



Neutral Citation Number: [2025] CICA (Civ) 10

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

**CICA CIVIL APPEAL No. 28 of 2024
(formerly FSD 193 of 2023 (NSJ))**

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND

IN THE MATTER OF KES POWER LIMITED

BETWEEN

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

Appellants

and

IGCF SPV 21 LIMITED

Respondent

Before: The Hon Sir Richard Field, JA
The Hon Sir Michael Birt, JA
The Rt Hon Sir Jack Beaton, JA

Appearances: Mr Iain Quirk KC with Ms Laura Hatfield, Mr Jonathan Stroud and Ms Vered Mazin of Bedell Cristin Cayman Partnership, on behalf of the Appellant.

Mr Graham Chapman KC with Mr Conal Keane, Mr Niall Dodd and Mr Alan Quigley of Dillon Eustace Cayman, on behalf of the Respondent

Heard: 21 May 2025

CICA (Civil) Appeal 28 of 2024 – In the Matter of KES Power Limited

Draft circulated: 27 August 2025

Judgment delivered: 12 September 2025

JUDGMENT

Sir Richard Field, JA

Introduction

1. This is an appeal from the order of Segal J (“the Judge”) dated 29 November 2024 dismissing the Appellants’ application to strike out the Respondent’s petition dated 7 July 2023 to wind up KES Power Limited (“KESP”) on the ground that it was just and equitable to do so under section 92(e) of the Companies Act (2023 Revision) (“the Act”).
2. The Appellants’ strike out application was based on the contention that the petition had been presented in breach of a binding promise contained in Schedule 4 of a Shareholders Agreement (“the SHA”) dated 15 October 2008 made between the Appellants and the Respondent which provided that absent the Appellants’ consent, the Respondent would exercise all of its powers to prevent a solvent winding up of KESP, it not being disputed that KESP was solvent.
3. In the Appellants’ submission, the relevant wording in Schedule 4 was clear and unambiguous and even if it was ambiguous its commercial purpose made its meaning clear, the purpose being that the parties were to continue as shareholders in KESP until they exited in accordance with the SHA at a profit and it was the parties’ mutual understanding that KESP was involved in a long-term turnaround project that required that the investment in the company was protected by a structure that protected it for the long term. The evidence relied on by the Appellants as to the long-term nature of the project consisted of paragraphs 41 and 42 of the first affirmation of Mr Ashary who is a director of the Appellant, Al Jomaih Power Ltd, and has been a director of KESP since 9 November 2005. In those paragraphs Mr Ashary testified that when the shares in KESP’s subsidiary, K-Electric Limited (“KESC”), were first acquired by the Appellants they were a failing asset and required investment over the long term and when the

Respondent became an investor in KESP in 2008, the mutual understanding of the Appellants and the Respondent was that the SHA needed to be structured to ensure that the investment in KESC was protected for the long term.

4. The Appellants also prayed in aid section 95 (2) of the Act that provides: “The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company”.
5. KESP was incorporated in the Cayman Islands to acquire and hold a majority interest in KESC, a utility company incorporated in Pakistan that is the monopoly generator, distributor and retailer of electricity for Karachi, the largest city in Pakistan. The acquisition of the interest in KESC followed a degree of limited privatisation in the ownership of KESC promoted by the Pakistan Government. At the time in 2005 that KESP acquired the shares in KESC, the Appellants were the sole owners of KESP’s issued share capital.
6. The Respondent was incorporated in 2008 by the Abraaj Group to enable the Abraaj Group (that included the Growth Capital Fund LP (“IGCF”)) to invest together with the Appellants and in that year the Abraaj Group acquired its interest in KESP pursuant to the terms of a subscription agreement dated 15 October 2008. At the same time, the Appellants and the Respondent entered into the SHA which was amended in April 2009 and again in January 2021.
7. The SHA is governed by English law and contains an exclusive jurisdiction clause providing that any dispute arising out of, or in connection with, the SHA shall be settled by the courts of England or the Cayman Islands.
8. In the SHA, KESP is referred to as “the Company”; the Respondent is referred to as “Abraaj” and the Appellants are referred to as “the Original Shareholders”.
9. The SHA covers a broad range of topics including: Warranties given by the Original Shareholders (Clause 4); Directors and Corporate Governance (Clause 5); Conduct of

Business (Clause 6); Information to be provided to KESP's shareholders; The Issue of New Shares; Sums payable by the Respondent to the Appellants on "Exit" by the Respondent; The Prohibition Against the Acquisition of Interests in and the regulation of investments in businesses related to KESC; Termination; A Whole Agreement Clause; Compliance with the SHA and the Articles (Clause 17); and Precedence of the terms of the SHA over the wording of the Articles if there is conflict between the two (Clause 17.2).

