IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO 193 OF 2023 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND

IN THE MATTER OF KES POWER LIMITED

BETWEEN

IGCF SPV 21 LIMITED

Petitioner/Respondent

and

(1) AL JOMAIH POWER LIMITED

(2) DENHAM INVESTMENT LTD

Respondents/Applicants

Before: **The Hon. Justice Segal**

Appearances:

Iain Quirk KC instructed by Jonathan Stroud and Amandy Jimenez of the Bedell Cristin Cayman Partnership for Al Jomaih Power Limited and Denham Investment Limited

Graham Chapman KC instructed by Conal Keane and Niall Dodd of Dillon Eustace Cayman for IGCF SPV 21 Limited

Heard: **29 November 2024**

Draft judgment circulated: **3 December 2024**

Judgment delivered: **10 December 2024**

SUMMARY
(not part of the judgment)

Leave to appeal - application to dismiss winding up petition under section 95(2) of the Companies Act denied – interlocutory or final order – application included application for an injunction – applicability of section 6(f)(ii) of the Court of Appeal Act – if leave required, should leave be granted – application for stay pending outcome of appeal

Introduction

1. On 11 October 2023 I heard an application (the ***Application***) by Al Jomaih Power Limited (***Al Jomaih***) and Denham Investment Ltd. (***Denham***) (collectively the ***Applicants***) made by summons dated 28 July 2023 (the ***Summons***) for declaratory relief and to have the winding up petition (the ***Petition***) dated 7 July 2023 presented by IGCF SPV 21 Limited (the ***Petitioner***) in respect of KES Power Limited (***KESP***) dismissed, or to restrain its further pursuit. The Applicants and the Petitioner are parties to, and the Summons was filed in, the Petition proceedings.

2. At the conclusion of the hearing, I gave an *ex tempore* judgment dismissing the Application and said that I would provide fuller written reasons in due course. This I did in my judgment handed down on 31 May 2024 (the ***Judgment***).

3. The order to give effect to the Judgment (the ***Order***) has recently been made. After various recitals including a recital listing the relief (five orders) sought in the Summons and defining the application covering and seeking this relief as the Strike-Out Application, the Order simply states that "*the Strike Out Application is dismissed*." Orders consequential on the dismissal of the Application were

made by consent (but after various disputes needed to be resolved) in an order dated 16 September 2024 including an order dealing with the costs of the Application and directions relating to Applicants' proposed applications for leave to appeal and for a stay of the Order pending the determination of the appeal (including the listing of a hearing of those two applications).

4. Subsequently, the Applicants filed and served (a) a summons dated 25 September 2024 (the ***Leave Summons***) seeking leave to appeal against the Order and (b) a summons of the same date (the ***Stay Summons***) seeking a stay of the Order pending the outcome of the appeal or the hearing of a further application to the Court of Appeal for leave to appeal. The Application is supported by the Affidavit (***Mallon 1***) of Mr. Leigh Mallon, a partner in Steptoe International (UK) LLP, the English solicitors acting for the Applicants.

5. The Petitioner opposes the granting of leave to appeal, to the extent that leave is required, and the stay. The Third Affidavit of Mr Casey McDonald (***McDonald 3***) was filed on behalf of the Petitioner.

6. The Leave Summons and the Stay Summons were heard on Friday, 29 November 2024. Mr. Iain Quirk KC appeared for the Applicants and Mr. Graham Chapman KC appeared for the Petitioner. At the end of the hearing I informed the parties that I would prepare a short judgment setting out my decision with brief reasons and distribute that early in the following week (commencing 2 December). This is that judgment.

7. Four issues arise for decision:

   (a). is the Order a final order so that the Applicants may appeal it as of right (the ***Final Order Point***)?

   (b). if not, and instead the Order is to be characterised as an interlocutory order, are the Applicants entitled as of right to appeal the dismissal of their application for an injunction (the ***Section 6 Point***)?

   (c). if leave to appeal the Order is generally required, or leave is required only in respect of parts of the Order, should leave be granted (the ***Leave Point***)?

(d). if leave is granted, should further steps in the Petition be stayed pending the outcome of the appeal (the ***Stay Point***)?

8. I have decided that:

(a). as regards the Final Order Point, the Order, for the purposes of deciding whether leave to appeal is needed, is to be characterised as a final order. Therefore, the Applicants may appeal the Order as of right without the need for leave.

