Neutral Citation Number: [2025] CICA (Civ) 20

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

Civil Appeal No. 0008 of 2025
(Formerly FSD 2025-0037 (JAJ))

BETWEEN:

(1) AL JOMAIH POWER LIMITED

-AND-

(2) DENHAM INVESTMENT LTD

Plaintiffs/Appellants

-and-

(1) IGCF SPV 21 LIMITED

(2) KES POWER LIMITED

Defendants/Respondents

BEFORE:

The Rt Hon Sir John Goldring, President
The Hon Sir Richard Field, JA
The Hon Sir Michael Birt, JA

Representation **Mr Iain Quirk, KC, Ms Laura Hatfield, Mr Jonathan Stroud and Ms Vered Mazin for the Appellants**
Mr Graham Chapman, KC, Mr Conal Keane, Mr Niall Dodd and Mr Alan Quigley for the First Defendant
The Second Defendant was not represented and did not appear

Heard: **18 September 2025**

Draft Judgment circulated: **24 November 2025**

Judgment delivered: **05 December 2025**

JUDGMENT

Sir Michael Birt, JA

1. This is an appeal by Al Jomaih Power Ltd and Denham Investment Limited ("the Appellants") against the decision of Asif J ("the judge") on 9 June 2025 to dismiss the Appellants' application for an interim injunction against the Respondents, IGCF SPV 21 Limited ("SPV 21") and KES Power Limited ("KESP"), both of which are companies incorporated in the Cayman Islands. The judge gave a short ex tempore judgment at the conclusion of the hearing but delivered further reasons in a judgment dated 31 July 2025 ("the Judgment").

The factual background

2. In what follows, I have drawn upon the helpful summary in the Judgment and upon the agreed background and chronology prepared by the parties.

(i) The ownership structure

3. K-Electric Limited ("KEL") is a company incorporated in Pakistan which is the sole or main provider of electricity to the residents of Karachi, which has a population of over 20 million people. It is accordingly a company of national importance in Pakistan.

4. In 2005, KEL, which had previously been owned by the government of Pakistan, was partially privatised. KESP acquired a majority of the shares in KEL pursuant to a share purchase agreement with the government of Pakistan ("the SPA 2005"). At the time, KESP was wholly owned by the Appellants. KESP owns 66.4% of the shares in KEL. Of the remaining shares, 24.36% is owned by the government of Pakistan and the balance of 9.24% is publicly listed on the Pakistan stock exchange.

5. In 2008, the Appellants entered into a joint venture concerning their indirect interest in KEL with the Abraaj Group, which was a private equity group of companies. They did this by selling some of their shares in KESP.

6. The chosen vehicle for the Abraaj Group's acquisition of its interest in KESP was SPV 21. With the approval of the government of Pakistan given on 27 November 2008, the Appellants sold 50% of their shares in KESP to SPV 21 for a capital contribution commitment of US$361m and a premium of US$50m pursuant to a subscription agreement dated 15 October 2008. As the judge pointed out at [12] of the Judgment, SPV 21 in fact owns 53.8% of the shares in KESP with the balance of 46.2% being owned by the Appellants, but there was no evidence before the judge as to how this adjustment of ownership between the Appellants and SPV 21 from 50% came about and it is not relevant for present purposes.

7. At the time of the sale of the shares in KESP by the Appellants to SPV 21, the Appellants and SPV 21 (together with KESP itself) entered into a shareholders' agreement dated 15 October 2008 to regulate their conduct in relation to KESP. The agreement was subsequently amended in 2019 and 2021 and I refer to the agreement as amended as "the KESP SHA". The KESP SHA made provision for the appointment process for the board of directors of both KESP and KEL and also included the following provisions which are relevant to this appeal:

(i) Clause 9.4

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

(ii) Clause 17.1

> ***"Each of the parties (other than [KESP]) undertakes to the others that it will exercise all powers and rights available to it as a director, officer, employee or shareholder in [KESP] (or in any other Group Company) in order to give effect to the provisions of this agreement and to ensure that [KESP] complies with its obligations under this agreement."***

(iii) Schedule 9 – Interpretation

> ***"Control means, with respect to any person, the possession, directly or indirectly, of the power to direct, or cause the direction of, the management of that person, whether through ownership of shares, voting securities, partnership or other ownership interests, agreement or otherwise, provided that if one person owns, directly or indirectly, fifty per cent (50%) or more of the share capital, voting, securities, partnership or other ownership interests of another person, such person shall be deemed to Control such other person and Controlled and under common Control shall be construed accordingly."***

8. At the time of the KESP SHA, SPV 21 was wholly owned by IGCF General Partner Limited ("IGCF GP"), in its capacity as general partner of the Infrastructure and Growth Capital Fund LP, an exempted limited partnership registered in the Cayman Islands. In 2014, following a restructuring of the share capital of SPV 21, IGCF SPV 26 Limited ("SPV 26"), a wholly owned subsidiary of IGCF GP, acquired an ownership stake in SPV 21. The majority owner of IGCF GP was Abraaj Investment Management Limited ("AIML") which was the investment manager for a number of private equity funds and their related structures within the Abraaj Group.

9. The current share capital of SPV 21 also consists of a sole voting share ("the Voting Share"), which is registered in the name of AIML.

(ii) The Sage transaction

10. The Abraaj Group, including AIML, collapsed in 2018 amid allegations of fraud and mismanagement by Mr Arif Naqvi, who was the founder and CEO of the Abraaj Group, and his associates. The Grand Court appointed provisional liquidators over AIML on 18 June 2018 and on 11 September 2019, it was placed in official liquidation.

11. The liquidators of AIML ("the JOLs") appointed Mr Casey McDonald as an independent professional director of two Abraaj entities which held successive corporate directorships of SPV 21. Then, on 31 May 2020, the JOLs appointed Mr McDonald directly as the sole director of SPV 21, replacing the Abraaj entity which had until then been the director of SPV 21, and of which Mr McDonald was a director.

12. Mr McDonald is a chartered accountant with over 20 years' experience and a professional director regulated by the Cayman Islands Monetary Authority amongst others. He has a focus on

appointments to the boards of distressed funds and investment vehicles and has acted as a court appointed fiduciary in this jurisdiction and other jurisdictions.

13. On 3 August 2022, the JOLs caused AIML to conclude a share and asset purchase agreement with Sage Venture Group Limited ("Sage"). Sage is a BVI company which is ultimately beneficially owned and controlled by Mr Shaheryar Chishty, through AsiaPak Investments Limited. Sage is not part of the Abraaj Group and has no connections with it. The relevant details of the transaction ("the Sage Transaction") are that in return for a payment of US$18 million and additional consideration if certain conditions were satisfied within 36 months:

    (i) Sage bought 75.5% of the shares in IGCF GP from AIML (and has subsequently acquired the remaining shares from the other shareholders of IGCF GP);
    (ii) Sage bought a debt from AIML of approximately US$41m said to be owed by KESP to AIML for consultancy services provided, although there is a dispute between the parties as to whether the debt is genuine;
    (iii) Sage agreed to buy the Voting Share from AIML.

14. The Sage Transaction followed a process during the summer of 2022 under the auspices of the JOLs. In the course of that process, a company associated with the Appellants was invited to submit an offer for the Voting Share or for a purchase of equity in SPV 21 and did so on 4 August 2022, but by then AIML had already agreed to sell to Sage, so the offer did not progress.

15. The JOLs sought sanction from the Grand Court to complete the Sage Transaction. On 14 October 2022, the Grand Court permitted the JOLs to cause AIML to enter into the Sage Transaction provided that the JOLs satisfied themselves that the transaction would not breach the terms of the relevant agreements concerning KESP and AIML or KEL's obligations to its lenders.