10. Clause 5.1 of the SHA provides: "Subject to applicable law, the provisions of this agreement and of Schedule 4, the Board shall have full management of, and operational control of the Company". Clause 6.1 under the heading "Reserved Matters" stipulates, "The provisions of Schedule 4 shall apply."
11. Schedule 4 is headed RESERVED MATTERS. It begins with the words:

"The Company covenants that and each Shareholder undertakes to exercise all his powers as a shareholder or otherwise so as to procure that none of the following matters shall be undertaken without the consent of Abraaj and the Original Shareholders. The Shareholders covenant that the following matters shall not be undertaken without the consent of Abraaj and the Original Shareholders (it being acknowledge (sic) by each party that none of the following matters are within the competence of the Board)."

12. There then follows a list of eleven such matters, including: Amendment of Constitutional Documents; Alteration to the Accounting Policies/Financial Year End; Distributions; No change of the Auditors of KESP or KESC; Debentures, Loans, Loan Stock; Merger or acquisition of KESP or KESC. The fifth matter between "Auditors" and "Debentures etc" is:

"Liquidation: The solvent liquidation, winding up or dissolution of the Company or KESC".

The hearing before the Judge and his decision dismissing the strike out application.

13. The Judge heard the Appellants' strike out application on 11 October 2023. At the end of the hearing he informed the parties that the application would be dismissed and read a short summary of his decision in which he stated that he accepted the Respondent's contention that, on the proper construction of the relevant provisions of the SHA, there was no contractual prohibition against the petition to wind up KESP under section 92 (e) of the Act. He said his reasons in further detail would be given in due course.
14. The Judge's judgment providing his considered reasons for dismissing the strike out application was delivered 7 months later on 31 May 2024.
15. In that judgment, the Judge first identified the issues in the strike out application and summarised the terms of the SHA and the key parts of Schedule 4. The Judge also referred to various of KESP's Articles of Association beginning at paragraph [9] of the judgment with the definition of "Reserved Matters" which he adapted to take account of the definition of "Law", as follows:

"those matters which are not otherwise reserved at [sic] [pursuant to the?] Act [Companies Act] for the Members that shall not be undertaken without the consent of [the Petitioner and the Applicants] (it being acknowledged by each party that none of the following matters are within the competence of the Board) being the following:

.....

(f) the solvent liquidation, winding up or dissolution of [the subsidiary] [KESC]"

16. The Judge also referred to Articles 145 and 146 that appear under the heading: "Winding- Up".
17. Article 145 provides:

"[KESP] shall be taken to have commenced a voluntary winding up and discussion [sic] [dissolution] upon the passing of a Special Resolution by the

holders of the Class O Shares [being the [Respondent] and the [Appellants] to wind up, dissolve liquidate and terminate [KESP]”.

18. As the Judge observed, Article 146 deals with how the liquidator is to apply KESP’s assets if KESP is “wound up”.

19. In paragraph [15], the Judge stated:

“Accordingly, the Articles make provision for the voluntary winding up of KESP. The effect of the requirement to pass a Special Resolution in order to commence such a winding up and the definition of Special Resolution as requiring 100% of Members to vote in favour of the resolution to wind up, is that such a winding up can only be commenced if all shareholders agree”.

20. In paragraphs [31-34], the Judge observed that the application gave rise to a short point of construction that was to be decided on the agreed rules and principles summarised in paragraphs [21-23] and [25] of Lord Clarke’s judgment in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 (“*Rainy Sky*”) and paragraph [18] of the judgment of Sir Geoffrey Vos C in *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821 (“*Lamesa*”), in which were cited with approval the principles stated in the judgment below given by HH Judge Pelling QC:

Lord Clarke in *Rainy Sky*:

“The language used by the parties will often have more than one potential meaning ... the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common

sense and to reject the other. ... Where the parties have used unambiguous language, the court must apply it.”

Sir Geoffrey Vos C in *Lamesa*:

“The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions – see [Arnold v Britton [2015] UKSC 36, [2016] 1 All ER 1; [2015] AC 1619] per Lord Neuberger.”

21. In paragraph [35], the Judge observed that applying these principles, the relevant wording of Schedule 4 had to be interpreted in light of the natural and ordinary meaning of the language used; the other provisions of the SHA; the wording in the Articles (recognising that the wording of the SHA prevailed over the wording of the Articles where there was a conflict between the two and the overall commercial purpose of the Schedule 4 wording in the context of the SHA as a whole and the Articles.
22. In paragraph [36], the Judge expressed the view that the greatest weight was to be given to the documents and the purpose of the wording in Schedule 4 as could be discerned from those documents. He added that he would take into account the evidence filed as to the factual matrix but the Appellants’ affidavit evidence was challenged in affidavit evidence adduced by the Respondent and the application was being dealt with on an
23. interlocutory and summary basis which meant that the Court was not in a position to resolve disputed issues of fact.
24. In paragraph [37] the Judge stated that the key words in Schedule 4 were (reversing the order for clarity): “The solvent liquidation, winding-up or dissolution of [KESP] or

KESC shall [not] be undertaken without the consent of [the Petitioner] and the [Applicants]”. In paragraph [38], he stated that KESP agrees to this covenant and the shareholders agree to procure that KESP performs it. The shareholders also and separately agree to the covenant. KESP and the shareholders each acknowledge that the prohibited action is not within the competence of the KESP board.

25. In paragraphs [39] - [42], the Judge said that: (i) the words used in Schedule 4 were the same words used in the definition of “Reserved Matters” in the Articles (although the words in the Articles only refer to KESC) [39]; (ii) the Articles made provision for the voluntary winding-up of KESP which would be pursuant to section 116 (c) of the Act that provides that a company may be wound up voluntarily if the company resolves by special resolution to be wound up voluntarily [40]; (iii) the words used in Article 145 (see paragraph [15] above) including in particular the words “*to wind up, dissolve liquidate and terminate*” were similar (but not identical) to the words used in Schedule 4 [40]; (iv) the words used in Schedule 4 did not mention the presentation of a winding up petition or a winding up by the Court [41]; and (v) the unanimous agreement of the shareholders was required by the Articles before a voluntary winding up could be commenced and Schedule 4 also sought to require unanimity before the type of winding up referred to in Schedule 4 could be commenced [42].
26. Paragraphs [43] – 47 read as follows:

“43. It seems to me that the Schedule 4 covenant refers and is intended to refer (and cross-refer) to the type of winding-up regulated and dealt with by the Articles. It mirrors but uses different wording to achieve the effect of the Articles, namely that the winding up referred to can only be commenced with the agreement of all the shareholders. The only winding up discussed and referred to in the Articles is a voluntary winding up and in the absence of any language in the SHA which refers, expressly or implicitly, to a winding up petition or winding up by the Court, the reference to winding up in Schedule 4 is, in view of the alignment between the SHA and the Articles and the similar words used in the relevant provisions in the SHA and the Articles, to be understood as a reference to a voluntary winding up. It is reasonable to

conclude from the words used and the context, that had the parties intended to extend the restrictions on the commencement of a winding up to the presentation of a winding up petition they would have said so and referred either to such a petition or to a winding up by the Court. It would have been easy for them to do so but they did not. They must be taken to have been aware of the different types of winding up and of the separate jurisdiction for a winding up by the Court and yet they made no reference to it.

44. The Schedule 4 covenant refers to a “solvent liquidation, winding-up or dissolution” of KESP. The adjective “solvent” is probably to be understood as qualifying and applying to each of the three modes of “Liquidation.” But the reference to a solvent winding up is not determinative of whether the form of winding up referred to is a voluntary winding up commenced by special resolution or a winding up by the Court commenced by petition. This is because both a voluntary winding up and a court ordered winding up on a contributory’s petition can be commenced in respect of a solvent entity. The solvency condition in the Schedule 4 covenant can be understood as carving out from the requirement to obtain unanimous shareholder consent the case where KESP is insolvent. This would obviously makes sense and be important to ensure that the shareholders (and KESP’s directors) could take steps to commence a winding up where KESP has become insolvent and the interests of creditors (and the directors’ duties to have regard to the interests of KESP’s creditors) requires urgent action (although there is no express authority in the articles permitting the directors to present a winding up petition without a shareholders resolution authorising them to do so – see section 94(2) of the Act).