(b). while the Section 6 Point does not arise in view of my decision on the Final Order Point, since the issue has been argued (and recognising that applying the distinction between final and interlocutory orders is not always straightforward) I will explain how I would decide it. In my view, if the Order is not properly characterised as a final order but instead is to be treated as an interlocutory order, the Applicants are not entitled to appeal as of right (pursuant to section 6(f)(ii) of the Court of Appeal Act (2023 Revision) (the ***COAA***)) the Court's refusal to grant their application for an injunction.

(c). as regards the Leave Point, once again this does not arise in view of my decision on the Final Order Point but I will briefly explain how I would have decided it. Had leave been required, I would have refused leave on the basis that I am not persuaded that the Applicants' proposed appeal has a realistic prospect of success or raises an issue which should be examined by the Court of Appeal in the public interest. Had the Applicants wished to proceed with an appeal, they would have needed to persuade the Court of Appeal on these points.

(d). as regards the Stay Point, a limited stay should be granted so that there will be no hearing of the Petition before the appeal has been finally determined. In my view, it would be wrong to decide the Petition before the appeal has been concluded since to do so (and certainly to make a winding up order) would render the appeal nugatory. I also do not consider that it is appropriate to put the parties to the costs of a trial before the appeal has been decided. But it does seem to me that the interests of, and prejudice to, the parties can be fairly balanced by giving directions for further steps to be taken in the Petition up to the filing of

evidence and before the listing of the trial so that, if the appeal is unsuccessful, the Petition can be brought on for trial promptly and only with minimal further delays.

9. I note that both the Leave Summons and the Stay Summons sought orders that costs be in the cause and I do not believe that there was any dispute about this. In any event, these seems to me to be the appropriate costs orders to be made.

The Application and the relief sought in the Summons

10. The relief sought and set out in the Summons was as follows:

(a). a declaration that on a true construction of schedule 4 (Reserved Matters) (Liquidation) of the SHA the Petitioner was in breach of the SHA by, and prohibited from, presenting the Petition on the ground that the Applicants had not consented to the presentation of the Petition.

(b). a declaration that the Petition had been presented in breach of the SHA (the ***Declaration***).

(c). an injunction restraining the Petitioner from prosecuting the Petition in breach of SHA (the ***Injunction***).

(d). an order that the Petition be dismissed pursuant to section 95(2) of the Companies Act (2023 Revision) (the ***Act***).

(e). an order that the Petitioner pay the Applicants' costs of and occasioned by the Summons on the indemnity basis, to be taxed if not agreed.

The Final Order Point - is the Order a final order so that the Applicants may appeal it as of right?

11. In my view, properly characterised, the Application sought the determination of what is in substance a separate and preliminary issue raised by the Applicants by way of a challenge to the Petitioner's right to present the Petition. The Applicants sought to establish and enforce their statutory right to

have the Petition dismissed. The Application was to, and would, finally determine that matter whichever way it was decided.

12. Prior to the filing of the Leave Summons and the Stay Summons there had been some debate between the parties as to whether the Judgment had dealt with the issue of whether the Court's order would be, and then whether the Order was to be, treated as an interlocutory or final order.

13. In the Judgment, I had recorded (at [21]) the submission made by the Petitioner that:

> "*…. the Applicants were seeking an order pursuant to GCR O.14A disposing of the Petition on a question of construction of Schedule 4 of the SHA and on a question of law in respect of the application of s.95(2) of the Act to the present case, on the basis that the issues were suitable for determination by the Court without a full trial of the action. The Applicants were accordingly invoking a summary procedure and not one in which any findings of fact could be made by the Court. The Applicants' position was that the effect of the contractual material they relied on was that the Petitioner was precluded from exercising its statutory right as a shareholder of KESP to petition for its winding up*."

14. The Petitioner was clearly right to make this point and raise the fact that the Summons required the determination of the issues identified before, rather than at, the trial of the Petition. But no objection was raised to those issues being dealt with by way of a summons in the Petition or an application made to adopt a different procedure. I took it to be the case that both sides were content to proceed to have the Application dealt with on the written evidence adduced on, and upon, the hearing of the Summons.

