



NEUTRAL CITATION NUMBER: [2026] CIGC (FSD) 25

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 88 OF 2023 (DDJ)

**IN THE MATTER OF THE ENFORCEMENT OF THE ARBITRAL AWARD OF THE ICC
INTERNATIONAL COURT OF ARBITRATION CASE NUMBER 25194/AYZ/ELU**

BETWEEN

A

for itself and on behalf of

B

PLAINTIFF

AND

(1) X

(2) Y

(3) Z

DEFENDANTS

Before: The Hon. Justice David Doyle

Appearances: Vernon Flynn KC instructed by Laura Stone of Mourant Ozannes
(Cayman) LLP for Y and Z
Peter de Verneuil Smith KC instructed by Ben Hobden and Catie Wang of
Harney Westwood & Riegels (Cayman) LLP for A for itself and on behalf
of B
No appearance by or on behalf of X

Heard: 17 March 2026

260407 In the matter of A & B v X, Y, Z – FSD 88 of 2023 (DDJ) - Judgment

**Draft Judgment
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Determination of an application for an extension of time to proceed with an application to set aside foreign arbitration award – Order 3 rule 5 of the Grand Court Rules – the relevant factors to consider – the extent of the delay, the excuse for the delay, the strength of the applicant’s case for setting aside the award if an extension was granted – the degree of prejudice to the respondent if the application for an extension was granted – the overriding objective – applicability of English caselaw – the importance of complying with Order 41 of the Grand Court Rules on evidential matters

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JUDGMENT

High level overview

1. Let me start with a high level overview. Cases in the Financial Services Division of the Grand Court of the Cayman Islands (“FSD”) often involve many millions of dollars and sometimes the amounts at stake advance into the billions. The legal principles applicable are normally the same whether one dollar or a billion dollars is at stake.
2. The overriding objective specified in the preamble to the Grand Court Rules refers to the need to deal with every case in a just, expeditious and economical way which is proportionate to (1) the amount of money involved, (2) the importance of the case and (3) the complexity of the issues. At the risk of being perceived as displaying some judicial pomposity, I have to say that the vast majority of cases that are dealt with in the FSD are (1) of high value, (2) important to the parties and the economy of the Cayman Islands and (3) complex.
3. High stakes financial services litigation in the Cayman Islands attracts some of the best and most heavily resourced legal teams in the world where every conceivable and some inconceivable points are argued. Sitting as a judge in the FSD, I am regularly reminded of the comments of Lord Templeman in the House of Lords in *Ashmore v Corporation of Lloyds* [1992] 1 WLR 446 at 453:

“It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of 10 bad points the judge will be capable of fashioning a winner ... [T]here has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination.”
4. In the case presently before the court the Defendants owe the Plaintiff nearly US\$2 billion pursuant to a foreign arbitration award which is accruing continuing interest. Various significant costs awards have also been made which the Defendants have not paid. The Defendants were found to be dishonest and to have conspired to defraud the Plaintiff. The evidence against them was described as overwhelming and damning. It involved, amongst other serious wrongdoing, bribery of high-ranking officials of a foreign regulatory body.

5. The Defendants disputed the merits of the claims against them and also argued that the relevant arbitration tribunal lacked jurisdiction over the claims in relation to the decision obtained from the foreign regulatory body because of the act of state doctrine and that certain hearsay evidence was inadmissible as the evidence had been gathered unlawfully by making payment to public officials and certain employees. The points raised by the Defendants were rejected before the tribunal and the foreign courts at first instance and on appeal.
6. By an order made by the Grand Court on 18 May 2023 the Plaintiff was given leave to enforce the award against the Defendants in the same manner in a judgment or order of the court to same effect. The Defendants were given 14 days within which to apply to set aside that order. The 14 days expired on 1 June 2023. The relevant Defendants did not make their set aside application until 7 August 2025. There was a delay of some 2 years, 2 months and 6 days, a total of 798 days.
7. They now seek an extension of time.
8. The parties and their well-resourced attorneys were unable to bring to my attention any local judgment where the court considered the factors to have regard to when dealing with an application for an extension of time to set aside an order allowing enforcement of a foreign arbitration as a local judgment.
9. In considering applications for an extension of time, in the present context, I have held that the primary factors to have regard to are (1) the extent of the delay, (2) the excuse for the delay, (3) the strength of the case for setting the order aside if an extension was granted and (4) the degree of prejudice to the respondent if the application is granted. The strength of the case would only normally be considered if without much investigation on a brief perusal of the grounds it can be seen that the challenge is either very strong or very weak. In this case because public policy grounds and a new argument has been flagged I have considered the supposed merits in a little more detail. The court must also take into account and seek to give affect to the overriding objective of dealing with cases in a just, expeditious and economical way. In doing that the court considers, as far as is practicable, (a) ensuring that the substantive law is rendered effective and it is carried out (b) ensuring the normal advancement of the proceeding is facilitated rather than delayed, (c) saving expense, (d) dealing with the case in ways which are proportionate (i) to the amount of money involved; (ii) to the importance of the case; and (iii) to the complexity of the issues and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to

allot resources to other proceedings. The court should also take into account access to justice, finality, legal certainty and in the present context the pro-arbitration policy of the Cayman Islands, public policy, and the very limited basis on which the enforcement of an arbitration award may be refused.

10. Where a party is in breach of timely compliance with a court order and seeks an extension of time the burden is normally on that party to excuse or at least explain the breach and persuade the court to exercise its discretion in favour of providing additional time for compliance. Affidavits of fact in support of applications for extension of time should stick to the facts rather than descend into comment, argument or submissions. With certain exceptions (O 14 r 2 (2), 4(2), O 86 r 2(1) and O 41 r 5(2) of the Grand Court Rules) an affidavit may contain only such facts as the deponent is able of the deponent's own knowledge to prove. An affidavit sworn for the purposes of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. An affidavit sworn by an attorney shall not be admissible in a case unless the attorney has direct personal knowledge of the facts and matters to which the attorney deposes and does not appear as advocate in the case (O 14 r 5(3) of the Grand Court Rules).
11. In this case the parties have chosen to present their evidence through affidavits from their lawyers.
12. The Defendants in their set aside application endeavour to run the act of state and the illegally obtained evidence arguments that have been rejected elsewhere. They also seek to raise a new argument which they failed to raise in the foreign proceedings but for which failure they provide no satisfactory explanation. The Defendants demand that their Cayman public policy arguments be heard on the merits. To enable them to do that they seek the indulgence of this court to provide them with an extension time in view of their failure to comply with the 14-day time limit specified in the order made as long ago as 18 May 2023.
13. Before this court, the relevant Defendants in effect say that (1) there was a good excuse for the delay, (2) minimal prejudice has been caused to the Plaintiff and (3) the overriding objective requires that they be given an opportunity to have their belated set aside application heard on the merits.
14. In this judgment I have noted the extent of the delay and I have held that (1) the relevant Defendants have not produced evidence to establish a reasonable explanation or a good excuse for the delay,

(2) their case on the merits is very weak and there is nothing of substance in the grounds of their set aside application (3) there is more than minimal prejudice to the Plaintiff and (4) the overriding objective and the overall justice of the case requires that this court decline to provide the requested 798 day extension. I have dismissed the application for an extension of time for the reasons stated in this judgment.

15. Having finished that high level overview, I now commence my descent into the detail.

Introduction

16. By order made by Kawaley J on 13 April 2023 it was ordered that the hearings in this arbitration connected case be held in private and that any judgment of the court shall be anonymised.
17. There is before the court an application included in a combined summons dated 7 August 2025 by Y and Z (the “Applicants”) for an extension of time (the “Application”) for applying to set aside an *ex parte* order made on 18 May 2023 (the “Cayman Order”). Under the Cayman Order A for itself and on behalf of B (the “Plaintiff”) was given leave pursuant to section 5 of the Foreign Arbitral Award Enforcement Act (1997) Revision (the “FAAE Act”) to enforce against X, Y and Z (the “Respondents” or “Defendants”) in this court a final arbitration award in a sum stated to be over US\$1.65 billion including interest and costs rendered in the ICC International Court of Arbitration on 20 March 2023 (the “Award”) in the same manner as a judgment or order of the court to the same effect.
18. The Cayman Order gave the Respondents a period of 14 days from service within which to apply to set it aside. The Cayman Order was served on the Applicants on 18 May 2023 and the time period for an application to set aside the Cayman Order expired on 1 June 2023.
19. On 14 April 2023 an order had been made recognising and enforcing the Award within the Dubai International Financial Centre (“DIFC”) (the “DIFC Order”).
20. On 20 June 2023, after the time limit for an application to set aside the Cayman Order had expired, the Applicants made a set aside application in respect of the Award in the court of the seat of the arbitration proceedings namely the DIFC court (the “DIFC Challenge”). The parties subsequently

agreed that the enforcement of the Award in DIFC would be stayed pending the determination of the DIFC Challenge.

21. On 20 June 2023 the Grand Court granted an *ex parte* freezing injunction against Z and X over X's 56% shareholding in the Plaintiff and over all of Z's assets (the "Cayman Freezing Injunction").
22. In the bundle (at divider 35) is an undated order signed for the Claimant (the Plaintiff in the Cayman Islands) and the Defendants on 11 July 2023. Schedule A specifies the undertakings given to the court as follows:

"The Claimant undertakes not to enforce the R&E Order in the DIFC pending the final determination by the DIFC Court of First Instance of the Defendants' application in Claim No...to set-aside of the Final Award issued on 20 March 2023 in ICC Case No... (the "Award") pursuant to RDC 43.54.

For the avoidance of doubt, this undertaking does not: (i) apply to any steps the Claimant may take to recognise or enforce the Award outside the DIFC; or (ii) in any way impact the Claimant's ability to obtain, maintain, police or enforce asset disclosure or asset preservation orders whether in the DIFC, in the UAE (onshore and/or offshore) or in any other jurisdiction (this includes but is not limited to the maintaining, policing or enforcing of any provisions contained in the Freezing Order of Justice Sir Jeremy Cooke dated 12 May 2023)."

23. On 14 December 2023 an *ex parte* order was granted (the "Cayman Receivership Order") appointing receivers (the "Receivers") over X's shareholding in the Plaintiff and over Z's shareholding in X. The Receivers were appointed to hold the ring until the determination of the DIFC Challenge.
24. On 29 August 2024 the DIFC Challenge was dismissed with costs (the "DIFC Set-Aside Judgment"). On 27 November 2024 permission was granted to appeal but a stay of enforcement of the Award was refused (the "DIFC PTA Order").
25. The Joint Agreed Case Summary (undated but filed 16 September 2025) at paragraph 17 states that on 2 September 2024 Mourant notified the Receivers that the Applicants intended to appeal the

DIFC Set Aside Judgment to the DIFC Court of Appeal. At paragraph 18 of the Joint Agreed Case Summary it is stated that on 4 September 2024, the Receivers confirmed that they would continue to act for the primary purpose of preserving and controlling the shares pending the outcome of the appeal in the DIFC or an order varying the Cayman Receivership Order.

26. On 16 June 2025 the Court of Appeal of DIFC (the “DIFC CA”), comprising HE Deputy Chief Justice Ali Al Madhani, HE Justice Robert French (the former Chief Justice of Australia) and HE Justice Michael Black KC, dismissed the appeal with costs (the “DIFC CA Judgment”).
27. On 17 July 2025 the Plaintiff filed a summons in the Grand Court to vary the Cayman Receivership Order to include a power of sale of the shares (the “Power of Sale Summons”). The parties have agreed that the Power of Sale Summons will be dealt with after the determination of the extension application, and, if that is successful, the set aside application (at first instance).
28. Finally on 7 August 2025 the Applicants issued a combined summons which sought to (1) extend time to apply to set aside the Cayman Order (ii) set aside the Cayman Order and (iii) grant permission to rely on expert evidence of foreign law.
29. On 10 December 2025 I ordered that the extension of time application be heard first and separately from the set aside application, which was included in the combined summons.

The position of the relevant parties in summary

30. I now summarise the position of the relevant parties.

The Applicants’ position in summary

31. The Applicants resist enforcement in the Cayman Islands on the basis that the Award is contrary to the public policy of the Cayman Islands on two grounds: (1) the Award is in respect of a matter which is not arbitrable and enforcement of the Award would be contrary to the public policy of the Cayman Islands as the Award infringes the act of state doctrine, and (2) the Award is based on and tainted by illegally obtained evidence and, therefore, enforcing the Award would be contrary to the public policy of the Cayman Islands.

32. The Applicants say that the relevant issue simply stated is: will the exercise of judicial discretion to extend the time limit in the Cayman Order give effect to the overriding objective?
33. The Applicants submit that the answer to that question is yes. They say that when the full context of these proceedings is properly considered, including the procedural history, the significance of the public policy issues raised and the substantial sums sought to be enforced against the Applicants, it is both just and proportionate to permit the set aside application to proceed to be determined, in its entirety, at an application hearing. They add that the balance of fairness and the overriding objective favour the exercise of the court's discretion to extend time.
34. The Applicants rely on their lawyers to explain the delay. The evidence filed by the lawyers seems to suggest that they and/or the Applicants made a decision not to take any action in the Cayman Islands to set aside the Cayman Order as they felt it best to await the outcome of the challenges to the Award in the DIFC on the basis that if the challenges were successful the Award would fall away and there would be nothing to enforce in the Cayman Islands (paragraph 192 of Hunt 1 and paragraph 12 of Fox 1).
35. The Applicants add that the Application also raises an important point of principle which both informs the discretion and is a self-standing point. The short point is whether a party can and should be precluded from raising a public policy issue under Article V (2)(b) of the New York Convention. The Applicants submit that the court should extend time on that basis, as upholding such a principle against preclusion embodies the purpose and spirit of Article V (2)(b).

The Plaintiff's position in summary

36. The Plaintiff's position is that the Application should be dismissed. The Plaintiff says that the delay is extraordinary: 2 years, 2 months and 6 days.
37. The Plaintiff says that there is no good reason for the delay and "none is advanced in evidence by the Applicants". The Plaintiff says it is to be inferred that the delay was the product of a deliberate decision to gamble that the Applicants would win in the DIFC Challenge at the seat of the arbitration in the DIFC and a decision not to bother to comply with the Cayman Order. The gamble failed: the Award was upheld at the seat and remains final and binding.

38. The Plaintiff says that the Applicants must now live with the consequences of their deliberate strategy not to comply with the Cayman Order.
39. The Plaintiff adds that even a brief examination of the proposed grounds of challenge demonstrates that the set aside application in the Cayman Islands is patently weak and granting an extension would serve no legitimate purpose.
40. The Plaintiff says that to grant the extension would materially prejudice A and B by prolonging an enforcement process that has already been unduly protracted and further needlessly driving up all associated costs.
41. The Plaintiff says, in short, that the Applicants' argument in respect of Article V(2)(b) of the New York Convention (which it describes as the "Proposed Public Policy Override") is unfounded in authority and wrong in principle. The Plaintiff says that an allegation of public policy within the meaning of Article V(2)(b) of the New York Convention does not operate to disapply applicable time limits.
42. The Plaintiff adds that even if the Proposed Public Override was applicable (which they emphasise it is not) it is satisfied by the court's consideration of the application for the extension of time and does not require a decision on the set aside application. The time limit in Order 73 rule 31 (8) of the Grand Court Rules does not prevent the award debtor from advancing a public policy challenge, because the court retains a discretion to extend time. The award debtor can advance the public policy point within the application for an extension and the court will consider its merits.

The applicable law

43. I turn now to the applicable law in respect of my consideration and determination of the Application.
44. The parties are not entirely agreed as to the applicable law. I will start with some apparent but limited common ground.

Order 3 rule 5 and the overriding objective

45. It appears common ground that the court should consider Order 3, rule 5 of the Grand Court Rules (2023 Revision) (“GCR”), and the overriding objective.

