



**Neutral Citation Number: [2025] CICA (Civ) 001**

**IN THE CAYMAN ISLANDS COURT OF APPEAL  
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS**

**CICA (Civ) No. 0025 of 2023  
(Formerly FSD 269 of 2023 (NSJ))**

**BETWEEN**

**IGCF SPV 21 LIMITED**

Respondent

-and-

**(1) AL JOMAIH POWER LIMITED  
(2) DENHAM INVESTMENT LTD**

Appellants

**BEFORE:**

**The Hon John Martin KC, JA  
The Hon Sir Richard Field, JA  
The Hon Sir Anthony Smellie, JA**

**Parties' Representation**

**Stephen Rubin KC instructed by Laura Hatfield and  
Jonathan Stroud of Bedell Cristin Cayman Partnership  
for the Defendants/Proposed Appellants**

**Graham Chapman KC instructed by Conal Keane and Niall  
Dodd of Dillon Eustace Cayman for the Respondent**

**Heard: on the papers**

**Draft Judgment circulated: 27 November 2024**

**Judgment delivered 10 January 2025**

*Civil Appeal 25/2023 – IGCF SPV 21 Limited - Judgment*

**JUDGMENT**

*Sir Richard Field, JA*

*Introduction*

1. The Court has before it two applications made by the Appellants (hereinafter individually called: “AJPL” and “DIL”) which it has determined on the papers.
2. The first is for leave to appeal to the Privy Council (“the JCPC”) this Court’s order dated 10 October 2024 (“the CICA Order”) dismissing the Appellants’ appeal from the Order of Segal J dated 16 August 2023 (the “Grand Court Order”)<sup>1</sup> restraining the Appellants from pursuing proceedings against the Respondent (“SPV 21”) in Pakistan in breach of an exclusive jurisdiction clause in favour of Cayman and/or England contained in clause 25.2 of a Shareholders Agreement dated 15 October 2008 made between the Appellants and the Respondent (“SPV 21”) that was subsequently amended (“the SHA”).
3. The second application is for a stay of paragraphs 1 - 4 of the Grand Court Order pending: (a) an appeal or an application for leave to appeal to the JCPC from the CICA Order; and/or (b) an application by the Appellants to the Grand Court for an order in similar terms to an order made *ex parte* by the High Court of Sindh, Pakistan dated 21 October 2022 (the “Pakistan Order”).
4. The factual background to these proceedings is related in some detail in paragraphs 7 – 44 of Smellie JA’s judgment dated 2 July 2024 (“the Judgment”) with which the other members were in agreement. Suffice it to say for present purposes that SPV 21, AJPL and DIL are shareholders in KES Power Ltd (“KESP”), a Cayman Islands company which holds 66.4% of the O Class shares in K-Electric Limited (“KEL”), a publicly listed company incorporated in Pakistan which supplies electricity within a 6500 square Kms area including the city of Karachi. The parties’ holdings of shares in KESP are: SPV 21 - 53.8 %; ALJP - 27.7%; and DIL - 18.5%.

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<sup>1</sup> The full order is reproduced in the Annex to this judgment.

5. KESP acquired its 66.4% holding of O Class shares in KEL in 2005 under a Share Purchase Agreement (“the SPA 2005”) made between KESP and two Pakistan private limited liability companies (the buyers) on the one hand, and on the other hand, the Government of Pakistan (the seller). The SPA 2005 is governed by Pakistan law and contains an exclusive jurisdiction clause in favour of Pakistan.
6. The relationship between SPV 21, ALPL and DIL as shareholders in KESP is governed by the SHA to which KESP is also a party. Clause 25.2 reads:

*“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.”*

7. SPV 21 was incorporated by members of the ABRAAJ group for the purpose of acquiring shares in KESP. Originally, the sole voting share (“the Golden Share”) in SPV 21 was held by Abraaj Investment Management Limited (“AIML”); the other shares are held by a Cayman Islands Limited Partnership, the Infrastructure and Growth Capital Fund LP (“the Fund”), which is managed by IGCF General Partner Limited (“the GP”). Prior to August 2022, the shareholders of the GP were AIML (as to 75.5%) and Ithmaar Holdings BSC (“Ithmaar”) (as to 24.5%).
8. On 3 August 2022, acting by its joint liquidators, AIML agreed to transfer the Golden Share to Sage Venture Group Limited (“SVGL”). Permission for the joint liquidators to enter into this agreement was granted by the Grand Court on 14 October 2022. SVGL is a BVI company which is ultimately owned and controlled by Mr. Shaheryar Chishty (“Mr. Chishty”). SVGL also acquired control of the GP and, either by itself, or through a connected company, it also acquired certain limited partnership interests in the Fund.
9. On 18 October 2022, following the resignation of three KEL directors, SPV 21 moved to appoint two new directors, Mr. Chishty and Darin Baur, to KEL’s board pursuant to clause 5.7 of the SHA. In response, the Appellants commenced proceedings in Pakistan (“the Pakistan Proceedings”) on 21 October 2022 against SPV 21 and seven additional defendants, on which date the High Court of Sindh, acting *ex parte* made the Pakistan

Order ordering that “no change shall be effected in the present Board of Directors of [KEL]”. The seven other defendants were KESP, KEL, Alvarez & Marsal (the manager of the GP) and the following three Pakistan regulatory bodies: the Pakistan Government’s Privatisation and Energy Ministries and the National Electric Power Regulatory Authority (NEPRA). (Later, the Securities & Exchange Commission of Pakistan (“SECP”), a further regulatory body, was added as an 8<sup>th</sup> defendant).

10. The Appellants plead in the Pakistan Proceedings, inter alia, that “a transfer of beneficial ownership/change in board or management control of KEL” is subject to the transfer restrictions in Articles 5.2 and 5.3 of the SPA 2005 and that SPV 21 is “in gross violation of Section 9.4 of the [SHA]<sup>2</sup> in attempting to transfer the beneficial ownership/effect a change in the board or management control of [KEL] ... which is not permissible under [the SHA] in order to secure board and management rights in [KEL]”. The Appellants also plead that any reorganisation of KEL requires the approval of NEPRA which had not been obtained and that the change of control of KEL pursued by SVGL is in breach of section 33 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (“the Electric Power Act”) and of Regulation 14 made under the National Electric Power Regulatory Authority Licensing (Distribution) Regulations, 2022 (“the 2022 Regulations”) which require KEL as a distribution licensee to obtain prior authorisation before selling or disposing of any assets in a manner inconsistent with its approved investment programme.
11. At first instance, SPV 21 applied in the FSD of the Grand Court for an interim order restraining the Pakistan Proceedings *pro tem*, and having succeeded on that application, it then sought a permanent anti-suit injunction at a subsequent trial. Justice Segal (“the Judge”) heard both applications, in each of which he delivered judgments effectively incorporating by reference the first judgment into the second (“the Main Judgment”).

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<sup>2</sup> “[SPV 21] undertakes and agrees that save for an Exit in Accordance with clause 11 hereof, it shall not permit nor take any action that would result in a change of Control of [SPV 21] provided that [SPV 21] shall be deemed not to be in contravention of this clause in circumstances where (notwithstanding a change of Control of [SPV 21]) SPV 21 remains managed by a member of the Abraaj Group.”

NB. (“Abraaj Group” is defined to mean SPV 21 and any person Controlled and/or managed by AIML provided that the management has not arisen as a result of or in connection with a transfer of the shares in the SPV 21 to that person; and “Exit” is defined in clause 11.5.)