15. I had then gone on (at [36]) to note, reflecting the Petitioner's submission, that the Application was being dealt with on a summary basis by reference only to affidavit and not oral evidence:

> *"It also seems to me that on this application greatest weight is to be given to the documents and the purpose of the wording in Schedule 4 as can be discerned from those documents. I do take into account the evidence filed as to the relevant factual matrix (the facts and circumstances known to or assumed by the parties at the time that the SHA was entered to) but this has been limited and is contested (see for example the challenge to Mr Ashary's evidence in Mr McDonald's Second Affidavit). As the Applicants themselves pointed out and the Petitioner reiterated, the application is being dealt with on an interlocutory and summary basis so that the Court is not in a position to resolve disputed issues of fact."*

16. When the issue was raised with me following the distribution of the draft judgment I had said as follows (in an email dated 31 May 2024 sent by my PA to the attorneys):

> *"The Judge has accepted the parties' agreed corrections but has retained the reference to "interlocutory" in paragraph 36.*
>
> *The Judge has explained that his use of the term in this paragraph was based (as Dillon Eustace correctly noted in their email dated 30 May) on Mr Rubin KC's reference at the hearing to the application being "an interlocutory matter" as recorded at page 61 of the agreed transcript at lines 6 to 9. Mr Rubin KC's reference to "interlocutory" was in the context of the Court's approach to resolving disputes of fact (based only on affidavit evidence) and paragraph 36 of the judgment reflects what was said and deals with the same context and issue."*

17. As I explained at the hearing (on 29 November), I was focused (in the Judgment and in my email response) on the Applicants' decision (accepted by the Petitioner) that the section 95(2) issue be dealt with by the Court and resolved on the basis of affidavit evidence only and the rule that in such cases (where there is no cross-examination of witnesses at a hearing or a trial) the Court has to be cautious about making findings in relation to, and resolving, disputed issues of fact. My reference to the Application being dealt with "*on an interlocutory and summary basis*" was intended to reflect that and to indicate that I was forming a view on the factual matrix and the facts relevant to the construction of the Shareholders Agreement dated 15 October 2008 (as amended) (the ***SHA***) primarily by reference to the documents and the undisputed facts revealed by the affidavit evidence and having regard to limitations resulting from there being no cross examination of the witnesses.

18. As I also said at the hearing, and I have already noted, I regarded the Applicants' decision to adopt (and the Petitioner's decision not to challenge) the procedure selected by the Applicants as an acceptance that the Application (and the distinct issues raised by it) would be decided on this basis. It would have been open to the Applicants and the Petitioner to have applied for cross-examination of the witnesses or to have said that the Application could not be decided without resolving any disputed issues of fact by cross-examination. It could have been argued that the issues raised by the Summons could only properly be decided after trial of the Petition. But no applications or submissions seeking such orders were made. While it was open to the Court to direct that witnesses be cross-examined or that the issues raised only be decided after the trial of the Petition, it did not seem to me to be necessary or appropriate to do so where neither party had sought this (and were content to adopt the procedure being used) and where the written evidence did not reveal any

material disputes of fact that were in issue and critical to the determination of the dispute as to the construction of the SHA (I would note the modern approach, followed at least since the English Court of Appeal's decision in *Alipour v Ary* [1997] 1 BCLC 557, under which the Court may, if appropriate, permit disputes relating to standing or the right of the petitioner to present the petition being dealt with within, rather than outside, the petition proceedings). It might well have been appropriate and helpful, however, to have addressed and spelt out at the hearing of the Application what I have taken to be agreed and implicit, namely that the application was intended finally to resolve the issue of whether the Petition must be dismissed pursuant to section 95(2) of the Act.

19. I pointed out at the beginning of Mr Quirk KC's submissions at the 29 November hearing that the parties should not take the references in the Judgment and 31 May email to the Application having been dealt with on an interlocutory and summary basis as an indication that I had formed a view or decided that the Order (or the Application) should be treated as an interlocutory order for the purpose of considering whether leave to appeal was needed.

20. I told Mr. Quirk KC that it seemed to me, subject to hearing counsel's submissions and argument on the point, that it was at least strongly arguable that, having regard to and applying the approach taken by the Court of Appeal to the distinction between final and interlocutory orders in its recent decision in *Minsheng Vocational Education Company Limited v. Leed Education Holding Limited* (appeal No.19 of 2023, unreported, 2 September 2024) (***Minsheng***), that the Order should be treated as a final order in relation to the separate matter raised in the Application, namely whether the Petitioner was prohibited from presenting the Petition by section 95(2) of the Act because doing so was in breach of the SHA. On this basis, the Applicants would be entitled to appeal as of right.

21. I said that it seemed to me strongly arguable that the Application raised a preliminary and separate issue (even though there had been no order for the trial of a preliminary issue within the Petition) which would be finally determined whether the Application was granted or dismissed. If granted, the Court would have determined that the Petitioner was precluded by reason of the terms of the SHA from presenting the Petition and that the Petition must be dismissed. If dismissed, the Court would have determined that the Petitioner was not precluded by reason of the terms of the SHA from presenting the Petition and that the Petition could proceed.

22. At the hearing, Mr. Quirk KC adopted this approach and submitted that it was correct. Mr. Chapman KC said that he accepted that this approach was correct and would not object for this reason to a decision that the Order was final and that as a result the Applicants were entitled to appeal the Order as of right. Accordingly, it was accepted by the parties at the hearing that the Order is a to be treated as final order and that leave to appeal is not required.

23. This does seem to me to be the right approach and I must explain the analysis a little further.

24. A party may appeal as of right a final order but leave is needed in respect of an interlocutory order.

25. Section 6(f)(ii) of the COAA states that:

> *"…[n]o appeal shall lie – without leave of the Grand Court or of the Court, from an interlocutory judgment made or given by the Judge of the Grand Court – ….. except (ii) where an injunction or the appointment of a receiver is granted or refused."*

26. Rule 12(3) of the Court of Appeal Rules (2014 Revision) (the ***Rules***) states that "*a judgment or order shall be treated as final if the entire cause or matter would … have been finally determined whichever way the court below had decided the issues before it*." Sub-rules 12(5) and 12(6) set out various types of order that are to be treated as interlocutory. Rule 12(6)(j) refers to "*an order striking out an action or other proceedings or any pleading under GCR Order 18 rule 19 or under the inherent jurisdiction of the Court."*

27. The President in *Minsheng* held that Rule 12(3) makes it clear that the application approach (as explained by Lord Hamblen in *Chhina v Ismail and Another* [2024] UKPC 10) underpins the assessment of whether an order is final or interlocutory in this jurisdiction. Under the application approach, an order is final if it results from an application which finally determines the matter for whichever side the decision is given and the characterisation of the order depends on the nature of the application rather than the order.

28. In *Minsheng*, the Court of Appeal, reversing my decision to the contrary, held that the injunction in that case was an interlocutory order (on the basis that Rule 12(6)(r) states than an order granting an interlocutory injunction is to be treated as an interlocutory order and the order I had made in that case was to be treated as an interlocutory injunction since it was parasitical on the underlying

litigation – in that case the foreign arbitrations – and amounted to relief granted to preserve the status quo pending the determination of the arbitration, until when the parties could still apply for seek further substantive directions).

29. In the present case, as I have noted, the parties referred to the Application as being, and the Order defines the Application as, a strike-out application. Strike-out applications, as I have said, are specifically covered by Sub-rule 12(6)(j) and are stated to be interlocutory applications. As Lord Hamblen said at [11] of his judgment in *Chhina*, an application for (and I would add in the nature of) a strike-out is treated as interlocutory because it will not inevitably result in the final determination of the proceedings. If dismissed, the proceedings will continue to trial.

30. But in my view, the Application is not a strike-out application. The relief sought was not based on GCR O.18, r.19 and was not based on the grounds that support a strike-out application as set out therein. Rather the Applicants sought the dismissal of the Petition based on, and to enforce, their statutory right under section 95(2).

31. Even though, as I have noted, there was no application or order for a trial of the section 95(2) point as a preliminary issue, that is what in substance was sought and how the Application was dealt with.

32. It seems to me that an order made following the determination of a preliminary issue (and an order in the nature of the determination of a preliminary issue) is not to be treated as interlocutory. It is true that such an order does not determine the "*entire cause*" contained in the Petition. But it does dispose of a critical separate issue arising in the Petition proceedings and seeks to do so once and for all.

33. I was not shown (in view of the way in which the Final Order Point came to be argued) any authorities on the treatment of orders made to determine a preliminary issue for the purpose of the final/interlocutory order distinction and therefore it would be inappropriate to seek to deal with the point in any detail. However, I would note the helpful discussion of the approach to be adopted when seeking to characterise orders of a type not listed in, and characertised by, Rule 12 to be found in the editorial notes to the 2024 Hong Kong White Book (to which references in this Court are encouraged: see Grand Court Practice Direction No 2 of 2024). The notes to O.59, r.21 (Appeals to the Court of Appeal) at 59/21/4 state as follows:

> *"Where is required to determine whether a judgment or order is or is not interlocutory in a case where such judgment or order is does not fall into one of the classes referred to in O.59, r. 21 … the test to be applied is still the "application test" namely that the determination of the application must finally dispose of the action or finally determine the relevant issue whichever party succeeds on the application …. But Chan PJ observed also in Shell Hong Kong v Yeung Wai Man (2003) 6 HKCFAR 222 [13] [in the Hong Kong Court of Final Appeal] that "A broad common-sense approach should be adopted. If the issue dealt with and determined by the court is a substantive part of the final trial or a crucial issue in the case or a point that goes to the root of the final trial or a dominant feature of the case then the order or judgment even if does not finally dispose of the whole action should nevertheless be regarded as a final judgment."*

34. It is also worth noting the following passage from the judgment of Chan PJ:

> "*where an order or judgment given in an application does not finally dispose of the whole action but only an issue in the action, it is necessary to consider the purpose and substance of the application, the issue dealt with and determined by the court and the effect of a determination of this issue on the rights of the parties, the further conduct of the proceeding and the final disposal of the whole action…"*

35. It seems to me that adopting this approach, for the reasons I have given, the Order in this case is to be treated as a final order.

36. I would add that this characterisation of the Application and Order fits the real purpose and nature of the Application which was to obtain a final determination of whether the Petitioner was prevented from bringing the Petition by reason of the SHA and section 95(2) of the Act. In my view, it would be inconsistent with the parties' expectations and intentions, and the proper procedural characterisation of the Application, to say that the Applicants would be able to apply again subsequently, on the basis of new evidence or changed circumstances, for relief under section 95(2) of the Act, as would at least generally be the position on an interlocutory application or order.

The Section 6 Point - do the Applicants need leave in order to appeal the dismissal of their application for the Injunction?

37. The Applicants argued that leave was not required for an appeal of the Order insofar as the Order dismissed their application for the Injunction. They relied on section 6(f)(ii) of the COAA.

38. The Applicants argued that the effect of section 6(f)(ii) of the COAA is that they may appeal as of right, without leave, the part of the Order dismissing their application for the Injunction. They had applied (in the Summons and in their written and oral submissions) for an injunction restraining the Petitioner from prosecuting the Petition and their application was refused. While the application for the Injunction was to be treated as being in the alternative (to an order dismissing the Petition) this did not matter for this purpose. The Applicants had made an application and were entitled to apply for injunctive relief, which application was distinct from the other applications for relief in the Application, and it was open to the Court to make an order restraining the Petitioner from prosecuting the Petition rather than an order to dismiss the Petition. The requirements of section 6(f)(ii) of the COAA were therefore satisfied and the Applicants could appeal the refusal to grant the Injunction as of right. It would then follow that the Court should grant leave in respect of the other applications (for the Declaration and the order to dismiss the Petition) since if the appeal of the refusal to grant the Injunction was in any event to be considered by the Court of Appeal it would be convenient and appropriate to allow the Court of Appeal to deal with the closely related challenges to those other applications. It would also be wrong to limit the issues which the Court of Appeal could consider by refusing to grant leave to appeal on those other related applications.

39. The Petitioner submitted that section 6(f)(ii) of the COAA did not apply in this case. They argued that the Injunction was sought solely on the basis that there had been a breach of a negative contractual stipulation (in schedule 4 of the SHA). Therefore, the only basis on which an injunction was sought was the same basis upon which the strike-out of the Petition was sought, namely that there had been a breach of a contractual provision in presenting the Petition. There was only one issue, namely whether the Petitioner was contractually barred from bringing the Petition. The inclusion of a plea for injunctive relief in the Summons was unnecessary. Accordingly, the Petitioner submitted, it could not be correct that the Applicants fell within section 6(f)(ii) since that sub-section could only sensibly be read as applying to cases in which there was a substantive and meaningful application for injunctive relief which was granted or refused on an interlocutory basis by the Court. There was, on a proper analysis, no application for injunctive relief in the present case, and the Court was not faced with, and did not determine, an application for injunctive relief.

40. There are two related reasons why the application for the Injunction should not be treated as separate (and severed) from the applications for the Declaration and the order to dismiss the Petition. First, the Injunction could only be made if, and after, the Court had decided to grant the

Declaration, which would require dismissal of the Petition, and so was sought to restrain conduct (the continuation of the Petition proceedings) that was no longer possible (because the Petition would have been dismissed). Second, even if it could be said that the Injunction could take effect and enjoin relevant conduct, it only sought to give effect to an enforce the other orders (the Declaration and the order to dismiss the Petition). In these circumstances, the application for the Injunction should not be treated as separate and severable from the other primary applications for the purpose of deciding whether section 6(f)(ii) applied and leave was required.