46. Order 3 rule 5 (1) provides:

“The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings.”

47. The preamble to the GCR provides:

“1. The Overriding objective

1.1 The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.

1.2 Dealing with a cause or matter justly includes, as far as is practicable –

- (a) ensuring that the substantive law is rendered effective and that it is carried out;
- (b) ensuring that the normal advancement of the proceeding is facilitated rather than delayed;
- (c) saving expense;
- (d) dealing with the cause or matter in ways which are proportionate
 - (i) to the amount of money involved;
 - (ii) to the importance of the case; and
 - (iii) to the complexity of the issues;
- (e) allotting to it an appropriate share of the Court’s resources, while taking into account the need to allot resources to other proceedings.

2. Application by the Court of the overriding objective

2.1 The Court must seek to give effect to the overriding objective when it

- (a) applies, or exercises any discretion given to it by these Rules; or
- (b) interprets the meaning of any Rule.

2.2 These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every case or matter on its merits.

3. Duty of the parties

The parties are obliged to help the Court to further the overriding objective. In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to help in this respect.

4. Court's duty to manage proceedings

4.1 The Court must further the overriding objective by actively managing proceedings.

4.2 This may include –

- (a) identifying the issues at an early stage;
- (b) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
- (c) encouraging the parties to co-operate with each other in the conduct of the proceedings;
- (d) helping the parties to settle the whole or part of the proceeding;
- (e) deciding the order in which issues are to be resolved;
- (f) fixing timetables or otherwise controlling the progress of the proceeding;
- (g) considering whether the likely benefits of taking a particular step will justify the cost of taking it;
- (h) dealing with as many aspects of the proceeding as is practicable on the same occasion;

- (i) dealing with the proceeding without the parties needing to attend at court;
- (j) conducting procedural hearings by means of telephone conference calls;
- (k) making appropriate use of technology; and
- (l) giving directions to ensure that the trial proceeds quickly and efficiently.

4.3 Whenever a proceeding comes before the Court, whether on a summons for directions or otherwise, the Court will consider making orders on its own motion for the purpose of giving effect to the overriding objectives of the rules.”

New Frontier

48. Mr Vernon Flynn KC, on behalf of the Applicants, submits that the court should focus on the factors outlined in *New Frontier Health Corporation* (FSD unreported judgment 24 April 2024, Doyle J) (“*New Frontier*”). See in particular at [18], [19], [21], [22] and [23]. In section E 'The Relevant Law' of the Plaintiff's skeleton argument there is reference to *New Frontier* at [16], [21] and [23] and the point is made that “the court emphasised that this judicial discretion has to be exercised with regard to the overriding objective and taking into account the “*fundamental importance*” of complying with court orders.”
49. The relevant principles and factors outlined in the context of *New Frontier* were as follows:
- (1) the court has a discretion to extend time with a view to the avoidance of injustice to the parties;
 - (2) the absence of a good reason for the delay is not sufficient for the court to refuse to exercise its discretion to extend time;
 - (3) once a party is in default it is for such party to satisfy the court that the discretion should be exercised in his favour and for such purposes he may rely on any relevant circumstances;

- (4) the court would however normally need to be satisfied that there was an acceptable explanation for the delay. If there was none the question of prejudice was unlikely to arise;
- (5) if there was an acceptable explanation, the court might still refuse to extend time if the delay was substantial or if to do so would cause significant prejudice to the other side;
- (6) time requirements must be observed. The overriding principle is that justice must be done;
- (7) a clear statement of the reasons for the inability to comply with the stipulated time limit should normally be provided and an adequate explanation for the delay will normally be required but all matters (including the adequacy of any reasons for the delay) must be considered and weighed in the balance together with the overall justice of the application;
- (8) in exercising its discretion as to whether or not to grant an extension the court should have regard to the overriding objective to deal with every matter in a just, expeditious and economical way;
- (9) the court should take into account section 7 of the Bill of Rights scheduled to the Cayman Islands Constitution to the effect that everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time;
- (10) the court should also take into account the importance of complying with court orders.

Soinco

50. The Plaintiff also relies on what in my judgment, in the present context, is a more relevant and persuasive judgment than *New Frontier*, namely the judgment of Waller LJ in *Soinco Saci v Novokuznetsk Aluminium Plant* [1998] 2 Lloyd's Rep 337 ("*Soinco*").
51. It was somewhat surprising to note that in their 34 pages (with 99 footnotes) skeleton argument dated 5 March 2026 the Applicants made no reference whatsoever to *Soinco* which was at divider 1 of the Joint Authorities Bundle for the hearing on 10 December 2025 and Mr Flynn had referred to it in his oral submissions at that hearing, so they were plainly aware of it.

52. In *Soinco* the Court of Appeal of England and Wales dealt with an appeal in respect of a refusal to extend time to set aside an order granting leave to enforce an arbitration award as a judgment. The application to set aside the order was on the ground that enforcement would be contrary to public policy. The headnote in the Lloyd's Law Report states that it was held that:

“(1) it was not arguable that under English law enforcement of this award would be contrary to English public policy; it was the award with which the English Court was concerned and not with the underlying contract; the question of illegality having been raised and dealt with by the arbitrators, and there being no requirement as a result to perform some act which English law would regard as illegal under English law or contrary to the recognized morals of England, the public policy was if anything in favour abiding by the terms of the Convention and enforcing the award (see p.340, col.2);

(2) in any event if an offence would be committed by NKAP in Russia as a party to the award in paying the same, that was the result of their own failure to obtain the requisite consents and English public policy would be offended if that relieved that party from its obligation to meet the award; the appeal would be dismissed (see p.340, col.2).”

53. Waller LJ at p.338 stated:

“It is obvious that where leave has been given to enforce an award as a judgment and judgment has been entered in relation to an arbitration award the Court is in entirely different territory from applications for extensions of time for compliance with interlocutory orders or rules applying during the currency of a case ...

Once an award has been obtained the Court unless good reason is shown for not doing so, will be prepared to turn that award into a judgment, so as to aid enforcement. In that context the failure to apply within the strict time limits to set aside the judgment will not be viewed as a mere technicality to be brushed aside even if the application has some chance of success were an extension of time to be granted. All will depend on the particular circumstances.”

54. Waller LJ felt that it was relevant to examine the merits:

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“If there is no prospect of any application being successful even if time is extended, that will be the end of the matter in any event. If the application has some merit, then it will be a question of balance.”

55. It seemed to Waller LJ that the principles applicable to obtaining leave to appeal out of time provided an appropriate guide. He had in mind the approach in *CM Van Stillevoeldt BV v EC Carriers Inc* [1983] 1 WLR 207 and *Norwich & Peterborough Building Society v Steed* [1991] 1 WLR 449. Waller LJ summarised the matters to be taken into account as “1. Extent of the delay; 2. the excuse for the delay; 3. the strength of the applicant’s case for setting the order aside if an extension were granted; and 4. the degree of prejudice to the respondent if the application is granted ... it is not quite right in all cases to say that the fact that the question as to whether the award should be enforced as a judgment will be re-opened should not count as prejudice. That may well be where the delay is short but may well not be so if time has gone by and a respondent has conducted his affairs on the basis that the judgment is not going to be challenged.”

56. Waller LJ added:

“It is unnecessary in this case to say more because as will appear this is an instance in which examination of the merits will lead to the conclusion that leave should be refused whatever excuse and however short the delay.”

Hysaj

57. In England it is clear that in applying CPR rule 3.1(2)(a) (which provides that the court may extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)) the correct approach to the merits in respect of applications for extensions of time to file appeal notices has moved on since *Soinco*. In *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633; [2015] 1 WLR 2472 (“*Hysaj*”) Moore-Bick LJ stated:

“(d) *The merits*

46 If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases.

47 Support for that conclusion can be found in the recent decision of the Supreme Court in *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] 1 WLR 4495, in which the court had to consider the extent to which the merits of a claim or defence were relevant to granting relief from the sanction of striking out in default of compliance with an "unless" order. Lord Neuberger of Abbotsbury PSC, with whom Lord Sumption, Lord Hughes and Lord Hodge JJSC agreed, held that, even in a case of striking out, the merits of the claim or defence were relevant only when they were so strong that there was no real answer to them in other words, in cases where an application for summary judgment could be expected to succeed. In Lord Neuberger PSC's view, at para 30:

"it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the parties' respective cases: it would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms."

48 In my view exactly the same considerations apply to applications for extensions of time for permission to appeal."

Terna

58. The Plaintiff says that the consideration of the merits in an extension application is necessarily at a high level and only concerned with strong points and cites *Terna Bahrain Holding Co. WLL v Al Shamsi* [2013] 1 ALL ER (Comm) 580 (“*Terna*”) at [31] per Popplewell J in the context of section 70 (3) of the Arbitration Act 1996 of England and Wales:

“On an application for an extension of time, the court will not normally conduct a substantial investigation into the merits of the challenge application, since to do so would defeat the purpose of the 1996 Act. However if the court can see on the material before it that the challenge involves an intrinsically weak case, it will count against the application for an extension, whilst an apparently strong case will assist the application. Unless the challenge can be seen to be either strong or intrinsically weak on brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time.”

59. In the context of *Terna* (a challenge of an arbitration award on grounds of serious irregularity under sections 67 and 68 of the Arbitration Act 1996 and also seeking an extension of time in which to do so) Popplewell J, drawing on previous caselaw, outlined the following principles:

“[27] ... (1) Section 70(3) of the 1996 Act requires challenges to an award number ss 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the 1996 Act, and which is enshrined in s 1(a). The party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the 1996 Act. Any significant delay beyond 28 days is to be regarded as inimical to the policy of the 1996 Act. (2) The relevant factors are: (i) the length of the delay; (ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so; (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay; (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed; (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration, or the costs incurred in respect of the arbitration, the determination of the application by the court might now have; (vi) the

strength of the application; (vii) whether in the broadest sense it would be unfair to the application for him to be denied the opportunity of having the application determined. (3) Factors (i), (ii), and (iii) are the primary factors.

[28] I add four observations of my own which are of relevance in the present case. First, the length of delay must be judged against the yardstick of the 28 days provided for in the 1996 Act. Therefore a delay measured even in days is significant; a delay measured in many weeks or in months is substantial.

[29] Secondly, factor (ii) involves an investigation into the reasons for the delay. In seeking relief from the court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. In the absence of such explanation, the court will give little weight to counsel's arguments that the evidence discloses potential reasons for delay and that the applicant 'would have assumed' this or 'would have thought' that. It will not normally be legitimate, for example, for counsel to argue that an applicant was unaware of the time limit if he has not said so, expressly or by necessary implication, in his evidence. Moreover where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter.

[30] Thirdly, factor (ii) is couched in terms of whether the party who has allowed the time to expire has acted reasonably. This encompasses the question whether the party has acted intentionally in making an informed choice to delay making the application. In CPR r 3.9(1), which sets out factors generally applicable to extensions of time resulting in a sanction, the question whether the failure to comply is intentional is identified as a separate factor from the question of whether there is a good explanation for the failure. This is because in cases of intentional non-compliance with time limits, a public interest is engaged which is distinct from the private rights of the parties. There is a public interest in litigants before the English court treating the court's procedures as rules to be complied with, rather than deliberately ignored for perceived personal advantage."

60. The Applicants say that the *Terna* factors are irrelevant as the factors set out in *Terna* regard extensions of time "to challenge an arbitration award" which are most notably known from

Kalmneft v Glencore [2001] CLC 1805. The case presently before the court relates to an application to extend a deadline prescribed in a court order pursuant to the court rules. The Applicants stress [49]-[50] of the *Kalmneft* judgment of Colman J in the English Commercial Court:

“49. It is therefore necessary to identify the criteria applicable to such applications under the Arbitration Act, for they may differ from those applicable under the CPR.

50. In determining the relative weight that should be attached to discretionary criteria the starting point must be to take into account the fact that the 1996 Act is founded on a philosophy which differs in important aspects from that of the CPR.”

61. At [51] Colman J also referred to the “twin principles of party autonomy and finality of awards which pervade the Act ...”

Streeter

62. Part way through the hearing Mr Peter de Verneuil Smith KC, on behalf of the Plaintiff, handed up a copy of *Streeter v Immigration Board* 1999 CILR 264 (“*Streeter*”) which concerned an application for an extension of time to appeal. Smellie CJ (as he then was) dealt with various jurisdictional points and at page 269 referred to the four considerations for the grant of an extension of time:

“(a) The length of the delay; (b) the reasons for the delay; (c) the likelihood of success on appeal; and (d) prejudice to the respondents (in the proposed appeal).”

63. At page 270 Smellie CJ commented that “even the absence of a good reason for any delay, is not in itself sufficient to justify the courts refuse to exercise its discretion (assuming I have the power) to grant an extension. The court is required, none the less, to look at all the circumstances and to be guided by the overriding principle that justice has to be done ... The test of doing justice requires a consideration of whether, in refusing the extension, a just claim might be shut out and whether, in granting the extension, prejudice might result to a respondent because of the failure on the part of an appellant to observe the time-limits imposed.”

64. In respect of the merits Smellie CJ referred to the test of “realistic prospect of success”.

Bloomberry

65. Singapore is one of the world’s leading arbitration jurisdictions and it is helpful to have regard to their caselaw also. The time limits imposed in Singapore for applications to set aside arbitration awards are “strict, favouring the policy of finality of arbitral awards ... and legal certainty.” (*Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2020] SGHC 01 (“*Bloomberry*”) at [26]). In that case Belinda Ang Saw Ean J at [48] set out Order 3 r.4(1) of the Rules of Court in Singapore which is in similar terms to Order 3 r.5(1) of the GCR of the Cayman Islands. At [49] the learned judge stated:

“Generally, the factors the court takes into consideration in deciding whether to grant an extension of time are: (a) the length of delay; (b) the reasons for delay; (c) the chances of the defaulting party succeeding ... if the time ... were extended; and (d) the degree of prejudice to the would-be respondent if the extension of time were granted ... with the courts generally focusing on the first two ...”

Finality and access to justice

66. When considering non-compliance with court orders and the consequences of such non-compliance it may also be useful to have regard to two principles “access to justice and finality in litigation” ([1] Beatson JA’s judgment in *Arnage Holdings Ltd v Walkers* [2025] CICA (Civ) 17 in the context of a failure to comply with an order for security for costs).

Pro-arbitration and Cayman public policy

67. It is also worth briefly touching on the pro-arbitration policy of the Cayman Islands which must form part of the context of every application before the court that concerns arbitrations. I should also briefly touch upon public policy.
68. Chief Justice Margaret Ramsay-Hale put it well when in *White Crystals Ltd v IGCF General Partner Ltd* (FSD unreported judgment delivered on 2 April 2024) (“*White Crystals*”) at [36] she stated:

“... given the strong public policy in the enforcement of tribunal awards in the FAAEA, which provides very limited bases on which the enforcement of an award may be refused, the scope of the public policy for refusing to enforce an award should be construed very narrowly.”

69. A year earlier I had put the position a bit more bluntly in *Sharq Insurance LLC v Barents Re Reinsurance Company, Inc* (FSD unreported judgment 13 July 2023) at [9]:

“There was absolutely nothing in the evidence or arguments presented on behalf of the Defendant that would have justified this Court in setting aside the *Ex parte* Order. It was apparent that the Defendant was desperately trying to invent any argument that would put off judgment day. Its position was quite hopeless. I am concerned that an entity which the court was informed is regulated by the Cayman Islands Monetary Authority should see fit to conduct itself in the way in which the Defendant has conducted itself in these proceedings. It should stop messing around and wasting court time. It should pay the Award forthwith.”

