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.