41. In my view, the core and substance of the Application was for an order dismissing the Petition in accordance with section 95(2) of the Act. Since the Court would, on granting the Application, be bound (by the terms of that subsection) to order that the Petition be dismissed the injunction sought could have no substantive and separate effect since the petition proceedings would immediately be terminated upon the Court's order granting the application being made (for this reason the injunction would not have been needed and probably not granted). The application for an injunction therefore had no independent existence (it added nothing to, and was not independent of, the applications for a declaration and order dismissing the petition) and should not in my view be treated as covered by section 6(f)(ii) of the COAA. To do so would effectively allow the Applicants to appeal as of right the Court's refusal to make the Declaration and dismissal order sought because the appeal of the refusal to grant the Injunction would require a reconsideration of the dismissal of those other applications (or to put it another way, on appeal the Court of Appeal could not grant the injunction without deciding to make the declaration sought and then to dismiss the Petition and so would be required to give leave to appeal the refusal to make those orders in order to be able to deal with the injunction appeal). It would, in my view, be inconsistent with the purpose of section 6(f)(ii) of the COAA to treat (the dismissal of) such an application for this type of injunctive relief as giving rise to a freestanding appeal as of right where to do so would in substance permit an appeal of right against the (dismissal of the) other applications for which leave would otherwise clearly be required.

42. In a case in which a single application includes applications for different types of relief including injunctive relief, it is necessary, for the purpose of determining whether an appeal as of right is available under section 6(f)(ii) of the COAA in respective only of the claim for an injunction, to consider whether the application for the injunction is for freestanding relief (so as to be separate and severable from the other applications for relief and to be independent of them). If the injunctive

relief sought is only a means of giving effect to other orders made on the application (and dependent on that other relief being granted) it should not be entitled to separate treatment for the purpose of deciding whether leave to appeal is required. Otherwise, an applicant would always be able to avoid the need for leave simply by tacking on and adding to their prayer for relief an application for an injunction which would and could not be granted (because it would seek to enjoin the continuation of proceedings which the Court had ordered be terminated).

43. This approach seems to me to be consistent with the approach taken by Justice Smellie (as he then was) in *Grupo Torras S.A. and another v Bank of Butterfield International (Cayman) Ltd and others*, 13 CILB 15 (7 September 1995, discussed in Roye, *Civil Litigation in the Cayman Islands* 2nd ed., at page 411-412 although the judgment is wrongly attributed to Chief Justice Harre). This is a case to which I referred the parties to in advance of the hearing which dealt with a predecessor to section 6(f)(ii) of the COAA and which, although distinguishable, is in my view a helpful guide to the approach to be adopted in cases where multiple applications for different relief are made and as to the purpose of permitting appeals as of right in relation to interlocutory injunctions.

44. Justice Smellie had to consider whether an order for discovery related to a Mareva injunction was to be regarded as a part of the injunction for the purpose of determining whether leave to appeal was necessary. He held that the onus is on the party seeking to appeal to show an entitlement to appeal as of right and decided that since the discovery order had been granted primarily to assist the plaintiff's tracing claim and not to police the injunction, for the purposes of the leave requirement the discovery aspects of the order were separate and severable from the injunctive aspects so that leave was required in relation to them. It could not be said that merely because there was an appeal as of right in respect of the claim for an injunction there was also an appeal as of right in respect of the discovery orders. The injunction in that case was a Mareva injunction and clearly granted separate substantive interlocutory relief pending the conclusion of the underlying proceedings. The discovery orders were separate from it.

45. Justice Smellie held that when the predecessor to section 6(f)(ii) of the COAA referred to an injunction "*it means just that, not also other types of orders which may be made ancillary to or in furtherance of an injunction.*" The sub-section "*contemplates the special nature of [an interlocutory injunctive order] and the possible need to seek relief from it by way of appeal on the expedited basis .. without having first to obtain leave*." In the present case, the reference in the sub-

section to an injunction should not be treated as referring to an injunction which is only ancillary to, or in furtherance of, the other relief sought and which has to be granted before the right to injunctive relief arose. The type of injunction sought on the Application was not in the nature of an interlocutory injunction in relation to which a separate expedited appeal would be needed or justified.

The Leave Point - should leave be granted?

46. I have carefully reviewed and considered the Applicants' draft grounds of appeal, their skeleton argument and the evidence filed in support of the Application (in particular the evidence given by Mr. Mallon in Mallon 1).

47. It is not in dispute that in order to grant leave to appeal on a discretionary basis, the Court must be satisfied that the appeal has a realistic, as opposed to fanciful, prospect of success, or that it involves some question of general public importance.