70. Parker J in *D.E. Shaw Composite Investments Asia 10 (Cayman) Limited v Grand State Investments Limited* [2025] CIGC (FSD) 39 (“*Shaw*”) at [16] respectfully agreed with what the Chief Justice said at [36] of *White Crystals*. Parker J at [73] of *Shaw* stated that it was “the public policy of the Cayman Islands which needs to be considered” and at [74] added that “this in practice is a narrow gate through which to pass” and adopted the test (in David Joseph’s well-known text *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd Ed, 2025, Sweet & Maxwell at [16.85]) that “nothing short of illegality, reprehensible or unconscionable conduct ought in general terms to suffice.”

71. At [83] Parker J concluded:

“The enforcement of the Final Award would not in the Court’s view be contrary to Cayman Islands public policy or the integrity of the Cayman Islands’ legal system.”

72. Judge Belinda Ang Saw Ean in *Bloomberry* at [96] stated:

“Case law on the scope of the public policy of Singapore is that it should be construed narrowly and consequently, the threshold for resisting enforcement of an award is a high one.”

73. More recently, the Court of Appeal in Jersey in *RTI Limited v OWH SEiL* [2025] JCA 327 at [67] referred to Jersey law which enabled a court to refuse enforcement of a Convention award if it would be contrary to public policy and quoted from another authority which confirmed that the Royal Court adopts “a pro-enforcement approach to arbitration awards” meaning that “a refusal on grounds of public policy should be approached with extreme caution ...”

74. Ian R. C. Kawaley writing extra-judicially in chapter 7 of *Judicial Cooperation in Commercial Litigation – The British Cross-Border Financial Centre World* (Third Edition 2025, General Editors Ian R. C. Kawaley, David Doyle and Shade Subair Williams published by Wildy, Simmonds & Hill Publishing) dealt with, amongst other issues, the enforcement of foreign arbitration awards in the Cayman Islands. At page 96 he stated:

“Decided cases suggest that challenges to enforcement are unlikely to be upheld in the absence of cogent grounds, which the respondent will bear the burden of making out. On the other hand, while challenges to an award are still pending, enforcement is likely to be stayed.”

75. The learned author also at page 96 refers to *Gol Linhas Aéreas v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21, [2023] Bus LR 1305 and the leading judgment of Lords Hamblen and Leggatt at [23]:

“It is well established that the grounds for refusing recognition and enforcement set out in art. V should be construed narrowly in the light of the New York Convention’s object and purpose of facilitating the recognition and enforcement of foreign arbitral awards ...”

76. At page 97 the author describes *White Crystals* as “One of the most important recent Grand Court decisions” which “illustrates the judicial approach when a potential ground for refusing enforcement is advanced” and cites [36] of *White Crystals*.

Applicability of English case law

77. The applicability of English case law is now well established in the law of the Cayman Islands. English case law is persuasive and would normally be followed unless there is good reason not to do so.
78. In *HQP Corporation Limited (in official liquidation) and Direct Lending Income Feeder Fund Ltd (in official liquidation)* [2025] CICA (Civ) 19 in a judgment delivered on 7 November 2025 Martin JA delivering the judgment of the court to which each member had contributed at [22] referred to “the limited circumstances in which the Court will decline to follow a decision of the House of Lords or the UK Supreme Court.”
79. At [195] Martin JA began a review of a number of authorities on the weight to be given by Cayman Islands Courts to decisions of the House of Lords (now the Supreme Court) and decisions of the English Court of Appeal. Those authorities included *Schramm v Financial Secretary, Registrar of Companies* 2004-05 CILR 104 where Collett JA at [9] had stated that: “It is rarely, if ever, that a court at this level fails to follow a line of authority so established [House of Lords]. We are not prepared to do so in this case since there is no compelling reason for us to do so.” Reference was made to other authorities to the effect that appellate decisions of the English courts are of “high persuasive authority” and a decision of the House of Lords was “of very great persuasive authority.”
80. In *IGCF SPV 21 Limited v Al Jomaih Power Limited* [2025] UKPC 54 judgment delivered on 24 November 2025 Lord Hamblen at [47] referred to my judgment in *HQP Corporation Limited* 2023 (2) CILR 203 (“*HQP*”) at first instance (paragraphs 24 to 38, 70 to 73, 39 to 69 and 70(3)) and stated:
- “It is well established and was not in dispute that the Cayman courts may decline to follow English decisions where there is good reason to do so.”
81. At paragraph 70 (2) in *HQP* I stated that English decisions are not binding on any judges of the Cayman Islands but they may be persuasive and in some cases highly persuasive.

The primary factors to have regard to in considering an application for an extension of time in an arbitration context

82. Although counsel place great emphasis on it, *New Frontier* was simply a judgment at first instance and in the particular context of an application within proceedings under section 238 of the Companies Act for an extension of time to comply with discovery obligations on the grounds that there was a risk of prosecution under the law of the People’s Republic of China.
83. In *Soinco* Waller LJ at page 338 stated: “It is obvious that where leave has been given to enforce an award as a judgment and judgment has been entered in relation to an arbitration award the court is in entirely different territory from an application for extensions of time for compliance with interlocutory orders or rules applying during the currency of a case ...”
84. Some of the factors in *New Frontier* and *Soinco* may overlap to a certain extent as Mr Flynn recognised but in my judgment it is primarily the *Soinco* factors and the overriding objective that this court should have regard to in the present arbitration context. It is often said that in law context is important and that is especially so in the present case. I should also make two other obvious points. Firstly the *Soinco* judgments were delivered on 16 December 1997 before the overriding objective was formally implemented in England and Wales. Secondly the factor regarding the strength of the case has been modified by subsequent case law. I take those two post *Soinco* developments into account.
85. I have approached this case on the basis that the primary factors to have regard to are specified in *Soinco* albeit recognising that some of the *New Frontier* factors overlap with the *Soinco* factors. The primary factors are (1) the extent of the delay, (2) the excuse for the delay, (3) the strength of the applicant’s case for setting aside the order if an extension was granted, and (4) the degree of prejudice to the respondent if the application was granted. I have also taken into account the overriding objective of dealing with cases in a just, expeditious and economical way, and the overall justice of the case.

Order 41 rule 5 and the relevant case law on evidential matters

86. The parties did not provide factual evidence themselves. Instead they relied on their lawyers to provide evidence to the court. In light of the submissions of Mr Flynn, it appeared that some local

attorneys felt it was “orthodox” to rely on affidavits from lawyers rather than from the parties themselves. It therefore appears necessary to set out the relevant rule and caselaw in this area and to reiterate the important message that lawyers and parties should adhere to Order 41 rule 5 of the GCR.

87. Order 41 rule 5 of the GCR provides:

“5. Contents of affidavit (O.41, r.5)

- (1) Subject to O.14, rr.2(2) and 4(2), to O.86, r.2(1), to paragraph (2) of this rule and to any order made under O.38, r.3, an affidavit may contain only such facts as the deponent is able of the deponent’s own knowledge to prove.
- (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.
- (3) An affidavit sworn by an attorney shall not be admissible in any cause or matter unless the attorney has direct personal knowledge of the facts and matters to which the attorney deposes and does not appear as advocate in the cause or matter.”

88. In *Torchlight GP Limited v Millinium Asset Services Pty Limited* 2018 (1) CILR 244 Kawaley J (as he then was) at [81] described O. 41 r.5(3) as a “locally crafted rule”. At [83]:

“In my judgment, when O.41, r.5(1) speaks of “only such facts as the deponent is able from his own knowledge to prove,” this does not extend to addressing the merits of contentious claims arising out of transactions which a lawyer has not personally been involved in. Rule 5(3) is clearly designed to reinforce this point by expressly limiting lawyers to deposing only as to matters of which they have “direct personal knowledge of the facts and matters to which he deposes ...” A lawyer may accordingly swear an affidavit in support an application to enforce a discovery order because, if involved personally in the discovery process, the lawyer will likely have direct personal knowledge of whether their opponent has produced documents or not. The same lawyer, if based in Cayman or London, could not possibly have personal knowledge, direct or otherwise, of whether a man in New

Zealand has entered into an unlawful means conspiracy unless that lawyer was personally involved in the relevant course of conduct. This rule is an important one because it is designed to ensure that the court has reliable evidence before it based on the experience that lawyers receiving instructions from clients in other jurisdictions are particularly vulnerable to being pressed to quickly file important evidence on a distant substantive witness's behalf. Left unchecked, this will mean the best available evidence is not placed before the court and averments which clients may not be willing to swear to are indirectly verified by a legal representative."

89. In *Terna Popplewell J* made similar points in the particular context of that case, in respect of investigating whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so and at [29] stated:

"In seeking relief from the court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. In the absence of such explanation, the court will give little weight to counsel's arguments that the evidence discloses potential reasons for delay and that the applicant 'would have assumed' this or 'would have thought' that. It will not normally be legitimate, for example, for counsel to argue that an applicant was unaware of the time limit if he has not said so, expressly or by necessary implication, in his evidence. Moreover where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter."

90. Ingrid Mangatal J in *Cowan v Equis Special LP* (FSD unreported judgment delivered 3 October 2019) stated:

"80. Further, I regret that I did not pick up on a point that I am usually highly aware of, (or if I did, I did not pursue it), in the midst of what was a lot of material and issues to absorb and cover during the hearing. The point is one taken by the Foreign Maples Defendants. It is that Mr. Cowan failed to serve an affidavit of his own in support of the Cowan Summons. Mr. Cowan instead relied on D'Addona 1 (Mr. D'Addona being a lawyer at Walkers who is based in Hong Kong but employed

by Walkers, Cayman Islands) and Basdeo 1, Mr. Basdeo being Senior Counsel at Walkers Cayman.

81. As far as I have been able to ascertain, no explanation was advanced at the hearing of the Cowan Summons as to why Mr. Cowan did not swear an affidavit for that hearing, and indeed, in Mr. Cowan's First Affidavit filed, for the hearing of the applications to set aside, there is no explanation as to that either.
82. This was an improper course. *GCR Order 41, 4.5(3)* states plainly that "*An affidavit sworn by an attorney shall not be admissible in any cause or matter unless the Attorney has direct personal knowledge of the facts and matters to which he deposes and does not appear as an advocate in the cause or matter.*" It is clear that neither Mr. D'Addona nor Mr. Basdeo had any personal knowledge of the facts underlying the various allegations for which leave to serve out was sought.
83. It is regrettable that this was how the application was put together. In the context of the applications herein, seeking to set aside on the grounds of a failure to make full and frank disclosure, this cannot be considered to be a mere technical error.
84. If Mr. D'Addona was doing no more than restating the contents of the Re-Amended Writ, I accept Mr. Millett QC's submission that then by definition Mr. Cowan was failing to make full and frank disclosure of all the matters that might be raised by the proposed new Defendants. On the other hand, if Mr. D'Addona was seeking to make full and frank disclosure by D'Addona 1, this does not meet the mark either. It was for Mr. Cowan to give the relevant affidavit, as required by *GCR Order 11, Rule 4(1)(d).*"

91. The Hong Kong Civil Procedure 2024 at 41/5/4 at page 1008 provides:

"An affidavit should where possible be sworn by the person with the most direct knowledge of the matters deposed to. This will usually be the party rather than his solicitor. Solicitors should only give evidence on behalf of their client in exceptional circumstances which should be justified. The court may require solicitors to explain why it is proper for them to make an affidavit on behalf of their client, and the costs of adducing such evidence may

be disallowed in the absence of a satisfactory explanation. See *UES International (HK) Ltd v. Maritima Maruba SA* (HCA 632/2011, [2013] H.K.E.C. 1831), *Chan Shu Moon v Director of Buildings* (DCMP 2408/2016, [2017] HKEC 251), and *Poon Chi Yan v JSI Logistics (Hong Kong) Ltd* (DCEC 1769/2012, 39 & 40/2014, [2017] HKEC 727). In *Weili Su and Another v Shengkang Fei and Others* [2019] HKCFI 2914, Mimmie Chan J expressed strong disapproval of the fact that lawyers were too willing to swear affidavits as to factual matters on behalf of the parties. She said that “*in this modern age*” the fact that a party may be outside Hong Kong would rarely be a satisfactory explanation for that party not to swear and sign an affidavit, and indicated that in the future (in the absence of a satisfactory explanation) the court may refuse to allow affidavits on facts which are made by solicitors who do not have direct knowledge of the matters deposed to – particularly in cases which turn on those very facts.”

92. The Hong Kong rules are stated on page 1006 as follows:

“Contents of affidavit (O.41, r.5)

5.—(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.”

93. The locally crafted Cayman rule in O.41 r.5(3) is in stricter terms insofar as evidence from local attorneys is concerned.

94. In four judgments delivered in 2025 Asif J banged the drum of the importance of compliance with Order 41 very loudly. It appears some attorneys did not hear the important messages contained in these judgments or even worse if they did then they chose to ignore the requirements emphasised powerfully and persistently by Asif J.

95. In *Phoenix Commodities PVT Ltd v ICM SPC* [2025] CIGC (FSD) 68 Asif J stressed the importance of compliance with Order 41 in that case focusing on exhibits to affidavits stating:

- “6. At the commencement of the hearing, I raised with counsel that one party had failed to comply with GCR O.41, r.12(6) in that the exhibits to their filed affidavits do not include indexes, and both parties had failed to comply with GCR O.41, rr. 14 and 15 in that copies of originating process, pleadings, affidavits and other documents filed in court are exhibited to affidavits when they should not be, and multiple copies of the same documents are exhibited.
7. This seems to be a recurring issue in cases that have come before me. Consistently with the overriding objective, these rules within GCR O.41 are aimed at promoting the efficiency of proceedings and avoiding unnecessary cost for litigants using the court by making it easier and quicker for the litigants, their attorneys and the court to navigate the documents. These rules facilitate this by precluding the need to exhibit documents that prove themselves; and discouraging wasteful duplication of material before the court.
8. In a number of cases where I have raised this in recent months, attorneys appear to be surprised by the requirements of GCR O.41. There is no excuse for senior attorneys, charging premium hourly rates, to be unfamiliar with, or worse to ignore, the requirements of the Rules. Failing to comply with the Rules is contrary to the duty of the parties under the overriding objective to assist the Court to progress cases expeditiously and economically, and results in avoidable inflation in the fees that litigants must pay.
9. A similar issue arises in relation to the content of affidavits and affirmations put before the court. In many cases, these contain summaries of exhibited documents and passages of supposition or argument, which are matters for a skeleton argument. None of this is appropriate for inclusion in an affidavit, affirmation or witness statement, which should be limited to the factual evidence that the particular witness is competent and properly able to put before the court. The inclusion of extraneous matters again leads to duplication, inefficiency, wasted time and effort and unnecessarily increased costs for litigants using the court. Attorneys should ensure that inappropriate material does not seep into affidavits, affirmations or witness statements for which they are responsible for filing. Failure to adhere to these principles risks the costs of preparation of affidavits, affirmations

or witness statements being reduced or disallowed, and, potentially, adverse costs orders.”

96. In *IGCF General Partner Limited v White Crystals Ltd* [2025] CIGC (FSD) 98 Asif J again stated the importance of parties complying with the various requirements of Order 41 generally and specifically to ensure that the court is presented with the best evidence available:

“22. Mr Lowe raises as a preliminary objection that the evidence relied on by WCL is largely inadmissible. This is because it is contained in affidavits sworn by attorneys, who, Mr Lowe says, cannot possibly have personal knowledge of the matters in question. Mr Lowe submits that this affidavit evidence therefore breaches GCR O.41, r.5(3), which states that:

“(3) An affidavit sworn by an attorney shall not be admissible in any cause or matter unless the attorney has direct personal knowledge of the facts and matters to which the attorney deposes and does not appear as advocate in the cause or matter.”