45. It seems to me that the Schedule 4 covenant is a provision relating to corporate governance and the regulation of the powers given to the shareholders by the SHA and the Articles.

46. This construction seems to me to fit with a reasonable and realistic understanding of the purpose of the Schedule 4 covenant. It is intended to

reinforce and reiterate in the dominant document (the SHA, as I have noted, takes priority over the Articles where there is a conflict) that a decision to bring the joint venture to an end using the power given by the Articles must be unanimous. The winding up power in article 145 involves collective decision making by the shareholders in the ordinary course (by special resolution) and the Schedule 4 covenant reflects the parties' agreement as to how that collective decision making should be made. But it was not intended that shareholders be deprived of their statutory right to apply to court for a winding up order in circumstances of equitable wrongdoing justifying a winding up on the just and equitable ground. That would be something much more onerous and different. It would involve not merely giving up the right to end the joint venture because of commercial, financial or operational reasons but giving up the right to do so and seek recourse from the Court in a case of equitable wrongdoing in the conduct of the joint venture or fundamental problems which meant that a shareholder was entitled to withdraw from the corporate enterprise.

47. That is why in my view a covenant covering a winding up petition on the just and equitable ground would need to be clearly and explicitly expressed. The Court should only take away the important statutory right if clear words are used. The Court would only be justified in interpreting the Schedule 4 covenant's reference to "winding up" as extending to a winding up by the Court if there was a clear indication in the SHA (or non-conflicting provisions in the Articles) or the relevant factual matrix that a winding up by the Court (and a winding up petition) on the just and equitable ground was contemplated and intended to be covered. There are no such indications in this case. While the facts and issues in China CVS are different from those in this case (the Court of Appeal was considering whether a covenant not to petition could be implied because and of in circumstances where there was a term requiring a reference to arbitration) the comments of Moses JA at [129] do support the view that a failure to make an explicit reference to a winding up petition will be taken to be significant. Moses JA said that:

“In the SHA, the parties could have expressly chosen to agree not to present a petition against the company. But they did not do so, despite s.95(2) of the Law. By failing to do so, they must be understood to have acknowledged the court’s exclusive jurisdiction to determine whether the facts justify winding up the company on just and equitable grounds ..”

48. It follows that I reject the Applicants’ submissions as to the proper construction of the Schedule 4 covenant. I do not accept their case as to the commercial purpose to be ascribed to Schedule 4 covenant. I do not accept that the factual matrix shows that it would be absurd if either party could petition to wind up KESP on just and equitable grounds. For the reasons I have given, it seems to me to be consistent with the agreement between the joint-venturers that they wished to regulate and exclude in the absence of mutual agreement their rights to terminate the joint venture and to wind up KESP in the event of commercial, financial or operational disputes and problems but not to remove their right to have recourse to the Court in the event of equitable wrongdoing or other circumstances justifying a winding up order on the just and equitable ground. For the same reason, the contractual protections against winding up in Schedule 4 can be seen as not extending to a winding up petition on the just and equitable ground.”

The Appellants’ case on appeal

27. Mr Iain Quirk KC submitted as follows:

- (1) The judge erred in not advertent to or relying on construction principles (iii), (iv) and (vii) referred to by Sir Geoffrey Vos C in *Lamesa* at paragraph [18] which read as follows:

“(iii) In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent

order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 17”;

(iv) “Where the parties have used unambiguous language, the court must apply it – see *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50; [2012] 1 All ER (Comm) 1 per Lord Clarke JSC at paragraph 23”;

(vii) “In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see *Wood v. Capita Insurance Services Limited* [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent– see *Wood v. Capita Insurance Services Limited* (ibid.) per Lord Hodge JSC at paragraph 13”;

- (2) The words used in Schedule 4 are in broad, unambiguous and mandatory language whose plain meaning is that shareholders are prohibited (without unanimous consent) from exercising their powers or otherwise as shareholders to seek the solvent winding up of KESP including by the presentation of a winding up petition on the just and equitable basis.
- (3) As is plain, no distinction is made in Schedule 4 between the different types of winding up and there is no reference to the Articles. The word “voluntary” is also wholly absent from the Schedule.
- (4) The SHA was drafted by Allen & Overy and construction principles (iii), (iv) and (vii) should have been applied by the Judge which ought to have led him to conclude that the Respondent’s winding up petition under section 92(e) of the Act was in breach of Schedule 4.