12. The Judge held that the Pakistan Proceedings brought by the Appellants against SPV 21, KESP, KEL and Alvarez and Marsal were in clear breach of clause 25.2 of the SHA and that none of the “*reasons*” advanced by the Appellants as to why the court should not enforce that provision by an injunction were sufficiently “*strong*” or applicable to require the Court to find that SPV 21’s application be refused. Accordingly, the Judge ordered the Appellants forthwith to terminate or otherwise discontinue the Pakistan Proceedings commenced against (i) SPV 21; (ii) Alvarez and Marsal; (iii) KESP; and (iv) KEL, and ordered them not to commence or pursue any proceedings in connection with any dispute or disagreement under, arising out of, or relating to the SHA. No order was made requiring discontinuation of the claims made against the four Pakistan regulatory bodies.
13. One of the reasons advanced by the Appellants why the Judge should not grant the claimed anti-suit injunction was that SPV 21 had submitted to the jurisdiction of the Pakistan Court by advancing a stay application under section 4 of the Pakistan Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act and a modification application under Order 39 rule 4 of the Pakistan Code of Civil Procedure. In rejecting this proposition, the Judge applied the test agreed on by all three parties, namely that adopted by Males LJ in *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599 at [114]: had the steps taken by SPV 21 in the foreign Pakistan proceedings gone beyond a challenge to the jurisdiction of the Pakistan court (“the *SAS Institute Inc* test”). The Judge found that SPV 21 had not submitted to the jurisdiction of the Pakistan Court. In his view, the steps taken by SPV 21 before the Pakistan Court had not gone beyond a challenge to that Court’s jurisdiction.
14. At the hearing of the appeal to this Court, two grounds of appeal were advanced. The first ground was dismissed and is not sought to be argued on appeal before the JCPC in the Appellants’ skeleton argument. The second ground was that the Judge had erred in applying the *SAS Institute Inc* test in finding that SPV 21 had not submitted to the jurisdiction of the Pakistan Courts when he should have followed and applied the decision of the English Court of Appeal in *Henry v Geoprosco International Limited*

[1976] 1 QB 726 (CA) and found that SPV 21 had indeed submitted to the jurisdiction of the Pakistan Court. This decision (“*Geoprosco*”) was not cited to the Judge; instead, as recorded above, it had been agreed between all three parties that the test whether there had been a submission to the jurisdiction was the *SAS Institute Inc* test.

15. In *Geoprosco*, the plaintiff, who was resident in Canada, brought proceedings in England to enforce a default judgment issued by the Supreme Court of Alberta (“the Alberta Court”) against the defendant company for damages for wrongful dismissal under a service agreement made between the parties which contained an arbitration clause. The defendant was registered in Jersey and had its head office in London but it had no presence in Canada. Accordingly, the plaintiff commenced the Alberta proceedings by serving a statement of claim on the defendant in Jersey with the leave of the Alberta Court. Apart from applying unsuccessfully to the Alberta Court: (i) to have the service of the statement of claim set aside on the grounds that the affidavit served in support of the application for service out was defective and that Canada was not the *forum conveniens*; and (ii) for a stay relying on the arbitration clause, the defendant took no part in the Alberta proceedings and the plaintiff obtained a judgment in default for damages in the sum of CAD 41,879. The defendant pleaded in the English proceedings that the judgment issued by the Alberta Court was unenforceable on the grounds that that Court had lacked jurisdiction over it and that it had not submitted to the Alberta Court’s jurisdiction by making the aforesaid applications to set aside service and for a stay. It was held at first instance that since there was no hearing on the merits of the plaintiff’s action in the Alberta Court, the defendant did not submit to that court’s jurisdiction and the action was dismissed. The Court of Appeal, following *Harris v Taylor* [1915] 2 KB 580, a judgment of the Court of Appeal, reversed this decision holding that, by making the aforesaid applications, the defendant had voluntarily submitted to the jurisdiction of the Alberta Court, the applications having amounted to more than a mere protest against the jurisdiction of that court.
16. As was pointed out in paragraph 97 of the Judgment, the *Geoprosco* decision ceased to have application in England and Wales following the enactment of Section 33 (1) of the Civil Jurisdiction and Judgments Act 1982 (“the CJA”), which provides that 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.

17. In support of their submission founded on *Geoproscos*, the Appellants cited: (i) paragraphs [159] and [160]<sup>3</sup> of Lord Collins’ judgment in *Rubin v EuroFinance* [2012] UKSC 46 for the proposition that *Geoproscos* applied equally to enforcement of foreign judgments and applications for anti-suit injunctions; (ii) *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL), where at p.705 Lord Roskill referred without comment to *Geoproscos*, it having been cited in argument; (iii) *Tracom SA v Sudan Oil Seeds Co Ltd* [1983] 1 Lloyd's Rep 560, where Staughton J observed that had section 33 not come into effect, he would have been bound by the decision in *Geoproscos* to find that there had been a submission to the jurisdiction; (iv) *Pan Ocean Co Ltd v China-Bae Group Co Ltd* [2019] 1 CLC 699 (Comm), an exclusive jurisdiction case, where Christopher Hancock QC sitting as a Deputy High Court Judge applied *Geoproscos* in finding that there had been a submission to the jurisdiction to the Courts of Singapore where jurisdiction had been contested up to an appeal in Singapore.

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<sup>3</sup> 159. The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have “taken some step which is only necessary or only useful if” an objection to jurisdiction “has been actually waived, or if the objection has never been entertained at all”: *Williams & Glyn’s Bank plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438, 444 (HL) approving *Rein v Stein* (1892) 66 LT 469, 471 (Cave J).

160. The same general rule has been adopted to determine whether there has been a submission to the jurisdiction of a foreign court for the purposes of the rule that a foreign judgment will be enforced on the basis that the judgment debtor has submitted to the jurisdiction of the foreign court: *Adams v Cape Industries* [1990] Ch 433, 459 (Scott J); *Akai Pty Ltd v People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep 90, 96-97 (Thomas J) ... (cases of foreign judgments); *Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader)* [1996] 2 Lloyd’s Rep 585, 601 (a case involving the question whether the party seeking an anti-suit injunction in support of an English arbitration clause had waived the agreement by submitting to the jurisdiction of the foreign court).

18. The Appellants also relied on the decision of Carr J (as she then was) in *Strategic Technologies Pte Ltd v Procurement of the Republic of China Ministry of National Defence [2020] 1 WLR 3388* where one of the questions was whether a judgment obtained in the Cayman Islands based on a judgment obtained in Singapore was enforceable in England under section 9 of the Administration of Justice Act 1920 in light of the fact that the judgment debtor had applied for a stay in the Singapore proceedings in deference to an arbitration clause. Proceeding on the basis of the expert evidence before her that a Cayman court would apply English common law when determining the issue of submission to the jurisdiction, unless there was a good reason not to, Carr J held that a Cayman court would follow *Geoproscos* and look objectively at all the circumstances in the round to determine whether there has been a submission to the jurisdiction of the foreign court bearing in mind that such submission could take place without a full contest on the merits. Adopting that approach, Carr J was satisfied that the defendant, having done much more than merely apply for a stay of the Singapore action, had submitted to the jurisdiction of the Singapore courts.
19. It was the view of this Court expressed in paragraph 111 of the Judgment that, since Carr J had not addressed full square the question whether the holding in *Geoproscos* that an application for a stay is, *ipso facto*, a basis for a finding of submission to a foreign court, the opportunity should be taken to clarify the position.
20. In paragraph 112 of the Judgment, this Court decided that *Geoproscos* should not be followed in the Cayman Islands, either on the issue of submission for the purposes of the recognition and enforcement of foreign judgments, or on submission to a foreign court as a consideration whether to grant an anti-suit injunction. The Court's reasons for this decision were: (i) whilst a decision of the English Court of Appeal will be respected and regarded as being highly persuasive, it is not binding on the courts of the Cayman Islands which will not follow it if there is good reason not to do so; (ii) whilst *Geoproscos* had not been overruled, neither had it been expressly approved by a higher court in England; (iii) the enactment of sections 32 and 33 of the CJA supported the view that the policy underlying the reasoning in *Geoproscos* was unsound; (iv) in deciding *Geoproscos* as it did, the English Court of Appeal had recognised the tautology