16. On or about 14 October 2022, Sage and the JOLs entered into two side letters concerning the Sage Transaction. The second side letter ("the Side Letter") is of particular significance for the present proceedings. In it, AIML and Sage noted at recital (A) that the Appellants had asserted that the transfer of the Voting Share to Sage would constitute a change of control of SPV 21 within the meaning of clause 9.4 of the KESP SHA. In the body of the Side Letter, Sage and AsiaPak acknowledged that they were on express notice of this claim asserted by the Appellants in relation to clause 9.4 and the Side Letter went on to provide, so far as relevant, at clause 4 as follows:

> ***"…To the extent that the legal title to the sole Voting Share in SPV 21 cannot be transferred by [AIML] to [Sage]:***
>
> ***(i) The parties acknowledge and agree that the equitable interest in the sole Voting Share in SPV 21 will be transferred from [AIML] to [Sage] on Completion;….***
>
> ***(ii) [AIML] agrees to hold the sole Voting Share for [Sage] as its nominee and to exercise any rights attaching to that share, and to generally deal with the sole Voting Share in accordance with [Sage's] written instructions…"***

Sage also agreed to indemnify the JOLs against any legal fees and expenses incurred in connection with the transfer to Sage of the Voting Share in SPV 21. It is unclear whether the Grand Court was informed of the content of the Side Letter when granting its approval on 14 October 2022 to the JOLs entering into the Sage Transaction.

17. It remains the position that the Voting Share is still registered in the name of AIML and that accordingly Sage only has the beneficial ownership of the Voting Share. However, pursuant to the Side Letter, the JOLs have committed to exercising the rights conferred by the Voting Share in accordance with the instructions of Sage. They have reached this agreement in full knowledge of the terms of clause 9.4.

18. On 18 October 2022, SPV 21 resolved to nominate Mr Chishty, his brother Sameer Chishty and Darin Baur, his business associate, as directors of KESP.

19. The next day, 19 October 2022, which was only five days after the date of the Side Letter and the sanction granted by the Grand Court, KESP's company secretary wrote to KEL indicating that KESP was appointing Mr Chishty and Mr Baur as KESP's nominated directors of KEL with immediate effect. The Appellants assert that this was done without the knowledge or consent of KESP's board of directors. They also contend that the inevitable inference, despite the assertion by Mr McDonald as to his independence, is that these appointments were made pursuant to the acquisition of control of SPV 21 by Sage / Mr Chishty.

(iv) Proceedings in Pakistan

20. Two days later, on 21 October 2022, the Appellants commenced proceedings in the High Court of Sindh at Karachi, Pakistan against SPV 21, the government of Pakistan, certain regulatory agencies and others, seeking declarations and a permanent injunction to restrain SPV 21 from appointing any directors to KEL ("the Pakistan Proceedings"). On the same day, the Appellants applied for, and obtained, an ex parte injunction restraining SPV 21 from making any changes to the composition of KEL's board of directors ("the Pakistan Injunction"). On 4 November 2022, SPV 21 applied to set aside the Pakistan Injunction and stay the Pakistan Proceedings. That application was due to be heard on 20 February 2024 but was adjourned and there was no information before the judge as to whether that hearing took place and, if it did, any outcome. It appears there has been other activity in Pakistan, both in the proceedings commenced by the Appellants, where other interested parties have sought to be joined, and in separate proceedings started by others.

(v) The Cayman anti-suit proceedings

21. SPV 21 took the view that the Appellants' action in commencing the Pakistan Proceedings was a clear breach of the jurisdiction provision in clause 25.2 of the KESP SHA which provided that the Grand Court and the English courts had exclusive jurisdiction to determine any dispute arising out of or in connection with that agreement. Initially, SPV 21 invited the Appellants to discontinue the proceedings in Pakistan and to commence a claim in either the Grand Court or the High Court of England and Wales. When the Appellants refused, SPV 21 commenced proceedings against the Appellants in the Grand Court on 24 November 2022 seeking an anti-suit injunction to restrain the Appellants from pursuing the Pakistan Proceedings and requiring them to apply to set aside the ex parte injunction they had obtained. Segal J in the Grand Court granted an interim anti-suit injunction on 30 January 2023 and, following a final hearing, gave judgment on 20 July 2023 holding that the Appellants were in breach of clause 25.4 of the KESP SHA and confirming the interim anti-suit injunction, which ordered the Appellants forthwith to terminate or otherwise discontinue the Pakistan Proceedings against SPV 21 and certain other defendants (but not the Government of Pakistan or the regulatory authorities). However, he stayed that injunction pending the Appellants' appeal to the Court of Appeal. The Court of Appeal dismissed that appeal on 2 July 2024.

22. The Appellants sought permission to appeal to the Judicial Committee of the Privy Council on the question whether SPV 21 had submitted to the jurisdiction of the High Court of Pakistan. They also applied to the Court of Appeal for a stay of the anti-suit injunction pending their intended

appeal or pending determination of an application to be made by the Appellants to the Grand Court for an injunction in terms similar to the ex parte injunction they had obtained in Pakistan.

23. On 10 January 2025, the Court of Appeal gave the Appellants permission to appeal to the Privy Council but refused their application for a stay pending that appeal. However, the Court of Appeal stayed the anti-suit injunction for up to 5 months upon an undertaking by the Appellants to apply to the Grand Court for an injunction to replace the Pakistan Injunction *"without delay"*. The draft of the Court of Appeal's judgment had apparently been provided to the parties on 27 November 2024, so that the Appellants were aware from that date that they needed to apply to the Grand Court promptly for an injunction.

24. The appeal to the Privy Council was limited to the question whether SPV 21 submitted to the jurisdiction of the High Court in Pakistan by making its application to that court to challenge jurisdiction. It did not involve any challenge to the finding of Segal J and this court that the Appellants acted in breach of clause 25.4 of the KESP SHA in commencing and pursuing the Pakistan Proceedings. The Privy Council dismissed the appeal on 24 November 2025.

25. The stay on the anti-suit injunction has since been further extended until the determination of the present appeal.

The present proceedings

26. Despite the Appellants undertaking to the Court of Appeal to do so *"without delay",* they had not commenced a claim before the Grand Court for an injunction by 12 February 2025, prompting SPV 21's attorneys to challenge them on this. On 24 February 2025, SPV 21 filed a Notice of Motion before the Court of Appeal seeking to lift the stay of the anti-suit injunction on the ground that the Appellants had failed to comply with their undertaking to the Court of Appeal. This appears to have prompted the Appellants into action and on 26 February 2025 they filed the writ and statement of claim in the current proceedings together with a summons for an interlocutory injunction. In very broad outline, as summarised by the judge, the respective cases before him were as follows.

27. The Appellants asserted that since 14 October 2022, Sage had become the majority owner and effectively controlled SPV 26 which in turn was the majority owner of SPV 21; that Sage had acquired beneficial ownership of the Voting Share and was therefore in control of SPV 21; and that

by reason of his beneficial ownership of Sage, Mr Chishty had become the indirect majority owner and effective controller of SPV 21.

28. They submitted that this amounted to a *"change of Control"* within the meaning of the KESP SHA and was a breach of clause 9.4. They sought an interim injunction, and a permanent injunction following trial, to restrain SPV 21 from permitting or taking any action that would involve SPV 21 acting in breach of clause 9.4 of the KESP SHA. They complained that Sage and Mr Chishty's aim was to use their control of SPV 21 to further their own interests at the expense of the Appellants and that this would lead to uncompensatable damage to the Appellants, justifying the grant of an interim injunction.

29. The terms of the interim injunction sought by the Appellants before the judge ("the Original Injunction"), which for all practical purposes were the same as the terms of the permanent injunction sought in the statement of claim, were as follows:

> ***"1. [SPV 21] shall not implement and/or act on the direct or indirect instructions of [Sage] and/or [Mr Chishty], or their agents or associates, or cause or procure the same to occur;***
>
> ***2. [KESP] shall not assist with or procure the appointment of any persons connected to [Sage] and/or [Mr Chishty] or any of their agents or associates to the board of [KEL];***
>
> ***3. [SPV 21] shall not, by itself and/or by its servants or agents, or by any director appointed by it to [KESP] permit or take any action that would result in a change of control as defined in the [KESP SHA] ("Control") by [Sage] and/or [Mr Chishty], whether directly or indirectly;***
>
> ***4. [SPV 21] shall forthwith cease to permit itself to be Controlled by Sage and/or [Mr Chishty], whether or indirectly;***
>
> ***5. [SPV 21] shall withdraw all instructions seeking to appoint or support the appointment of [Mr Chishty] and [Mr Darin Baur] as directors of [KEL]. Further, [SPV 21] shall not seek to appoint any other person as directors of [KEL] to whom [the Appellants] object;***
>
> ***6. [SPV 21] shall not register any transfer of the sole [Voting Share] in [SPV 21] without the written agreement of [the Appellants]; and***
>
> ***7. [SPV 21] shall not, without the consent of [the Appellants], in any way permit and/or take any action that results in Control of [SPV 21] by [Sage]***

and/or [Mr Chishty] or any other person (other than a member of the Abraaj Group) as defined in the [KESP SHA].”