- (5) What the Judge said in paragraphs [37] and [38] of his judgment constituted the inadequate extent of his review of the wording of Schedule 4 and it involved no consideration of the natural and ordinary meaning of the language used in the Schedule. In [37], the Judge omitted to recite the first part of the obligation on the parties in Schedule 4 that they exercise all of their powers as a shareholder or otherwise so as to procure that there is no solvent winding up of KESP. Instead, he only referred to the second part in which the shareholders covenant that the solvent liquidation, winding up or dissolution of KESP or KESC shall not be undertaken without the consent of the Respondent and the Appellants.
- (6) The Judge also erred in [37] both in stating that the “defined term” was “liquidation” when the definition was a list of subject matters with the operative words next to it and also in putting the word “not” in square brackets when the word in fact appears in the language imposing the second obligation.
- (7) Contrary to the approach taken by the Judge, the Articles do not dislodge the natural and ordinary meaning of Schedule 4 for the following reasons.
- (i) The definition of “Reserved Matters” in the Articles is limited to “the solvent liquidation, winding up or dissolution of the subsidiary [KESC]”. There is no mention of KESP. The word “voluntary” is also entirely absent from the definition. Further, Article 145 refers to KESP, not KESC, and does no more than replicate section 116 (c) of the Companies Act.
 - (ii) The reference to a voluntary winding up in Article 145 is not a sound basis for reading across to Schedule 4 since there is no reference to “reserved matters” in Article 145 because “reserved matters” in the Articles are only concerned with a winding up of KESC, not KESP.
 - (iii) In the context of the Articles and the Schedule 4 covenant, it does not make sense for the covenant to be confined only to the type of winding up provided for by Article 145. A winding up pursuant to

Articles 145 and 146 can only be brought by way of Special Resolution of the holders of the Class O Shares in KESP. A Special Resolution as defined in the Articles requires the agreement of 100% of the Shareholders entitled to vote (in accordance with the Articles). Accordingly, limiting the Schedule 4 covenant to winding up in accordance with Article 145 renders the Schedule 4 covenant redundant since such a winding up could not happen without the parties' unanimous consent in any event.

- (iv) The Judge erred for the following three reasons when he said in [40] that the words used in Article 145 are similar to the words in Schedule 4. First, Article 145 is expressly limited to a voluntary winding up whilst Schedule 4 does not have that limitation. Second, the entire structure of the two provisions is different. Article 145 does not set out to be a prohibition on winding up: it contains neither of the two prohibitions that are imposed by Schedule 4. Third, whilst Schedule 4 contains the words “liquidation, winding up or dissolution”, it does not contain the words “and terminate” that appear in Article 145, “terminate” being part of the language of a voluntary winding up -- a court does not “terminate” a company.
- (v) It follows that the words “solvent winding up” in Schedule 4 encompass both a voluntary winding up and a compulsory winding up.
- (8) The Judge erred in concluding that, because the parties did not expressly refer to a winding up petition when it would have been easy to do so, the parties did not intend Schedule 4 and the Articles to prevent the parties from presenting such a petition. What was open to him to do was to make the same point in reverse, that the parties could easily have stated that, despite the natural and ordinary meaning of “solvent winding up” covering all forms of winding up, the covenant in Schedule 4 did not prevent a party from presenting a winding up petition. Similarly, if the parties to the SHA intended Schedule 4 to refer only

to the type of solvent winding up referred to in Article 145 of the Articles (or some other limited subset), they could easily have expressed that intention in Schedule 4 or elsewhere in the SHA.

- (9) The Judge accepted that the parties wished to exclude their right to wind up KESP where there were commercial, financial or operational disputes and problems. But the Judge's conclusion that the prohibition in Schedule 4 did not extend to petitioning to wind up the company on just and equitable grounds means that a shareholder, here the Respondent, can sidestep the agreement not to wind up where there are commercial, financial or operational disputes and problems. Indeed, it makes the prohibition on winding up in those circumstances completely pointless.
- (10) The Judge erred in proceeding on the basis that the Appellants' construction of Schedule 4 would leave the parties deadlocked which underlays his conclusion that the parties cannot have intended to give up the ability to seek a winding up by the court if there existed the grounds for such an order to be made by the court. The Judge so erred because the SHA contains an exit mechanism which was negotiated and agreed by the parties. The parties are therefore not left deadlocked or unable to withdraw. Instead, they are bound to abide by an agreed mechanism, rather than the more potentially uncertain and destabilising process of a petition. Clauses 9 and 11 and Schedule 5 of the SHA provide that mechanism. Paragraphs 3 to 5 of Schedule 5 to the SHA provide detailed pre-emption, "drag along" and "tag along" rights. The pre-emption rights provide the Respondent with a right of first refusal to acquire the Appellants' shares in the event that the Appellants intended to sell their shares to a third party. The drag along rights provide the Respondent with the right to force the Appellants to sell their shares if certain criteria are met. The tag along rights provide that, in the event that the Respondent intends to sell a certain number of its shares in KESP, the Appellants have the right to require some or all of their shares to be sold to the same purchaser.
- (11) The Judge's interpretation is inconsistent with the plain commercial purpose of the parties as evidenced by the documents and the affidavit evidence which the

Judge chose to ignore notwithstanding that Mr Ashary was not cross-examined and the evidence purportedly set against Mr Ashary's evidence was that provided by Mr McDonald who had been the sole director of the Respondent only since May 2020 and thus had had no involvement in the Respondent becoming an investor in KESC.

The Respondent's case on appeal presented by Mr Chapman KC

28. (1) The Judge reached the correct interpretation of Schedule 4 for the reasons he gave in his judgment.
- (2) The context of the opening words of Schedule 4 is clauses 5 and 6 of the SHA which are the only provisions in that agreement that refer to Schedule 4, both of which are concerned with the effect of operational matters relating to the business and operation of KESP and not with the rights and obligations of the shareholders as shareholders between themselves. It follows that, when one takes the "Reserved Matters" in Schedule 4 together with clauses 5 and 6 in the main body of the SHA, the reference to "Reserved Matters" is to matters which would otherwise be within the competence of the company or the board, but which by reason of this provision are instead reserved to its shareholders.
- (3) The covenant in the first sentence of the definition of "Reserved Matters" at the start of Schedule 4 is given by the company [KESP] that none of the following matters shall be undertaken [by the company] these being matters that the company might otherwise be competent to do. In addition, in the first sentence, the shareholders undertake to procure that none of these matters will be undertaken. Some of the matters in question are matters that in any event would not be within the competence of the board. What Schedule 4 does not contain, which you might expect to see if this agreement was to have the effect as suggested by the Appellants, is a mutual promise and covenant between the shareholders that they will not petition to wind up the company on any grounds whatsoever. It is accordingly submitted that the purpose of Schedule 4 is to set out the agreement as to which matters are outside the competence of the

company and its board and one of those matters is the solvent liquidation, winding up or dissolution of either the company itself or its subsidiary, KESC. Schedule 4 does not say that the shareholders are, or are purporting, to contract out their statutory right as shareholders to wind up KESP in appropriate circumstances, which it would have done, had that been the intention.

- (4) Article 145 is intended to reflect the agreement in the SHA that there cannot be a voluntary winding up without the agreement of the shareholders who are parties to the SHA who are the holders of the Class O Shareholders. Article 145 ties back completely to the restriction in the SHA and again, one does not see anywhere any limitation, express or implied, on the shareholders' statutory rights seeking to wind up the company.
- (5) The exit provisions in the SHA do not cater for the type of situations that are covered by a just and equitable winding up petition. Under the exit provisions there is a very complicated regime for permitted transfers. Given that the SHA provided such restrictive and detailed provisions for exit, it would be surprising if the parties' genuine intention was to oust and exclude their statutory right to petition for a winding up.

Discussion and decision

29. In my judgment, for the reasons advanced by Mr Quirk, the Judge misconstrued the key words in Schedule 4 -- "*The solvent liquidation, winding up or dissolution of the Company or KESC*"-- in finding that these words only encompassed solvent voluntary winding ups.
30. In the first place, in my view, the Judge should have determined, but did not, what the natural and ordinary meaning of the key words was within the four corners of Schedule 4, having regard not only to construction principle (i), but also principles (iii) and (iv) articulated in paragraph 18 of the judgment of Sir Geoffrey Vos C in *Lamesa*, but which the Judge omitted to include when referring to this paragraph in Sir Geoffrey Vos' judgment.

