Dillon Eustace

KES Power Limited – the Grand Court dismisses rival shareholders' strike-out application

June 2024

In a comprehensive judgment released by the Financial Services Division of the Grand Court of the Cayman Islands, Mr Justice Segal rejected an application to strike out a just and equitable winding up petition brought by IGCF SPV 21 Limited (the **Petitioner**) in respect of a Cayman Islands entity – KES Power Limited (**KESP**) – in which the Petitioner is a shareholder. The strike-out application was brought by two other shareholders (Al Jomaih Power Limited and Denham Investment Ltd) who contended that the petition had been presented in breach of a shareholders' agreement (the **SHA**) to which they were a party and in breach of section 95(2) of the Companies Act (the **Act**).

Conal Keane and Niall Dodd of Dillon Eustace, led by Graham Chapman KC of 4 New Square Chambers, acted for the successful respondent to the strike-out application, IGCF SPV 21 Limited.

Section 95(2) of the Act provides that the Court shall dismiss a winding up petition where the petitioner is contractually bound not to present it.

The Court was of the view that the application centered around a discrete matter of contractual construction, namely how the specific wording of schedule 4 of the SHA was to be interpreted. In making its finding, the Court applied the approach to interpretation taken in an established line of authorities, as summarised in the decisions in *Rainy Sky* and *Lamesa*.

The Court, applying those principles of construction, stated that the relevant wording of schedule 4 needed to be considered and interpreted in light of:

i. the natural and ordinary meaning of the language used;

ii. the other provisions of the SHA;

iii. the terms of, and wording in, the company's Articles (with the terms of the SHA prevailing over the Articles in the event of a conflict between the two); and

iv. the overall commercial purpose of the Schedule 4 wording in the context of the SHA as a whole and that of the Articles.

The Court accepted the Petitioner's arguments that on the proper construction of schedule 4 and the definitions set out in the SHA, particularly with regard to "liquidation", the Petitioner had not agreed that it would not present a winding-up petition. The Court's view was that (1) the schedule 4 covenant was a provision relating to corporate governance and the regulation of the powers given to the shareholders by the SHA and the Articles and (2) this construction fitted with a reasonable and realistic understanding of the purpose of the covenant. It was not, in the Court's view, intended that shareholders would be deprived of their statutory right to apply to court for a winding up order in circumstances of equitable wrongdoing justifying a winding up on the just and equitable ground. A covenant prohibiting the presentation of a winding up petition on just and equitable grounds would need to be clearly and explicitly expressed.

As a general point, strike out applications have become relatively common in the Grand Court. Order 18, Rule 19 of the Grand Court Rules provides that the court may, at any stage of proceedings, make an order striking out any pleading or anything in the endorsement of any writ in the action, on the ground that:

a. It discloses no reasonable cause of action or defence, as the case may be; or

b. It is scandalous, frivolous or vexatious; or

c. It may prejudice, embarrass or delay the fair trial of the action; or

d. It is otherwise an abuse of the process of the court.

The majority of strike out applications in recent years have been unsuccessful before the Grand Court. Whether to file a strike-out application is a difficult tactical decision. In some cases, there may be cogent commercial reasons for the application and / or it may be intended to send an early message to one's opponents that a robust approach to the defence of the proceedings will be adopted as part of a wider litigation strategy. A successful strike-out application can stop a case in its tracks. The converse, however, is that losing a strike-out application will likely lead to an adverse costs order and may affect the way the in which the Court views the proceedings as a whole.

If you have any further queries on this subject or wider Cayman litigation matters, please reach out to Conal or Niall.

CONTACT US

Our Offices

Dublin
33 Sir John Rogerson's Quay
Dublin 2
Ireland
Tel: +353 1 667 0022

Cayman Islands
Landmark Square
West Bay Road, PO Box 775
Grand Cayman KY1-9006
Cayman Islands
Tel: +1 345 949 0022

New York
33 Irving Place
New York
NY 10003
United States
Tel: +1 646 770 6080

Tokyo
12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006,
Japan
Tel: +813 6860 4885

CONTACT POINTS

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.

Conal Keane
Partner | Cayman Islands
E conal.keane@dilloneustace.ie
T + 1 345 814 4051

Niall Dodd
Counsel | Cayman Islands
E niall.dodd@dilloneustace.ie
T + 1 345 814 4055

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