23. Mr Lowe notes that this Rule is local to the Cayman Islands, i.e. it does not have an equivalent rule in the *Rules of the Supreme Court of England and Wales 1965*. He argues that it was introduced in the Cayman Islands to deal with the abuse of having lawyers, often based offshore, swear affidavits instead of their clients doing so. He draws my attention to the judgment of Kawaley J in *Torchlight GP Limited v Millenium Asset Services PTY Limited* [2018] 1 CILR 244, where the learned judge accepted a similar submission from Mr Lowe and said at paragraph [83]:

“... This rule is an important one because it is designed to ensure that the court has reliable evidence before it based on the experience that lawyers receiving instructions from clients in other jurisdictions are particularly vulnerable to being pressed to quickly file important evidence on a distant substantive witness’s behalf. Left unchecked, this will mean the best available evidence is not placed before the court and averments which clients may not be willing to swear to are indirectly verified by a legal representative.”

24. In *Torchlight*, the evidence in question had been sworn by an attorney-at-law to support an *ex parte* application for leave to serve out. The evidence had subsequently been confirmed by an affidavit sworn by a director of the plaintiff company. Kawaley J stated that, in the absence of such a confirmatory affidavit, he would probably have set aside the relevant orders giving leave to serve out. Instead, he penalised the plaintiff in respect of the costs of arguing the issue up to the date when the second affidavit was sworn.
25. I accept the general thrust of Mr Lowe’s argument. It is important that parties comply with the various requirements of GCR O.41 generally, and with GCR O.41, r.5(3) specifically, to ensure that the court is presented with the best evidence available and in the most efficient way possible. However, in this case, much of the affidavit evidence that has been filed on both sides is not germane to the questions that I have to determine (or is simply comment on the documents and argument). The issues raised by WCL’s summons largely turn on the documents exhibited by the witnesses. I have kept Mr Lowe’s submission in mind, but I do not consider that the question of admissibility of the evidence provides an answer to the issues for determination.”
97. In *Asia Television Holdings Limited* [2025] CIGC (FSD) 104 Asif J felt compelled to add a postscript which stated:
- “118. Finally, by way of a postscript, there is a procedural issue that I need to raise. One of the affidavits relied on by the Company was sworn by a member of staff at Carey Olsen. I have raised with all of the parties that the affidavit in question fails to comply with GCR O.41, r.5(3). In particular, the affidavit is sworn by an attorney and is not limited to matters of which the attorney has direct personal knowledge, which is the requirement in GCR O.41, r.5(3). Instead, the affidavit is full of hearsay evidence and, even worse than that, despite the deponent having stated at the outset of the affidavit that they will identify the sources of all information provided in the affidavit where the information is not within their personal knowledge, they have not indicated anywhere who are the persons who are the source of the information contained in the affidavit.

119. This is a recurrent problem in cases that have come before me in the last few months. It is at least the third, and possibly the fourth or fifth case where this issue has arisen. In two of those cases, the other party has objected to the evidence in question for this reason. In three of them, the other party has not. In those two cases before this one, and equally in this case, it has not made a difference in terms of the decision that I have made, but it is not good enough. As I said, in *Phoenix Commodities Pvt Ltd* [2025] CIGC (FSD) 68, attorneys practicing in this court should know what the Rules require and should comply with the Rules.
120. The reason for and importance of GCR O.41, r.5(3) was explained by Kawaley J in *Torchlight GP Ltd v Millinium Asset Services Pty Ltd* [2018] 1 CILR 244 at paragraphs 81-83. In that case, Kawaley J indicated that if it had not been for the fact that the evidence in the affidavit in question had subsequently been adduced through another deponent, the grant of leave to serve out would have been set aside. Breaches of GCR O.41, r.5(3) may therefore have serious real-world consequences.
121. It really is not satisfactory for evidence to be put before the court that does not comply with GCR O.41, r.5(3). In *Phoenix Commodities*, I indicated that failures to comply with the Rules might well result in costs being disallowed or adverse cost orders.
122. I repeat that warning again, if practitioners do not comply with the Rules, they risk having the cost of preparing the affidavits in question disallowed because the other party certainly, and probably the attorney's own client, should not be paying for work product that is defective.
123. I will say no more about that, other than to acknowledge the sincere apology that was given by Carey Olsen, and the offer to swear and file an affidavit complying with the Rules. I am not going to require that in this case, as the matters covered in the affidavit in question are peripheral, but I do strongly encourage all attorneys appearing in the Civil Division and the FSD to make sure that they know and understand and comply with all of the requirements of GCR O.41."

98. In *IGCF General Partner Limited v White Crystals Ltd* [2025] CIGC (FSD) 123 Asif J was minded to impose a costs penalty for failure to comply with Order 41 and stated:

“16. Both in their skeleton argument for the substantive hearing and at the hearing itself, the Plaintiffs complained that the affidavit filed on behalf of the Defendant was inadmissible because it was sworn by the Defendant’s solicitor in London, who could not sensibly have personal knowledge of the matters addressed. The affidavit was therefore said to be in breach of GCR O.41, r.5(3). The Plaintiffs urged me not to admit it for that reason. I addressed this briefly in my substantive judgment and concluded that I would admit it because it mainly exhibited relevant documents. I did not rely on the substance of the affidavit itself in reaching my conclusions.

17. However, the apparent breach of GCR O.41, r.5(3) should not go unmarked, and neither should the fact that the majority of the text of the affidavit in question comprised commentary on the documents and argument, rather than admissible evidence.

18. I am therefore minded to disallow the costs of preparing the affidavit in question. However, as this has not been explicitly raised or responded to by the parties in their current round of submissions, I will allow both parties to make further written submissions on this point, if so advised, limited to 5 pages each, before reaching a final decision. I suggest that these should again be sequential, with the Plaintiffs to go first and to be filed by 7 and 14 January 2026 respectively.”

99. There really is no good excuse in 2026 for failing to comply with Order 41. Let me try and summarise the essential messages that parties and attorneys ignore at their peril. Affidavits of fact should contain facts not comment, argument or submissions. The rules in respect of exhibits should be followed. An affidavit sworn by an attorney is not admissible unless the attorney has direct personal knowledge of the facts and matters to which the attorney deposes and does not appear as advocate in the matter.

Determination

100. I turn now to consider the various primary factors which I should take into account in the exercise of the court's discretion as to whether or not to grant an extension of time.

The extent of the delay

101. It is common ground that the time limit specified by the Cayman Order expired on 1 June 2023 and the Applicants did not make their application until 7 August 2025. The Plaintiff calculates the delay as "798 days" or "2 years, 2 months and 6 days". The Applicants do not appear to take issue with those calculations. In the context of the 14 days provided in the GCR and the Cayman Order the delay in this case is a very long period of time.

The excuse for the delay

102. How do Y and Z attempt to excuse the delay of over 2 years?

103. At paragraph 71 of the Applicants' skeleton argument it is boldly stated (with no citation of evidence in support in that paragraph) that:

"The Applicants' failure to apply to set aside the Enforcement Order within the 14 day period was not the result of deliberate non-compliance or disregard for the Court's orders. The delay was the result of the Applicants' understanding that it would not be precluded from seeking to set aside the Enforcement Order after the end of the 14 day period. Viewed in the complete procedural context, the Applicants' delay is not abusive and not as significant as it appears at first blush. To the contrary, it reflects a good faith attempt to deal with matters in a proportionate and sensible manner."

104. At paragraph 73 of the Applicants' skeleton argument the following is stated (footnotes omitted):

"The Applicants took the position that if the Award had been set aside in the DIFC there would have been no underlying award to enforce in the Cayman Islands. As explained by Mr Fox, he understands the position as a matter of law to be that a set aside application would, outside very rare circumstances, not be precluded by the 14 day time limit contained

in the Enforcement Order in circumstances where the award had been set aside at the seat of the arbitration. Mr Fox further explains that it is his understanding that it was on that basis, and because proceedings were being pursued in the DIFC to set aside the Award, the Applicants did not apply to set aside the Enforcement Order by 1 June 2023.”

105. At paragraph 76 of their skeleton argument the Applicants add:

“In any event, even if the Applicants’ legal assessment on the impact of a successful set aside at the seat of the arbitration ultimately proves to have been mistaken, what is relevant is that, as a matter of fact, the evidence demonstrates that the Applicants’ decision was taken in good faith and with regard to proportionality and efficiency, rather than as a tactic to delay enforcement or obstruct the Court’s processes.”

106. What evidence is there to support those submissions?

107. I looked through the 15 bundles before the court to see if I could find any evidence sworn or affirmed by an officer of Y or from Z himself. I could not find it. It was not there. The Applicants appeared simply to have fielded their lawyers to try and explain away their significant delay in this case. It was not suggested that it was impossible for Y or Z to provide evidence themselves.

108. David Holman Hunt (“Mr Hunt”) says he is an English solicitor and a partner in a law firm Boies Schiller Flexner (UK) LLP who represent the Applicants. Mr Hunt in his first affidavit sworn in New York on 6 August 2025 (“Hunt 1”), in support of the application to set aside the Cayman Order and for an extension of time within which to do so, says he seeks to “summarise a very complex and far-ranging dispute”. Mr Hunt at paragraph 3 states that where the contents of his affidavit are not with his own knowledge he has “indicated the source of such information and they are true to the best of my knowledge and belief.” There is no section headed along the lines of “Excuse for the Delay”. At paragraph 128 Mr Hunt says that the Applicants did not apply to set aside the Cayman Order “within 14 days from service and now seek an extension of time pursuant to Order 5, Rule 3 of the Grand Court Rules (2023 Revision) to make this Set Aside Application”. At paragraph 129 Mr Hunt says:

“If the challenges to the Award in the DIFC had been successful, there would have been no Award to enforce in the Cayman Islands and accordingly there would have been no need

for any (substantive) set aside application of the Enforcement Order. Although there is no stay of the Enforcement Award, as outline [sic] above, save for seeking to maintain the status quo, [A] has not sought to [sic] enforcement of the Award in the Cayman Islands pending the outcome of the challenges to the Award in the DIFC. In the circumstances, I do not believe that [A] has suffered any prejudice from the delay in bringing the Set Aside Application pending the outcome of the DIFC Set Aside Proceedings and the DIFC Appeal.”

109. At paragraphs 130-143 Mr Hunt refers to the Restricted Access Regime. He does not say that the initial lack of access to documents covered by the Restricted Access Regime caused a delay in filing the application to set aside the Cayman Order. Indeed it is clear from paragraph 142 that the combined summons was filed without reference to materials covered by the Restricted Access Regime. Access has now been granted and 3 red restricted access bundles formed part of the hearing bundles.
110. Nicholas Fox (“Mr Fox”) in his first affidavit sworn on 10 February 2026 in Grand Cayman (“Fox 1”) says he is an attorney-at-law of the Grand Court of the Cayman Islands and a partner in the firm of Maurant Ozannes (Cayman) LLP who represent Y and Z. He says he made the affidavit in further support of the Applicants’ extension of time application and in response to the Plaintiff’s evidence. At paragraph 5 he says save where otherwise indicated the facts were “derived from my personal knowledge. Where such facts and matters are not within my personal knowledge, I identify the source of my information and belief, and the facts and matters are true to the best of my knowledge and belief.” He says that he “personally commenced advising the Applicants in July 2025”. In a strangely worded paragraph Mr Fox states:

“12. As stated at paragraph 129 of Hunt 1, the Applicants’ position was that if the Award had been set aside in the DIFC, then there would have been no underlying award to enforce in the Cayman Islands. Accordingly, as I understand the position as a matter of law, a set-aside application would, outside very rare circumstances (e.g. the decision overturning the Award having been produced by fraud) would not have been precluded by the 14-day time limit contained in the Enforcement Order and would have been very likely to succeed notwithstanding being brought outside that period. I understand from paragraph 18 of Reynolds 1 that this is

disputed as a matter of law and therefore that this will have to be a matter of submissions.”

111. Mr Fox does not state the basis for his understanding in respect of the law and it is not stated to be the understanding of the Applicants. He does not say who informed him of the “Applicants’ position”. He appears simply to rely on paragraph 129 of Hunt 1. He then seems to give his legal view or understanding without citing anything in support of it or confirming whether it had been communicated to the Applicants, or whether it was their understanding too.

112. At paragraph 13 he adds:

“My understanding is that it was on that basis, and because proceedings were being pursued in the DIFC to set aside the Award, the Applicants did not apply to set aside the Enforcement Order by 1 June 2023. In doing so, the Applicants did not intend any discourtesy to the Cayman Court, nor to cause any prejudice to any other party.”

113. Mr Fox does not give any grounds for his “understanding”. Mr Fox also appears to be seeking to give evidence as to the “intentions” of the Applicants. There is no evidence direct from the Applicants as to their “intentions”, or what they did or did not intend to “cause”. I remind myself that Mr Fox only started advising the Applicants in July 2025 (over two years after the time limit had expired). It is difficult to see how he can explain away the Applicants’ delay prior to his personal involvement or how his asserted “understandings” of the legal position can significantly help the court.

114. With clear knowledge of proper procedures, Mr Fox at paragraph 14 states:

“I appreciate that an alternative course may have been to apply to set aside the Enforcement Order prior to 1 June 2023 and then seek to stay that application, pending the outcome of the DIFC Set Aside Proceedings including the DIFC Appeal. However, it appears from all of the material I have seen that if that course of action had been taken, the parties would most likely still be in materially the same position that they are now. The reality is that all parties were aware of the steps the Applicants were taking in the DIFC and there was extensive communication about these at all relevant times.”

115. Mr Fox does not say why that proper “course of action” was not taken.

116. Mr Fox adds:

“15. For that reason, the relief sought and obtained in the Cayman Islands to date has been largely confirmed to ‘hold the ring’ pending the outcome of the DIFC Appeal and no party has seriously disputed that, for example, the Power of Sale Summons (or any other step to materially shift the status quo) should have been issued, let alone determined, before the outcome of the DIFC Appeal. As a consequence, and despite the Plaintiff’s evidence to the contrary, it does not seem to me that any prejudice has been caused by the Applicants proceeding in this manner.

16. Nevertheless, the Applicants recognise the importance of court-ordered deadlines and the Court rules. The decision to proceed in this manner was not made for any ulterior motive and I apologise for the non-adherence to the 14-day period.”

117. I note the reference to a “decision” to proceed in the way the Applicants proceeded. It appears that a deliberate decision was made not to comply with the Cayman Order. I do not know why Mr Fox is himself apologising for the non-adherence to the 14-day period. It was an obligation upon his clients. I note there is no apology offered by or on behalf of the Applicants. For example, Mr Fox does not say that he is instructed by his clients to tender an apology. It is also difficult to see how Mr Fox can say that there was no “ulterior motive”. Evidence on these issues should have come from the Applicants themselves. There is no evidence from the Applicants themselves explaining the delay or apologising for it or explaining their motives.

118. Mr Fox from paragraph 17 refers to “The agreement to hold the ring”, and the procedural history. Mr Fox refers to correspondence between the attorneys in September 2024. By letter dated 12 September 2024 Mourant (the attorneys for the Applicants) write to Harney Westwood & Riegels (the attorneys acting for the Plaintiff) seeking a “consensual stay” of the Cayman Order pending the determination of the appeal in the DIFC. They say that a “stay of the Order in Cayman during the pendency of the Appeal will preserve the status quo ...”. They seek confirmation that this is agreed by 4pm on 16 September 2024 and if agreed “our clients shall provide a draft consent order”. Harneys respond by letter dated 18 September 2024 stating that the requested stay “is clearly a delay tactic aimed at frustrating enforcement of the Award and preventing our client from being

compensated for its losses resulting from your clients' egregious fraud." Harneys state that in the event "security is provided, our client will agree to the Requested Stay." Mr Fox does not explain why security was not provided and why in the absence of a consent order agreeing to a stay lodged with the court for approval, the Applicants did not immediately upon receipt of the letter dated 18 September 2024 apply to the Grand Court for an extension of time within which to file an application to set aside the Cayman Order and for a stay in the meantime.

