the Original Injunction could be omitted if the judge preferred, nothing was said by the Appellants to counter Mr Chapman's arguments either in writing or in oral submissions. At no stage did the Appellants address any argument against SPV 21's submission that the Original Injunction went beyond what was permissible and was too wide. In those circumstances it is not surprising that the judge was persuaded by Mr Chapman's argument that the Original Injunction was too wide. In my judgment, it is the Appellants who must bear responsibility for the fact that the issue of whether a narrower injunction could be granted was not addressed at the hearing but only when the judge announced his decision.

94. In those circumstances, is it permissible for the Appellants now, at this stage on appeal, to seek a narrower form of injunction? In this connection, I would refer to the observation in *Scully Royalty Limited* (supra) at [37] where, with reference to the overriding objective in the Grand Court Rules, this court said:

> ***"37. I do not consider that the approach in Columbraria is consistent with the overriding objective. It is incumbent upon a party to put its best foot forward before the Grand Court and to produce all the relevant evidence which it seeks to rely upon in support of its case. This is as applicable to hearings on interlocutory matters such as freezing orders, forum disputes etc as it is to full trials. A hearing before the Grand Court is not a dry run for an appeal, with a party seeking on appeal to cure any deficiencies in the material produced before the Grand Court. As Lewison LJ stated in Fage UK Limited v Chobani UK Limited [2014] EWCA Civ 5 at [114]:***
>
> > ***"The trial is not a dress rehearsal. It is the first and last night of the show"."***

95. That observation was of course made in the context of an application to adduce further evidence on an interlocutory appeal, but in my view the general approach described in that passage is equally applicable to other ways in which an appellant may seek on appeal to cure any deficiencies in the material before the Grand Court, such as raising new arguments or seeking different relief.

96. Of course, that is not to say that this court will never allow a party to seek to cure deficiencies in the material below. On the contrary, this court has a broad discretion to allow further evidence, to allow points to be taken which were not taken below and to allow amendments to the relief sought. But the onus lies fairly and squarely on an appellant to show good reason why such discretion should be exercised in his favour given the importance of the overriding objective and the corresponding need for parties to put their best foot forward in the court below as described in the above extract from *Scully*.

97. On balance, despite Mr Chapman's powerful criticisms of the Appellants as described at paras 79-81 above, I am persuaded that this court should agree to consider the appeal on the basis of the Amended Injunction despite the failure of the Appellants properly to address this issue at first instance. My brief reasons are as follows:

i) This is not a case where the Appellants are seeking new relief. Everything contained in the Amended Injunction was essentially already contained in the Original Injunction; the only difference being that the Original Injunction contained certain additional provisions which are not to be found in the Amended Injunction.

ii) It follows that there is no new argument or material which the Appellants are seeking to raise and which SPV 21 has to deal with. It was in a position to and did make submissions before

the judge about those provisions of the Original Injunction which are now contained in the Amended Injunction, e.g. the appointments of directors to KEL. Mr Chapman was able simply to renew his submissions on these matters before this court. This was not therefore a case of a respondent to an appeal suddenly being faced with a new argument, point of law or material which it did not have to deal with below and which it would be unfair to expect it to deal with for the first time on appeal.

iii) If allowing the Appellants to limit the relief sought in this way would lead to the appeal being successful – with the result that the Appellants might expect to be awarded their costs of the appeal – the court could easily remedy any prejudice in this respect to SPV 21 by penalising the Appellants in costs on the basis that the costs of the appeal were only incurred because of their failure to address the issue of the width of the relief sought before the Grand Court or to limit the relief which they were seeking.

98. It follows that I would uphold this ground of appeal by allowing the Appellants to limit the relief sought to that contained in the Amended Injunction and then holding that there was clearly a serious issue to be tried as to whether a permanent injunction in that form would be granted at trial. However, as described earlier, this ground is academic given the decision on the clean hands ground of appeal.

(iii) Likelihood of uncompensatable loss or damage to the Appellants

99. Before the judge, the Appellants' main submission in relation to damage was that, if Mr Chishty and his associates were appointed as directors of KEL, they would be able to inflict irremediable damage on KEL, thereby prejudicing the Appellants interest (via KESP) in KEL. Thus, for example, at [60] of their skeleton argument before the judge, the Appellants, in reliance upon the evidence of Mr Farooki, the chief portfolio manager of the First Appellant, asserted that if interim relief was not granted, SPV 21, under the effective control of Sage and ultimately Mr Chishty, would be given free rein to inflict prejudice on the Appellants by stacking the board of KEL in its favour and thereby *"tak[ing] or influenc[ing] strategic decisions in circumstances where SPV 21's right to do so remains in legal dispute"*. Mr Farooki further asserted that such steps taken *"would not be easily reversible… they may result in binding commercial decisions, commitments to third parties, or the implementation of a strategic direction that [the Appellants] cannot unwind"*.

100. To like effect was the evidence of Mr Mallon on behalf of the Appellants who at [153] of his first affidavit asserted that, if Mr Chishty and his associates were appointed to the board of KEL, Mr

Chishty could use his influence to implement changes that could severely harm the operation of KEL and the Appellants' interest therein by, for example, entering into related party contracts with other companies that Mr Chishty owned in Pakistan.

101. The Appellants submitted that damages would not be an adequate remedy for damage of this sort as it would be difficult to quantify and difficult to reverse even if they were ultimately successful at trial; see for example [56] of their skeleton before the judge. This approach was consistent with their stance before the Court of Appeal when seeking a stay of the anti-suit injunction where they submitted that they would suffer irreparable harm if Mr Chishty and his associates were appointed to the board of KEL pursuant to his control of SPV 21.

102. The submission that KEL (and therefore the Appellants) would suffer irreparable harm if Mr Chishty and his associates were appointed to the board of KEL was strongly resisted by SPV 21 in its submissions and was rejected by the judge as described at para 40 above. He held that, given that Mr Chishty and his associates could only constitute four out of thirteen directors and would therefore need the support of three other directors (whether independent directors or those nominated by the Appellants) to cause KEL to take a particular action, there was no real risk of damage to the Appellants' interests being caused by refusal of the injunction sought. He further held that, to the extent that the Appellants were to suffer any damage to their interest in KEL, that damage should be easily quantifiable as a result of KEL being a publicly listed company in Pakistan. Damages would therefore be an adequate remedy.

103. On appeal, Mr Quirk sought to introduce a very different argument. He did not seek to challenge the judge's decision that, for the reason given in the judgment, there was no real risk of damage to the Appellants' interests in KEL. However, he submitted that this was in itself a reason to grant an injunction.

104. In support, he referred to Chitty on Contracts, 35th edition at 31-075/076 and Gee on Injunctions at 2-013/2-014, both of which articulate the principle that, when one is dealing with breach of a negative covenant, an injunction is usually the appropriate remedy. Thus at 31-075, Chitty states:

> ***"Where a contract is negative in nature, or contains an express negative stipulation, breach of it may be restrained by injunction. In such cases an injunction is normally granted as a matter of course, so that the fact that***

> ***'damages would be an adequate remedy….is not generally a relevant consideration where the injunction restrains the breach of a negative covenant'. But as the remedy is an equitable one, it is in principle a discretionary remedy and it may be refused on the ground that its award would cause such 'particular hardship' to the defendant as to be oppressive to him. Moreover:***
>
> ***'in determining whether…. an injunction should be refused in the exercise of the court's discretion, the consequences of the grant or the refusal of an injunction for both parties will be relevant, and that may include consideration of whether damages would be a sufficient and appropriate remedy for the claimant'."***

105. The above statements relate to the grant of a permanent injunction at trial. In relation to the grant of an interim injunction, Chitty at 31-081 states:

> ***"The 'balance of convenience' test does not apply where an interim injunction is sought to restrain 'a plain and uncontested breach of a clear covenant not to do a particular thing'."***

106. This statement draws on the decision of Megarry J in *Hampstead & Suburban Properties Limited v Diomedous* [1969] 1 Ch 248, 259, where he said:

> ***"Thirdly, there is Doherty v Allman. I accept, of course, that Lord Cairns' words were uttered in a case where what was in issue was a perpetual injunction and not an interlocutory injunction…. But these considerations do not preclude the words from having any weight or cogency in relation to an interlocutory injunction. Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenantor promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better…. I see no reason for allowing a covenantor who stands in clear breach of an expressed prohibition to have a holiday from the enforcement of his obligations until the trial….."***

107. It seemed at one stage that Mr Quirk was submitting that that was the situation here and the mere fact that one was dealing with an alleged breach of a negative covenant (namely clause 9.4) was sufficient to justify the imposition of an injunction. If there was no damage caused by the breach and no injunction granted, there would in effect be no remedy for the breach of contract. However, in his reply submissions, he confirmed that it had not been contended before the judge that there was *'a plain and uncontested'* breach of clause 9.4 and the judge had made no finding to that effect. He accepted that the case had been fought on *American Cyanamid* principles, which only require the comparatively low bar of a serious issue to be tried, and he accepted that this court should do likewise.