of its reasoning but felt constrained to follow a settled, albeit doubtful line of authority; (v) *Geoproscos* 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 a precedent in relation to submission in recognition and enforcement of foreign judgments cases it should not be extended to apply to a case involving submission to a foreign court for the purpose of deciding whether it was proper to grant an anti-suit injunction. In such a case, the proper test was that applied in *SAS Institute Inc* which was adopted by the Judge; (vii) in light of the reasons given for departing from *Geoproscos*, it will be open to the Grand Court when considering the adoption of English non-binding but potentially persuasive case law going to the exercise of jurisdiction, to consider if that case law had been doubted, whether by having been nullified or superseded by legislation in England, or otherwise.

21. As to the Appellants' contention founded on [159] and [160]<sup>4</sup> in *Rubin v Eurofinance* (op cit) that Lord Collins' "general rule" applied to anti-suit injunctions as well as to anti-enforcement cases, this Court expressed the view in paragraphs 101 and 102 of the Judgment that even if one were to adopt the assimilation to anti-suit injunctive relief proposed on behalf of the Appellants, the wording in paragraphs [159] and [160] in *Rubin* would give rise to an outcome different from the approach in *Geoproscos*. This was 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 seemed to be the antithesis of the hard and fast rule from *Geoproscos* that submission on the merits is deemed to have occurred from the very bringing of an application for a stay (or for that matter a mere appearance to challenge or protest against jurisdiction), no question of the party's volition or assumed intention to waive or not waive its objection being a necessary part of the inquiry.

*The application for leave to appeal to the JCPC*

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<sup>4</sup> See fn 3 above

22. As is well known, Section 3 of The Cayman Islands (Appeals to Privy Council) Order 1984 (“the 1984 Order”) provides:

“3. (1) *Subject to the provisions of this Order, an appeal shall lie as of right from decisions of the Court to Her Majesty in Council in the following cases—*

*(a) final decisions in any civil proceedings, where the matter in dispute on the appeal to Her Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards;*

*(b) final decisions in proceedings for dissolution or nullity of marriage; and*

*(c) such other cases as may be prescribed by any law for the time being in force in the Cayman Islands;*

*(2) Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases—*

*(a) decisions in any civil proceedings, where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council; and*

*(b) such other uses as may be prescribed by any law for the time being in force in the Cayman Islands.”*

*The Appellants’ contention that they have an appeal to the JCPC as of right.*

23. The Appellants submit that they are entitled to appeal to the JCPC as of right pursuant to section 3(1)(a) of the 1984 Order, contending that the proposed appeal involves directly or indirectly a claim to or question respecting a right of the value of £300 sterling or upwards. It is argued that the “*right*” in question is the chose in action constituted by the Appellants’ right to sue SPV 21 in the Pakistan Proceedings with a view to obtaining an order preventing a change in the board or management control of KEL via a change of control of KESP, founded on a breach of section 9.4 of the SHA. The Appellants contend that the value of this claimed right is in excess of £300 on the grounds that KEL, which is located and operates in Pakistan, is valued at USD 1.77 billion and that “*it is common ground*” that the rights and obligations that the parties owe to each other under the SHA are extremely valuable. It is accepted by the Appellants that damages as such are not claimed in the Pakistan Proceedings, but they

point to a claim in paragraph 11 of the Prayer in the Pakistan Plaintiff for “*any and other relief as is fit or appropriate*” which it is contended would encompass damages and/or damages in lieu of an injunction or specific performance.

24. In paragraph 5 of their skeleton argument, the Appellants give the following three examples in support of their contention that the monetary value of their claim in Pakistan is well in excess of the £300 threshold:
- (i) Disputes arising under the SPA 2005 (i.e., those involving the Government of Pakistan and its regulators) are required to be pursued in Pakistan. If the Appellants are permitted to continue the proceedings in Pakistan, they will be able to resolve all disputes between all stakeholders in a single jurisdiction. That right is very valuable for numerous reasons beyond merely the legal costs and time incurred.
  - (ii) The High Court of Sindh has jurisdiction over KEL, the Government of Pakistan and Mr. Chishty. Accordingly, the High Court of Sindh is uniquely placed to oversee and determine the entire dispute. If the proceedings are required to be split between the Cayman Islands and Pakistan, the Appellants will be required to take the orders granted by the Grand Court and have them enforced in Pakistan. The ability to have determinations enforced directly is also incredibly valuable.
  - (iii) The legal costs of resolving disputes in Pakistan is significantly less than is the case in England or the Cayman Islands. If the parties are required to resolve their dispute in this jurisdiction, the costs that they will each be required to incur will (exponentially) exceed the £300 sterling threshold.
25. The Appellants also pray in aid paragraph 39 of the Pakistan Plaintiff which states “*for the purpose of jurisdiction and the court fee, the suit is valued at more than Rs 650 million [GBP 1,752,116.30] and hence the fee is Rs .....*” .
26. In addition, the Appellants advance a submission predicated on an observation made in the fourth affidavit of Mr. McDonald that, if having been refused a stay pending an application for leave to appeal to the JCPC, the Appellants sought an injunction in Cayman or England in terms similar to the Pakistan Order as heralded in their stay

application, this would be regarded by SPV 21 as an abuse of process since the Appellants would only be bringing proceedings in the contractually agreed forum if deprived of the benefit of Pakistan Proceedings brought in breach of the exclusive jurisdiction clause. The Appellants deny that the postulated injunction application would be refused on abuse of process grounds but contend that if that were the case, there could be no question that the rights in issue in these proceedings would be worth more than £300.

27. Further and in the alternative, the Appellants contend that the damages in the sum of USD 25,000 [GBP 18,765] awarded by the Judge in favour of SPV 21 for breach of clause 25.2 results in the matter in dispute on the appeal to the JCPC having a value in excess of £300. These damages were awarded in response to a claim for damages for breach of clause 25.2 pleaded by SPV 21 in its Originating Summons by reference to the costs incurred by SPV 21 of and occasioned by the Pakistan Proceedings on the indemnity basis.
28. The Appellants submit that if the appeal to this Court had been allowed or were to be allowed by the JCPC, by concluding that SPV 21 had submitted to the jurisdiction, the damages award for wasted costs in Pakistan would have to be set aside because that action would be continuing in Pakistan.

*The Appellants' alternative contention that they should be granted discretionary leave to appeal*

29. The approach the JCPC takes when considering applications for discretionary leave to appeal is enshrined in Paragraph 3.3.3(a) of Practice Direction 3 to the Judicial Committee (Appellant Jurisdiction) Rules 2009 which provides:  

*“Permission to appeal is granted – (a) in all cases for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal.”*
30. The Appellants contend that if their primary case that they have an appeal as of right is not upheld, they should nonetheless be granted discretionary leave to appeal on the

basis that this Court's decision not to follow *Geoproscos* and to uphold the Judge's application of the *SAS Institute Inc* was an error of law and that they have reasonably arguable grounds of appeal that raise pure points of law that are of great general or public interest.