119. Mr Flynn says that I should not draw any adverse inferences from that. I think however it reasonable to infer that a decision was made not to make an application for an extension of time and a stay rather than such simply not being pursued through negligence or inadvertence. Mr Flynn in effect says "So what?". I remind myself that the burden is on the Applicants to provide a good excuse for the delay, although I accept that the absence of a good excuse is not in itself sufficient to justify a refusal of an application to extend time. All other relevant factors and relevant circumstances must be considered together with the overriding principle that justice must be done.
120. Mr Fox in his evidence refers to the DIFC Appeal being dismissed on 16 June 2025. He says that on 19 June 2025, as a consequence, the Plaintiff wrote to the Applicants indicating that it intended to apply to the Grand Court to vary the receivership order to seek a power of sale of the shares and on 3 July 2025 the Applicants notified the receivers of the appeal decision and of their intention to bring the set aside application. On 17 July 2025 the Plaintiff filed a summons in the Grand Court to vary the receivership order to seek a power of sale for the shares. Mr Fox adds that on 8 August 2025 the Applicants filed the application to set aside the Cayman Order and requested an extension of time. Mr Fox does not seek to explain away the delay from 16 June 2025 to 8 August 2025 (nearly 8 weeks).
121. Mr Fox refers to an email sent 1 November 2024 noting that the Applicants had retained the services of Mourant "to advise them in connection with the Final Award, including in relation to any steps which may be taken in the Cayman Islands ...". Mr Fox also refers to a letter dated 14 March 2025 from his firm Mourant to Harneys which refers to the email of 1 November 2024 and adds:

"Our clients intend to shortly file an application pursuant to Section 7 of the Foreign Arbitral Award Enforcement Act (1997 Revision) to set aside the Order of the Honourable Justice Kawaley dated 18 May 2023".

122. There is no explanation in that letter for the delay. Moreover this is being said prior to the determination of the DIFC Appeal. There is no reference to an agreement between the parties or an understanding of the Applicants that such an application in the Cayman Islands was unnecessary until after the DIFC appeal had been determined. Indeed the stated intention of the Applicants on 14 March 2025 was to file an application “shortly”. It was not filed until 8 August 2025 nearly 5 months later. The statements in that letter appear to be inconsistent with the evidence now put forward by the Applicants’ lawyers in an attempt to explain the delay.
123. I should add that at paragraph 11 of Fox 1, Mr Fox says that the resolution of the access of Mourant and Mr Flynn to materials covered by the Restricted Access Regime (which he states was resolved shortly before 5 December 2025) delayed the preparation and filing of the set aside application.
124. At paragraph 25 of Fox 1, Mr Fox adds that as a result of that delay “the Applicants were forced to file the Set Aside Application initially without reference to or reliance on any “Restricted Access Material”.”
125. Mr Hunt in his second affidavit sworn on 15 August 2025 (“Hunt 2”) provides his evidence in respect of the Power of Sale Summons.
126. Mr Hunt in his fourth affidavit sworn on 10 February 2026 (“Hunt 4”) at paragraph 5 says that he has confined himself in that affidavit to addressing “overarching points about the position of the parties and the status of related proceedings outside of the Cayman Islands. Mr Nicholas Fox, a partner at Mourant, addresses in his affidavit matters concerning these proceedings in the Cayman Islands. I do not repeat the content of Mr Fox’s affidavit.” However, perhaps in partial recognition of some of the serious deficiencies in the evidence previously filed and in an attempt to plug some of the yawning gaps, at paragraph 5 he adds:
- “However, I note that it was my understanding and that of my clients that my clients would not be precluded from seeking the setting aside of the [Cayman] Order after the end of the 14 day period set out in that Order. To the best of my knowledge and belief, it was not my clients’ intention to disrupt or delay these proceedings.”
127. Mr Hunt does not give the grounds of his “understanding”. He does not say how he knows it was the understanding of his clients. He does not say how he has knowledge of his clients’ “intentions”.

He does not give the source of his knowledge or the basis of his belief. He does not say that he is “instructed” by his clients as to their understanding. Compare the position with paragraph 33 of Hunt 2 which states: “I am instructed that [Z’s] position is that he has complied with all his asset disclosure obligations and has not taken any steps to dissipate assets.”

128. At paragraph 6 of Hunt 4, Mr Hunt says that where the contents of his affidavit “are not within my own knowledge, I have indicated the source of such information, and they are true to the best of my knowledge and belief.” The sources of the information do not appear to have been indicated.

Applicants’ position on the excuse for the delay

129. On behalf of the Applicants it is in effect suggested that there is a good reason for the delay as the Applicants were awaiting the outcome of the challenges to the Award in the DIFC and if those challenges had been successful there would be nothing to enforce in the Cayman Islands. Reference is made to an “understanding” that in any event a set-aside application would, outside very rare circumstances (such as fraud) not be precluded outside the 14-day time limit contained in the Cayman Order and would have been very likely to succeed notwithstanding being brought outside that period.
130. Mr Flynn was also keen to stress that there was no advantage to the Applicants in failing to apply promptly to set aside the Cayman Order and the court should not draw any adverse inferences that the Applicants were engaged in an abusive or improper strategy.

Plaintiff’s position on the excuse for the delay

131. The Plaintiff says that there is no good reason for the delay and that the Applicants were served with the Cayman Order on 18 May 2023 and they made a decision, no doubt on advice, not to apply to set it aside within the specified time limit.
132. The Plaintiff says that the evidence advanced by the Applicants as to their “reasons” for non-compliance is very limited and is to be found in the Applicants’ reply evidence at paragraph 12-15 of Fox 1. The Plaintiff says that the only reason given is that the Applicants believed that if they won in the DIFC set aside then enforcement would not proceed in the Cayman Islands because there would be no binding award to enforce. At paragraph 12 of Fox 1 it is stated:

“As stated at paragraph 129 of Hunt 1, the Applicants’ position was that if the Award had been set aside in the DIFC, then there would have been no underlying award to enforce it in the Cayman Islands ...”.

133. The Plaintiff at footnote 62 of its skeleton argument states that paragraph 129 of Hunt 1 is in unapologetic terms and makes no attempt to address, still less justify, the failure to comply with an order of the Cayman Courts. Mr Hunt at paragraph 129 states:

“If the challenges to the Award in the DIFC had been successful, there would have been no Award to enforce in the Cayman Islands and accordingly there would have been no need for any (substantive) set aside application of the Enforcement Order. Although there is no stay of the Enforcement Award, as outline (sic) above, save for seeking to maintain the status quo, IT Ltd has not sought to (sic) enforcement of the Award in the Cayman Islands pending the outcome of the challenges to the Award in the DIFC. In the circumstances, I do not believe that IT Ltd has suffered any prejudice from the delay in bringing the Set Aside Application pending the outcome of the DIFC Set Aside Proceedings and DIFC Appeal.”

134. Although the Plaintiff did not direct my attention to it I note that paragraph 16 of Fox 1 reads:

“... the Applicants recognise the importance of court-ordered deadlines and the Court rules. The decision to proceed in this manner was not made for any ulterior motive and I apologise for the non-adherence to the 14-day period.”

135. The Plaintiff says that paragraphs 21-26 of Fox 1 appear to suggest that the delay was, in part, due to the time it took for the parties to resolve the approach to the so-called Restricted Access Documents in these proceedings. The Plaintiff says that such suggestion is misconceived, not least because the Applicants were able to, and did issue the combined summons prior to Mourant and Vernon Flynn KC receiving access to the materials in question.

136. The Plaintiff in its skeleton argument adds:

- “58 The Applicants’ own evidence shows that (i) they took a deliberate decision not to comply with the Enforcement Order and (ii) their rationale was entirely based on the gamble that they would win in the DIFC and thus collapse any enforcement action in the Cayman Islands. This was an informed and carefully thought-out strategy which was considered to be advantageous to the Applicants. It is self-evidently not a “good” reason because it amounts to a litigant who could have complied with a court order instead choosing to breach a court order because that course of action was considered to be of strategic benefit to that litigant. This is a case where a party has intentionally allowed time to expire for its own perceived benefit (cf. *Terna* [30]). That very clearly constitutes the absence of a “good reason” because court orders and rules are not optional and may not be breached because of a perceived advantage to an individual litigant. Any other approach would fundamentally contradict the overarching principle that court orders and rules must be complied with by the parties.
- 59 In any event, putting aside the Applicants’ wholly unacceptable approach to treating the Grand Court Rules and Court orders as a part of a game, on their own logic the only way their approach made sense was if they won in the DIFC. The Applicants lost in the DIFC and on their own evidence have no reason at all to justify the non-compliance in these circumstances.
- 60 If the Applicants wished to preserve their position, they should have issued a set aside summons before 1 June 2023. They could then have sought to stay the enforcement of the Award in the Caymans pending the DIFC Challenge pursuant to s.7(5) of the Act. That course would likely have required the Applicants to put up security which, if complied with, would have addressed the question of injustice to IT Ltd. The Applicants have, however, shown themselves unwilling to provide security to support their set-aside attempts (see the DIFC), which may explain why this course was not pursued.
- 61 Alternatively, had the Applicants complied with the Enforcement Order and issued a timely application they may have been required to progress their Cayman set aside application in parallel with the DIFC proceedings. That application would by now have been resolved and there would be no further delay.

62 The Court should find that not only was there no good reason for the failing to comply with the Enforcement Order but this is a case where the Applicants have deliberately and on a calculated basis breached the Grand Court's rule and order. That conduct is not merely unjustified but abusive. Such behaviour is to be deprecated and weighs heavily in the balancing exercise."

Decision on the excuse for the delay

137. Where a party is in breach of timely compliance with a court order and seeks an extension of time the burden is normally on that party to persuade the court to exercise its discretion in favour of providing additional time for compliance. It will usually assist such party if he provides full and frank evidence to the court with a good excuse or at least a reasonable explanation for the delay in complying with the order. A court may reasonably expect the party himself or itself to provide evidence explaining and excusing the delay rather than simply fielding lawyers to provide evidence and submissions attempting to explain and excuse the delay.
138. The Applicants have chosen to present their explanation and excuse for the delay in evidence and submissions put forward by their lawyers and the Plaintiff has chosen to respond in similar fashion. I remind myself that the burden is on the Applicants to satisfy the court that the court's discretion should be exercised in their favour.
139. In fairness to the Applicants, I have searched the 15 volumes of material long and hard to see if I could find a full or proper explanation or a good excuse for the failure to comply with the Cayman Order. I could not find it. It was not there.
140. There is no persuasive admissible evidence before the court that fully or properly explains or provides a good excuse for the long delay in this case.
141. Mr Fox, the local Cayman attorney, only became personally involved from July 2025 (paragraph 69 Fox 1). He can have no "direct personal knowledge of the facts and matters" (O 41 r 5(3) GCR) before that date. In any event although he can speak, if relevant, of his own information and belief (provided he identifies the sources and grounds thereof) he cannot speak of the Applicants' beliefs, motives, intentions, or desires. Mr Fox says that the Applicants' position was that if the Award

was set aside in the DIFC there would be no underlying award to enforce in the Cayman Islands (paragraph 12 of Fox 1) and his understanding is that it was on that basis that the Applicants did not comply with the Cayman Order and apply to set it aside by 1 June 2023 (paragraph 13 of Fox 1). Mr Fox was clearly aware of the proper procedure that should have been adopted namely an application to set aside made prior to 1 June 2023 coupled with an application for a stay pending the determination of the DIFC Challenge including the DIFC Appeal (paragraph 14 of Fox 1). Mr Fox says that the “decision to proceed” in the manner the Applicants proceeded “was not made for any ulterior motive” (paragraph 16 of Fox 1). It is difficult to see how Mr Fox can give direct evidence of the Applicants’ motives.

142. The evidence of Mr Fox does not properly or adequately explain or excuse the delay either before or after the determination of the DIFC Appeal and neither does the evidence of Mr Hunt.
143. Mr Hunt says that if the challenge to the Award in the DIFC had been successful there would have been no Award to enforce in the Cayman Islands and accordingly there would have been no need for any substantive set aside application of the Cayman Order (paragraph 129 of Hunt 1). At paragraph 5 of Hunt 4, Mr Hunt says that it was his understanding and “that of my clients that my clients would not be precluded from seeking the setting aside of the [Cayman] Order after the end of the 14-day period set out in that Order.” The grounds of the “understanding” are not provided.
144. I have concluded on the very limited admissible and “confusing” (to use Mr Flynn’s own word) evidence before the court that no proper explanation and no good excuse for the long delay has been provided to the court.
145. Even if there had been admissible evidence before the court from the Applicants themselves that they delayed the application in the Cayman Islands pending the outcome of the DIFC Challenge (which appears on its fact to be inconsistent with the position stated in Mourant’s letter of 14 March 2025) there is no admissible persuasive evidence explaining or providing a good excuse as to why the Applicants delayed a further 7-8 weeks after the outcome of the DIFC Challenge was known to them. 7-8 weeks in the context of an overdue strict 14-day rule imposed and court ordered deadline is not a short insignificant period of time. Mr Hunt and Mr Fox attempt to blame the difficulties with delayed access to the restricted material but the Applicants could and should have applied much earlier than they did and they could have done so without initial reliance on the restricted material. The lack of access to the restricted access material did not prevent the Applicants from

filing an application for an extension of time and a set aside order and I do not accept that such amounts to a good excuse for the delay.

146. Mr Fox acknowledges the proper procedure that should have been adopted (see paragraph 14 of Fox 1). There is no evidence before the court to the effect that the Applicants were unaware of the Cayman Order or the proper procedure in respect of applications to set aside and stays or that they received negligent legal advice or by way of some inadvertence they failed to take it, or that other innocent mistakes were made.
147. It is not said by or on behalf of the Applicants that they did not have the resources to make the set aside application within the time period specified in the Cayman Order. Indeed the evidence indicates that the Applicants were fully “lawyered up” and able and willing to take every conceivable step to avoid making payments under the Award and any connected costs orders.
148. The limited evidence before the court reveals that, with full knowledge of the time period and with ability to make an application within the 14-day period, a deliberate decision not to take steps to comply with the Cayman Order was made for no good reason. There may be more to this than meets the eye but I can only determine the application for an extension of time on the basis of the admissible evidence before the court. The evidence reveals a deliberate informed failure to comply with the Cayman Order with no proper explanation or good excuse. That, on the face of it, is abusive conduct.
149. The fact that no proper explanation or good excuse has been provided in the evidence in respect of the long delay is not the end of the matter. I now consider the other factors I must hold in the balance before reaching a decision.

The merits/strength of Applicants’ set aside case

150. In exercising the court’s discretion as to whether to grant an extension of time I think, on the authorities (see *Sonico* for example) it is legitimate to have regard to the merits of the set aside application. In a case where a court can “without much investigation” (Moore-Bick LJ in *Hysaj* at [463]) or “on brief perusal” (Poplewell J in *Terna* at [31]) see that the set aside application is very strong or very weak (or “intrinsically weak” as Poplewell J put it at [31] in *Terna*) then the merits should be considered in the balancing exercise to be conducted by the court.

Applicants' position on the merits/strength of their set aside case

151. The Applicants do not write or say a lot about the merits of their set aside application as they say that the merits are not relevant to the extension of time request. They add that if the court does conduct a merits analysis it should be limited (paragraph 98 of their skeleton argument).

152. The Applicants say that if the court determines that the merits are relevant, even if the court were to find that the merits of the set aside application were “intrinsically weak” this would only be a factor, albeit not a primary factor, against granting the extension. To support this submission they cite at footnote 90 of their skeleton argument *Butcher J in STA v OFY* [2021] EWHC 1574 (Comm) at [31]. I think they meant to cite [29] which reads:

“... if the court can readily see on the material before it that the challenge appears intrinsically weak, then that will be a factor, albeit not a primary factor, counting against an extension.”