Nevertheless, he submitted that the fact that the judge had held that it was unlikely that any damage would be caused if no injunction were granted was a powerful factor which pointed in favour of the grant of an interim injunction, as otherwise there would be no consequence for SPV 21 for its breach of contract.

108. Mr Quirk made his submissions most persuasively. However, I cannot accept them. I can accept that the fact that one is concerned with an alleged breach of a negative covenant may well be relevant to the *American Cyanamid* balancing process on the basis that there will not necessarily be any particular damage and a party should be held to his bargain. However, the fact remains that before the judge the case was fought by the Appellants on the basis that not to grant an injunction and thereby to allow Mr Chishty and his associates to be appointed as directors of KEL, was likely to cause real damage to the Appellants via their interest in KEL. It was never submitted that the fact that there was an alleged breach of a negative covenant was of significance and no reference was made to the principle articulated in *Chitty* or *Hampstead Properties*.

109. It is therefore not surprising that the judge concentrated on whether he accepted the Appellants' case that damage was likely to follow if no injunction was granted. Having decided that he did not, for the reasons he gave, it is also not surprising that he then concluded that the fact that there was no real likelihood of damage pointed against the need for an interim injunction.

110. In my judgment, it is too late now for the Appellants to seek to justify the imposition of an interim injunction on a wholly different basis. Mr Quirk submitted that the Appellants had made the point about the lack of damage before the judge and referred to [56] of their skeleton before the judge. However, that merely asserted that any prejudice flowing from actions by Mr Chishty and his associates as directors of KEL would not be *"practically quantifiable as, or remediated by, damages after the fact"*. That is a very different point from saying that there would be no damage and that that was a reason for granting an injunction.

111. The position on this ground of appeal differs from that concerning the *'serious issue'* ground referred to above. In relation to that ground, as described at para 97 above, no new argument or material was put forward. That is not the case in relation to this ground of appeal. The Appellants seek to put forward a completely new argument based upon there being no likelihood of damage to KEL, which is the complete opposite of the argument which they ran below. Applying the principle described at

paras 94-96 above, it would not be consistent with the overriding objective or conducive to the efficient administration of litigation to allow the Appellants to change their case so significantly on appeal.

112. I accept that the Appellants did argue below that damages would be difficult to quantify and would not be an adequate remedy for any harm that was caused to KEL (and therefore the Appellants) by virtue of the appointment of Mr Chishty and his associates to the board of KEL and that submission was renewed before us. I further accept that the judge's reason at [107] for concluding that any damage that was suffered could be easily quantifiable – namely that the shares in KEL were publicly listed in Pakistan – was not an entire answer to the point. This was because, as Mr Quirk submitted, the publicly listed shares comprise only 9.24% of the share capital and the value of the controlling shareholding held by KESP could not be directly correlated to the value of the publicly listed shares. I accept that there is some force in this argument but the degree to which the value of publicly listed shares went down as a result of any actions by Mr Chishty and his associates would provide some assistance in calculating the damage to KESP's controlling interest. Furthermore, the Grand Court is extremely experienced in valuing companies and would therefore have no difficulty in undertaking the exercise of determining the value of the controlling interest at any particular point. Similarly, I see no reason why it should not be in a position to determine the extent to which any decline in the value of the controlling interest is attributable to actions by Mr Chishty and his associates and therefore a consequence of any breach of contract by SPV 21.

113. In summary therefore, I see no grounds on which this court can properly interfere with the judge's assessment of the likelihood of uncompensatable loss or damage being caused to the Appellants in the event of an interim injunction not being granted and his assessment of whether damages would be an adequate remedy.

Summary

114. I would summarise my conclusions as follows:

i) On the basis of the Amended Injunction, there is a serious issue to be tried.

ii) Given the way in which this case was argued before him, the judge was entitled to reach the conclusion which he did in respect of whether damages would be an adequate remedy.

iii) The judge was entitled to reach the conclusion which he did to the effect that the Appellants lack of clean hands meant that they should as a matter of discretion be denied the equitable relief of an interim injunction regardless of the other matters in the case.

115. It follows, particularly in the light of (iii) above, that this appeal must be dismissed.

Sir Richard Field, JA

116. I agree.

Sir John Goldring, President

117. I also agree.