31. In the Appellants' submission, this Court wrongly proceeded on the basis that there was a difference in respect of submission to the jurisdiction between anti-enforcement and anti-suit cases, waiver of the jurisdiction of the foreign court being necessary in the former cases but not in the latter cases. In the instant case, SPV 21 did waive the jurisdiction of the Cayman Islands by asking the Pakistan Court to refer the case to arbitration rather than to the Cayman Courts.
32. The Appellants argue that the correct course to have been followed by SPV 21 was to apply for an injunction in Cayman or England, not to seek a stay from a Pakistan Court which SPV 21 was contending did not have the power to determine the dispute. In seeking a stay to allow for arbitration (albeit mistakenly based on an arbitration clause that had been excised by amendment), SPV 21 was clearly declaring that it recognised the ultimate jurisdiction of the Pakistan Court to enforce any arbitral award and make consequential orders; it involved taking a deliberate step indicative of the fact that "*objection [to jurisdiction] has never been entertained at all*". The applicable rule is "*voluntary submission*" as held by Roskill LJ in *Geoproscos* and no analysis of waiver is required. The general rule referred to by Lord Collins in *Rubin v Eurofinance* did not overrule the rule in *Geoproscos* which applies both to anti-enforcement and anti-suit cases, which is reflected in the fact that the drafting of section 33 of the CJJA reversed the rule in *Geoproscos* in terms that applied equally to submission to the jurisdiction in anti-suit and anti-enforcement cases.
33. The Appellants further contend that this Court erred in failing to hold that *Geoproscos* represents the common law to be applied in Cayman (where there is no equivalent to section 33 of the CJJA) in relation equally to both anti-enforcement and anti-suit injunctions.

34. In addition, the Appellants seek permission to argue that this Court erred in holding in paragraph 112 (vii) of the Judgment that it will be open to the Grand Court, when considering the adoption in Cayman of English non-binding but potentially persuasive case law going to the exercise of jurisdiction, to consider whether that case has been doubted, whether by having been nullified or superseded by legislation in England, or otherwise.
35. The Appellants submit that the implications for Cayman law of this Court's decision not to follow *Geoprosco* are of great public importance, particularly in respect to the treatment of international disputes in this jurisdiction. They also contend that the Court's departure from the *Geoprosco* rule due to doubts as to its correctness and legislative intervention in England is a further independent point of great importance, going as it does to the extent of this Court's jurisdiction and representing a significant departure from the established approach.

*SPV 21's case that the Appellants are not entitled to appeal as of right and there are no grounds for discretionary leave.*

36. SPV 21 contends that the "right" to be valued is SPV 21's right under clause 25.2 of the SHA on which its claim is based, namely SPV 21's right to have its application for the relief set out in the Originating Summons properly determined "*which is no different to the right of any person with a relevant interest has to see the law applied*". Plainly, this right is not quantifiable in monetary terms which is necessary for the requirements of section 3(1)(a) of the 1984 Order to be satisfied for there be to an appeal as of right. The mere fact that an applicant for leave would benefit financially by more than £300 if its appeal succeeds or that the value of the respondent's assets greatly exceed £300 is not sufficient; see *Palladyne International Asset Management B.B. v Upper Brook (A) Limited and others* (unreported reasons for refusing final leave to appeal to the JCPC, 4 February 2020) and *Essar Global Fund Limited and another v Arcelormittal USA LLC* (unreported, CICA 6 May 2021).
37. In *Palladyne*, the question before this Court was whether resolutions passed by three incorporated Investment Funds replacing the Appellant ("PIAM") as a director of the

funds violated Article 10 (4) of the Libya (Restrictive Measures) (Overseas Territories) Order 2011 that provided that, absent a licence, a person shall not “*deal with*” funds or economic resources which are owned, held or controlled by a person designated under the Order, the three funds having been so designated. This Court agreed with the Judge below that the passing of the resolutions did not dissipate or affect the value or character of the shares in the funds as financial assets or the value of the underlying assets of the respondent companies in any way and that the exercise of the voting rights in the shareholder resolutions were not in themselves a dealing with the funds and did not in themselves allow access to or make a change that ‘would enable use’ of the assets of the respondent companies.

38. PIAM’s subsequent application for leave to appeal as of right to the JCPC was refused. This Court held:

- “a) *The mere fact that the Applicant would benefit financially by more than £300 if an appeal by it succeeds or that the value of the Respondents’ assets greatly exceeds £300 is not sufficient: see the decision of the JCPC in Jacpot Ltd v Gambling Regulatory Authority [2018] UKPC 16 at §14 (Lord Sumption) citing Royal Hong Kong Jockey Club v Miers [1983] 1 WLR 1049. What is important is the nature of the specific civil right involved. Where there is no money claim or claim to property the value of which exceeds the £300 threshold, the question is whether an appeal would determine the existence of a property right or a proprietary right to dispose of property worth more than £300.*
- b) *The Applicant’s right or interest in this case in ensuring that the appointment and removal of directors of the Respondent companies is lawful is not different in kind from the right which any person with a relevant interest has to see that the law is applied, which was held not to suffice in Jacpot (revocation of gambling licences), Meghi Lakhamshi v Furniture Workshop [1954] AC and Becker v Marion City [1977] AC 271, two cases approved in Jacpot, on which the Applicant relies, were cases in which the landowners’ rights were proprietary rights. A director does not have a right to continue to be a director, let alone a proprietary right to do so. Nor does a director have a proprietary right to control and dispose of the Respondents’ assets ...”*

39. In *Jacpot*, a company running a gambling business in Mauritius sought special leave from the JCPC to appeal as of right the dismissal by the Mauritius Supreme Court of its application for judicial review of the decision of the Mauritian Gambling Regulatory Authority to revoke a number of its gambling licences. The application for special leave was made under Article 8(1)(b) of the Constitution of Mauritius which is essentially in

the same terms as Section 3(1)(a) of the 1984 Order. The JCPC dismissed Jacpot's application for leave to appeal as of right. The advice to the Board was given by Lord Sumption who at [15] held:

*“[Jacpot’s] gaming licences were not property in any relevant sense, but simply an authority to provide facilities for gaming, which would otherwise have been unlawful. Nor did they have any civil right to receive or retain a gaming licence. Their only relevant right was the right to a fair and lawful decision of the Authority. That right, important as it is, is a public law right which is no different in kind from the right which any person with a relevant interest has to see the law applied. It is incapable of valuation in monetary terms. It follows that the present appeal does not pass the value threshold and is not therefore available as of right.”*

40. Earlier at [14], Lord Sumption referred to the JCPC's decision in *Royal Hong Kong Jockey Club v Miers* [1983] 1 WLR 1049. In this case the defendant, the Hong Kong Jockey Club (“the Club”) petitioned the JCPC challenging the majority decision of the Hong Kong Court of Appeal that the plaintiff, Mr. Miers, was entitled to appeal as of right to the JCPC. Mr. Miers was a jockey whose licence to ride in races was not renewed by the Club, in consequence of which he suffered a considerable loss of earnings. He proceeded to issue in the High Court of Hong Kong an originating summons seeking a declaration that the defendants' decision was null and void and an inquiry into damages. He advanced five grounds in support of his claim, only two of which came to be considered, namely, that he was denied a fair hearing and that there was no, or no sufficient, evidence upon which the Club could properly conclude that his licence should not be renewed. His claim in the High Court was dismissed and his appeal against that decision was dismissed by the Court of Appeal. The reasons for the JCPC's decision overturning the Court of Appeal's majority decision that Mr. Miers was entitled to appeal as of right to the JCPC were given in Lord Scarman's advice to the Board in which he held that the postulated damages claim required the establishment of a special contractual right to be granted a licence and no such contractual term had been pleaded. He then went on to say at 1054A-G:

*“The civil right which is involved in the appeal is the right to a hearing and a determination by the stewards which comply with natural justice. Their Lordships, therefore, turn to consider the second question which arises on the petition—the value to the plaintiff of this right.*

*The plaintiff has, however, put before the Board an alternative argument. If he cannot rely on his lost earnings, he relies on the cost and expense of his unsuccessful hearing before the stewards. These costs, he submits have been thrown away on an abortive hearing ... As with the first question considered by their Lordships, the present proceedings, which are for judicial review, do not touch upon certain matters crucial to the proper raising of this claim. It would be necessary for the plaintiff to formulate and plead "the contractual nexus," or, more precisely, though less succinctly, the terms of the contract, express or implied, upon which he relies before he could begin to establish a breach of contract entitling him to recover such sums as damages. If such a claim can be shown to exist, it must be pursued by action for damages for breach of contract: it does not in these proceedings. Indeed, it cannot arise for consideration in an appeal, the issue in which is confined to whether or not there has been a failure on the part of the stewards to comply with the rules of natural justice. For these reasons their Lordships are of the opinion that appeal as of right does not lie in this case."*

41. In *Essar Global Fund Limited and another v Arcelormittal USA LLC*, this Court refused an application brought by Essar Global Fund Limited ("Essar Global") for leave to appeal to the JCPC as of right the Court's decision holding that the Grand Court had jurisdiction to grant a Norwich Pharmacal Order (NPO) against Essar Global in aid of foreign proceedings to enforce a US\$ 1 billion arbitration award against Essar Steel Limited in favour of Arcelormittal USA ("AMUSA").
42. Essar Global contended that: (i) the appeal raised, directly or indirectly a claim to or questions respecting rights (including proprietary rights) including AMUSA's right to a NPO and Essar Global's rights to maintain confidentiality of information about its business and its right to deal as it wished with its property in the form of documents and document storage systems; (ii) the Court only needed to be satisfied that the value of these rights exceeded £300 and should take a broad-brush and pragmatic approach to the valuation thereof; (iii) adopting this approach it was clear that the value of the rights exceeded £300 in light of the facts that the award was now worth US\$ 1.5 billion, AMUSA had incurred costs that greatly exceeded £300 in obtaining the NPO and Essar Global's costs in carrying out the NPO would greatly exceed £300.
43. The judgment of the Court was delivered by Martin JA, with whom Sir John Goldring (President) and Sir Bernard Rix JA agreed. In paragraph 11 of the judgment, Martin JA referred to a number of points made by Lord Sumption in his judgment in *Jacpot* including: (1) in light of the fact that discretionary leave can be sought if leave as of

right is not available, provisions governing appeals as of right are normally to be strictly construed; (2) the relevant statutory provision “applies the value threshold to any of (i) the “matter in dispute”, (ii) a “claim to or question respecting property”, or (iii) a “right” of any kind; (3) “[t]he application of the value threshold is straightforward when there is a money claim or a claim to property exceeding the prescribed value. More difficult are cases in which the issue involves property or rights exceeding the threshold value in the broader sense that more than the prescribed sum turns on the outcome, as it almost always will if civil proceedings are to be worth litigating at all”; (4) the decisions in *Meghji Lakhamshi & Brothers v Furniture Workshop* [1954] AC 80 and *Becker v Marion City Corpn* [1977] AC 271 (PC) were “authority for the propositions (i) that to pass the value threshold, it is not necessary for there to be a money claim; and (ii) that where an appeal will determine the existence of a proprietary right or a proprietor’s right of disposal over the property, there is an appeal as of right if the property’s value exceeds the threshold”.

44. In paragraph 14 of the judgment, Martin JA set out the Court’s reasons for concluding that it could not be said in the present case that “the matter in dispute on the appeal to Her Majesty in Council is of the value of £300 sterling or upwards” or that “the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards”.

*“The matter in dispute on the appeal, and the claim or question directly or indirectly involved, all relate to the availability to AMUSA of Norwich Pharmacal relief. The relevant right is accordingly AMUSA’s right on which its claim is based, not the affected rights of the appellants. AMUSA’s claim is not to recover property or money; it is to obtain documents and information which it may use for the purpose of enforcing the Award. It has no proprietary right to the documents or information. It has no entitlement to a NPO even if the conditions for the grant of an order exist: it is still a matter for the discretion of the court as to whether an order is appropriate in all the circumstances. The most that can be said is that AMUSA has a right to seek enforcement of what was described in Norwich Pharmacal as “a duty to assist the person who has been wronged by giving him full information”. The value of that right is not to be determined either by the value to AMUSA of being assisted in enforcing the Award, or by the cost to the appellants of complying with the duty... In its nature, the right appears to us to be no different from the rights considered in *Jacpot and Palladyne*: AMUSA’s only right is to have its application for Norwich Pharmacal relief properly determined, so that here, as there, the right in question is no different in kind from the right which any person with a relevant interest has to see the law applied. The right is*

*incapable of valuation in monetary terms, and the statutory threshold is not passed.”*

45. SPV 21 also submits that it is doubtful that the Judge’s decision and consequential orders following the trial of its Originating Summons constitute a “final order”. In its submission, the nature of the injunction granted was such that either party could come back to the Grand Court if certain events in Pakistan occurred, for example, if it became impossible for the Pakistan proceedings to be discontinued or there were attempts to circumvent the effect of the injunction by issuing new proceedings with materially identical effect.
46. When responding to the Appellants’ application for discretionary leave pursuant to section 3(2)(a) of the 1984 Order, those acting for SPV 21 understandably address in their skeleton argument the Grounds of Appeal dated 21 June 2024 annexed to the Appellants’ application for leave to appeal to the JCPC dated 9 September 2024. In paragraphs 1 and 2 of those grounds it is pleaded that this Court erred in upholding the Judge’s finding that there was no risk of inconsistent findings and outcomes in proceedings in Cayman or England concerned with alleged breaches of the SHA, on the one hand, and, on the other hand, the Pakistan proceedings that would continue against the four Pakistan regulatory authorities on the question whether there had been a change of control over SPV 21 with downstream consequences as to the control of KESP and KEL.
47. The Appellants’ Grounds of Appeal were modified by the Appellants’ Skeleton Argument dated 23 September 2024 wherein the only grounds of appeal in respect of the application for discretionary leave are directed at this Court’s findings that *Geoprocso* applied only to anti-enforcement cases and not anti-suit injunction cases and in any event was a decision that would not be followed in the Courts of the Cayman Islands. In respect of these grounds, SPV 21 submits that “there is no public interest in the findings of fact made in this case, and the argument that *Geoprosco* – a long-outdated decision from a bygone era which does not apply in any modern jurisdiction – should be considered the law of Cayman, was advanced on a speculative basis in the present appeal, not having been advanced in the Grand Court, and is obviously hopeless. This Court was right to conclude that: “*On the basis of all the foregoing,*

*Civil Appeal 25/2023 – IGCSPV 21 Limited - Judgment*

*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". [115]*

*Discussion and decision in respect of the application for leave to appeal as of right and on discretionary grounds.*