30. The Appellants asserted that they were pursuing this relief in order to protect their investment in KEL. They asserted that if relief was not granted, Mr Chishty, through Sage and SPV 21, would implement changes to KEL that could severely and irremediably harm its operations and the Appellants' interests in KEL. They asserted that SPV 21 was unlikely to suffer any prejudice if relief was granted, so that the balance of convenience was firmly in favour of ordering an injunction in the terms sought.

31. The judge summarised the overarching contentions of SPV 21 that the Appellants were not entitled to the interim injunctive relief sought as follows:

(i) The relief sought by the Appellants went far beyond any contractual rights in favour of the Appellants in the KESP SHA. The Appellants were seeking to restrain SPV 21 from the exercise of its contractual rights, rather than to prevent breaches of its contractual obligations.

(ii) The Appellants had failed to show that they would suffer substantial damage if the injunction were not granted, still less irremediable damage.

(iii) Damages would be an adequate remedy for any breaches of the Appellants' rights.

(iv) There was no serious issue to be tried on the Appellants' claim for permanent injunctive relief. Accordingly, the Appellants should not be granted interim injunctive relief.

(v) The Appellants had been guilty of egregious delay in bringing their claim and had done so with unclean hands. They had delayed for over two years, during which period they had themselves deliberately breached and remained in continuing breach of the KESP SHA on which they sought to rely and had ignored findings by the Grand Court and the Court of Appeal that they were in breach of it. The court should not reward the Appellants' behaviour by a discretionary exercise of its equitable jurisdiction in their favour.

The Judgment

32. It was common ground before the judge that the applicable principles when considering the grant of an interim injunction are those set out in the well-known case of *American Cyanamid Co v Ethicon* [1975] AC 396 at 408-409. The judge considered that these were helpfully summarised by Mangatal J in *Xie Zhicun v XiO GP Ltd* (Unreported 09/06/17) at paragraph 101 in the following terms:

> ***"(a) Is there a serious issue to be tried; do the Plaintiffs have a real prospect of succeeding in their claim for permanent injunctions at the trial?***
>
> ***(b) If there is a serious issue to be tried, will the Plaintiffs be adequately compensated by damages for the loss they would have sustained as a result of the Defendants continuing to do that which it was sought to be enjoined, and are the Defendants in a position to pay the damages?***
>
> ***(c) If damages would not provide an adequate remedy for the Plaintiffs, if the Defendants were to have succeeded at trial, would they be adequately compensated under the Plaintiffs' undertaking as to damages? I bear in mind, that as Lord Hoffmann said at paragraph 17 of NCB v Olint:***
>
> > ***"In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy."***
>
> ***(d) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of the balance of convenience arises.***
>
> ***(e) Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.***
>
> ***(f) The Court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."***

33. Having set out in some detail the submissions of the parties on the issues which had to be considered when applying the *American Cyanamid* test, the judge's conclusions can be summarised as follows.

(i) No serious issue to be tried

34. SPV 21 had argued that, as it was not a party to the Sage Transaction, which was between the JOLs of AIML and Sage, there was no serious issue to be tried as to whether it had permitted or taken any action which had resulted in the change of control of SPV 21 to Sage and whether it had therefore acted in breach of clause 9.4 of the KESP SHA.

35. The judge rejected that contention. He referred to contemporaneous documents which could support a finding that SPV 21 did facilitate the completion of the Sage Transaction by issuing documents required for the transaction to go forwards. In particular, the transaction required a

form of charge over SPV 21's shares and a negative pledge to be given by SPV 21 in favour of AIML. The judge explained at [95] that the form of charge required SPV 21 to provide certain documents to enable the charge to be executed, including a memorandum signed by SPV 21's director that the charge was endorsed on SPV 21's register of members, an executed notice of charge and an executed letter of undertaking and confirmation, again to be signed by SPV 21's director, and all in the form annexed to the form of charge. Similarly, SPV 21 had to execute the negative pledge and there was no suggestion before the judge that it had not been provided by SPV 21. Accordingly, the judge held that there was a serious issue to be tried as to whether SPV 21 had breached clause 9.4 by permitting or taking action that would result in a change of control of SPV 21.

36. However, the judge held that, as set out in *Zhikun*, the correct question was whether there was a serious issue to be tried that a plaintiff would obtain the relief it was seeking at trial; thus in the present case, the question was whether there was a serious issue that the court would grant a permanent injunction in the terms sought or in broadly similar terms.

37. The judge held at [100]-[103] that the orders sought went well beyond what would be appropriate as a remedy for a breach of clause 9.4 by SPV 21 and impermissibly strayed into granting the Appellants additional rights which were not to be found in the KESP SHA. He also held that there were real problems with the ability of the court to enforce any orders that were made in the terms proposed. For example, the order sought at paragraph 4 of the Original Injunction was to direct SPV 21 forthwith to cease to permit itself to be controlled by Sage and/or Shaheryar Chishty, whether directly or indirectly. The judge concluded that this did not make clear what SPV 21 was meant to do or not to do in order to comply. He said there were similar difficulties with the scope, meaning and enforceability of the other paragraphs in the relief sought.

38. He considered whether there was an irreducible minimum that might be ordered by way of final injunction, for example if the orders were limited to paragraph 1 of the Original Injunction (as set out at paragraph [29] above). However, he concluded that even this would be unworkable. For example, what would happen if the instructions that were given to SPV 21 by Sage were clearly in SPV 21's best interests or in the best interests of KESP or KEL? An order in the terms sought by the Appellants would require SPV 21's director not to accede to such directions and arguably to be in breach of his or her fiduciary duties.

39. Accordingly, he was not satisfied that there was a serious issue to be tried as to whether the Appellants would achieve the relief which they were seeking in the proceedings. That meant that the Appellants failed in their application. However, the judge went on to consider the other matters listed in *American Cyanamid* and, although he did not specifically say so, this must implicitly have been in case he was found to be wrong in his conclusion that there was no serious issue to be tried.

(ii) Likelihood of uncompensatable loss or damage to the Appellants

40. The judge noted that if no interim injunction was granted and if the Pakistan Proceedings were withdrawn, SPV 21 would be able to appoint additional directors of KEL up to its maximum number of four directors. There are five independent directors and the Appellants are entitled to appoint four directors, making a possible total of thirteen directors. Thus, even if SPV 21 were to appoint four directors, including Mr Chishty and Mr Baur, neither Sage nor Mr Chishty would be able to control the way in which KEL carried on its business. They would only be able to influence its management to the extent that at least three other directors agreed that their proposals were in KEL's best interests. The judge held that he was entitled to conclude that all directors, but in particular the five independent directors, would exercise their judgment in the best interests of KEL according to their fiduciary duty to KEL. In those circumstances, he did not see how Sage and Mr Chishty would be able to drive through decisions that they wanted in respect of KEL against the wishes of the Appellants' nominated directors and the independent directors. They would only be able to achieve a particular course of action if at least three other directors agreed with them. He accordingly held that there was no real risk of damage to the Appellants' interests that would be caused by refusing the injunction sought.

41. He further held that, to the extent that the Appellants were to suffer any damage to their interests in KEL, such damage should be easily quantifiable as a result of KEL being a publicly listed company and accordingly they could be compensated by an award of damages.

(iii) Likelihood of uncompensatable loss or damage to SPV 21

42. The judge noted that at present, because of unfilled positions, SPV 21 has two directors of KEL out of the current complement of ten directors. If an injunction was granted, this would remain the position. If no injunction were granted, SPV 21 could increase its directors to four but the

Appellants could also increase their directors from the current number of three to four. Thus, if no injunctions were granted, SPV 21 would have four out of thirteen directors as compared with two out of ten at present (which would remain the position if an injunction were granted).