That case involved an application under CPR r 62(9) for an extension of time to bring a challenge under section 68 of the Arbitration Act 1996 of the UK Parliament and took into account the *Terna* factors which the Applicants say are not relevant.

153. The Applicants also say that the decisions in the DIFC are not relevant to these proceedings as the public policy of the Cayman Islands is strictly an issue for the courts of the Cayman Islands. They say that the decision of the DIFC Court of First Instance and the DIFC Court of Appeal are not relevant to the question in issue in this case, which is whether there has been a breach of the public policy of the Cayman Islands.

154. The Applicants add that they have sought to introduce new expert evidence in these proceedings which they say support their act of state doctrine ground. They say that their expert explains in his expert report dated 7 August 2025 that an administrative decision procured by bribery and corruption is invalid as a matter of Iraqi administrative law. He says “if the reason for issuing the decision is unlawful, the decision will be considered null and void under Iraqi administrative law.”

155. I also note the contents of Hunt 1 in respect of the set aside application.

Plaintiff's position on the merits/strength of Applicants' set aside case

156. Understandably the Plaintiff writes and says a lot more about the merits.
157. The Plaintiff says that a consideration of the merits on an extension application is necessarily conducted at a high level. It adds that even a brief examination of the grounds advanced in support of the set aside application makes it clear that its merits are “patently weak” (paragraph 63 of the Plaintiff’s skeleton argument).
158. The grounds of the set aside application are not set out in the Summons itself but Hunt 1 covers them in some detail.
159. Section 7(3) of the FAAE Act provides:

“Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.” (“Section 7(3)”)

160. The Applicants contend (see Hunt 1 at paragraph 10) that:
- (1) the Award is in respect of a matter which is not capable of settlement by arbitration, because the Award is in respect of a matter which is non-arbitrable by reason of the act of state doctrine: (paragraph 10 (a));
 - (2) enforcement of the award would be contrary to the public policy of the Cayman Islands as it is contrary to the act of state doctrine (paragraph 10 (b));

I refer to paragraph 10(a) and (b) together as the “Act of State Ground”.

- (3) the Plaintiff relied upon illegally obtained evidence and, therefore, the Tribunal’s reasoning and conclusions in the Award relied upon and were tainted by illegally obtained evidence (paragraph 10 (c)) (the “Illegally Obtained Evidence Ground”)

and consequently enforcement of the Award should be refused pursuant to Section 7(3).

The Act of State Ground

161. The Plaintiff says that the Act of State Ground is raised against the backdrop of a massive fraud perpetrated by the Applicants against A and B. The Plaintiff says that the Applicants contend that, because of their fraudulent actions involving them bribing public officials, the act of state doctrine has been engaged, so that the Tribunal should not have decided A's claims, thereby providing the Applicants with immunity from any liability and enabling them to enjoy the fruits of their large-scale fraud in perpetuity. The Plaintiff adds that this is an ambitious argument which unsurprisingly has so far failed every time it has been argued.
162. The Applicants submit that when assessing the Act of State Ground as a matter of English law (which is persuasive in the Cayman Islands) the starting point is whether the Award engages the act of state doctrine at all, or whether A's claims fell within (1) the *Kirkpatrick* limitation and/or (ii) the public policy exception.

The Kirkpatrick limitation

163. In *WS Kirkpatrick & Co Inc v Environmental Tectonics Corp International* (1990) 493 US 400 ("*Kirkpatrick*") the US Supreme Court held that the act of state doctrine does not bar a court "from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does not require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of such an official act."
164. *Kirkpatrick* was endorsed, inter alia, by Rix LJ in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458 ("*Yukos*") at [95]-[102], Lord Sumption in *Belhaj v Straw* [2017] AC 964 ("*Belhaj*") at [240] and Lord Lloyd-Jones relying on Rix LJ's judgment in *Yukos* in "*Maduro Board*" of the *Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela* [2023] AC 156 ("*Maduro*") at [136] and [152].
165. The distinction is between (i) cases requiring a ruling on the validity or lawfulness of a sovereign act, and (ii) cases where unlawful conduct may be incidentally disclosed. If a court or arbitral tribunal is not asked to rule on the lawfulness or validity of an executive act, the act of state doctrine

does not apply. *Kirkpatrick* puts beyond doubt that a claim based on the consequences of a state act procured by bribery is not barred.

The public policy exception

166. The act of state doctrine does not preclude adjudication of state acts that breach established rules of international law or are contrary to public policy (*Belhaj* at [153]-[156], *Maduro* at [136(2)]). In *Crane Bank Ltd v DFCU Bank Ltd* [2023] EWCA Civ 886 at [60]-[64] the English Court of Appeal confirmed that it is arguable that this includes the public policy against bribery and corruption.
167. The Tribunal held that the act of state doctrine was not engaged because A’s claims did not require any finding that the regulatory body (“RB”) decision was invalid or unlawful. The Tribunal further held that, even if the act of state doctrine had been engaged, the public policy exception applied. The DIFC court of first instance likewise held that the Award did not infringe the act of state doctrine as it did not challenge the validity of the RB decision and so fell within the *Kirkpatrick* limitation. The DIFC CA reached the same conclusion. It held that the act of state doctrine, as applicable in the DIFC “did not preclude arbitration as between private parties of the question whether one party, by bribery of a public authority of a foreign state had inflicted actionable loss and damage to the other”. Further the Award did not investigate the validity of the RB decision: “That Decision was taken to be effective” (paragraph 314). It expressly noted that its line of reasoning reflected *Kirkpatrick* (paragraph 317). The DIFC CA further noted that as a matter of public policy, the act of state doctrine could not be used “to blindfold the Courts or DIFC-seated arbitrators in cases where the disputes before them have arisen out of the corrupt conduct of one of the parties” (paragraph 317).
168. The Plaintiff stresses that the set aside application in this jurisdiction is the fourth attempt by the Applicants to advance these grounds. The Plaintiff relies on the first affidavit of John S Willems (“Mr Willems”) sworn on 5 January 2026 (“Willems 1”). Mr Willems in Willems 1 says he is a New York qualified attorney and a partner of White & Case LLP and gives an address in Paris, France. He says he is one of the partners with responsibility for the conduct of the Plaintiff’s claims in the arbitration proceedings and he gives an overview of the arbitration proceedings, the arguments made by the parties and the decision of the tribunal as reflected in the Award.

169. If the court were to proceed to a determination of the set aside application, the Plaintiff says that it would again submit that the Award does not infringe the act of state doctrine as (1) the claims are on all fours with *Kirkpatrick* and (ii) in any event, Cayman public policy against bribery and corruption (see for example the Anti-Corruption Act (2024 Revision)) precludes reliance on the doctrine to shield private parties from liability merely because their scheme involved bribing a public official. The Plaintiff says to hold otherwise would create a rogue's charter. The Plaintiff adds that although there is no Cayman authority directly on point, it is anticipated that the Grand Court will be guided by the English authorities considered by the Tribunal and the DIFC Courts. The Plaintiff submits that there is no real prospect of establishing that the Award infringes the act of state doctrine.
170. The Plaintiff says that the Applicants seek to circumvent this difficulty by advancing a new argument that was not raised in the DIFC proceedings and which relies on Iraqi law expert evidence said to show that an administrative decision procured by bribery or corruption is invalid under Iraqi administrative law. Reference is made to paragraphs 26 and 27 of Hunt 4.
171. The Plaintiff says that even if made out, this new Iraqi law argument does not alter the fact that this case is on all fours with *Kirkpatrick* such that the act of doctrine is not engaged. The Plaintiff adds that further if the Applicants truly believed this point had substance, it could and should have been advanced in the DIFC proceedings and raising it now constitutes a *Henderson v Henderson* abuse of process (*Carpatsky Petroleum Crpn v PJSC Ukrnafta* [2020] Bus. L.R 1284 (“*Carpatsky*”) at [123]-[124] and *Al-Haidar v Rao* (Kawaley J unreported FSD judgment delivered on 15 April 2024) (“*Al-Haidar*”) at [22]).
172. The Plaintiff says that even if the Applicant could establish an infringement of the act of state doctrine, they would still need to demonstrate that such infringement justifies refusal of enforcement under Section 7(3) on the basis that (1) the Award concerns a matter not capable of settlement by arbitration and/or (2) enforcement would be contrary to the public policy of the Cayman Islands.
173. The Applicants have not articulated their case on non-arbitrability beyond asserting that the Award is in respect of a matter which is “non-arbitrable by reason of the act of state doctrine” (Hunt 1 paragraph 10(a)). The Plaintiff says that this states, rather than demonstrates, the proposition in

dispute and add that accordingly, it is not open to the court to conclude that any such case would have real strength.

174. The Plaintiff also says that similarly the Applicants have not set out the basis for their case that the alleged infringement of the act of state doctrine would render enforcement of the Award contrary to the public policy of the Cayman Islands within the meaning of Section 7(3). The Cayman Islands courts have consistently held that the public policy exception to enforcement is narrow: “the scope of the public-policy basis for refusing to enforce an award should be construed very narrowly” (*White Crystals* at [36]) and “[n]othing short of illegality, reprehensible or unconscionable conduct ought in general terms suffice” (*Shaw* at [74]). The Plaintiff says that the Applicants have not demonstrated how their case would surmount this high bar and the Plaintiff adds that it cannot.
175. The Plaintiff submits that the Applicants’ Act of State Ground is weak and without real prospects, weighing against an extension of time. Alternatively, the Plaintiff submits that if the court considers its merits too uncertain to access at this stage, the argument becomes a neutral point in the balancing exercise.

The Illegally Obtained Evidence Ground

176. The Plaintiff says that the Applicants contend that enforcement of the Award should be refused on the basis that it is allegedly tainted by reliance on illegally obtained evidence, which is said to render enforcement contrary to Cayman Islands public policy (Hunt 1 paragraph 10(c)).
177. The evidence relied upon in the set aside application that is said to have been obtained unlawfully comprises written statements from Mr Bortman (principal of Raedas Consulting Ltd) (the “Bortman Hearsay”) and three documents (1) an invoice from a sham law firm (the “Sham Invoice”) (2) a spreadsheet recording US\$50 million in bribes (the “Spreadsheet”) and (3) a letter dated 22 January 2014 (the “Letter”). Raedas Consulting Ltd is described as “a company based in London and specialising in investigations” (paragraph 60 DIFC CA Schedule of Reasons).
178. The Plaintiff denies that the Bortman Hearsay was unlawfully obtained but in any event the Tribunal made it clear (in at least twelve places) that it did not rely upon it and the DIFC court at first instance (paragraph 69) and the DIFC CA (at paragraph 328) found that the Tribunal had not relied on the Bortman Hearsay. Those findings give rise to an issue of estoppel, precluding the

Applicants from contending otherwise (*Gol Linhas Aéreas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21, [2023] Bus LR 1305 at [60]).

179. The Plaintiff adds that even if the Applicants were permitted to re-open this point, their attempts at arguing that the Tribunal, contrary to its express statements, nevertheless relied on the Bortman Hearsay, are not reasonably arguable (and to the extent that they raise points not raised in the DIFC courts, amount to *Henderson v Henderson* abuse of process; *Carpatsky* at [123]-[124]).
180. The Plaintiff says that the Applicants' case in respect of allegedly illegally obtaining documents has been vague and shifting over time. In their evidence in support of the DIFC Challenge, the Applicants appeared to object to the Tribunal's reliance on the Sham Invoice and the Spreadsheet; yet in their skeleton argument served two days before the hearing of the DIFC Challenge, the Applicants shifted their attention to the Letter (this the Plaintiff says was clearly an afterthought, as the Letter had not even been included in the hearing bundle) and during the appeal proceedings, the Applicants did not mention the Sham Invoice or the Spreadsheet at all.
181. The DIFC CA rejected the allegation that the Letter had been obtained illegally and its findings in this respect create a further issue estoppel, says the Plaintiff.
182. The Plaintiff adds that having abandoned reliance on the Spreadsheet and the Sham Invoice before the DIFC CA, the Applicants renewed reliance on these documents before the Grand Court would amount to a *Henderson v Henderson* abuse (*Carpatsky* at [123]-[124]).
183. The Plaintiff says that in any event, issues of preclusion aside, the Applicants' case on the allegedly illegally obtained documents remains unparticularised and unsubstantiated. The burden is on the Applicants to show that the particular documents had in fact been procured unlawfully. The Plaintiff says that the Applicants have not come close to doing so.
184. The Plaintiff submits that the Illegally Obtained Evidence Ground fails at the first hurdle.
185. The Plaintiff adds that even if certain evidence had been obtained illegally and relied upon, that would not render enforcement of the Award contrary to the public policy of the Cayman Islands.

186. The Plaintiff submits that under Cayman law, illegally obtained evidence is admissible, unless obtained by torture: *Meridian Trust Company Limited v Eike Fuhrken Batista Da Silva* (FSD unreported judgment of Ingrid Mangatal J delivered on 11 November 2016) (“*Meridan*”) at [99]-[105] applying *Imerman v Tchenguiz* [2010] EWCA Civ 908, [2011] Fam 116 at [170]-[177]. The Plaintiff states that the reliance on illegally obtained evidence cannot offend the public policy of the Cayman Islands if Cayman Islands law itself allows the reliance on such evidence.
187. The Plaintiff says that it is also material that the DIFC courts, as supervisory courts, concluded that the Award is not tainted by reliance on illegally obtained evidence (see *Gol Linhas* at [110]).
188. The Plaintiff submits that in these circumstances the Illegally Obtained Evidence Ground has no prospects of success and an extension of time would serve no useful purpose.

Decision on the merits/strength of Applicants’ set aside case

189. In my judgment on “brief perusal” and “without much investigation” it is clear that the Applicants’ case on the merits in respect of the set aside application is, at best, very weak. There is nothing of significant substance in it. I am driven to this clear conclusion by the submissions put forward on behalf of the Plaintiff as outlined above.
190. In respect of the Act of State Ground I do not agree with the Applicants that the decisions of the DIFC courts (in particular the DIFC CA) are of no relevance. The DIFC CA conducted an impressive review of the relevant law and principles and relied on many English authorities which would be followed in the Cayman Islands.
191. Moreover in this area of wrongdoing, bribery and corruption I would find it difficult to accept that the public policy of England and Wales and the Cayman Islands are not significantly aligned. The DIFC CA applied the legal principles to the specific context of this case. For the avoidance of doubt I, of course, accept that in dealing with the relevant legal principles it is the public policy of the Cayman Islands that the court must have regard in considering the public policy arguments raised by the Applicants in this jurisdiction. Having considered the position I have concluded that the public policy grounds relied upon by the Applicants in their set aside application are, at best, very weak.