48. The proposed grounds of appeal filed by the Applicants are brief and do not take matters further than the assertion, made in Mallon 1, that the Applicants' interpretation of the relevant contractual provisions is "*reasonably arguable*" (at [15]) and that the Applicants (at [24]-[27]) have a good arguable case. The Applicants essentially repeat the arguments they made on the hearing of the Application.

49. As Justice Doyle remarked in his judgment in *Arnage Holdings Ltd and others v Walkers* (unreported, 27 July 2023) at [15] "*It is a difficult process in effect trying objectively to mark your own first instance homework*" and I accept that it is always possible that the Court of Appeal may take a different view as the proper construction of the SHA. However, I am not persuaded that the Applicants' proposed appeal has a realistic prospect of success. Where the dispute gives rise to what I described as a short point of construction ([31] of the Judgment) based primarily on the contractual documents themselves and I have formed a clear view as to the proper interpretation of those documents it seems to me that it would be wrong to grant leave.

50. For the same reason, it seems to me that the proposed appeal does not raise an issue which should be examined by the Court of Appeal in the public interest. The dispute primarily concerns the

interpretation of a particular agreement. I decided the case based on the proper construction of the SHA (see [48] of the Judgment). I only referred to *China CVS* as support for the construction that I had concluded to be correct (see [51] of the Judgment). I can see that the issue of whether clear words are necessary in order for a covenant only to take steps to initiate a winding up or liquidation with consent covers the presentation of a winding up petition can be regarded as having wider significance and potentially raising a point of public interest but in this case this was only a secondary factor in my decision which depended primarily, as I have said, on my interpretation of the relevant contractual documents. It seems to me that decisions on the construction of particular agreements do not generally raise points of public importance and justify an appeal as of right on this ground, and in my view this is such a case.

51. The Applicants will need, if they wish to proceed with the proposed appeal, to apply to the Court of Appeal and persuade the Justices of Appeal that their preferred construction has a realistic prospect of being accepted or that the proposed appeal raises a question of general public importance.

The Stay Point

52. Having held that the Applicants may appeal the Order as of right, I now need to deal with the Stay Point.

53. There is no dispute as to the applicable law. Section 19(3) of the COAA provides that: "*No stay of execution or other proceedings shall be granted upon any judgment appeal against save upon payment by the appellant into the Grand Court of the whole sum, if any, found due upon such judgment and the amount of any costs awarded to the other party or parties or upon good cause shown to the Court or the Grand Court*." It has been held (see *Heriot African Trade Finance Fund Limited v. Deutsche Bank (Cayman) Limited* [2011 (1) CILR 34] Cresswell J) that the "*critical test is whether good cause has been shown"* by the appellant and that in considering whether good cause has been shown the Court will have regard to all the circumstances of the case including whether the appeal would be rendered nugatory if a stay were refused; whether the appellant has a good arguable case on appeal; the purposes for which the appeal is being brought and the balance of convenience.

54. The Applicants in their skeleton argument (see for example [29]) and Mr. Quirk KC during his oral submissions referred to various complaints regarding the conduct of the Petitioner and those who the Applicants contend are directing the Petitioner (frequently based on unpleaded and as yet unsubstantiated allegations) which it was said showed that the Petition was being pursued for an improper and collateral purpose. But when pressed by me as to their relevance for current purposes, Mr. Quirk KC confirmed that the Applicants' case that there was good cause for a stay relied on the submission that deciding the Petition before the appeal had been determined would render the appeal nugatory and that the evidence (see Mallon 1) showed that there was a real risk that the Petition would (and was likely to) come on and be listed before the listing of the appeal before the Court of Appeal or a judgment on the appeal had been handed down.

55. The Petitioner argued that the Applicants were clearly pursuing a strategy of seeking to delay the hearing of the Petition for as long as possible and the result of the filing of the Application had already been to give them a *de facto* stay of 16 months. The delay had already caused serious prejudice to the Petitioner. They should not be deprived of the fruits of their success in defeating the Application. Further delay would only cause further prejudice. The Petitioner cited the statement made by Lord Hodge in his judgment in *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corpn* [2023] UKPC 33 that "*As the winding up process is intended to be conducted with expedition, the court will, as a general rule, rarely wish to grant a stay of such proceedings.*" The Petitioner accepted that it would be wrong to permit any appeal to be rendered nugatory but argued that this could be avoided by the Court directing or the parties agreeing that if on hearing the Petition the Court decided that a winding up order should be made, the order would be stayed pending the determination of the appeal. The Petitioner had already offered to accept such an approach, which was reasonable and should obviate the need for any wider stay. However, the Applicants had refused to agree.