43. The judge concluded that this was not a matter of significant difference in terms of influence and ability to exercise decision-making powers. Accordingly, he held that SPV 21 had not satisfied him that it was likely to suffer uncompensatable loss if an injunction in the Appellants favour were to be granted.

(iv) Delay and unclean hands

44. In the light of his ruling on uncompensatable loss on each side, the judge did not consider the question of the balance of convenience. However, he did go on to consider the question of delay and unclean hands on the part of the Appellants.

45. In the context of the equitable maxim *'he who seeks equity must do equity',* he considered the English decision of *Chappell v Times Newspapers Ltd* [1970] 1 WLR 482. This was a case where publishers, following a threat of industrial action by a trade union, stated that they would regard any employee who took industrial action as having terminated his employment. Five individual employees instituted proceedings seeking an interim injunction to restrain the publishers from terminating their employment.

46. Megarry J found on the evidence that, if they were called upon by the trade union to take further industrial action, the individual plaintiffs would do so. In these circumstances, he held as follows at 495A-D:

> ***"There is a general principle which lies enshrined in the maxim "he who seeks equity must do equity". That maxim, like the other maxims of equity, is not to be construed or enforced as if it were a section in an Act of Parliament; but it expresses in concise form one approach made by the court when the discretionary remedy of an injunction is sought. If the plaintiff asks for an injunction to restrain a breach of contract to which he is a party, and he is seeking to uphold that contract in all its parts, he is, in relation to that contract, ready to do equity. If on the other hand he seeks the injunction but in the same breath is constrained to say that he is ready and willing himself to commit grave breaches of the contract at the behest of a body or person (whether his***

> ***union or not) engaged in an active campaign of organising the repeated commission of such breaches, then it seems to me that the plaintiff cannot very well contend that in relation to that contract he is ready to do equity. One may leave on one side any technicalities of law or equity and simply say, in the language of childhood, that he is trying to have it both ways: he is saying "You must not break our contract but I remain free to do so".***

47. In the Court of Appeal, Lord Denning M.R. said this at 502A-E:

> ***"There is another point which seems to me decisive. These men are saying that the publishers are about to break the contract of employment. But it is plain that they are not ready and willing to perform their own side of it. It has long been settled both at common law and in equity that in a contract where each has to do his part concurrently with the other, then if one party seeks relief, he must be ready and willing to do his part in it. You will find the common law so stated in Smith's Leading Cases, 13th ed. (1929) vol.2 p.10: notes to Cutter v Powell (1795) 6 Term. Rep. 320. You will find the equity stated in Measures Brothers Limited v Measures [1910] 2 Ch. 248 where Sir H H Cozens-Hardy M.R. said at p.254:***
>
> ***"I prefer to base my judgment upon the ground that the plaintiffs, who are seeking equitable relief by way of injunction, cannot obtain such relief unless they allege and prove that they have performed their part of the bargain hitherto and are ready and able also to perform their part in the future."***
>
> ***The principle was stated by Lord Radcliffe more recently in Australian Hardwoods Pty. Ltd v Commissioner for Railways [1961] 1 WLR 425, 432-433:***
>
> > ***"….where the agreement is one which involves continuing or future acts to be performed by the plaintiff, he must fail unless he can show that he is ready and willing on his part to carry out those obligations, which are, in fact, part of the consideration for the undertaking of the defendant that the plaintiff seeks to have enforced."***
>
> ***In this case it seems to me impossible for any of the plaintiffs to say that he is ready and willing to perform his part of the contract when on the statement of his union, the National Graphical Association (which he has never disavowed) he may be called upon, or other members of his union may be called upon, to take industrial action so as to bring great losses to their employers. Not being ready and willing to do their part, they cannot call on the employers to continue to employ them. They are seeking equity when they are not ready to do it themselves.***
>
> ***This is enough to decide the case."***

The judge also quoted passages from the judgments of Stephenson LJ (at 504E-G) and Lane LJ (506E-G) in the Court of Appeal which were to like effect.

48. The judge held that the Appellants' position was analogous to that of the plaintiffs in *Chappell* because they had deliberately chosen to commence proceedings in Pakistan in clear breach of clause 25.2 of the KESP SHA and they had taken no steps to discontinue those proceedings and discharge the ex parte injunction obtained in Pakistan despite both Segal J and this court concluding that they had acted in breach. For the reasons set out at [121], the judge found on the evidence that the Appellants had made a deliberate decision not to bring proceedings in the Cayman Islands or in England and Wales but to sue in Pakistan instead.

49. The judge therefore held at [123] that, even if he had not already concluded that he should dismiss the summons, he would have refused to grant the Appellants the interim injunction which they sought as a matter of the exercise of his discretion on the ground that they did not come to the court with clean hands.

50. The judge also considered the question of the Appellants' delay in bringing the proceedings before the Grand Court. He noted that the Appellants had known since at least 1 February 2023, when Segal J granted the interim anti-suit injunction, that they might have to concede the Pakistan Injunction but they had done nothing to commence the proceedings for an injunction in the Grand Court until 26 February 2025, more than two years later. Furthermore, although having undertaken to the Court of Appeal that they would commence proceedings *'without delay'*, they did not do so until 26 February.

51. The judge held that this represented substantial unexplained or unjustified delay in commencing the proceedings. He noted that the question of delay was complicated by the existence of the Pakistan Injunction and the fact that Segal J and the Court of Appeal had granted stays of the anti-suit injunction. He found therefore that the Appellants delay in commencing the current action was not so plain and obvious that it was sufficient on its own to justify refusing to give the Appellants the relief which they sought, but it was significant in the overall balancing exercise and weighed in favour of refusing to exercise his discretion to grant the requested interim injunction. In effect, as he said at [127.4], the delay provided an additional supporting reason to refuse to exercise the court's discretion in the Appellants' favour.

Grounds of appeal

52. The Appellants submit that the judge erred in dismissing their application for an interim injunction. In broad terms, they raised three grounds of appeal in their skeleton argument:

(i) The judge was wrong to find that there was no serious issue to be tried because the relief sought by the Appellants was too wide and was unworkable. Alternatively, if he was of that view, the judge could and should have narrowed the terms of the injunction sought so as to hold the ring pending trial rather than dismissing the application altogether.

(ii) The judge was wrong to find that the Appellants should be denied relief because of unclean hands and delay in circumstances where the anti-suit injunction had been stayed both by Segal J and by this court.

(iii) The judge was wrong to hold that damages would be an adequate remedy for the Appellants.

53. I shall consider each of these but first it is important to recall the approach of an appellate court to a discretionary decision at first instance. A decision as to whether to grant an interim injunction and the associated issue of whether any hands are sufficiently unclean to deny relief are quintessential discretionary decisions on which judges may reasonably reach different conclusions.

54. In *Scully Royalty Limited v Raiffeisen Bank International Limited* [2022] (1) CILR 118, this court said at [53]:

> ***"It is well established that a decision whether to grant an interlocutory order such as a freezing order is a discretionary decision for the first instance judge and an appellate court may only interfere on limited grounds as set out, for example, in Hadmore Productions Limited v Hamilton [1983] 1 AC at 220A-E (per Lord Diplock). It is not sufficient that the members of the appellate court would have exercised their discretion differently."***

55. It is worth recalling the observation of Lord Diplock in *Hadmore,* referred to in *Scully,* which was in the following terms:

> ***"An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the***

> ***Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it is one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."***

56. As an example of the need for appellate restraint, Mr Chapman referred us to the case of *Abdule v Commissioner of Police of the Metropolis* [2016] 1 WLR 898, which concerned a decision of the High Court not to strike out a claim for failure to comply with certain procedural rules. On appeal, Lewison LJ, with whom Kitchin and Moore-Bick LJJ agreed, made clear that he would have reached the opposite decision to the High Court judge. Thus, at [24] he said:

> ***"Let me say at once that if I had been the first instance judge I would have accepted [counsel for the appellant's] submissions. I would have given more weight to the lamentable history of delay in progressing this case, the apparent incompetence of the claimant's solicitors, and the loss of the trial date, but that is not the question for an appeal court."***

However, the Court of Appeal went on to dismiss the appeal on the basis that it was within the discretionary range of decisions open to the judge below.

Clean Hands

57. Although Mr Quirk dealt with this as the second of his three grounds, I propose to consider it first. That is because, as will be seen, the decision on this ground is determinative of the whole appeal.

(a) Submissions

58. As described at paras 44-49 above, the judge held that, quite apart from the other matters which he considered, he would have refused to grant the interim injunction in any event on the ground that the Appellants did not come to the court with clean hands because of their breach of clause 25.2 of the KESP SHA in commencing and then not discontinuing the Pakistan Proceedings against SPV 21.

59. The Appellants submitted that there was no proper foundation for the judge's conclusion, which was one he was not entitled to reach. I would summarise their arguments as follows.

60. First, the judge criticised the Appellants for commencing and then not taking any steps to discontinue the Pakistan Proceedings despite the decision of Segal J and this court that in doing so they were in breach of clause 25.2 of the KESP SHA. But that was to ignore the fact that Segal J and this court had granted a stay of the anti-suit injunction and the judge was wrong to find that this did not excuse the Appellants' failure to discontinue the Pakistan Proceedings. Contrary to the judge's view, the facts of this case were not analogous to the facts in *Chapell*. In that case, the applicants sought specific performance of a contract while being in breach of the same contract. By contrast, in this case this court in its decision of 10 January 2025 had effectively permitted the continuation of the Pakistan Proceedings by virtue of the stay of the anti-suit injunction.

61. Secondly, the judge's conclusion that the Appellants came with unclean hands could not be justified in circumstances where, in its judgment of 10 January 2025, this court had specifically granted a stay of the anti-suit injunction for five months in order to enable the Appellants to obtain an order from the Grand Court in similar terms to the Pakistan injunction concerning the appointment of directors to KEL. It could not be a case of unclean hands for the Appellants not to withdraw the Pakistan Proceedings when this was expressly envisaged by the stay granted by this court.

62. Thirdly, the fact that the Appellants commenced the Pakistan Proceedings in breach of contract should not bar them for all time from seeking equitable relief; to so hold would mean that in any case where a party started in the wrong jurisdiction and an anti-suit injunction was granted, that

party would be barred from obtaining any equitable remedy in the proper court. There was no authority to support such a proposition and it could not be correct.

(b) Discussion

63. There are in fact two relevant equitable maxims. The first is *'he who seeks equity must do equity'*. The second is *'he who comes into equity must come with clean hands'*. The judge referred to the case of *Chappell* (which was concerned with the first maxim) but then spoke exclusively of *'clean hands'*, which relate to the second maxim. However, I do not think that this is significant and no point was raised on it before us. The two maxims are very similar in meaning and the only difference is that the first maxim could be said to be looking to the future whereas the second maxim looks more to the past (see Snell's Equity, 32nd edition at 5-015).

64. This aspect of the judge's decision was *par excellence* an exercise of discretionary judgment. When considering application of the 'clean hands' equitable maxim, a judge has to assess the nature and gravity of any lack of clean hands on the part of an applicant and decide whether the applicant's conduct is sufficient to deny equitable relief which would otherwise be granted to him. It is therefore a classic example of where an appellate court must bear in mind the need for restraint as outlined at paras 53-56 above.

65. I am not sure that I would necessarily have reached the same conclusion as the judge on the facts of this case. But that is not the test. I am quite satisfied that the judge's decision was well within the band of reasonable decisions open to him and cannot possibly be categorised as being plainly wrong. I reach that view for the following reasons:

(i) The judge found at [121] that the Appellants consciously considered whether they should comply with clause 25.2 of the KESP SHA and bring proceedings in the Cayman Islands or in England and Wales and made a deliberate decision not to, and to sue in Pakistan instead. This was therefore not an inadvertent or innocent breach; it was a deliberate and conscious breach of contract.

(ii) The Appellants then contested the existence of any breach of contract on their part before Segal J and subsequently before the Court of Appeal despite the clear wording of clause 25.4. They could at any stage have accepted that they were in breach and begun proceedings in the Cayman Islands, but they chose not to until in effect forced to do so.

(iii) It was perfectly open to the judge to conclude that the fact that the Cayman courts have granted a stay of the anti-suit injunction does not excuse the Appellants' failure to withdraw the Pakistan Proceedings. The grant of a stay simply means that there is no order in force to the effect that the Appellants must discontinue the Pakistan Proceedings. But a stay does not prevent the Appellants from withdrawing the Pakistan Proceedings voluntarily. Indeed, there has been nothing to prevent the Appellants from withdrawing the Pakistan Proceedings (and thereby bringing their breach of contract to an end) at any time since October 2022. The fact that they have not done so even in the period since the decision of the Grand Court (and subsequently this court) that they were in breach of contract suggests that they wish to hold on to the fruits of their breach of contract as long as possible.

(iv) Nor does the decision of this court on 10 January 2025 bear the weight which the Appellants seek to place on it. The fact that this court agreed to a stay in order to give time for an application to be made to the Grand Court does not mean that it was approving or blessing a continued breach of contract. As already stated, it has been a voluntary decision on the part of the Appellants not to withdraw the Pakistan Proceedings.

(v) I accept that the facts of this case are not wholly analogous to the case of *Chapell*, but they are substantially analogous. In that case, the plaintiffs sought the equitable remedy of a decree of specific performance despite reserving the right to break the contract of employment in the future. Because the case was concerned with future conduct, the Court of Appeal focused on the first maxim, namely that *'he who seeks equity must do equity'*. In the present case, while not specifically reserving the right to break the KESP SHA in future, the Appellants seek the equitable remedy of an interim injunction to prevent SPV 21 from breaching the KESP SHA whilst having committed and then remaining in breach themselves both at the time of the hearing before the judge and at the date of this appeal; thus having unclean hands.

(vi) I do not accept Mr Quirk's submission that the judge's decision to deny relief on the facts of this case means that any party who breaches an exclusive jurisdiction term in a contract by suing in the wrong jurisdiction will thereafter be barred from obtaining equitable relief in the correct jurisdiction because he would be treated as having unclean hands. That is for two reasons. First, such matters are very fact specific and will depend upon the circumstances surrounding the breach of contract by the applicant as well as the alleged breach of contract by the defendant. The judge's decision only relates to the facts of this

particular case. Secondly, I read the judge's decision as dealing only with the question of interim relief. If a time comes after trial when the alleged breach of contract by SPV 21 is found to be proved (rather than merely being a serious issue to be tried as at present), the court will then have to reconsider the balance of equity and fairness in the light of the then proven breach of contract by SPV 21 and decide whether any unclean hands on the part of the Appellants are such that at that stage they should be denied equitable relief for such proven breach.

(vii) Putting these matters together, it was in my view entirely open to the judge to conclude that the Appellants were seeking equitable relief when they had unclean hands and that their conduct was sufficient to justify denial of the equitable relief of an interim injunction.

66. The judge made clear that his decision on this issue was a standalone ground for dismissing the Appellants' application for an interim injunction. It follows that the decision to uphold the judge on this issue means that the appeal must be dismissed regardless of the outcome of the two other grounds of appeal. It is not therefore strictly necessary to deal with those two grounds, but I shall do so briefly in case it is of assistance in the future.

(i) No serious issue to be tried

(a) Submissions

67. In his skeleton argument, Mr Quirk emphasised the judge's conclusion that there was a serious issue to be tried as to whether SPV 21 had breached clause 9.4 by reason of actions which it had taken to assist the change in control as summarised by the judge at [95] (see paragraph 35 above). In those circumstances, an interim injunction should be granted to preserve the status quo pending the outcome of the trial.

68. His skeleton argument essentially made four key points in support of the appeal. First, if the judge was of the view that the relief sought by the Appellants went beyond what would be appropriate as a remedy for any breach of clause 9.4 by SPV 21, he should have considered, in consultation with counsel at the hearing, whether a narrower form of relief would be appropriate in order to maintain the status quo. The judge had not raised with counsel any concerns as to the width or extent of the relief which the Appellants were seeking.

69. Secondly, the judge was wrong to find that even an order limited to paragraph 1 of the Original Injunction (see para 29 above) would be unworkable. The directors of SPV 21 would not be in breach of their duties by complying with any court order. Furthermore, in the interim period pending trial, if directions were given by Sage which the directors of SPV 21 considered they should follow despite the interim injunction, they could always seek permission and/or variation from the court.

70. Thirdly, the judge was wrong to conclude that the relief sought by the Appellants could not be enforced by the court or was otherwise unworkable as a matter of permanent relief. On analysis, each paragraph of the injunction would not prove difficult or uncertain for the court to enforce or for SPV 21 to comply with.

71. Fourthly, the judge was wrong to conclude at [98], in reliance on the summary of Mangatal J in *Zhikun*, that he had to look in detail at the relief that was sought by the Appellants and consider whether there was a serious issue that the court would grant a permanent injunction in the terms sought or in broadly similar terms if the Appellants were successful in proving a breach of clause 9.4 at trial. The purpose of interim relief was simply to maintain the status quo pending trial and it was entirely plausible that any final relief granted would differ from interim relief granted earlier in the proceedings. In any event, there was a serious issue to be tried as to the relief sought by the Appellants given the court's power to order a narrower form of relief if it deemed appropriate.

72. No suggestion as to the terms of any narrower injunction were put forward by the Appellants in their skeleton argument; it was simply stated at [53] that the Appellants remained open to a narrower form of order which met the essential purpose of preventing a perpetuation of the unlawful change of control in SPV 21 pending the conclusion of a trial.

73. However, the day before the hearing of the appeal, the Appellants submitted a draft order containing narrower injunctive relief which is what they sought this court to order if it allowed the appeal (p26 of the transcript). In other words, they were no longer seeking an order in the terms of the Original Injunction. The terms of the draft order ("the Amended Injunction") were as follows:

> ***"(a) SPV 21 shall not implement and/or act on the instructions of [Sage] and/or [Mr Chishty];***
> ***(b) KESP shall not assist with or procure the appointment of Mr Chishty or Mr Daran Baur to the board of [KEL];***

(c) SPV 21 shall withdraw all instructions seeking to appoint Mr Chishty or Mr Daran Baur as directors of KEL;

(d) SPV 21 shall not register any transfer of the sole voting share in SPV 21 without the express consent of the Appellants."

As can be seen, these four paragraphs are essentially simplified versions of paragraphs 1, 2, 5 and 6 of the Original Injunction.

74. In his oral submissions, Mr Quirk focused exclusively on the argument that the judge should have raised with counsel his concerns about the width of the interim injunction sought and, if he felt that the relief sought was too wide, should have granted narrower relief. The Amended Injunction now sought by the Appellants was very much narrower and met the concerns of the judge if they were valid. In essence, the injunction simply sought to prevent SPV 21 from putting into effect a change of control which, on the Appellants' case, had come about as a result of a breach of clause 9.4 by SPV 21. There was therefore a serious issue to be tried as to whether a permanent injunction in such terms would be granted at trial.

75. Mr Chapman submitted that the judge had applied the correct legal test and had reached a discretionary decision which was reasonably open to him; indeed, he had reached the correct decision.

76. Mr Chapman pointed out that, in their skeleton argument below, the Appellants at [44] had themselves cited the passage from *Zhikun* quoted above as articulating the *American Cyanamid* test. It was not therefore open to them on appeal to argue that the judge had applied the wrong test.

77. The judge was also correct to hold that the relief sought before him went beyond what would be appropriate as a remedy for a breach by SPV 21 of clause 9.4 and strayed into granting the Appellants additional rights which were not to be found within the KESP SHA. He was also correct to find that the injunctions were in certain respects overbroad and unworkable.

78. An important consideration was that this was not a more common situation where a party to a shareholders' agreement seeks to transfer shares in breach of a negative covenant in the agreement prohibiting him from transferring his shares or only allowing him to do so subject to compliance with certain conditions. Clause 9.4 dealt with control of one of the parties to a shareholders' agreement. The parties to the Sage Transaction were Sage and the JOLs. Neither of them was

party to, or bound, by the KESP SHA and clause 9.4 in particular. Control of SPV 21 had passed to Sage / Mr Chishty as a result of the Sage Transaction coupled with the Side Letter. It was not open to the court to undo or prevent a transaction between two parties who were not bound by the KESP SHA. In the circumstances, there was no serious issue that an injunction in effect preventing the Sage Transaction from being put into effect would be granted at trial and it went beyond what the Appellants were entitled to.

79. Furthermore, Mr Chapman submitted that it was not open to the Appellants to seek at this late stage an injunction in narrower terms than they sought before the judge. SPV 21 had at all relevant times made the point that the injunction went beyond what was permissible and could not be effectively enforced. He had dealt with this at [45]-[49] of his skeleton argument and in his oral submissions before the judge in some detail; see pp129-131, 140, 159-160, 165, 173-175, 190 (using the bundle numbering) of the transcript of the hearing before the judge.

80. Despite this, at no stage in their skeleton argument or in oral submissions (whether in opening or in reply) before the judge did the Appellants address this issue; they simply maintained their application for an interim injunction in the wide terms of the Original Injunction.

81. Mr Chapman further submitted that even in their skeleton for this appeal, the Appellants did not put forward a narrower form of injunction; they simply suggested that they would be open to a narrower form of order. It was only the day before the hearing of the appeal that the Appellants came forward with the suggested wording contained in the Amended Injunction. It was, submitted Mr Chapman, not acceptable in the face of the objections from SPV 21 to say nothing to the judge indicating that a narrower form of injunction could be considered and then protest when the judge did not raise the point himself before reaching his decision.

82. Mr Chapman also submitted that, even if this court was now willing to consider the narrower draft order, it suffered from the same defects as the original order sought. The Sage Transaction was between two entities who were not party to the KESP SHA and SPV 21 had a contractual right under the KESP SHA to nominate directors to KEL without having to obtain the consent of the Appellants. Thus paragraphs (a), (b) and (c) of the Amended Injunction still prohibited SPV 21 from exercising its contractual rights and granted the Appellants rights which went beyond those which it had under the contract.

(b) Discussion

83. In my judgment, the judge was correct, applying the observation of Mangatal J in *Zhikun,* to consider whether there was a serious issue to be tried not only as to whether SPV 21 was in breach of contract, but also as to whether the court would grant a permanent injunction at trial. It seems to me that the summary by Mangatal J is consistent with *American Cyanamid* itself where, immediately before the well known passage where he explained the balancing process to be followed in considering whether to grant an interim injunction, Lord Diplock said at 408B:

> ***"So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."*** [emphasis added]

In other words, the court will not proceed to consider the balance of convenience if there is no real prospect (i.e. serious issue to be tried) of the plaintiff succeeding in his claim for a permanent injunction at trial.

84. However, it must always be borne in mind that some flexibility must be allowed when considering the degree of precision of the terms of any injunction which might be granted at trial. In some cases, a judge may consider that, if successful at trial, a plaintiff will be granted some of the injunctive relief sought in the statement of claim but not all of it. This does not mean that no interim injunction may be granted. It simply means that the judge will tailor the terms of the interim injunction so as to be consistent with his view of the general nature of any permanent injunction that may be granted, but the terms of an interim injunction may well not be in identical form to any likely permanent injunction.

85. In my judgment, the judge was correct in this case to find that paragraph 4 of the Original Injunction – *"SPV 21 shall forthwith cease to permit itself to be Controlled by Sage and/or Mr Chishty, whether directly or indirectly"* – was not capable of clear enforcement. Disobedience of an injunction is punishable as a contempt of court. It is essential therefore that the terms of an injunction are clear and that the recipient of an injunction knows with clarity what he has to do or not do in order to comply with the injunction.

86. Given that the Sage Transaction was between Sage and the JOLs and that it was not within SPV 21's power to reverse the control acquired by Sage / Mr Chishty by virtue of the Sage Transaction and the Side Letter, I agree with the judge that it is very difficult to know what SPV 21 was meant to do or not to do in order to comply with paragraph 4. Mr Quirk submitted that paragraph 4 meant simply that SPV 21 must cease permitting its management to be directed by Sage and/or Mr Chishty. But that is already dealt with in paragraph 1 of the Original Injunction. If Mr Quirk is correct, paragraph 4 is unnecessary and adds nothing. In my judgment, the judge was entitled to read the paragraph as meaning more than this but also to be uncertain as to what exactly it did mean.

87. However, I consider that the judge erred in considering that there were similar difficulties with the scope, meaning and enforceability of the other paragraphs of the Original Injunction. The only other paragraph which he specifically considered in the Judgment was paragraph 1, which simply restrains SPV 21 from implementing and/or acting on the direct or indirect instructions of Sage and/or Mr Chishty or their agents or associates or cause or procure the same to occur. I accept Mr Quirk's submission in his skeleton that this is clear enough and that obeying an injunction could not amount to a breach of fiduciary duty on the part of a director of SPV 21. I further agree that, if necessary, SPV 21 could refer back to the court for directions.

88. I also consider that paragraphs 2, 5 and 6 – which in simplified form are replicated in (b), (c) and (d) of the Amended Injunction – do not go beyond what might reasonably be ordered following trial.

89. One has to recall the background to the Appellants' claim. There can be no doubt that there has been a change of control of SPV 21 from the Abraaj Group to Sage / Mr Chishty as a result of the Sage Transaction and the Side Letter. The judge found that there is a serious issue to be tried that, by various actions it took, SPV 21 facilitated this change of control and had therefore acted in breach of clause 9.4. Furthermore, by use of the Side Letter, steps have been taken to deliberately circumvent the restriction in clause 9.4. In those circumstances, it seems to me that there is at least a serious issue to be tried as to whether, following success at a trial, the court would grant a permanent injunction to restrain SPV 21 from acting upon the change of control which, on this hypothesis, would only have been obtained as a result of its own breach of contract. An injunction restraining appointment of Mr Chishty and Mr Baur as directors of KEL and restraining SPV 21

from acting on the instructions of Sage and / or Mr Chishty would, it seems to me, be a perfectly possible remedy following such a breach of contract.

90. Mr Chapman submitted that an injunction in such terms was to go beyond the contractual rights conferred on the Appellants under the KESP SHA and was to interfere with the contractual right of SPV 21 to appoint directors to KEL. However, where such an appointment was only being made because of SPV 21's own breach of contract enabling control to be passed to Sage / Mr Chishty, I do not see that an injunction restraining such appointment goes beyond the contractual rights conferred by the KESP SHA. It simply restrains SPV 21 from giving effect to its own breach of contract.

91. As can be seen therefore, had the Appellants originally applied for an injunction in the form of the Amended Injunction, I consider that it would have been plainly wrong to find that there was no serious issue to try as to whether a permanent injunction in those terms would be granted at trial.

92. However, the Appellants did not apply for an injunction in that form. They applied for an injunction in the wide terms of the Original Injunction. They are critical of the judge for not raising with counsel during the hearing the possibility of a narrower injunction if he had concerns about the terms of the Original Injunction. They submit that it was too late for him only to consider whether a narrower form of injunction was possible when he retired to consider and then announced his decision.

93. I accept that many judges might well have raised the issue with counsel during the hearing but in my view the Appellants' criticism is not justified. As pointed out at para 79 above, Mr Chapman in both his skeleton and oral submissions before the judge made forceful submissions to the effect that the terms of the Original Injunction were too wide and went beyond what was permissible. It was therefore clearly an issue which the judge would have to consider. Yet, apart from a limited concession in their oral reply to the effect that paragraph 3 of the Original Injunction could be omitted if the judge preferred, nothing was said by the Appellants to counter Mr Chapman's arguments either in writing or in oral submissions. At no stage did the Appellants address any argument against SPV 21's submission that the Original Injunction went beyond what was permissible and was too wide. In those circumstances it is not surprising that the judge was persuaded by Mr Chapman's argument that the Original Injunction was too wide. In my judgment,

it is the Appellants who must bear responsibility for the fact that the issue of whether a narrower injunction could be granted was not addressed at the hearing but only when the judge announced his decision.

94. In those circumstances, is it permissible for the Appellants now, at this stage on appeal, to seek a narrower form of injunction? In this connection, I would refer to the observation in *Scully Royalty Limited* (supra) at [37] where, with reference to the overriding objective in the Grand Court Rules, this court said:

> ***"37. I do not consider that the approach in Columbraria is consistent with the overriding objective. It is incumbent upon a party to put its best foot forward before the Grand Court and to produce all the relevant evidence which it seeks to rely upon in support of its case. This is as applicable to hearings on interlocutory matters such as freezing orders, forum disputes etc as it is to full trials. A hearing before the Grand Court is not a dry run for an appeal, with a party seeking on appeal to cure any deficiencies in the material produced before the Grand Court. As Lewison LJ stated in Fage UK Limited v Chobani UK Limited [2014] EWCA Civ 5 at [114]:***
>
> > ***"The trial is not a dress rehearsal. It is the first and last night of the show"."***

95. That observation was of course made in the context of an application to adduce further evidence on an interlocutory appeal, but in my view the general approach described in that passage is equally applicable to other ways in which an appellant may seek on appeal to cure any deficiencies in the material before the Grand Court, such as raising new arguments or seeking different relief.

96. Of course, that is not to say that this court will never allow a party to seek to cure deficiencies in the material below. On the contrary, this court has a broad discretion to allow further evidence, to allow points to be taken which were not taken below and to allow amendments to the relief sought. But the onus lies fairly and squarely on an appellant to show good reason why such discretion should be exercised in his favour given the importance of the overriding objective and the corresponding need for parties to put their best foot forward in the court below as described in the above extract from *Scully*.

97. On balance, despite Mr Chapman's powerful criticisms of the Appellants as described at paras 79-81 above, I am persuaded that this court should agree to consider the appeal on the basis of the

Amended Injunction despite the failure of the Appellants properly to address this issue at first instance. My brief reasons are as follows:

i) This is not a case where the Appellants are seeking new relief. Everything contained in the Amended Injunction was essentially already contained in the Original Injunction; the only difference being that the Original Injunction contained certain additional provisions which are not to be found in the Amended Injunction.

ii) It follows that there is no new argument or material which the Appellants are seeking to raise and which SPV 21 has to deal with. It was in a position to and did make submissions before the judge about those provisions of the Original Injunction which are now contained in the Amended Injunction, e.g. the appointments of directors to KEL. Mr Chapman was able simply to renew his submissions on these matters before this court. This was not therefore a case of a respondent to an appeal suddenly being faced with a new argument, point of law or material which it did not have to deal with below and which it would be unfair to expect it to deal with for the first time on appeal.

iii) If allowing the Appellants to limit the relief sought in this way would lead to the appeal being successful – with the result that the Appellants might expect to be awarded their costs of the appeal – the court could easily remedy any prejudice in this respect to SPV 21 by penalising the Appellants in costs on the basis that the costs of the appeal were only incurred because of their failure to address the issue of the width of the relief sought before the Grand Court or to limit the relief which they were seeking.

98. It follows that I would uphold this ground of appeal by allowing the Appellants to limit the relief sought to that contained in the Amended Injunction and then holding that there was clearly a serious issue to be tried as to whether a permanent injunction in that form would be granted at trial. However, as described earlier, this ground is academic given the decision on the clean hands ground of appeal.

(iii) Likelihood of uncompensatable loss or damage to the Appellants

99. Before the judge, the Appellants' main submission in relation to damage was that, if Mr Chishty and his associates were appointed as directors of KEL, they would be able to inflict irremediable damage on KEL, thereby prejudicing the Appellants interest (via KESP) in KEL. Thus, for example, at [60] of their skeleton argument before the judge, the Appellants, in reliance upon the

evidence of Mr Farooki, the chief portfolio manager of the First Appellant, asserted that if interim relief was not granted, SPV 21, under the effective control of Sage and ultimately Mr Chishty, would be given free rein to inflict prejudice on the Appellants by stacking the board of KEL in its favour and thereby *"tak[ing] or influenc[ing] strategic decisions in circumstances where SPV 21's right to do so remains in legal dispute"*. Mr Farooki further asserted that such steps taken *"would not be easily reversible… they may result in binding commercial decisions, commitments to third parties, or the implementation of a strategic direction that [the Appellants] cannot unwind"*.

100. To like effect was the evidence of Mr Mallon on behalf of the Appellants who at [153] of his first affidavit asserted that, if Mr Chishty and his associates were appointed to the board of KEL, Mr Chishty could use his influence to implement changes that could severely harm the operation of KEL and the Appellants' interest therein by, for example, entering into related party contracts with other companies that Mr Chishty owned in Pakistan.

101. The Appellants submitted that damages would not be an adequate remedy for damage of this sort as it would be difficult to quantify and difficult to reverse even if they were ultimately successful at trial; see for example [56] of their skeleton before the judge. This approach was consistent with their stance before the Court of Appeal when seeking a stay of the anti-suit injunction where they submitted that they would suffer irreparable harm if Mr Chishty and his associates were appointed to the board of KEL pursuant to his control of SPV 21.

102. The submission that KEL (and therefore the Appellants) would suffer irreparable harm if Mr Chishty and his associates were appointed to the board of KEL was strongly resisted by SPV 21 in its submissions and was rejected by the judge as described at para 40 above. He held that, given that Mr Chishty and his associates could only constitute four out of thirteen directors and would therefore need the support of three other directors (whether independent directors or those nominated by the Appellants) to cause KEL to take a particular action, there was no real risk of damage to the Appellants' interests being caused by refusal of the injunction sought. He further held that, to the extent that the Appellants were to suffer any damage to their interest in KEL, that damage should be easily quantifiable as a result of KEL being a publicly listed company in Pakistan. Damages would therefore be an adequate remedy.

103. On appeal, Mr Quirk sought to introduce a very different argument. He did not seek to challenge the judge's decision that, for the reason given in the judgment, there was no real risk of damage to the Appellants' interests in KEL. However, he submitted that this was in itself a reason to grant an injunction.

104. In support, he referred to Chitty on Contracts, 35th edition at 31-075/076 and Gee on Injunctions at 2-013/2-014, both of which articulate the principle that, when one is dealing with breach of a negative covenant, an injunction is usually the appropriate remedy. Thus at 31-075, Chitty states:

> ***"Where a contract is negative in nature, or contains an express negative stipulation, breach of it may be restrained by injunction. In such cases an injunction is normally granted as a matter of course, so that the fact that 'damages would be an adequate remedy….is not generally a relevant consideration where the injunction restrains the breach of a negative covenant'. But as the remedy is an equitable one, it is in principle a discretionary remedy and it may be refused on the ground that its award would cause such 'particular hardship' to the defendant as to be oppressive to him. Moreover:***
>
> ***'in determining whether…. an injunction should be refused in the exercise of the court's discretion, the consequences of the grant or the refusal of an injunction for both parties will be relevant, and that may include consideration of whether damages would be a sufficient and appropriate remedy for the claimant'."***

105. The above statements relate to the grant of a permanent injunction at trial. In relation to the grant of an interim injunction, Chitty at 31-081 states:

> ***"The 'balance of convenience' test does not apply where an interim injunction is sought to restrain 'a plain and uncontested breach of a clear covenant not to do a particular thing'."***

106. This statement draws on the decision of Megarry J in *Hampstead & Suburban Properties Limited v Diomedous* [1969] 1 Ch 248, 259, where he said:

> ***"Thirdly, there is Doherty v Allman. I accept, of course, that Lord Cairns' words were uttered in a case where what was in issue was a perpetual injunction and not an interlocutory injunction…. But these considerations do not preclude the words from having any weight or cogency in relation to an interlocutory injunction. Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenantor promptly begins to do what he has promised not to do, then in the absence of special***

> ***circumstances it seems to me that the sooner he is compelled to keep his promise the better…. I see no reason for allowing a covenantor who stands in clear breach of an expressed prohibition to have a holiday from the enforcement of his obligations until the trial…..”***

107. It seemed at one stage that Mr Quirk was submitting that that was the situation here and the mere fact that one was dealing with an alleged breach of a negative covenant (namely clause 9.4) was sufficient to justify the imposition of an injunction. If there was no damage caused by the breach and no injunction granted, there would in effect be no remedy for the breach of contract. However, in his reply submissions, he confirmed that it had not been contended before the judge that there was *‘a plain and uncontested’* breach of clause 9.4 and the judge had made no finding to that effect. He accepted that the case had been fought on *American Cyanamid* principles, which only require the comparatively low bar of a serious issue to be tried, and he accepted that this court should do likewise. Nevertheless, he submitted that the fact that the judge had held that it was unlikely that any damage would be caused if no injunction were granted was a powerful factor which pointed in favour of the grant of an interim injunction, as otherwise there would be no consequence for SPV 21 for its breach of contract.

108. Mr Quirk made his submissions most persuasively. However, I cannot accept them. I can accept that the fact that one is concerned with an alleged breach of a negative covenant may well be relevant to the *American Cyanamid* balancing process on the basis that there will not necessarily be any particular damage and a party should be held to his bargain. However, the fact remains that before the judge the case was fought by the Appellants on the basis that not to grant an injunction and thereby to allow Mr Chishty and his associates to be appointed as directors of KEL, was likely to cause real damage to the Appellants via their interest in KEL. It was never submitted that the fact that there was an alleged breach of a negative covenant was of significance and no reference was made to the principle articulated in *Chitty* or *Hampstead Properties*.

109. It is therefore not surprising that the judge concentrated on whether he accepted the Appellants’ case that damage was likely to follow if no injunction was granted. Having decided that he did not, for the reasons he gave, it is also not surprising that he then concluded that the fact that there was no real likelihood of damage pointed against the need for an interim injunction.

110. In my judgment, it is too late now for the Appellants to seek to justify the imposition of an interim injunction on a wholly different basis. Mr Quirk submitted that the Appellants had made the point

about the lack of damage before the judge and referred to [56] of their skeleton before the judge. However, that merely asserted that any prejudice flowing from actions by Mr Chishty and his associates as directors of KEL would not be *"practically quantifiable as, or remediated by, damages after the fact"*. That is a very different point from saying that there would be no damage and that that was a reason for granting an injunction.

111. The position on this ground of appeal differs from that concerning the *'serious issue'* ground referred to above. In relation to that ground, as described at para 97 above, no new argument or material was put forward. That is not the case in relation to this ground of appeal. The Appellants seek to put forward a completely new argument based upon there being no likelihood of damage to KEL, which is the complete opposite of the argument which they ran below. Applying the principle described at paras 94-96 above, it would not be consistent with the overriding objective or conducive to the efficient administration of litigation to allow the Appellants to change their case so significantly on appeal.

112. I accept that the Appellants did argue below that damages would be difficult to quantify and would not be an adequate remedy for any harm that was caused to KEL (and therefore the Appellants) by virtue of the appointment of Mr Chishty and his associates to the board of KEL and that submission was renewed before us. I further accept that the judge's reason at [107] for concluding that any damage that was suffered could be easily quantifiable – namely that the shares in KEL were publicly listed in Pakistan – was not an entire answer to the point. This was because, as Mr Quirk submitted, the publicly listed shares comprise only 9.24% of the share capital and the value of the controlling shareholding held by KESP could not be directly correlated to the value of the publicly listed shares. I accept that there is some force in this argument but the degree to which the value of publicly listed shares went down as a result of any actions by Mr Chishty and his associates would provide some assistance in calculating the damage to KESP's controlling interest. Furthermore, the Grand Court is extremely experienced in valuing companies and would therefore have no difficulty in undertaking the exercise of determining the value of the controlling interest at any particular point. Similarly, I see no reason why it should not be in a position to determine the extent to which any decline in the value of the controlling interest is attributable to actions by Mr Chishty and his associates and therefore a consequence of any breach of contract by SPV 21.

113. In summary therefore, I see no grounds on which this court can properly interfere with the judge's assessment of the likelihood of uncompensatable loss or damage being caused to the Appellants in the event of an interim injunction not being granted and his assessment of whether damages would be an adequate remedy.

Summary

114. I would summarise my conclusions as follows:

i) On the basis of the Amended Injunction, there is a serious issue to be tried.

ii) Given the way in which this case was argued before him, the judge was entitled to reach the conclusion which he did in respect of whether damages would be an adequate remedy.

iii) The judge was entitled to reach the conclusion which he did to the effect that the Appellants lack of clean hands meant that they should as a matter of discretion be denied the equitable relief of an interim injunction regardless of the other matters in the case.

115. It follows, particularly in the light of (iii) above, that this appeal must be dismissed.

Sir Richard Field, JA

116. I agree.

Sir John Goldring, President

117. I also agree.