192. I agree with the Plaintiff's submissions that there is no real prospect of the Applicants establishing that the Award infringes the act of state doctrine.
193. The Award does not engage the act of state doctrine and even if it did it would fall within the *Kirkpatrick* limitation and the public policy exception. The Applicants try to suggest that this is a very complex area which requires further consideration. In my judgment, having considered the position, stripped of its detail it is quite simple and straightforward. The Applicants act of state grounds are as I say, at best, very weak.
194. There is also considerable force and good sense in the Plaintiff's submission that the Applicants are simply too late in their attempts to raise a new Iraqi law argument and that this is another abuse by the Applicants. Mr Hunt at paragraph 27 of Hunt 4 says that "This matter of Iraqi law was not in issue before the DIFC Courts." He does not attempt to explain why this point was not put in issue previously by the Applicants. I was provided with no good reason as to why this new argument was not raised at an earlier stage. It strikes me as another somewhat desperate and belated attempt to avoid enforcement of the Award. I asked Mr Flynn why this fresh point was not previously raised and he in effect stated that a different expert had been engaged. But even if that was the case it would not have been a sufficient excuse to prevent the application of the *Henderson v Henderson* abuse principle.
195. I am satisfied that the Applicants would not be able to climb over the *Henderson v Henderson* abuse principle mountain. Indeed they would not even get to base camp.
196. Butcher J covered the position well at [123] and [124] in *Carpatsky*. At [123] Butcher J referred to the scope for the application of the *Henderson v Henderson* abuse of process principle and that it was open to the court to find that it is an abuse of its process for a party to raise a challenge in the English courts to enforcement of a foreign arbitration award which it could and should have raised in challenge proceedings which had taken place in the curial court. At [124] Butcher J considered that there were good grounds for saying that the party should not be able to bring forward before an English enforcing court another aspect of such a challenge which he could have put before the supervisory court, absent special circumstances. Butcher J stated that to recognise that the *Henderson v Henderson* principle is potentially applicable in relation to decisions of the supervisory courts on procedural issues would be consistent with the policy of sustaining the

finality of decisions of the supervisory courts recognised in *Minmetals Germany GmbH v Fercosteel Ltd* [1999] CLC 647. At [125] Butcher J touched upon issue estoppel considerations.

197. I asked Mr Flynn why the Applicants had not raised the new Iraqi law point before the DIFC. He had no proper answer. I fully appreciate that I am not hearing an application for a *Henderson v Henderson* abuse order but in considering this belated new argument it is appropriate that I consider whether the Applicants may be permitted to run it. Frankly on the basis of what has been put before the court I have concluded that there is no real prospect of the Applicants being permitted to run this new argument.
198. I should also add that the English *Henderson v Henderson* abuse of process principle has long been accepted as applicable as a matter of the law of the Cayman Islands (for some relatively recent examples see Kawaley J in *Al-Haidar* at [22] in an arbitration context and Doyle J in *Arnage v Walkers* (FSD unreported judgment delivered on 28 October 2022) in a general litigation context.
199. I am also persuaded that the Plaintiff is right when it says that even if made out this new belated Iraqi law argument does not alter the fact that this case is on all fours with *Kirkpatrick* as applied in English law which the Cayman Islands would follow such that the act of state doctrine is not engaged.
200. The Illegally Obtained Evidence Ground is also a non-runner. It does not even get into the starting blocks, let alone fail at the first hurdle as suggested by the Plaintiff. Even if the evidence was illegally obtained it is plain that it was not relied on and the Applicants do not suggest that it was obtained by, for example, torture. It is also worthwhile citing the wise and insightful comments of Ingrid Mangatal J in *Meridian* at [105]:

“... I am aware that the provision of information from inquiry agents and investigative journalists is commonplace in international fraud cases, particularly since absent evidence from such sources, it can often be impossible for victims of complex cross-border fraud to have any opportunity to track and preserve the fruits of the fraud to meet future judgments ... shortly put, fraudsters do not conduct their business in a transparent manner. Complaints of impropriety can on balance seem hollow given the reason why obtaining the evidence was necessary.”

201. Put simply, I am satisfied that the Illegally Obtained Evidence Ground has no real prospects of success.
202. Mr Flynn, latching on to Waller LJ's conclusion on page 342 of *Soinco* "I am unpersuaded that it is arguable that under English law enforcement of this award would be contrary to English public law", says that the public policy grounds must be unarguable before I can bring the merits into the balance. I disagree. Waller LJ was simply expressing his conclusion in that case in those terms. He was not stating or suggesting that arguability is the test. The word did not appear when Waller LJ set out the relevant test on page 338. In considering whether to grant an extension of time to proceed with a set aside application the court may consider the merits and if it is apparent on a brief perusal or without much investigation that the merits are either very strong or very weak the merits can be weighed in the balance.
203. I can see why Mr Flynn, in the Applicants' skeleton argument and in his oral submissions, has shied away from the merits of the set aside application in this case as they are very much against the Applicants. In my judgment the grounds of the set aside application are very weak, at best.
204. Mr Flynn was at pains to submit that the merits were not relevant and if the court was against him on that submission and nevertheless went on to conduct a merits review "it should be limited" (paragraph 98 of the Applicants' skeleton argument). Mr Peter de Verneuil Smith KC agreed that a "consideration of the merits in an extension application is necessarily at a high level" (paragraph 48(e) of the Plaintiff's skeleton argument) and "The court should not embark upon a detailed examination of the merits" (paragraph 63 of the Plaintiff's skeleton argument).
205. Popplewell J in *Terna* at [31] stated "on an application for an extension of time, the court will not normally conduct a substantial investigation into the merits of the challenge application, since to do so would defeat the purpose of the 1996 Act. However if the court can see on the material before it that the challenge involved an intrinsically weak case it will count against the application for an extension, whilst an apparently strong case will assist the application. Unless the challenge can be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time". In similar vein Moore-Bick LJ in *Hysaj* at [46] stated: "Only in those cases where the court can see without much investigation that the grounds ... are either very strong or very weak will the merits

have a significant part to play when it comes to balancing the various factors that have to be considered ...”.

206. In fairness to the parties and in view of Mr Flynn’s arguments on preclusion I felt it appropriate to consider the merits in a little more detail than would otherwise normally be the case.
207. On a brief perusal and without much investigation the grounds appeared “intrinsically weak” or “very weak”. On further investigation and on a little more detailed perusal that remained the case. Even when the court conducted a slightly deeper dig there were no gold nuggets to be found to bolster the Applicants’ grounds for their set aside application. The Applicants’ case falls well within the “very weak” category. When it comes to balancing the various factors in considering the exercise of the court’s discretion the merits are very much against the Applicants.
208. I should add that even if I had declined to consider the merits and treated them as a neutral point in the balancing exercise, the balance would still have come down firmly in favour of the Plaintiff and the refusal of the extension of time in view of the extent of the delay, the absence of a good excuse for it, and the existence of some prejudice to the Plaintiff.
209. Before leaving the merits I again stress that in my consideration of the same I have had regard to the public policy of the Cayman Islands, as referred to by counsel.
210. In considering the public policy grounds the court would also have regard to the public policy of the Cayman Islands against condoning bribery and corruption and in favour of bringing wrongdoers to justice.
211. At [317] of the DIFC CA Schedule of Reasons the point is made that “the DIFC Courts serve as part of an international community of commercial courts and in that way contribute to the rule of law in transnational trade and commerce.” Likewise the FSD. There are strong public policy considerations in the Cayman Islands against corruption and bribery. The Cayman Islands is not a safe haven for international wrongdoers. There is a very strong public policy in the Cayman Islands of assisting bringing international wrongdoers to justice. The Cayman Islands are keen to play their part in a smoothly functioning international law and arbitration regime where wrongdoers are brought to justice and legal entities are required to meet their legal obligations and to discharge their legal liabilities.

212. Wrongdoers, of course, have rights and the proper procedures must be followed fairly. They also have responsibilities including responsibilities to comply with their legal obligations and to discharge their legal liabilities. There is also a very strong public interest in the Cayman Islands in ensuring that wrongdoers do not benefit and are seen not to benefit from their wrongdoing.

Preclusion

213. I now deal with the preclusion issue raised by the Applicants which they say informs both the discretion and is a self-standing point.

214. In light of my consideration of the public policy points and my conclusion above I can take the preclusion issue relatively shortly.

Applicants' position on preclusion

215. The Applicants say that the short point is whether a party can and should be precluded from raising a public policy issue under Article V(2)(b) of the New York Convention. The Applicants submit that the court should extend the time on that basis, as upholding the principle against preclusion embodies the purpose and spirit of Article V(2)(b).

216. The Applicants say that the purpose of Article V(2) is to protect the public interest and even if the parties do not raise arbitrability or public policy grounds the national courts can rely on the grounds in Article V(2) to refuse enforcement. They add that a party cannot be precluded from raising the grounds for refusal in Article V(2) and the parties cannot waive the public policy aspects safeguarding the public interest. The Applicants refer to various commentaries on the New York Convention Article V(2) and state that the grounds for refusal set out in Article V(2) "are to be observed by the court *ex officio* at all stages of the proceedings" (Reinmar Wolff "New York Convention, Article V(2)(b) [Public Policy], in Reinmar Wolff (ed.), New York Convention: Article-by-Article Commentary (2nd ed.), para 518).

217. The Applicants submit that even in circumstances where a party raises a defence on these grounds late, the court should nonetheless hear the parties due to the protected nature of Article V(2) grounds, which are intended to protect the public interest.

218. The Applicants say that it appears that the precise issue (Article V(2) and preclusion) is “not commonly litigated” (paragraph 43 of their skeleton argument). They say that the principle that a party should not be precluded from raising a public policy defence is reflected in the legislative regimes and court decisions of a number of civil and common law jurisdictions. The Applicants treat the court to a tour of the positions in England and Wales, Sweden, Germany, Switzerland, the United States of America, Australia and Singapore.

219. Mr Flynn sought to place disproportionate emphasis on six words appearing at the end of Reinmar Wolff ‘New York Convention, Article V(2) (b) [Public Policy]’ in Reinmar Wolff (ed), *New York Convention: Article-by-Article Commentary* (2nd ed.) at 518 in Section IV General Concept of Public Law sub-Section 6 Preclusion and Waiver:

“... The public policy defense is subject to preclusion and waiver to the extent that it protects only party interests, e.g. procedural irregularities. It is more an issue of terminology whether a public policy defense exists but is precluded or waived or whether such party conduct already prevents an irregularity from becoming a public policy violation. Where the enforcing State’s interests are affected, no party can effectively waive the public policy or be precluded from contending it ...”

220. The Applicants submit that the courts of England and Wales have considered the importance of hearing defences based in public policy, despite a party otherwise ordinarily being precluded from raising those defences due to national procedural rules. Mr Flynn refers to *Process & Industrial Developments Ltd v Federal Republic of Nigeria* [2018] EWHC 3714 (Comm) especially at [63] and [89], [2020] EWHC 239 (Comm) at [263] and [272] and *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46 which he says places the principle of finality in context.

221. Mr Flynn also seeks to draw an analogy with the state immunity cases including *Royal Embassy of Saudi Arabia (Cultural Bureau) v Costantine* [2025] UKSC 9, [2025] 1 WLR 1207 where at [47] Lord Lloyd-Jones JSC stated:

“There is, however, in section 1 (2) a clear direction to all courts and tribunals that effect should be given to immunity and this must be capable of overriding procedural rules.”

222. Mr Flynn was unable to refer to a similar comment or statutory provision in respect of act of state cases or other public policy grounds.
223. Article III of the UNCITRAL Secretariat Guide on the New York Convention expressly provides:
- “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon ...”
224. Paragraph 19 on page 83 states:
- “... the Convention does not refer to any specific set of rules, leaving it to each Contracting State to define the rules of procedure applicable to the recognition and enforcement of arbitral awards in its territory.”
225. The Applicants submit, as a “principled point” that a public policy defence under Article V(2)(b) of the New York Convention, as reflected in Section 7(3), should not be precluded or, alternatively, the court should take this into account as part of the overall discretionary assessment when considering all the circumstances of the case and the overriding principle of justice (paragraph 70 of the Applicants’ skeleton argument).
226. The Applicants submit that the court should extend time on “the distinct and principled basis” that challenges founded on public policy ought not to be precluded, upholding the purpose and spirit of Article V(2)(b).

Plaintiff’s position on preclusion

227. The Plaintiff defines the Applicants’ arguments on preclusion and Article V(2)(b) as the Proposed Public Policy Override and say that it is “unfounded in authority and wrong in principle” (paragraph 50 of the Plaintiff’s skeleton argument).
228. The Plaintiff says that the closest relevant authority (*Soinco*) considered an application for an extension of time to challenge the enforcement of a New York Convention award on public policy grounds. The Plaintiff adds that nothing in the judgment suggests that either the parties submitted

or the court considered that the mere fact that the challenge was based on public policy grounds meant that the extension was bound to be granted.

229. The Plaintiff submits that procedural rules limiting the time in which an award debtor can challenge an enforcement order are permitted by Article III of the New York Convention which provides that recognition and enforcement of arbitral awards are to be carried out “in accordance with the rules of procedure of the territory where the award is relied upon”. The Plaintiff says that this understanding is reflected in the jurisprudence.
230. Mr de Verneuil Smith refers to *Arbitration Law* by Robert Merkin KC (2025) at 19.65 and an application in England to enforce a New York Convention award being governed by Part 62 of the CPR “but the general provisions of the Civil Procedure Rules are also applicable so that if their ordinary application leads to the failure of an application for enforcement, that does not amount to a refusal of enforcement under the New York Convention.” The author at footnote 2 cites *Diag Human v Czech Republic* [2013] EWHC 3190 (Comm) applied in *Wuhu Ruyi Xinbo Investment Partnership v Shandong Ruyi Technology Group Co Ltd* [2024] SGHC 308. In *Diag Human* Burton J at [15] stated:

“[15] It is quite clear that the local court is free to impose its own procedural conditions, such as orders for disclosure, indeed time limits for evidence, and, in respect of compliance with those conditions, to make final or unless orders, and, in the event of failure to comply with such final or unless orders, to impose sanctions including dismissal. It is plain to me that this must also include security for costs, if otherwise appropriate, and so long as non-discriminatory; and the fact that there is an express remedy given by art VI, whereby a *defendant* may be liable for security in respect of the award and/or for costs, does not in my judgment take away the effect of the second sentence of art III, which permits the imposition of conditions, and hence inevitably of sanctions for non-compliance with them, including a dismissal, which would thus not be offensive to art V. I am satisfied that there is no need to take the cautious approach suggested by Mr Joseph of the imposition of a stay.”

231. In *Wuhu Ruyi* S Mohan Judge of the High Court of Singapore deals with *Diag Human* at [189] to [190] and at [190] states:

“*Diag Human* is thus authority that directly supports my conclusion that the Singapore courts can, in enforcement proceedings in respect of Convention Awards: (a) impose unless orders that prescribe the sanction of striking out of those enforcement proceedings; and (b) enforce that sanction in the event of non-compliance with the unless order.”

232. In the Cayman Islands those rules of procedure include Order 73 rule 31(8) of the GCR which provides that:

“Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the Court may fix, the respondent may apply to set aside the order and the award shall not be enforced until after the expiration of that period or, if the respondent applies within that period to set aside the order, until after the application is finally disposed of.”

233. The Plaintiff says that by providing for *ex parte* enforcement subject to a defined period within which the award debtor may apply to set aside the order, the GCR and the Grand Court have struck a balance between the public interest in refusing enforcement of awards that offered public policy and the public interest in the finality of arbitration. The Plaintiff says that a rule that an award debtor can never be time-barred from invoking the public policy exception under Article V(2), would undermine that balance, rendering procedural limits meaningless and allowing enforcement to be challenged at any time – potentially many decades after the order was made.

234. The Plaintiff says that an allegation of public policy within the meaning of Article V(2)(b) of the New York Convention does not operate to disapply applicable time limits.

235. The Plaintiff submits that in any event, even if the Proposed Public Policy Override were applicable (which the Plaintiff stresses it is not) it is satisfied by the court’s consideration of the extension of time application and does not require a decision on the set aside application. The Plaintiff says that the time limit in GCR O.73 r.31(8) does not prevent the award debtor from advancing a public policy challenge, because the court retains a discretion to extend time. The Plaintiff adds that the award debtor can advance the public policy point within the extension application and the court will consider its merits (just as it would for example with a jurisdictional challenge) when exercising its discretion. The Plaintiff says accordingly this erroneous argument does not provide

a basis for requiring the court to grant the extension of time application and to determine the set aside application on its merits.