56. At the hearing I put it to Mr. Chapman KC that what would clearly have been reasonable would for the Petitioner to agree that while the further steps in the Petition leading up to the listing of the trial of the Petition would continue, it would agree, or directions would be given so, that the trial of the Petition would not be listed until the outcome of the appeal was known. I said that I could see that it could be said that requiring the Applicants to incur the additional costs of taking the intermediate steps including discovery would be materially prejudicial to them but it seemed to me that since delay in the prosecution of the Petition gave rise to serious prejudice to the Petitioner and that there

would be real and practical benefits in completing the discovery and filing of witness statements stages in the Petition before the appeal was decided, so that if the appeal was dismissed the Petition could be listed in short order (subject possibly to the need for further updating of the evidence) and the additional costs and prejudice to the Applicants could be justified.

57. Mr. Chapman KC, after taking instructions, confirmed that his clients supported such an approach. Mr. Quirk KC said that his clients considered that it was unnecessary and unjustifiable to require them to incur the (inevitably substantial) costs of discovery but broadly accepted that the approach I had outlined was reasonable.

58. I accept that it would obviously be wrong to make a winding up order before the appeal has been determined. It would render the appeal nugatory. I also do not accept that the Petitioner's proposal, that there be a direction that if a winding up order were made it would immediately be stayed, removes the risk of serious prejudice to the Applicants (or KESP) or is workable. The prejudice to KESP and the Applicants flowing from the making of a winding up order that had to be stayed and subsequently discharged would be substantial (as I pointed out at the hearing, I considered that making a winding order which was to be immediately stayed would raise a number of complications and was highly unusual and therefore an unattractive option). Requiring the Applicants to incur the additional costs of a trial of the Petition which would be wasted in the event that the appeal was successful would also be seriously prejudicial to the Appellants and unjustifiable.

59. However, I consider that the Petitioner is right to stress the importance of minimising further delay in the progress of the Petition. Progress of the Petition proceedings has already been substantially delayed and it seems to me that when determining the balance of convenience, considerable weight should be given to the need for the Petition proceedings to be progressed with the minimum of further delay.

60. With these considerations in mind, in my view, the right balance is to be achieved by giving directions for the steps in the Petition up to the listing of the trial of the Petition to be completed in accordance with an agreed timetable or a timetable ordered by the Court. I have seen the Petitioner's draft order for directions (which provides for the filing of a defence by the Applicants and a reply by the Petitioner – the Petition effectively standing as points of claim – and for discovery and inspection followed by the filing of affidavit evidence) which in broad terms seems to me be

appropriate. I shall invite the parties to seek to agree a directions order within seven business days of the date on which this judgment is handed down failing which they should file with the Court a form of directions order identifying what is agreed and what is in dispute with brief submissions and I shall settle the directions order on the papers. The directions will stipulate that the Petition will not be listed without a further order.

61. This approach will ensure that the Petition will not be listed and the costs of preparing for and conducting a trial will not have to be incurred until the outcome of the appeal is known. This would obviously involve the parties in further and not immaterial expenditure which could be wasted if the appeal was successful. However, it would allow progress to made in the Petition proceedings so that if the appeal is unsuccessful, there will be only the minimum delay in listing the trial of the Petition (and it is to be hoped, depending on the exact timing, that the appeal would be determined at worst only a short time after the evidence filed in the Petition had been produced and therefore that there would be no or only a limited need for supplemental evidence to bring it up to date). This in my view would achieve a fair and the proper balancing of the parties' interests.

62. The Petitioner sought an order that the Applicants be required to apply (or that the stay only be granted upon the Applicants undertaking to the Court that they would apply) to the Court of Appeal without delay for a special sitting of the Court of Appeal in order to expedite the hearing of the appeal. However, I do not consider that this is necessary or appropriate at this stage (the additional expense to the Applicants and inconvenience to the Court of Appeal being not immaterial and the time saved in listing the appeal being unclear). But I will expect the Applicants promptly to seek the earliest listing of the appeal that is available and to consider, if it appears that there will be a material delay in obtaining a listing in the Court of Appeal's ordinary schedule for the first half of next year, an application for a special sitting and I will be prepared to revisit the issue of whether to give a direction that a special sitting be applied for in the event that there is any material delay in progressing and obtaining a listing of the appeal.

The Hon. Justice Segal

Judge of the Grand Court, Cayman Islands

10th December 2024