48. In addition to the important decisions of this Court and the JCPC concerned with appeals as of right to the JCPC referred to above, there is a further decision that it is appropriate to refer to, namely, *Augusta Healthcare Inc v Valley Health System*, (Golding (President), Martin JA and Moses JA, 10 November 2023). Here, Valley Health System ("Valley"), one of two shareholders in a captive insurance company, Virginia Solutions SPC ("VS"), presented a petition to wind up VS on the just and equitable grounds under section 92 (e) of the Companies Act on the basis that the company was a quasi-partnership. The petition was contested by the other VS shareholder, Augusta Healthcare Inc ("Augusta"). At first instance, the Judge was satisfied that VS was indeed a quasi-partnership and granted the petition. That decision, however, was overturned by this Court which held that whilst VS had been a quasi-partnership in its early stages, it had ceased to be so and accordingly there had been no proper basis for the winding up order made by the Judge. Valley then applied to this Court for leave to appeal to the JCPC as of right, alternatively in the discretion of the Court. For the reasons contained in the judgment of Martin JA which referred extensively to the references in the *Essar Global* judgment to Lord Sumption's judgment in *Jacpot*, this Court dismissed both limbs of the application.
49. The Court considered whether or not Valley's rights exceeded the statutory threshold, noting that the matter in dispute on the putative appeal would be whether or not a winding up order should have been made. In the view of the Court, construing section 3(1)(a) of the 1984 Order strictly in accordance with *Jacpot*, the matters which were in dispute would not be directly or indirectly resolved by the outcome of the appeal and Valley's interest in the matter did not have a value capable of being identified in monetary terms. Even if Valley had successfully established that all the elements

necessary to give the court jurisdiction to make a winding up order under s. 92 (e) existed, Valley would have no right to such an order, it being always in general terms a matter for the court's discretion. As in *Essar Global*, "Valley's right is to have its application to the court properly determined, and as in *Jacpot*, that right is no different in kind from the right any person with a relevant interest has to see the law applied".<sup>5</sup>

50. Turning to the second limb of section 3(1)(a) – whether the putative appeal involved directly or indirectly a claim to or question respecting property or right of the value of £300 or more – the focus of the limb is on claims or questions which are directly or indirectly "involved" in the putative appeal, which implies matters which are in dispute which will be directly or indirectly resolved by the outcome of the dispute. Peripheral matters, not a matter in dispute that may coincidentally be affected by the outcome of the appeal, did not fall within this limb. Costs are not a question or claim involved in the appeal. They are not the subject of any dispute existing prior to the litigation itself, are ancillary to the matter in dispute, and cannot be regarded as being a separate matter in dispute or directly or indirectly affected by the resolution of the dispute. If it were otherwise, there could hardly ever be a final decision where the value in terms at least of the costs did not exceed £300.
51. With regard to the application for discretionary leave, the resolution of the question whether or not the winding up order should have been made involved the application of long-established principles to the circumstances of the case and could not be said to be of great general or public importance.

The Appellants claim to be entitled to have an appeal as of right.

52. It was decided recently by this Court in *Minsheng Vocational Education Company Ltd v Leed Education Holding Ltd and others* (Goldring, President, Birt JA and Smellie JA, unreported, 2 September 2024) that, following the guidance provided by Lord Hamblen in *Chhina v Ismail and Another* [2024] UKPC 10, the question whether an order made

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<sup>5</sup> Martin JA's judgment in *Augusta Healthcare* was recently cited with approval by the JCPC in *Sian Participation Corp v Halimeda International Limited* [2024] UKPC 16 at [117] and [119], an appeal from the Court of Appeal of the British Virgin Islands.

in civil proceedings is a final order for the purposes of section 3 (1) (a) and (b) of the 1984 Order was to be determined by reference to Rule 12 of the Court of Appeal Rules (2014 Revision), which in relevant part, states:

*“(1) For all purposes connected with appeals to the Court of Appeal, a judgment or order shall be treated as final or interlocutory in accordance with subrules (2) to (7)...*

*(2) A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it.”*

53. Rule 12 (6) contains a lengthy list of orders which are to be treated as interlocutory and not final orders. The grant of an order for a permanent injunction after a trial, following the grant of an order for an interim injunction, is not included in this list, although the grant of an order for an interlocutory injunction is within the list at (r).
54. In my judgment, the entire cause or matter arising from SPV 21’s Originating Summons that came before the Judge for trial stood to be finally determined whichever way the Judge decided the issues before him. I am therefore satisfied that the Judge’s decision constituted a final order in civil proceedings for the purposes of section 3(1)(a) of the 1984 Order.
55. It is for the Appellants to establish that the statutory threshold of £300 in section 3(1) (a) of the 1984 Order is passed in respect of: (i) *“the matter in dispute”*; or (ii) *“a claim to or question respecting property”*; or (iii) a *“right”*.
56. The Appellants’ primary contention is that they have a *“right”* in the nature of a chose in action to advance a claim in the Pakistan Courts for breach of the SHA founded on SPV 21’s nomination of persons to be directors of KEL. In *Essar Global*, the Court took the view that the matter in dispute on the appeal and the claim directly or indirectly involved all related to the availability to AMUSA of Norwich Pharmacal relief. The relevant right was accordingly AMUSA’s right on which its claim was based, not the affected rights of Essar Global. However, in my opinion, the position is different in the instant case since the Appellants had a right to pursue a claim against SPV 21 in the

Pakistan Court on the basis that there were good grounds for contending that for reasons of justice and convenience proceedings in Pakistan outweighed SPV 21's prima facie right to enforce clause 25.2 by way of an injunction granted in Cayman or England.

57. I turn therefore to consider whether the value of the Appellants' postulated statutory right exceeded £300 applying the principles expressed in the authorities to which I have earlier referred. As recorded above, the Appellants contend that the value of their claimed right is vastly in excess of £300 on the grounds that: (i) KEL, which is located and operates in Pakistan, is valued at USD 1.77 billion; (ii) "*it is common ground*" that the rights and obligations that the parties owe to each other under the SHA are extremely valuable; (iii) pursuit of the claim for breach of the SHA in the courts of Pakistan would be particularly valuable because: (a) the Appellants would thereby be able to resolve all disputes between them and SPV 21 and the other named defendants in the Pakistan Proceedings in a single jurisdiction quite apart from the fact that the costs and time involved would be significantly cheaper than bringing the claim in Cayman or England; (b) the Pakistan Court is uniquely placed to oversee and determine the entire dispute because it has jurisdiction over KEL and Mr. Chishty so that the orders of that court could be directly enforced whereas orders obtained in Cayman or England would have to be enforced in Pakistan by proceedings in the Pakistan Court; (c) whilst the Appellants have not advanced a money claim in the Pakistan Proceedings they have included in the prayer of the Plaint a claim for "*any and other relief as is fit or appropriate*" which it is contended would encompass damages and/or damages in lieu of an injunction or specific performance.
58. In my judgment, the Appellants have signally failed to establish that the value of their right to bring proceedings in the Pakistan Courts exceeds £300. As is plain from *Jacpot* and the Cayman authorities referred to above that have adopted the reasoning in that case, the fact that the Appellants might benefit financially by more than £300 if their putative appeal succeeded; or that the assets of one or both parties to the proceedings greatly exceed that value; or that the Appellants' litigation costs will exceed the £300 threshold, is insufficient to satisfy the requirements of section 3(1)(a), strictly construed as it must be.

59. I turn to consider the Appellants' alternative case based on the award of damages in the sum of US\$25,000 (GBP 18,765) for their breach of clause 25.2 made against them by the Judge following the trial of SPV 21's Originating Summons. The first question to be answered is whether SPV 21's claim for damages for breach of clause 25.2 is comprehended by the words "*the matter in dispute*" in section 3(1)(a). In my view, by reason of the use of the definite article "*the*", these words connote "*the central matter in dispute*" and do not extend to incidental matters. On one view, the central matter in dispute is whether SPV 21 lost the benefit of the clause 25.2 exclusive jurisdiction provision by its stay and modification applications in the Pakistan Proceedings, in which case SPV 21's damages claim is not part of the matter of dispute. On another view, the central matter in dispute is whether the Appellants are bound not to pursue the proceedings in Pakistan, in which case the injunction and the damages claim could both be said to be elements of the matter in dispute.
60. In my judgment, the first view is the correct view, but that said, I am of the opinion that SPV 21's claim for damages for breach of clause 25.2 measured by reference to the costs SPV 21 incurred in the Pakistan Proceedings is comprehended by the words "*the appeal involves, directly or indirectly a claim to ... a right of the value of £300 sterling or upwards.*" In my opinion, this is not a claim simply in respect of costs awarded as such by the court seized of the proceedings in which the costs were incurred, which would not fall within section 3(1)(a) of the 1984 Order. Instead, it is a claim that meets the requirements Lord Scarman referred to in the *Hong Kong Jockey Club* case in the passage of his advice to the Board set out in paragraph 40 hereinabove.
61. The claim meets Lord Scarman's requirements because it was pleaded in SPV 21's Originating Summons served on the Appellants as a breach of clause 25.2 of the SHA to which SPV 21 and the Appellants were parties.

*The Appellants' alternative application for discretionary leave*

62. In case it be held on a petition presented to the JCPC by SPV 21 that the Appellants were not entitled to leave to appeal as of right, I think it appropriate that I deal with the Appellants' alternative application for discretionary leave.
63. In my judgment, the questions as to whether this Court erred in concluding that anti-suit injunction cases were outside the scope of the rule in *Geoproscop* and that *Geoproscop* should not in any event be followed in Cayman are of such great general and public importance that the Appellants should have discretionary leave to appeal to the JCPC pursuant to section 3(2)(a) of the 1984 Order. In expressing this conclusion, I have particularly in mind the significant (and increasing) number of international commercial cases heard in the Grand Court that involve applications for anti-suit injunctions in respect of foreign proceedings already on foot and for stays of local and/or foreign proceedings in favour of arbitration agreements. I am also of the view that it would be very useful if the JCPC provided guidance as to the matters that the courts of these islands should consider when deciding whether to follow a non-binding but on-the-point decision of the English Court of Appeal.

*The Appellants' application for a stay pending appeal to the JCPC*

64. This application is made against the background that the Judge granted a stay of paragraphs 1- 4 of the Grand Court Order pending the appeal to this Court against that order and on 10 October 2024, this Court extended that stay to the determination of the applications now before it.
65. In *Maso Capital Investments Ltd et al v Trina Solar Ltd* (unreported, 4 August 2023), Birt JA pointed out that it was decided in *Re CVC Opportunity Equity Fund Partners* [2000] CILR N8 that this Court has an inherent jurisdiction to grant a stay pending an appeal to the JCPC. Birt JA also approved the following summary of the principles on the granting of a stay pending appeal provided by Justice Doyle in *In re the Matter of Aquapoint L.P. (in official liquidation)* (unreported, 5 October 2022) at [20]

*"It can be seen from the local Cayman authorities that: (1) an appeal does not operate as a stay; (2) the starting point is that there should be no stay and a successful party at first instance should not be deprived of the fruits of that success; (3) there must be 'good cause' or 'good reason' for a stay. In some of*

*the English authorities there is reference to ‘solid grounds’; (4) the court is likely, all other things being equal, to grant a stay where the appeal could otherwise be rendered nugatory or deprived of much of its significance; and (5) in deciding whether or not to impose a stay the court will consider the grounds of appeal, their likelihood of success and the balance of convenience having regard to the interests of the relevant parties. The overriding feature is the interests of justice.”*

66. In support of their stay application, the Appellants contend that, in the absence of a stay, their appeal to the JCPC will be rendered nugatory and they and KEL will suffer the following irreparable harm. Mr. Chishty will exercise his control of SPV 21 to appoint himself and his associates to the KEL Board and, in the wake of the inevitable resulting failure of the Board to function as an effective body, there will be a real risk that Mr. Chishty will act to serve his own interests at the expense of KEL and KESP by causing KEL to enter into very large contracts for the purchase of coal from coal interests owned and/or controlled by him on terms that would be unfairly favourable to the coal interests and detrimental to KEL.
67. The Appellants’ evidence in support of this scenario consists of the first affidavit of Mr. Leigh Andrew Mallon, a solicitor acting for the Appellants on various related matters, and the third affirmation of Mr. Shan-e- Abbas Ashary, a director of AJPL. In paragraph 16 of his affidavit, Mr. Mallon states that as a matter of practice, the KEL directors nominated by the Government of Pakistan are neutral and instead of taking an active interest in the day-to-day management decisions are tasked with a “watching brief” casting any votes in accordance with the majority.
68. The evidence in reply adduced by SPV 21 is contained in the fourth affidavit of Mr. Casey McDonald who makes the point, among others, that KEL’s Board consists of 13 directors of whom KESP’s nominees will number no more than 5 and further asserts that the evidence adduced by the Appellants is flimsy and unconvincing.
69. The Appellants also rely on the observations made by the Judge when he granted a stay of paragraphs 1-4 of his order pending an appeal to this Court, namely that it seemed to him that if SPV 21 were permitted to proceed with the appointment of new KEL directors action taken by those appointees affecting KEL’s business rights and reputation could well be difficult to unwind after a successful appeal.

70. SPV 21 strongly opposes the grant of the requested stay contending that there is no sufficient ground for denying it the fruits of the judgments it obtained below and in this Court. It is submitted that the evidence relied on by the Appellants has no solid foundation and a stay would cause SPV 21 far greater prejudice than the Appellants would suffer if it were not, and such prejudice it might suffer would be of the Appellants' own making by launching the Pakistan Proceedings in blatant breach of the exclusive jurisdiction provision in clause 25.2 of the SHA.
71. In my judgment, on the material before the Court, the Appellants' application for a stay pending the determination of the appeal to JCPC should be refused. I am of this view for four principal reasons. First, bearing in mind that the JCPC is a busy court, I would estimate on the basis of appeals from this Court to the JCPC over the last four or five years that it is unlikely that the appeal will be determined within about 15 months, and it could well be longer. Secondly, the Grand Court Order has already been effectively stayed for a year. Thirdly, although the proposed appeal is arguable, in my opinion it only just crosses the arguability threshold in the face both of the fact that *Geoproscro* was not a decision that was binding on this Court and the reasons given by this Court for deciding not to follow it. Fourthly, I think the risk of irrecoverable harm to the Appellants if there is no stay is decidedly on the small side because: (i) even with five directors representing the interest of SPV 21/Mr. Chishty on the KEL Board, there will be eight other directors having no connection with SPV 21 and Mr. Chishty; and (ii) the alleged scenario that Mr. Chishty would cause KEL to purchase coal from his coal interest to the detriment of KEL involves Mr. Chishty cutting off his nose to spite his face, which I think is rather unlikely. Fifthly, there is a potentially much speedier option open to the Appellants to avoid the consequences they say will result if no stay is granted, namely, an expedited application to the Grand Court for an injunction to restrain SPV 21 from being in breach of clause 9.4 of the SHA by participating in and or causing the appointment of directors to the KEL Board on the back of a change of control of those entities. As will be readily apparent, this option is related in part to the Appellants' alternative application for a stay pending an application to the Grand Court

for an injunction restraining an unlawful change of control of SPV 21, KESP and KEL in breach of clause 9.4, to which I now turn.

72. Although this stay sought by the Appellants is expressed to be “*pending an application to the Grand Court for an injunction*”, it is plain that the Appellants intend these words to mean “*pending the determination of an application to the Grand Court for an injunction*”. The relief that the Appellants say they would seek in an action in the Grand Court is:

- (1) Restraining SPV 21, by itself and/or by its servants, agents, etc. or any director appointed by it to KESP, from permitting or taking any action that would result in a change of control as defined in the SHA (“Control”) by SVGL and/or Mr. Chishty, whether directly or indirectly, or giving effect to such a change.
- (2) Directing that SPV 21 forthwith cease to permit itself to be Controlled by SVGL and / or Mr. Chishty, whether directly or indirectly.
- (3) Directing that SPV 21 withdraw its instructions to the directors of KESP nominated by SPV 21 to seek to or support the appointment of Mr. Chishty and Mr. Baur as directors of KEL.
- (4) Restraining SPV 21 from registering any transfer of the sole voting share in SPV 21 without the written agreement of the Appellants.
- (5) Without the consent of the Appellants in any way permitting and / or taking any action that results in Control of SPV 21 by SVGL and / or Mr. Chishty or any person other than entirely and only AIML and / or the Abraaj Group through the Fund.
- (6) Restraining SPV 21 from implementing and / or acting on the instructions of SVGL and / or Mr. Chishty, or their agents or associates, or causing or procuring the same to occur.

73. The Appellants accept in paragraph 55 of their skeleton argument that in seeking this relief, they would effectively be removing the Pakistan Proceedings and pursuing them in this jurisdiction. They also offer an undertaking to issue the contemplated proceedings in the Grand Court without delay.

74. It appears to be common ground that this Court has jurisdiction to grant the alternative stay sought by the Appellants, which in any event is conferred by section 19 (3) of the Court of Appeal Act: “[n]o stay of execution or other proceedings shall be granted upon any judgment appealed against save upon payment by the appellant ... or upon good cause shown to the Court or to the Grand Court.”
75. SPV 21 opposes the alternative stay application on the following grounds: (i) this Court should not countenance a stay pending proceedings in this jurisdiction in circumstances where the Appellants deliberately and in flagrant breach of clause 25.2 of the SHA brought proceedings in Pakistan seeking the same relief that it is now proposed in the Cayman Grand Court; and (ii) the Appellants are seeking to retain the fruits of litigating in breach of contract in an impermissible forum; (iii) by reason of (i) and (ii), the proposed proceedings in the Grand Court would be an abuse of process and liable to be struck out.
76. As I have already stated, in my judgment, there is but a small risk that if no stay at all is granted actions may be taken that are attributable to KEL directors nominated by SPV 21/KESP in breach of clause 9.4 of the SHA that cannot be unwound. However, given that small risk, I have come to the conclusion that the Appellants should be granted a stay of the Grand Court Order for a maximum period of five months from the date of this judgment to obtain an order from the Grand Court or on appeal from this Court restraining SPV 21 from seeking to have directors appointed to the KEL Board in breach of clause 9.4 of the SHA. In fixing the period of five months I have in mind that: (i) the trial of SPV 21’s Originating Summons was heard on 31 March and 3 April 2023 and judgment was delivered on 20 July 2023 about 3 ½ months later; (ii) the Appellants’ undertaking to issue the contemplated proceedings without delay; and (iii) the Grand Court Order has already been effectively stayed for a year. In the event that the decision of the Grand Court is delivered before the expiration of the said five months but is appealed to this Court whose decision will not be delivered before the expiration of the said five months, the Appellants will have liberty to apply to this Court for an extension of the stay hereby granted.

77. For the avoidance of doubt, this five months' stay would end after the period of five months if no order restraining SPV 21 from seeking to have directors appointed to the KEL Board in breach of clause 9.4 of the SHA has been obtained, even though proceedings have been begun and are continuing.
78. To the extent that the Appellants may also be applying for a stay of the Judge's consequential order dated 24 October 2023 awarding SPV 21 damages in the sum of US\$ 25,000, I decline to include that order in the stay I propose should be granted in paragraph 74 above. I do so pursuant to sections 7 and 8 of the 1984 Order and on the assumption that those damages remain unpaid. Those sections provide:

*“7. Where the decision appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said decision shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said decision to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as her Majesty in Council shall think fit to make thereon.*

*8. For the purposes of sections 5 and 7, a person may provide security in any manner that the Court may approve in his case, and for the avoidance of doubt it is declared that such security may with the approval of the Court consist in whole or in part of a deposit of money.”*

79. On the material before the Court, I can see no good reason for requiring SPV 21 to provide security for the repayment of the damages received from the Appellants if the damages award is reversed on appeal.

### **Conclusions**

80. For the reasons given above, I would:
- (1) Grant leave to appeal to the JCPC as of right.
  - (2) In the alternative to (1), grant discretionary leave to appeal to the JCPC.
  - (3) Refuse the Appellants' application for a stay of the Grand Court Order pending the appeal to the JCPC.

- (4) Grant the Appellants a stay of paragraphs 1-4 of the Grand Court Order (but not the subsequent order of 24 October 2023 awarding SPV 21 damages of US\$25,000) for the maximum period of five months to allow for proceedings to be brought by the Appellants in the Grand Court with a view to obtaining an order restraining SPV 21 from seeking to have directors appointed to the KEL Board in breach of clause 9.4 of the SHA, with liberty to apply to his Court in the event that the decision of the Grand Court is delivered before the expiration of the said five months but is appealed to this Court whose decision will not be delivered before the expiration of the said five months.

**Sir Anthony Smellie, JA**

I agree.

**The Hon John Martin KC, JA**

I also agree.

**ANNEX TO JUDGMENT**

## Paragraphs 1-4 of the Grand Court Order

- “(1) The [Appellants] shall (whether by themselves or their agents) forthwith terminate or otherwise discontinue the proceedings commenced by them in the High Court of Sindh at Karachi, Pakistan by the Suit for Declaration and Permanent Injunction issued on 21 October 2022 (the “Pakistan Proceedings”) against (i) [SPV 21], (ii) Alvarez and Marsal, (iii) KES Power Limited and (iv) [KEL] without any cost to the [Respondent]. For the avoidance of doubt, the [Appellants] shall forthwith take steps to cause the [Pakistan Order] in the Pakistan Proceedings to be set aside.
- (2) The [Appellants] shall not (whether by themselves or their agents commence or pursue, or procure or assist the commencement or pursuit of, any proceedings in connection with any dispute or disagreement under, arising out of, or relating to the Shareholder Agreement dated 15 October 2008 (as specifically amended by the Second Deed of Amendment to the Subscription Agreement and the Shareholder Agreement relating to KES Power Ltd dated 5 January 2021) (the “SHA”), in any court or tribunal other than in the Grand Court of the Cayman Islands or an English court.
- (3) The [Appellants] may continue the Pakistan Proceedings against (i) the Government of Pakistan through the Secretary Commission, Ministry of Privatisation and Investment, (ii) the Government of Pakistan through the Secretary, Ministry of Energy, Power Division, (iii) National Electric Power Regulatory Authority and (iv) the Securities and Exchange Commission of Pakistan as defendants to the Pakistan Proceedings if and to the extent that the [Appellants] only apply for and pursue relief that requires those defendants to the Pakistan Proceedings to exercise their duties, rights or powers in relation to [KEL] or KES Power Limited in a manner that does not prevent the [Respondent] from exercising, or interfere with the exercise (whether before or after the date of this order) by the [Respondent] of, its rights under the SHA as a KES Power Limited shareholder.
- (4) Save as specifically provided for by paragraph 3 of this order, the [Appellants] are finally enjoined and restrained (whether by themselves or their agents) from continuing, pursuing, or taking any further steps in the Pakistan Proceedings [...]