31. Those latter principles are set out in paragraph 26 (1) hereinabove. In my opinion, the natural and ordinary meaning of these key words when construed within the four corners of Schedule 4 in accordance with those principles, especially principles (i) and (iii) is that the words “solvent winding up” encompass both a voluntary and a compulsory winding up. But as is clear from paragraphs 37 and 38 of his judgment, this is not what the Judge did, as submitted by Mr Quirk. Instead, the Judge went straight on to construe the key words by reference to the Articles from which he deduced that the solvent windings up prohibited by Schedule 4 were limited to voluntary windings up.
32. I accept Mr Quirk’s submission that the Articles do not dislodge the natural and ordinary meaning of the key words which I find them to have. As Mr Quirk contended, the definition of “Reserved Matters” in the Articles is limited to “the solvent liquidation, winding up or dissolution of the subsidiary [KESC]” from which the word “voluntary” is entirely absent, as are the words “the Company [KESP]”. Further, as to Article 145 which is set out in paragraph [17] above, this contains no reference to “Reserved Matters” because “Reserved Matters” in the Articles are only concerned with a winding up of KESC, not KESP, and the word “terminate”, which is apt in respect of voluntary windings up, but not apt in compulsory windings up, does not feature in Schedule 4 . Further, as Mr Quirk also argued: (i) Article 145, with its reference to “voluntary”, does no more than repeat section 116 (c) of the Act;¹ and (ii) in the context of the Articles and the Schedule 4 covenant, it does not make sense for the covenant to be confined only to the type of winding up referred to in Article 145 because: (a) a winding up pursuant to Article 145 can only be brought by way of Special Resolution of the holders of the Class O Shares in KESP and “Special Resolution” is defined in the Articles as one that requires the agreement of 100% of the Shareholders entitled to vote; and (b) limiting the Schedule 4 covenant to winding up in accordance with Article 145 would render the Schedule 4 covenant redundant since such a winding up could not happen without the parties’ unanimous consent in any event.

¹ “A company incorporated and registered under this Act or an existing company may be wound up voluntarily — (a) ...; (b) ...; (c) if the company resolves by special resolution that it be wound up voluntarily”.

33. In addition, I accept Mr Quirk’s contention that for the three reasons he advanced, the Judge erred when he stated in paragraph [40] of his judgment that “*the words used in Article 145 are similar (but not identical) to the words in Schedule 4 ...*”. Those reasons were: (i) Article 145 is expressly limited to a voluntary winding up whilst Schedule 4 does not have that limitation; (ii) the entire structure of the two provisions is different: Article 145 does not set out to be a prohibition on winding up and it contains neither of the two prohibitions that are imposed by Schedule 4; and (iii) whilst Schedule 4 contains the words “liquidation, winding up or dissolution”, it does not contain the words “and terminate” that appear in Article 145, “terminate” being part of the language of a voluntary winding up -- a court does not “terminate” a company.
34. I have given careful consideration to the clear and thoughtful submissions advanced on behalf of the Respondent that were all premised on the overarching contention that, for the reasons the Judge gave, his conclusion that the prohibition provided for in Schedule 4 was limited to voluntary windings up should be upheld. With respect to Mr Chapman, I find that none of his submissions, was an answer to the case mounted by Mr Quirk.
35. It follows that, by virtue of Schedule 4, the Respondent is contractually bound not to present a petition to wind up KESP and the matter therefore falls squarely within the terms of section 95(2) of the Act (quoted at paragraph [4] above).
36. For the reasons given above, I find that this appeal succeeds and it is unnecessary for me to deal with the remainder of Mr Quirk’s submissions. Accordingly, I propose that the Judge’s order dismissing the Appellants’ application to strike out the Respondent’s winding up petition be set aside. The Appellants having succeeded in this appeal, my provisional view is that the Appellants should have their costs both of the appeal and below but I would grant the Respondent liberty to serve short submissions within seven days of the date of this judgment setting out reasons why the provisionally proposed costs order ought not to be the order of the Court.
37. I further propose that the Appellants should have leave to serve on the Court and the Respondent within 10 days of the date of this judgment drafts of such further declaratory and/or injunctive orders they seek from the Court, together with supporting

submissions, to which the Respondent must thereafter within the next ten days serve its responsive submissions.

Sir Jack Beatson, JA

38. I agree.

Sir Michael Birt, JA

39. I also agree.