Decision on preclusion

236. In my judgment Article V(2)(b) of the New York Convention is subject to local rules of procedure and it does not override the court's discretion as to whether or not to grant an extension of time to challenge an award. I reject the Applicants' arguments to the effect that Article V(2)(b) on a self-standing basis requires this court to extend time and allow the set aside application to go to a full hearing. Moreover there is nothing in these arguments which lead me to conclude, on a discretionary basis, that I should grant the extension of time and permit the set aside application to proceed to a full hearing.
237. The public policy arguments raised by the Applicants have not been precluded but have been considered in the context of the extension of time application. It is plain on a consideration of the Applicants' public policy grounds that there is nothing of substance in them worthy of further consideration by the court.
238. Article V.2(a) and (b) simply refers to recognition and enforcement of arbitral awards "may be refused" by the courts if it found that (a) the subject matter of the difference is not arbitrable or (b) the recognition on enforcement of the award would be contrary to the public policy of that country. Moreover Mr Flynn's tour of the commentaries on Article V.2 (a) and (b) and of the caselaw in other jurisdictions, by analogy, did not lead me to accept what Mr Flynn accepted was a "novel" point.
239. It is easy to see why it was a "novel" point and had not been raised before. It was in my judgment a bad point unsupported by authority and unjustified in principle. I had no hesitation in rejecting Mr Flynn's self standing preclusion argument and it carries no weight in the discretionary balancing exercise as it is simply a bad point. Not even the eloquence, apparent originality of thought, six words from Reinmar Wolff (taken out of context) and the dogged persistence of Mr Flynn can turn a sow's ear into a silk purse, or turn a bad point into a good one.

The degree of prejudice to the Plaintiff if extension is granted

240. I now consider the issue of prejudice.

Plaintiff's position on prejudice

241. The Plaintiff says that it has suffered and continues to suffer prejudice as a result of the Applicants' conduct.

242. The Plaintiff relies on the first affidavit of John Simon Reynolds ("Mr Reynolds") sworn on 6 January 2026 ("Reynolds 1"). Mr Reynolds says he is an English solicitor and a partner of Meysan Partners UK LLP with an address in London and his firm (along with Jones Day) represents the Plaintiff. At paragraph 6 he says he is responding to Hunt 1 and "addresses matters of fact rather than submissions". At paragraph 8 he says that save as other stated "the facts and matters set out in this affidavit are within my personal knowledge and are true". He adds "Where any fact or matter is not within my personal knowledge, I confirm that it is true to the best of my knowledge, information and belief, and is derived from the source that I identify."

243. The Plaintiff says that it deferred execution of the Cayman Order by not seeking a power of sale pending the determination of the DIFC Challenge but it did so on the basis that it would be able to proceed immediately with further execution steps once the DIFC Challenge was finally resolved (paragraph 99). The Plaintiff at footnote 96 of its skeleton argument cites Reynolds 1 paragraph 21 to support that statement. Paragraph 21 does not appear to support that statement. I think paragraph 22 is the relevant paragraph and it states:

"Contrary to the observation made by Mr Hunt [A] has suffered prejudice and continues to suffer prejudice as a consequence of the Applicants' conduct. Whilst [A] was prepared to defer the execution of the Enforcement Order in respect of the [B] shares (by not seeking a power of sale for the Receivers at the time of their appointment) while the DIFC Set Aside Application was ongoing (the Receivership Order having been made to hold the ring pending the determination of the DIFC Set Aside Application), this was on the basis that the Applicants' time to apply to set aside the Enforcement Order had long since passed, that no indication had been given that they intended to make such an out of time application, and that they were accordingly barred from making the same – so that [A]

anticipated it would be in a position to immediately take further steps to execute the Enforcement Order once the DIFC Set Aside Application was finally disposed of, or earlier if circumstances merited it. If the Applicants had challenged the Enforcement Order within the prescribed time-frame, [A] could either have applied for security in respect of any adjournment pending the DIFC proceedings to protect its position, and/or it could have defended (and defeated) the Applicants' challenge to the Enforcement Order at the same time as the DIFC Set Aside Application, thereby avoiding any further delay.”

244. Mr Reynolds also refers to delay (paragraph 23 of Reynolds 1), a risk of dissipation despite the existing freezing injunctions (paragraph 24 of Reynolds 1) and to further costs being incurred and the Applicants refusing to honour them (paragraph 25 of Reynolds 1).
245. I have criticised the Applicants for the unsatisfactory nature of the affidavit evidence placed before the court on their behalf. What is good for the goose is good for the gander.
246. Despite his statement at paragraph 6 of his affidavit Mr Reynolds does sometimes depart from “matters of fact” in his affidavit and descends into submissions, arguments and comments that should not appear in affidavits of fact. There is no evidence from A or B in respect of prejudice or what they were or were not prepared to do and what decisions they made and on what basis they made those decisions or what they anticipated or the grounds of their anticipation. From the factual evidence before the court however it can be seen that the Applicants' conduct has caused delay and additional costs.
247. The Plaintiff in effect says it has been prejudiced in waiting for a determination of the Power of Sale Summons.
248. The Plaintiff says that had the Applicants genuinely wished to preserve their position, they could have issued a set aside summons before 1 June 2023 and sought a stay (in which case the Plaintiff would likely have had the benefit of security) or pursued a Cayman application in parallel with the DIFC proceedings, thereby avoiding further delay being suffered by the Plaintiff. The Plaintiff says that the suggestion that, had the Applicants' acted in time and sought a stay “the parties would most likely still be in materially the same position that they are now” is wrong.

249. The Plaintiff says that the Applicants' reliance in the Cayman Islands on new arguments and Iraqi law evidence not advanced in the DIFC proceedings (outlined at paragraphs 77, 78 and 87 of its skeleton argument) underscores the prejudice caused by the Applicants' delay in challenging the Cayman Order.
250. The Plaintiff says that the delay caused by the Applicants' actions must be viewed against the Applicants' broader course of conduct:
- (1) the Applicants engaged in dishonest schemes that caused A and B losses exceeding US\$1.6 billion (now approaching US\$2 billion with post-award interest);
 - (2) the Applicants have failed to comply with any of their obligations under the Award and are actively resisting enforcement in a number of jurisdictions;
 - (3) the Applicants are subject to freezing injunctions in the Cayman Islands, the DIFC and the BVI and receivers have been appointed in the Cayman Islands;
 - (4) there have been difficulties with asset disclosure and related information;
 - (5) the Applicants have also repeatedly failed to comply with other court orders against them, including several costs orders.
251. The Plaintiff says that there can be no doubt that the Applicants are recalcitrant award debtors who have consistently sought to thwart and delay enforcement of the Award, and the set aside application is properly to be understood as a further attempt to achieve that objective. The Plaintiff says that against the background to this case, any further delay would materially prejudice the Plaintiff by prolonging an already protracted enforcement process.
252. The Plaintiff adds that permitting the set aside application to proceed would result in yet further losses to the Plaintiff as it would incur yet further costs which, if (as expected) it prevails, it is extremely unlikely to recover without further protracted enforcement action. It is stated that to date, the Plaintiff has won costs orders for approximately US\$2.3 million which remains unpaid.

Applicants' position on prejudice

253. The Applicants say that the Plaintiff's contention that it has suffered serious or irreparable prejudice is not one based in fact. The Applicants say that the only asset to enforce against in the Cayman Islands is Z's 75% interest in X and in turn X's 56% shareholding in B. The Applicants say that this is not a situation where there are cash or other liquid assets in the Cayman Islands for which the Plaintiff has been delayed in its ability to seek, via the Joint Receivers, to execute over during the pendency of the delay. The Applicants say that the Plaintiff has not been denied "any opportunity out of enforcement" (paragraph 91 of the Applicants' skeleton argument).
254. The Applicants say that in reality the Plaintiff was not actively seeking to enforce in the Cayman Islands until 17 July 2025 after the conclusion of the DIFC appeal and after the Plaintiff had been made aware of the Applicants' own intended application. The Applicants say that Mr Reynolds "gives evidence for the Plaintiff that the Plaintiff":
- "... was prepared to defer the execution of the Enforcement Order ... while the DIFC Set Aside Application was ongoing" (paragraph 22 of Reynolds 1).
255. The Applicants refer to the fifth affidavit of Jean-Pierre Harb ("Mr Harb") sworn on 17 July 2025 ("Harb 5"). Mr Harb says that he is a partner in the Paris office of Jones Day which, with Meysan Partners, serves as counsel for the Plaintiff. The Applicants refer to paragraphs 12 and 20 of Harb 5 and say the Plaintiff's own position is that the Power of Sale Summons is designed "to enable the transfer of those shares to the [Plaintiff] in order to streamline any future recoveries" (paragraph 12) and as "a means of achieving control over the recovery pathway for enforcement" (paragraph 20). The Applicants say that the Plaintiff is seeking to improve its future control over possible enforcement of the part of the Award in the name of B, through obtaining control of Mr Z's shares in X. The Applicant says that there is no evidence of any enforcement proceedings against the Applicants in any jurisdiction which are imminently likely to result in recoveries beyond A's entitlement under the Award.
256. I have considered the Applicants' position in respect of the Plaintiff's criticisms of non-compliance and deliberate obstruction and frustration of the enforcement process (in particular paragraphs 88-90 of the Applicants' skeleton argument and Mr Flynn's robust defence of the Applicants' position in his oral submissions at the hearing).

257. The Applicants say that Mr Fox explains that whilst an alternative course may have been to apply to set aside the Cayman Order on or before 1 June 2023 and then seek to stay that application pending the outcome of the DIFC Challenge, it appears from all of the materials that if that course of action had been taken “the parties would most likely still be in materially the same position that they are now” (Fox 1 paragraph 14). Mr Fox at paragraph 18(e) of Fox 1 also gives evidence that the Applicants did on 12 September 2024 request a consensual stay of the Cayman Order pending the outcome of the DIFC appeal and on 18 September 2024, the Plaintiff refused. It is difficult to understand why the Applicants did not then make their application for an extension of time, a set aside order and a stay pending the determination of the DIFC appeal. That failure is not adequately explained and no good reason for it is covered in admissible evidence.
258. The Applicants say that the severe prejudice that they would suffer compared to what they say is the absence of prejudice to the Plaintiff weighs in favour of allowing the set aside application to proceed to a determination on the merits.
259. The Applicants say that the Plaintiff’s position is secured in light of the asset freezing injunctions and the appointment of the receivers.
260. In addition to the significant sum to be enforced against the Applicants, they say that a significant portion of their liability under the Award is currently owed (indirectly by way of a liability to B) to Z due to his indirect shareholding of B and if the set aside application falls away, the Plaintiff will seek to proceed with its Power of Sale Summons and this will deprive Z of his interest in the Award for little or no consideration to him.
261. Mr Flynn stressed that delay and additional costs would have been incurred anyway even if a set aside application had been filed promptly as it would have had to await the outcome of the DIFC Challenge. Mr Flynn submitted that there was an absence of significant prejudice to the Plaintiff and to shut the Applicants out would be disproportionate and highly prejudicial to them.

Decision on prejudice

262. On this topic the Applicants have sought to minimise and belittle the prejudice to the Plaintiff and the Plaintiff has sought to emphasise and on occasion exaggerate the prejudice to it. The Plaintiff

is however fully justified in highlighting the prejudice in the form of further delay and additional costs.

263. I reject the message that Mr Flynn was attempting to communicate on behalf of the Applicants to the court to the effect that even if an application to set aside had been promptly made and a stay granted the delay and additional costs the Plaintiff now complains about would have been incurred anyway. In my judgment there is no doubt that the manner in which the Applicants have conducted themselves has caused additional delay and additional costs and that is prejudicial to the Plaintiff. If an extension was granted the Plaintiff would suffer prejudice in terms of further delay and additional costs over and above the delay and costs which would have been incurred if the Applicants had proceeded properly.
264. On a scale of 1-10 with minimal prejudice being 1 and maximum significant extreme prejudice being 10, I would put the prejudice to the Plaintiff in the present context at about 4. It is materially more than minimal prejudice but not close to significant extreme prejudice. It consists mainly of further delay and additional costs which may not be immediately recoverable or at least difficult, expensive and time consuming to recover.
265. The prejudice to the Plaintiff must be balanced against all other relevant factors. Although *Soinco* and the other relevant authorities do not refer to prejudice to the applicant if an extension is refused I do not ignore the position of the Applicants if the court refuses to grant an extension of time. I have taken it into account when considering the overriding objective and the overall justice of the case. I now turn to the overriding objective and the overall justice of the case.

The overriding objective

266. In exercising the court's discretion as to whether or not to extend time I must "seek to give effect to the overriding objective" (2.1 of the preamble to the GCR). The overriding objective is to enable the court to deal with matters in a "just, expeditious and economical way."
267. At paragraph 95 of the Applicants' skeleton argument it is stated that the Applicants' approach was informed by a desire to avoid unnecessary duplication of proceedings and costs. There is no evidence from the Applicants themselves as to their "desire". It is added that while the DIFC Challenge was on foot, and while enforcement in Cayman was not being actively pursued, the

Applicants reasonably sought to avoid burdening the court with a set aside application that may have been rendered otiose by success in the DIFC. I am unimpressed with such arguments.

268. The way in which the Applicants failed to comply with the Cayman Order and belatedly put on an application for an extension of time and an application to set aside the Cayman Order has not assisted the court in furthering the overriding objective of dealing with matters in an expeditious and economical way.
269. A just decision will be the result of balancing the various relevant factors.
270. The way in which the Applicants have delayed their application has not ensured “the normal advancement of the proceeding” (1.2(b) of the preamble to the GCR).
271. The conduct of the Applicants has not saved expense (see 1.2(d) of the preamble to the GCR). It has significantly increased expense.
272. The Applicants say that I should act in a proportionate way and not shut them out of their public policy arguments having regard to (1) the amount of money involved (2) the importance of the case and (3) the complexity of the issues. Stripped of all the unnecessary detail the issues raised by the Applicants upon proper and considered analysis, are not particularly complex when compared to other issues that come before the FSD. I accept that US\$2 billion is a lot of money and I am told by counsel that the Award concerns the highest amount of an arbitration award ever to come before the Cayman courts. I accept that this case is important to the Applicants, the Plaintiff and the Cayman Islands.
273. Despite the award in its favour made on 20 March 2023 the Plaintiff has still not received all the money due to it from the Defendants. The Plaintiff says it has only recovered a very small proportion of the total. The Plaintiff says that its recoveries to date amount to only approximately US\$4.5 million, equalling to approximately a quarter of one percent of the Award debt. The Plaintiff says that to date A has won costs orders for approximately US\$2.3 million which remain unpaid. The Plaintiff estimates their total enforcement costs so far as approximately US\$18 million (paragraph 68 of Reynolds 1).

274. The way in which the Applicants have approached the proceedings in the Cayman Islands has not made the best use of court resources (see 1.2(e) of the preamble to the GCR). The Applicants could have easily filed a set aside application within the time limit and then applied for a stay and offered security. They did not do that. Instead they failed to comply with the Cayman Order and brought a belated application for an extension of time which has taken up a significant amount of court resources to determine.

275. The overriding objective and the overall justice of the case requires the court to dismiss the application for an extension of time.

Conclusion

276. I dismiss the application for an extension of time for the reasons stated in the judgment and am minded to do so with costs against the Applicants. If costs cannot be agreed then any concise written submissions (no more than 5 pages) should be sent to my PA within 14 days of the delivery of this judgment.

Order

277. The attorneys should send to my PA a draft order (agreed as to form and content) reflecting the determinations in this judgment within 7 days of its delivery.

Power of Sales Summons

278. The parties should within 21 days of delivery of this judgment file (if possible on an agreed basis or if not separately with concise submissions in support of a maximum length of 5 pages) draft directions towards the hearing of the Power of Sale Summons, estimate as to duration and joint non-availability.

David Doyle

**THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT**