



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

**Cause No: FSD 237 of 2023 (IKJ)**

**BETWEEN:**

**(1) ABRAAJ SPV 108 LIMITED  
(2) ABRAAJ SPV 127 LIMITED**

**Plaintiffs**

**and**

**IGCF SPV 21 LIMITED**

**Defendant**

**Cause No: FSD 262 of 2023 (NSJ)**

**BETWEEN:**

**(1) SHAN-E-ABBAS ASHARY  
(2) AL JOMAIH POWER LIMITED  
(3) DENHAM INVESTMENT LTD.**

**Plaintiffs**

and

- (1) KES POWER LIMITED
- (2) IGCF SPV 21 LIMITED
- (3) KP CORPORATE DIRECTOR LTD.
- (4) MARK SKELTON
- (5) SHAHERYAR ARSHAD CHISHTY
- (6) SAMEER ARSHAD CHISHTY
- (7) DARIN DANIEL BAUR
- (8) ADEEB AHMAD

Defendants

**Before:** The Hon. Justice Segal

**Appearances:** Graham Chapman KC instructed by Conal Keane and Niall Dodd of Dillon Eustace Cayman for the Defendant in FSD 237 of 2023 and the 2<sup>nd</sup> and 4<sup>th</sup> to 8<sup>th</sup> Defendants in FSD 262 of 2023

Clare Stanley KC instructed by Barnaby Gowrie and Blake Egelton of Walkers for the Plaintiffs in FSD 237 of 2023

Iain Quirk KC instructed by Laura Hatfield and Jonathan Stroud of the Bedell Cristin Cayman Partnership for the Plaintiffs in FSD 262 of 2023

**Heard:** 31 May 2024

**Decision notified:** 31 May 2024

**Draft judgment circulated:** 5 June 2024

**Judgment delivered:** 14 June 2024

#### HEADNOTE

*Combined case management conference – application for case management and for matters to be tried together – procedural issues – application for a stay – overriding objective*

## JUDGMENT

### Introduction

1. On Friday 31 May 2024 I heard two summonses for directions in two sets of related proceedings which, by consent, were listed to be heard together at a combined case management conference. Both sets of proceedings relate to the consequences of the collapse of the Abraaj group and the control of a valuable Cayman incorporated company - KES Power Limited (**KESP**) – which was part of a joint-venture between Abraaj and Al Jomaih Power Limited (**Al-Jomaih**) and Denham Investment Ltd (**Denham**).
2. In the first set of proceedings (the **Ashary Proceedings**) (with cause number FSD 262 of 2023 (NSJ)) there are three plaintiffs (the **Ashary Plaintiffs**). These are Mr Ashary, Al Jomaih and Denham. There are eight defendants. KESP, IGC F SPV 21 Limited (**SPV 21**), KP Corporate Director Limited (**KPCD**), Mr Skelton, Mr Shaheryar Chishty, Mr Sameer Chishty, Mr Baur and Mr Ahmad.
3. Al Jomaih, Denham and SPV 21 are shareholders in KESP (and parties to a shareholders agreement (the **SHA**)). KESP owns a 66.4% interest in K-Electric Limited (**KEL**), an important electricity company in Pakistan. Under KESP's memorandum and articles (**KESP's Articles**) and the SHA, Al Jomaih and Denham on the one hand and SPV 21 on the other each have the right to appoint five directors to the KESP board. Mr Ashary, Mr Skelton, Mr Shaheryar Chishty, Mr Sameer Chishty and Mr Baur are directors of KESP. KPCD was a director of KESP but SPV 21 (who appointed KPCD) has purported to remove it and the purported removal is at the heart of both sets of proceedings. Mr Ahmad was purportedly appointed by SPV 21 as a successor to KPCD and his appointment is also challenged. Mr Ashary, with four other KESP directors (being Mr Al Jomaih, Mr Dalali, Mr Al Saad and Mr Khan) was appointed to the KESP board by Al Jomaih and Denham. KPCD, Mr Skelton, Mr Shaheryar Chishty, Mr Sameer Chishty and Mr Baur were appointed, and Mr Ahmad was purportedly appointed, by SPV 21. Mr Shaheryar Chishty and Mr Sameer Chishty are directors of a BVI company called Sage Venture Group Limited (**Sage**), which has acquired the controlling interest in SPV 21.

4. In the second set of proceedings (the *SPV 21 Proceedings*) (with cause number FSD 237 of 2023 (IKJ)) there are two plaintiffs (the *SPV 21 Proceedings Plaintiffs*). These are Abraaj SPV 108 Limited and Abraaj SPV 127 Limited. The SPV 21 Proceedings Plaintiffs were subsidiaries of the holding company of the Abraaj group, Abraaj Holdings Ltd (which is now in official liquidation). Joint receivers (Mr Hutchison and Mr Bishara) have been appointed by Mashreqbank psc (*Mashreqbank*) over the shares in each of the SPV 21 Proceedings Plaintiffs and it was the joint receivers who initiated these proceedings. There is one defendant. That is SPV 21. The SPV 21 Proceedings Plaintiffs are holders of non-voting shares in SPV 21.
5. I refer to the Ashary Proceedings and the SPV 21 Proceedings together as the *Proceedings*.
6. In addition to the Proceedings, on 7 July 2023, SPV 21 presented a winding up petition (with cause number FSD 193 of 2023 (NSJ)) against KESP (the *Petition*) as a contributory on the basis that a winding up would be just and equitable and in reliance on five grounds, namely a breach of legitimate expectations, functional deadlock, breach of a legal bargain, the breakdown of the quasi-partnership and loss of substratum.
7. In the Ashary Proceedings, some of the defendants, namely the Second and Fourth to the Eighth Defendants (the *Ashary Defendants*) have filed a summons for directions dated 25 January 2024 (the *Ashary Summons*). KESP has not joined in the Ashary Summons because its management is deadlocked as a result of the disputes which form the basis of the Proceedings.
8. In the SPV 21 Proceedings, SPV 21 has filed an amended summons for directions dated 26 January 2024 (the *SPV 21 Summons*).
9. By consent orders in the SPV 21 Proceedings dated 31 January 2024, 7 March 2024, and 8 May 2024, and in the Ashary Proceeding dated 2 May 2024, it was ordered that the Ashary Summons and the SPV 21 Summons be heard together at a joint case management conference (*CMC*), and that the evidence filed in the SPV 21 Proceedings in relation to the SPV 21 Summons and the evidence filed in the Ashary Proceedings in

relation to the Ashary Summons be admissible in the both Proceedings for the purpose only of the joint hearing of the summonses.

10. By the Ashary Summons, the Ashary Defendants seek orders that (a) the Proceedings both be assigned to me, (b) the Proceedings be case managed and tried together, (c) the Proceedings be stayed pending the hearing of the trial of the Petition and (d) that in the event a winding up order is not made at that trial there be a further CMC in the Proceedings to give further directions to trial.
11. By the SPV 21 Summons, SPV 21 seeks orders to the same effect.
12. At the end of the hearing, I informed the parties of my decision. I said as follows (as recorded in the hearing transcript):

- “1. I think what I can do is tell you what decisions I have come to and do that in headline terms and then I will try and deliver my judgment .. during the course of next week as quickly as I can, which will then explain the reasons.*
- 2. But it does seem to me we have reached a point where clearly it is important for all parties that some rapid progress is made in relation to these various proceedings.*
- 3. So my decisions can be summarised as follows.*
- 4. First, the application that has been made by SPV 21, that the Ashary Proceedings (being those with cause number FSD 262 of 2023) and the SPV Proceedings (that is the proceedings with cause number 237 of 2023) be stayed pending the determination of the Petition, that application is dismissed. In my view it is not appropriate to order the stay which SPV 21 has sought.*
- 5. Secondly, the Ashary Proceedings and the SPV 21 Proceedings should be (effectively should continue to be) case managed jointly in order to coordinate the two sets of proceedings and, where possible, to simplify the discovery process and provide that evidence adduced in one set of proceedings shall be admissible in the other. It seems to me that there is clearly a substantial and significant overlap, albeit not complete, but substantial and significant, justifying the joint case management of those two proceedings.*
- 6. The Court will wish actively to case manage both sets of proceedings to ensure that rapid progress is now made and that they are conducted in as efficient and cost-effective manner as possible. Coordination of proceedings,*

however, does not mean that an identical timetable must be established, but the substantial overlap of factual issues and remedies means that the additional costs associated with requiring all parties in both sets of proceedings to participate in case management conferences is justified.

7. *I note what has been said about the failure of some parties to cooperate and move matters forward. Leaving to one side whether those allegations are justified or are not, the Court will expect the parties to perform, and if necessary enforce the parties' performance of, their obligations to assist the Court to case manage the proceedings in accordance with the overriding objective.*
8. *Third, in my view it is however not appropriate at this stage to make an order for a joint trial. However, this is an issue which should be revisited following completion of discovery when the parties will have had an opportunity to review their positions as regards witness statements, evidence and other applications to be made, if any, and therefore once it becomes clearer what will be involved in having either a joint trial or separate trials. So that is a matter which can be kept under review as part of the process of the joint case management which I have ordered and shall order takes place.*
9. *Fourth, it seems to me that it will be most efficient if I am the judge dealing with the joint case management issues. It appears that there is a consensus, or at least close to a consensus, that if there is to be joint case management that one judge be assigned to deal with that, and it seems to me in the circumstances that I am best placed to do so and this approach is consistent with the arrangement that was previously made with Justice Kawaley in relation to dealing with the joint case management applications that I have heard today.*
10. *Fifth, as to the question of whether if there is to be a joint trial who would be the single judge to deal with both trials, this is something that can be reviewed and dealt with when further consideration is given as to whether a joint trial is appropriate. Further directions would then be made regarding the judge to deal with both trials. The assignment of the judge to deal with both matters will ultimately be a matter for the Chief Justice.*
11. *The sixth and final point, I think, is that, as regards the Petition, the parties to the Petition are now in a position to proceed to agree directions for the further conduct of the Petition. I hope that it is possible within short order for the directions to be agreed, and if those directions cannot be agreed then a rapid application should be made to me for a hearing to be listed, if a hearing is necessary, or for the issue to be dealt with on the papers, to settle further directions to enable the Petition to progress."*
12. *As regards the question of costs, that is something which the parties can consider and seek to agree, no doubt in light of and after they have seen my written judgment and my written reasons, which, as I say, will be handed down during the course of next week."*

13. I now set out my reasons for these decisions.

### The SPV 21 Proceedings

14. The SPV 21 Proceedings Plaintiffs complain about action taken by SPV 21 (in removing KPCD as a director of KESP). They do so (as I understand it) *qua* parties to a contract with SPV 21 which the SPV 21 Proceedings Plaintiffs say was breached by such action. The SPV 21 Proceedings Plaintiffs (ultimately the joint receivers acting to protect the interests of Mashreqbank) say that SPV 21 agreed to appoint to the KESP board a director chosen by them in order to protect their indirect interest in KESP, that KPCD was the entity selected, and that SPV 21 improperly removed KPCD to promote its own interests (and the agenda of its new ultimate owners) in breach of contract with the effect that such removal was invalid or should be set aside.
15. In their Statement of Claim in the SPV 21 Proceedings, the SPV 21 Proceedings Plaintiffs refer to article 84 of KESP's Articles which states as follows:

*“[SPV 21] may appoint up to five [directors of KESP, referred to as the Abraaj Directors] and remove from office any [such director] and appoint another in his place.”*

16. They also refer to a payment deed (the **Deed**) dated 30 September 2020 between the SPV 21 Proceedings Plaintiffs and SPV 21 to which IGCF SPV 26 Ltd (**SPV 26**)<sup>1</sup> (another holder of non-voting shares in SPV 21 whose ultimate holding company is said to be IGCF General Partner Limited (**IGCF GP**) which is the general partner of an Abraaj group fund, the Infrastructure and Growth Capital Fund LP) and IGCF GP are also parties. Pursuant to the Deed, the SPV 21 Proceedings Plaintiffs made loans to SPV 21 and SPV 21 agreed to appoint KPCD as one of its directors on the KESP board. KPCD was a company proposed by the joint receivers in respect of which the joint receivers were the sole directors. SPV 21 subsequently appointed KPCD as a KESP director. KPCD is a Cayman company and the Deed is governed by Cayman Islands law. Clause 4.6 of the Deed was in the following terms:

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<sup>1</sup> On 26 January 2024, pursuant to a resolution of its board, SPV 26 changed its name to K Power Holdings Limited.

“IGCF acknowledges that the parties to this Deed have a common interest in the operations of [KEL] and the status and progress of the prospective sale of KESP’s stake therein to Shanghai Electric Power Limited. SPV 21 agrees to use its rights and powers as shareholders, so far as reasonable, to ensure that [KPCD] has access to information in relation to the matters referred to in the preceding sentence consistent with [KPCD’s] position as a director of KESP. The Parties acknowledge that in accordance with [KESP’s Articles] SPV 21 has discretion in relation to the appointment and removal of [the directors it appoints to the KESP board].”

17. The SPV 21 Proceedings Plaintiffs aver (at [26] of the Amended Statement of Claim) that on the true construction of clause 4.6 of the Deed (or by reason of an implied term), SPV 21’s discretion, and its right, to remove a director nominated by them and appointed to the KESP board pursuant to the Deed had been qualified so that it could not be exercised until all sums owing to the SPV 21 Proceedings Plaintiffs under the Deed had been repaid (or earlier if there was good cause to do so, e.g. an actual or threatened breach of fiduciary duty by KPCD); the power would not be exercised in the interests of IGCF GP or SPV 26 unless those interests were aligned with those of the SPV 21 Proceedings Plaintiffs; the power would only be exercised *bona fide* and for proper purposes; the power would not be exercised in an unreasonable, arbitrary, capricious or irrational manner but only lawfully, rationally, in good faith and consistently with its contractual purpose and that SPV 21 would only take into account relevant considerations when exercising the power.
18. The SPV 21 Proceedings Plaintiffs aver that in August 2022, the joint official liquidators (*JOLs*) of Abraaj Investment Management Ltd (*AIML*) had sold AIML’s interest in the KESP structure (held through SPV 26) to Sage (the *Sage Transaction*) and that since that time Sage has controlled SPV 26 and through that control Sage has also controlled SPV 21. They also aver that a dispute has arisen between SPV 21 and Al Jomaih and Denham as to the lawfulness and effect of the Sage Transaction (the *Sage Dispute*).
19. The SPV 21 Proceedings Plaintiffs then refer to the circumstances surrounding the purported removal of KPCD as a director of KESP. They note that on 9 June 2023, the English solicitors for AIML served English proceedings (the *English Proceedings*) on KESP in which AIML and Sage (and subsequently Mashreqbank) claim to be owed US\$41,446,114 by KESP. The service of the English Proceedings had resulted in various discussions between the KESP directors, as well as between Mr Hutchison (as a director of KPCD) and the director of SPV 21, Mr McDonald. A serious difference of view had



arisen between the KESP directors appointed by SPV 21 (save for KPCD) and those appointed by Al Jomaih and Denham concerning how KESP should respond to the English Proceedings, in particular whether KESP should instruct English solicitors to advise it or to arrange for the defence of the English Proceedings. The KESP directors appointed by Al Jomaih and Denham wanted KESP to be legally represented and to take advice on how to defend the English Proceedings while the KESP directors appointed by SPV 21 (save for KPCD) did not.

20. The SPV 21 Proceedings Plaintiffs refer to correspondence and conversations between Mr Hutchison, Mr Skelton and Mr McDonald and aver that Mr Hutchison had indicated that he considered that KESP should appoint its own English legal counsel to advise on the response to the English Proceedings. On 12 June 2023, KPCD indicated that independent solicitors should be appointed and on that day there had been an attempt to hold a KESP board meeting to consider the position and to instruct solicitors but Mr Skelton as chair did not attend and had sought to cancel the meeting. There is a dispute (at least between the parties to the Ashary Proceeding) as to whether the meeting was cancelled or adjourned to 19 June due to Mr Skelton's absence.
21. Prior to the further meeting scheduled for 19 June 2023, SPV 21 sent a letter to the KESP board on 18 June 2023 (the **SPV 21 Letter**), following further discussions between Mr Hutchison, Mr Skelton and Mr McDonald, purporting to remove KPCD as a KESP director. The SPV 21 Letter stated as follows:

*“In accordance with the provisions of article 103(e) of [KESP's Articles] [SPV 21] hereby:*

- (i) removes [KPCD] as a director of [KESP] with immediate effect; and*
- (ii) instructs KESP to update its register of directors and officers to reflect the removal of [KPCD].”*

22. The further meeting took place on 19 June (the **19 June Meeting**) but there is a dispute as to whether this was the adjourned meeting or a new meeting. The 19 June Meeting was convened to consider whether, and if agreed, to appoint Messrs Fieldfisher as solicitors to advise KESP on the English Proceedings. There is a dispute in the Ashary

Proceedings as to whether a purported resolution (the *Purported 19 June Resolution*) approving the instruction of Fieldfisher was proposed and passed at this meeting .

23. The SPV 21 Proceedings Plaintiffs aver (see [51] of the Amended Statement of Claim) that the reason why SPV 21 acted to remove KPCD was the comments made by Mr Hutchison as to his/KPCD's voting intentions. They further aver that SPV 21 acted (for the benefit of Sage, the main claimant in the English Proceedings) so as to prevent the KESP board from voting in favour of the resolution to appoint English solicitors.
24. The SPV 21 Proceedings Plaintiffs aver (at [52] and [53] of the Amended Statement of Claim) that SPV 21 did not have power to remove KPCD or alternatively that SPV 21's exercise of its power was not made for a proper purpose (being made to further the interests of IGCF GP, SPV 26 and/or Sage and not in the interests of the SPV 21 Proceedings Plaintiffs or SPV 21), was objectively unreasonable, arbitrary, capricious and/or irrational, was unlawful and not rational or in good faith or consistent with the contractual purpose of its discretion, took into account irrelevant considerations and failed to take into account what was relevant, namely, the interests of KESP and SPV 21, and the need to permit KPCD to vote as a director in accordance with its fiduciary duties.
25. The SPV 21 Proceedings Plaintiffs claim that in these circumstances SPV 21's purported removal of KPCD was a breach of the Deed and/or was void or voidable and so should be set aside. The SPV 21 Proceedings Plaintiffs seek, *inter alia*:
  - (a). a declaration that SPV 21's purported removal of KPCD was void or voidable and an order that it be set aside.
  - (b). further or alternatively, a mandatory injunction ordering SPV 21 to take all steps available to it to (re)appoint KPCD and/or damages and interest.
26. Pleadings closed in the SPV 21 Proceedings in December 2023. SPV 21 has filed an Amended Defence and the SPV 21 Proceedings Plaintiffs have filed an Amended Reply to the Amended Defence. In the Amended Reply, the SPV 21 Proceedings Plaintiffs join issue on whether KESP has a good defence to the English Proceedings (the SPV 21 Proceedings Plaintiffs deny that there is no good defence to the claim) and aver that the

KESP directors appointed by SPV 21 acted in breach of duty by taking steps to prevent KESP from being able to instruct appropriately qualified English solicitors.

### The Ashary Proceedings

27. In the Statement of Claim filed by the Ashary Plaintiffs in the Ashary Proceedings, the Ashary Plaintiffs also challenge the removal by SPV 21 of KPCD as a director of KESP. Al Jomaih and Denham claim *qua* shareholders of KESP and Mr Ashary claims *qua* director of KESP.
28. The Ashary Plaintiffs' primary case is that KPCD was not removed as (and remains) a KESP director, that Mr Ahmad was not validly appointed as a director, that the 19 June Meeting was validly convened and held, and that the Purported 19 June Resolution (approving the engagement of Fieldfisher and the appointment of a sub-committee of the KESP board to instruct Fieldfisher) was validly passed, so that Fieldfisher has been appointed to act for KESP. The Ashary Plaintiffs' secondary case, in the alternative, is that if KPCD was removed, its removal (and Mr Ahmad's appointment) should be set aside and Mr Skelton should be required to convene a further KESP board meeting to appoint Fieldfisher and establish the sub-committee (and that the Fourth to Eighth Defendants be restrained from voting against these resolutions, or from taking steps until the conclusion of the English Proceedings to interfere with Fieldfisher's appointment, and that SPV 21 be restrained from appointing another KESP director until the conclusion of the English Proceedings).
29. The Ashary Plaintiffs claim that SPV 21 has attempted to use its powers as a KESP shareholder to engineer a situation in which KESP is unable to defend the English Proceedings by purporting to replace KPCD with Mr Ahmad so that Mr Ahmad could vote against the appointment by KESP of legal advisers to advise on those proceedings. They also claim that Mr Skelton, Mr Shaheryar Chishty, Mr Sameer Chishty and Mr Baur (the Fourth to Seventh Defendants), and if validly appointed Mr Ahmad, have acted in breach of duty in voting against the appointment of Fieldfisher.
30. The Ashary Plaintiffs refer to and rely on the SHA and KESP Articles.

31. Clause 5.3 of the SHA states that:

*“[SPV 21] may appoint up to five directors of [KESP] and remove from office any such director and, if desired, appoint another in his place. Directors so appointed shall be Abraaj Directors.”*

32. The Ashary Plaintiffs also refer to article 84 of the KESP Articles (quoted above).

33. The Ashary Plaintiffs aver (see [26] of their Statement of Claim) that SPV 21’s power to remove directors of KESP under both the SHA and the KESP Articles:

*“was subject to a legal restriction/and or an implied term (implied as a matter of law) that the power must be exercised for the benefit of KESP as a whole and not to secure an ulterior advantage for any one shareholder (the **Ulterior Advantage Restriction**). Any purported exercise of SPV 21’s power to appoint or remove directors of KESP for purposes contrary to the Ulterior Advantage Restriction is void and ineffective (alternatively voidable).”*

34. The Ashary Plaintiffs aver (see [80] and [81] of their Statement of Claim) that it is to be inferred that the causative (alternatively the predominant) purpose of SPV 21 in purporting to remove KPCD was to secure an ulterior advantage as against Al Jomaih and Denham in relation to their dispute concerning the validity and effect of the Sage Transaction (what Al Jomaih and Denham consider to be Sage’s improper attempted takeover of control of KESP and KEL) and improperly to apply pressure on Al Jomaih and Denham. Accordingly, the purported exercise by SPV 21 of its powers to remove KPCD and to appoint Mr Ahmad contravened the Ulterior Advantage Restriction and was therefore void and ineffective (or alternatively voidable). The Ashary Plaintiffs also say that they are entitled to injunctive relief against SPV 21 to restrain any further actual or purported exercise of its powers to appoint or remove directors.

35. The Ashary Plaintiffs aver that a vote was taken at the 19 June Meeting on, and that the KESP directors nominated by Al Jomaih and Denham all voted in favour of, the Purported 19 June Resolution. They accept that Mr Skelton voted against the Purported 19 June Resolution but say that if, as is alleged in the Petition, he claims to have held and voted pursuant to proxies for the other directors nominated by SPV 21, so that there were other votes against the Purported 19 June Resolution, this needed to be proved. The

Ashary Plaintiffs say that since KPCD was never validly removed and Mr Ahmad never appointed, there could only have been a maximum of four votes against the Purported 19 June Resolution which therefore in the circumstances must be taken to have been passed. In any event, the Ashary Plaintiffs say, by voting against the Purported 19 June Resolution, the Fourth to Seventh Defendants (and if validly appointed Mr Ahmad) acted in breach of duty.

36. The Ashary Plaintiffs therefore seek declarations that the 19 June Meeting was valid and effective, that KPCD remains a director, that Mr Ahmad is not a director and that Fieldfisher have been appointed. In the alternative, they seek an order setting aside the removal of KPCD and appointment of Mr Ahmad, and for the convening of a new KESP board meeting.
37. The Ashary Plaintiffs acknowledge that to the extent that the relief they seek involves the enforcement of the KESP directors' duties they seek that relief on a derivative basis. The Ashary Plaintiffs have not to date applied for permission to continue the derivative claim but recently the parties have agreed, and a consent has been made confirming, that the Ashary Plaintiffs' time for making that application has been extended and that a one day hearing of the application be listed shortly.
38. Pleadings have now also closed in the Ashary Proceedings. The Ashary Defendants have filed an amended defence and KPCD has also filed a defence (in which KPCD states that it adopts a neutral position in the Ashary Proceedings save that it denies that Mr Hutchison indicated that it was necessary or in the interests of KESP for counsel to be engaged to defend the English Proceedings). The time for the Ashary Plaintiffs to file a reply to the Ashary Defendants' defence has expired and they have not indicated that they wish to have or will seek an extension of time to file a reply.

### **The Petition**

39. In the Petition, SPV 21 complains about the conduct of Al Jomaih and Denham in relation to and following the Sage Transaction. SPV 21 avers that it is just and equitable in the circumstances to make a winding up order in respect of KESP.

40. The grounds relied on are set out at [106]-[110] of the Petition. Ground 1 is based on SPV 21's assertion that it had a legitimate expectation that KESP would be managed and administered in accordance with its objects and the SHA and so as to promote its success and that of KEL, and that this expectation has been frustrated and breached. SPV 21 avers that the KESP board is no longer functional and that Al Jomaih and Denham have acted and continue to act in breach of the SHA and to block the efficient administration and management of KESP's affairs. Ground 2 is based on SPV 21's assertion that there is functional deadlock on KESP's board and therefore also in relation to its management. Ground 3 is based on an asserted breach of the legal bargain between the shareholders. Ground 4 is based on SPV 21's assertion that KESP is a quasi-partnership and that the relationship of trust and confidence between the shareholders has broken down irretrievably. Ground 5 is based on SPV 21's assertion that KESP has lost its substratum because the main objects for which it was formed (the owning and exercising of rights in KEL) are now incapable of being fulfilled.
41. SPV 21 claims that Al Jomaih and Denham have, in breach of clause 5.7 of the SHA, sought to block SPV 21's attempts to cause KESP to nominate candidates for vacancies on the KEL board; caused KESP to be in breach of clause 5.7 of the SHA by failing to fill the vacancies on the KEL board; commenced proceedings in Pakistan in breach of clause 25.2 of the SHA; failed to comply with or caused their nominated directors on the KESP and/or KEL boards to fail to comply with regulatory requirements in Pakistan; sought to cause or persuade the Government of Pakistan and regulatory bodies in Pakistan to prevent SPV 21 from appointing its nominees to the KEL board, or to frustrate the Sage Transaction; and caused their KESP board representatives to fail to attend KESP board meetings.
42. In October last year, I heard and dismissed an application by Al Jomaih and Denham to have the Petition struck-out or restrained on the basis that it had been presented in breach of a no-petition covenant in the SHA binding on SPV 21. But, because of a heavy trial which was listed for shortly after that hearing I have only recently been able to hand down a judgment setting out my reasons for that decision. As a result there has been a delay in progressing the proceedings in the Petition, in particular the defence has yet to be filed, since I indicated at the October hearing that I understood that Al Jomaih and

Denham would wish to review my written reasons before finalising the directions for the further steps in the Petition.

43. Such directions had been agreed in principle in advance of the October hearing but have not yet been made. These directions included a direction that KESP be treated as the subject matter of the Petition and that the Petition proceedings be treated as an *inter partes* proceeding between SPV 21 as petitioner and Al Jomaih and Denham as respondents. SPV 21 says that it anticipates that it will be possible rapidly to agree the directions and timetable and notes that assuming the timetable contained in the draft directions is reflected in the directions as agreed and made, the Petition will be ready for trial in another 5 months.

### **The submissions in support of the summonses – the position of SPV 21 and the Ashary Defendants**

#### *In overview*

44. SPV 21 and the Ashary Defendants (who I refer to together as SPV 21 in this part of the judgment) submit that there are significant common and overlapping issues in all three sets of proceedings and that it is obviously desirable that they be case managed and tried together in order to save the time and cost of duplicative proceedings and to avoid the very real risk of inconsistent findings between the cases.
45. SPV 21 relies on GCR O.4, r.4(1) which provides as follows:

*“Where two or more causes or matters are pending in the same Division of the Court and it appears to the Court that —*

- (a) some common question of law or fact arises in both or all of them; or*
- (b) the rights or relief claimed are in respect of or arise out of the same transaction or series of transactions; or*
- (c) for some other reason it is desirable to make an order under this Rule,*

*the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after*

*another or may order any of them to be stayed until after the determination of any other of them.”*

*The Proceedings should be case managed and tried together*

46. SPV 21 noted that GCR O.4, r.4(1) provides a jurisdictional basis beyond the Court’s inherent jurisdiction to make the orders sought by the summonses. SPV 21 submitted that all three of the factors identified in the sub-rules were engaged in the present case, and that in the circumstances the Court should exercise its residual discretion, having regard to the need to promote the overriding objective, to make these orders.
47. SPV 21 said that it was also long established that the Court should make arrangements to avoid the risk of inconsistent findings wherever possible. This Court had recognised the good sense of this in the recent judgment of Justice Parker in *Kuwait Ports Authority & others v Port Link GP Ltd* (28 March 2024) (FSD 97 of 2021 and FSD 41 of 2022).
48. As regards the SPV 21 Proceedings and the Ashary Proceedings, SPV 21 emphasises five core points. First, both Proceedings seek, in substance, exactly the same relief. It would be inappropriate for the identical claims for relief to be determined in two separate sets of proceedings heard at different times potentially by different judges. Secondly, both Proceedings concern whether, and if so, to what extent SPV 21’s right to appoint directors under the articles of KESP was subject to a restriction (whether labelled a proper purpose restriction or the Ulterior Advantage Restriction). Thirdly, both Proceedings concern whether, if SPV 21’s right to appoint directors was subject to such a restriction, the decision to replace KPCD was for a proper purpose or an ulterior motive. Fourthly and relatedly, both Proceedings concern the alleged motives and conduct of SPV 21 and also of the KESP directors nominated by it. Fifthly, those alleged motives are inextricably bound up in the wider dispute between SPV 21 and Al Jomaih and Denham concerning the Sage Transaction and the breakdown in relations between them. SPV 21 submits that these are common and overlapping issues which rely on the same factual background and their determination will turn on the same, or at least an overlapping, documentary record and the same, or at least overlapping, evidence from the same witnesses. SPV 21 says that it is effectively facing the same claim for the same relief from both the SPV 21 Proceedings Plaintiffs and the Ashary Plaintiffs. Separate trials would be prejudicial to



SPV 21 largely for the same reasons as the two sets of proceedings against Walkers were found to be unfair and prejudicial in *Port Fund*. This was because of the burden on SPV 21's witnesses, who would have to give their evidence at two trials on the same issues twice, the burden on management and the burden falling on a single legal team. Separate trials would also place an undue and unnecessary burden on the Court and be wasteful of resources.

49. SPV 21 also argues that joint case management and, if necessary, a joint trial would cause no prejudice to either the SPV 21 Proceedings Plaintiffs or the Ashary Plaintiffs.

*The Proceedings should be stayed pending the determination of the Petition*

50. SPV 21 argues that the obvious course is to stay both Proceedings until the conclusion of the proceedings in the Petition since the Proceedings will be rendered nugatory if the Court decided to make a winding up order in respect of KESP.
51. SPV 21 says that the question of whether to grant a stay is a discretionary case management decision for the Court. The issue for the Court was whether it was in the interests of justice for a stay to be granted. It was not necessary to show that there were rare and compelling circumstances.
52. SPV 21 relied on the statement of the applicable principles by Justice Parker in *The Port Fund LP et al v Walkers (Dubai) Limited Liability Partnership* (27 June 2022) (FSD 383 of 2021 (RPJ)) (*Port Fund*) at [26]-[46] of his judgment. In that case, Justice Parker had granted a stay of one of two sets of proceedings brought against Walkers arising out of the firm's representation of certain clients. He concluded that there were good reasons relating to the administration of justice and the unfairness and prejudice that the second claim caused to Walkers justifying the Court stepping in and regulating matters. It would not be fair for Walkers to have to face more than one claim dealing with the same subject matter. There was a complete overlap and Justice Parker had taken into account as an important factor that substantially more Court resources and available Court time would be used up by two sets of proceedings to the detriment of other Court users.

53. Justice Parker had noted that [4.2] of the GCR Preamble sets out a non-exhaustive list of powers the Court may exercise to assist in discharging its duty to further the overriding objective of dealing with cases justly, by actively managing proceedings including deciding the order in which issues are to be resolved, fixing timetables or otherwise controlling the progress of the proceedings and considering whether the likely benefits of taking a particular step will justify the costs of taking it.
54. Justice Parker had reviewed the key authorities, in particular the judgment of the Court of Appeal in *Re Nanfong International Investments Ltd* [2018] 2 CILR 321 (*Nanfong*). In *Nanfong*, Moses JA had confirmed that the principles relevant to the grant of a stay on case management grounds were to be found in *Reichhold Norway v Goldman Sachs* [2000] 1 WLR 173 (another English Court of Appeal decision) (*Reichhold*) where Lord Bingham CJ had said that it was necessary to show “*very strong reasons [for granting a stay of proceedings properly commenced] and [that] the benefits which were likely to result from doing so clearly outweigh the disadvantages to the plaintiff.*” SPV 21 said that Justice Parker had drawn particular attention (at [46]) to the following passage in Justice Doyle’s judgment in *Re New Silk Route Advisers LP* (FSD 278 of 2021 (DDJ), Unreported, 10 February 2022) at [70]-[71]) (*New Silk*) containing “*an important statement on the manner in which the Court’s approach to case management stays has developed in the 20 years or so since Reichhold*”:

*“I should add that active judicial case management has moved on considerably since ... Reichhold. It may be that Lord Bingham’s ‘rare and compelling circumstances’ comments in Reichhold need to be read in light of the more modern litigation culture in 2022 which requires more active judicial case management than was in its infancy in 1999 ... The law and practice of case management stays has been developing since the 1990s. With much more cross border international litigation in 2022 as compared with 1999 it is inevitable that the circumstances which justify a temporary case management stay in 2022 will not be as rare as the circumstances prevailing in 1999 ... each case must of course be decided on its own facts and circumstances ... there needs to be a good reason. At the very least the determinations in the foreign court must be considered to be likely to have ‘an important effect’ on the proceedings in the Cayman Islands, if not actually determinative of them. Moreover, case management stays may be imposed where imposing such would ‘better serve the interests of justice.’ The Court has a wide discretion which must be exercised cautiously with regard to the relevant facts and applying the relevant principles outlined in the authorities...”*

55. Justice Parker said (at [78]) that he adopted Justice Doyle’s analysis (although his comments were made in the context of cross border litigation with parallel cases in more than one jurisdiction) and that he agreed that the approach to case management stays needed to be adapted to current times where there is a greater emphasis on the importance of active judicial case management and that this principle applied even more so to the Court controlling procedure in its own jurisdiction.
56. SPV 21 submitted that therefore it was no longer correct (if it ever was) to assert that a case management stay will only be granted in “*rare and compelling circumstances*.” It was clear from the approach adopted and applied by the Cayman Islands Court of Appeal in *Nanfong* that the test is whether a stay would further the ends of justice.
57. SPV 21 submits that this approach is supported by the judgment of Males LJ in the Court of Appeal of England & Wales in *Athena Capital Fund v Secretariat of State for the Holy See* [2022] EWCA Civ 1051 (*Athena Capital*). Lord Justice Males had (at [57-59]) referred to *Reichhold*, confirmed that the single test to be applied was whether it was in the interests of justice for a stay to be granted, and said that there was no separate test of “*rare and compelling circumstances*.”
58. SPV 21 submits that a stay of the Proceedings pending the outcome of the Petition would represent sensible case management in accordance with the overriding objective, saving costs and Court time. The Petition deals, amongst other things, with the same facts as are raised in the Proceedings, will require the Court to make determinations about those facts, and is likely to resolve all of the differences between the parties in respect of KESP once and for all by leading to the appointment of independent liquidators.
59. SPV 21 says that a stay is appropriate in particular because the Petition and the Proceedings give rise to common issues which will be determined most expeditiously in the Petition; in any event, determination of the Petition is likely to prove dispositive of the Proceedings for all practical purposes both in light of the determination of the issues in the Petition and more particularly if liquidators are appointed to KESP; a stay is likely to lead to substantial savings in Court time and costs and will remove the risk of inconsistent findings being made on common and overlapping issues across the three sets

of proceedings, and also remove the risk of conflicting relief being granted (or denied) in those proceedings in relation to the same subject-matter.

60. SPV 21 argues that the common issues are likely to be determined more expeditiously in the Petition, which is likely to be determined more quickly than the other Proceedings. The determination of the Petition is also likely to prove dispositive of the other two sets of Proceedings for all practical purposes. If the Petition succeeds and liquidators are appointed, then the SPV 21 Proceedings and Ashary Proceedings both become academic. Liquidators would take over the management of KESP. What then, SPV 21 asks rhetorically, would be the purpose of seeking declarations as to the validity of the replacement of KPCD as a director of KESP, what would be the practical point or purpose of seeking declarations as regards whether Fieldfisher were, or should be, appointed as solicitors to KESP, and what would be the point of pursuing the derivative claims which would be claims which the liquidators themselves would have to consider and would be able to pursue in any event? If the Petition were for any reason to fail and liquidators were not appointed, then the findings made on the Petition, particularly in relation to the common issues, ought to lead at the very least to a very substantial narrowing of the issues and more likely, a complete resolution of the remaining Proceedings.
61. SPV 21 argues that the Ashary Plaintiffs and the SPV 21 Proceedings Plaintiffs are wrong to argue that a stay of the Proceedings would prejudice the position of KESP in the English Proceedings. SPV 21 referred me to the judgment in the English Proceedings of Mr Sean O’Sullivan KC (sitting as a deputy High Court Judge) dated 18 December 2023 and noted that Mr Ashary, Mashreqbank and the joint receivers had now been joined as parties to the English Proceedings and, in Mr Ashary’s case, joined for the express purpose of advancing any and all defences that he considers are available to KESP in those proceedings. SPV 21 said that in these circumstances, the position of KESP in relation to the English Proceedings was now fully or at least adequately protected. Accordingly, it could be said that the Proceedings needed to continue in order to protect KESP’s position in the English Proceedings.

62. Furthermore, SPV 21 says that the SPV 21 Proceedings Plaintiffs and the Ashary Plaintiffs are wrong to claim that the re-appointment of KPCD as a director of KESP in the event that either of the two Proceedings succeeded would resolve the Petition. The grounds of the Petition go far beyond functional deadlock and the functional deadlock ground itself goes far beyond the events of June 2023 and the disagreement as to whether or not to appoint English solicitors to advise on the English Proceedings. SPV 21 says that it is difficult to see, even if KPCD was to be re-appointed, that this would resolve the deadlock because the deadlock goes beyond the English Proceedings and arises because of the wide disputes and difficulties caused by the reaction of Al Jomaih and Denham to the Sage Transaction. Further, there is an apparent dispute and difference between Mr Hutchison, as Mashreqbank's receiver, and the position of Al Jomaih and Denham. As can be seen from KPCD's short defence in the Ashary Proceedings there is an issue between KPCD and the Ashary Plaintiffs as to what Mr Hutchison was prepared to agree. SPV 21 says that it would be surprising if Mr Hutchison were now to agree to the appointment of solicitors to defend the English proceedings when Mashreqbank is now claiming to be owed the debt which is the subject of the English Proceedings and when Mr Hutchison says that the claim in the English Proceedings is in effect unanswerable, with the only issue being to whom the debt is owed. Nor can it be assumed that Mr Hutchison will inevitably and always side with the Al Jomaih and Denham on the other matters of dispute including, for example, those parties continuing to block the appointment of SPV 21's nominees to the board of KEL.

### **The submissions in opposition to the summonses – the position of the SPV 21 Proceedings Plaintiffs**

#### *The SPV 21 Proceedings Plaintiffs' position in outline*

63. The SPV 21 Proceedings Plaintiffs oppose the relief sought in the summonses on the following main grounds:

- (a). The SPV 21 Proceedings Plaintiffs ultimately seek to protect the interests of Mashreqbank and stand apart from the wider dispute between Al Jomaih and Denham on the one hand and Sage on the other. They should not be drawn into and have their claims delayed and encumbered (and their costs increased) by separate

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proceedings which involve the litigation of that wider dispute. Further, they are not parties to the Ashary Proceedings or to the Petition and thus have no real ability to influence the speed or outcome of those other proceedings.

- (b). both the Petition and the Ashary Proceedings have been beset with delays and this has demonstrated (objectively at least) a lack of any real desire by the parties to move those proceedings forward with expedition in accordance with the overriding objective.
- (c). the dispute between the parties in the Ashary Proceedings comprises a far broader dispute covering facts and questions of law that are not relevant to the SPV 21 Proceedings. The Ashary Proceedings will involve a complex piece of commercial litigation traversing years of the relationship between the shareholders in KESP and involving a large number of different parties. The trial is likely to occupy several weeks of Court time.
- (d). in contrast the SPV 21 Proceedings concern a very short window of time in June 2023 and whether the conduct of SPV 21 amounted to a breach of contract. The only parties to the SPV 21 Proceedings are the SPV 21 Proceedings Plaintiffs and SPV 21. The issues arising principally relate to contractual interpretation and the nature and extent of the duties to which SPV 21 was subject when exercising its powers to remove directors of KESP (involving a consideration of the principles to be derived from the Supreme Court's judgment in *Braganza v BP Shipping Ltd* [2015] UKSC 17). A trial of the SPV 21 Proceedings will be short with a duration of possibly only one week.
- (e). pleadings have closed in the SPV 21 Proceedings (they were deemed closed five months ago on 12 December 2023). The parties were prepared to exchange lists of documents in accordance with GCR O.24, r.2 on 19 January 2024 (albeit the date was vacated). There is good cooperation between the attorneys in these proceedings.

- (f). in contrast, the pleadings in the Ashary Proceedings have not closed and there seems to be no inclination on the parties to that action to finalise pleadings and get to discovery and the attorneys do not seem to be able to make progress.

*The Proceedings should not be case managed and tried together*

64. The SPV 21 Proceedings Plaintiffs do not disagree with SPV 21's summary of the applicable law. They submitted that the approach set out by Smellie CJ in *Omni Securities Limited v Deloitte & Touche and others* [2001 CILR 68], although a consolidation case, was instructive and helpful in the joint case management and joint trial context (the SPV 21 Proceedings Plaintiffs said that what SPV 21 and the Ashary Defendants were seeking was in substance very close to a consolidation). Smellie CJ had said that in exercising its discretion the Court had to balance the desirability of trying together actions involving common or overlapping issues of law or fact against the possibility that consolidation would cause undue prejudice to one of the parties. Actions would be consolidated despite such prejudice if a fair trial could not be achieved without the causes being tried together (for example because the outcomes might otherwise be contradictory and deprive the plaintiff of a remedy against either defendant).
65. The SPV 21 Proceedings Plaintiffs say that in this case while there is some overlap between the Proceedings, there are substantial and material differences which require that the Proceedings continue to be case managed and tried separately. They argue that they would be materially prejudiced if there was an order for a joint trial and even if there was an order for joint case management. They ask the Court not to put them in the position where "*they are dragged into the melee of [the Ashary Proceedings].*" They say that the SPV 21 Proceedings are straightforward and can and should be dealt with expeditiously. They submit that if the case management and trial of the SPV 21 Proceedings are linked with the Ashary Proceedings it is inevitable that costs will increase and justice will be delayed for the SPV 21 Proceedings Plaintiffs. That, they argue, would be the antithesis of the overriding objective.
66. The SPV 21 Proceedings Plaintiffs submit that it is clear from their amended statement of claim that the factual issues in dispute are narrow and that the evidence to be assessed

arises primarily from a limited number of emails and conversations involving a small number of people (just Mr Hutchison, Mr Skelton and Mr McDonald) taking place over just a few days in June 2023. SPV 21 has pleaded in its amended defence no positive case as to what was said but otherwise denies the averments in the amended statement of claim. While the amended defence (and then in response to that, the amended reply to the defence) refers to a good deal of other facts and disputes as to the actions and motives of SPV 21 and the KESP directors the essential factual issue in dispute was a narrow one, namely what was said and written in those three days in mid-June 2023, from which the Court will be able to draw inferences as to whether Mr Skelton and Mr McDonald were in fact saying that Mr Hutchison ought to breach his fiduciary duties and ought to fetter his discretion, ought to follow the instructions of the Sage parties.

67. The SPV 21 Proceedings Plaintiffs note that while pleadings have closed in the SPV 21 Proceedings discovery had not been completed and witness statements had not yet been produced or exchanged so that it was impossible to have a clear sense of what issues will actually end up being in dispute at trial, which witnesses will need to be cross-examined and for how long. The SPV 21 Proceedings Plaintiffs said that it might well be that in the SPV 21 Proceedings the cross-examination would be limited and of a very narrow compass but that in the Ashary Proceedings it would be much more extensive. Furthermore, the SPV 21 Proceedings Plaintiffs submit that while, as Smellie CJ had pointed out in *Omni Securities*, prejudice to the defendant is important it is not decisive. The objective must be to ensure a fair trial.

*The Proceedings should not be stayed pending the determination of the Petition*

68. As regards the application to stay the Proceedings pending the determination of the Petition, the SPV 21 Proceedings Plaintiffs agree with SPV 21 that the ultimate test is whether the stay sought is “*in the interests of justice*” and that the Court’s jurisdiction to order a stay on that basis is unfettered. But they submit and emphasise that it is a high bar to establish that the stay sought is in the interests of justice. It is still the case that stays are only granted in rare and compelling circumstances. They noted that *Reichhold* and *Nanfong* both dealt with applications to stay domestic proceedings in favour of foreign proceedings but argued that the principles which applied to such applications



applied equally to applications to stay one domestic proceeding in favour of another domestic proceeding.

69. The SPV 21 Proceedings Plaintiffs rely on the following statement of the principles to be applied by the Court by Lord Justice Males in *Athena Capital* at [59]:

*"There is, as it seems to me, no reason to doubt that it is only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad. After all, the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and article 6 [of the European Convention on Human Rights]. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional. In my judgment all of the guidance in the cases which I have cited is valuable and instructive, but the single test remains whether in the particular circumstances it is in the interests of justice for a case management stay to be granted. There is not a separate test in "parallel proceedings" cases."*

70. The SPV 21 Proceedings Plaintiffs submit that the authorities show that an applicant may find it easier to establish a compelling reason for a stay where there are existing parallel proceedings which, if heard earlier, could be expected to resolve the issues in the other proceedings and that a stay may be ordered where the outcome of one set of proceedings may have an important effect on the conduct of the other.
71. The SPV 21 Proceedings Plaintiffs submit that the test for granting a case management stay is not made out.
72. They submit that staying the SPV 21 Proceedings until after the Petition had been determined at trial would cause them substantial and unfair prejudice. The Petition relates to the wider dispute between SPV 21/Sage and Al Jomaih and Denham as shareholders of KESP. The SPV 21 Proceedings Plaintiffs are not parties to that wider dispute and their claims raise separate issues (arising out of the Deed to which Al Jomaih and Denham are not parties) which are capable of being, and which should be allowed to proceed to trial, without the need to engage with or be affected by the complexities of a separate dispute raising a series of other issues.

73. They also say that one of the key platforms for the relief sought in the Petition is that there is functional deadlock. But, they say, that deadlock has been caused by SPV 21 by improperly removing the SPV 21 Proceedings Plaintiffs' nominated director (being the one director on the KESP board which is not beholden to either group of shareholders). The SPV 21 Proceedings Plaintiffs submit that to delay the SPV 21 Proceedings in order to determine the Petition on the basis of a contrived functional deadlock would be inappropriate, especially in circumstances where the SPV 21 Proceedings Plaintiffs are not parties to the Petition. Staying the SPV 21 Proceedings in favour of the Petition would not be in the interests of justice as it would result in an application seeking terminal relief being heard based significantly on a ground which is in dispute in both of the Proceedings.

### **The submissions in opposition to the summonses – the position of the Ashary Plaintiffs**

#### *The Ashary Plaintiffs' position in outline*

74. The Ashary Plaintiffs' strongly resist the stay application and I think it is fair to say that their main concern is that the stay application be dismissed. They supported the submissions made by the SPV 21 Proceedings Plaintiffs in relation to the application for joint case management and a joint trial but regarded the case management issues as primarily for the Court.

#### *The Proceedings should not be stayed pending the determination of the Petition*

75. As regards the application to stay the Ashary Proceedings pending the determination of the Petition, the Ashary Plaintiffs submit that it would be unjust and improper to allow the SPV 21 and the KESP directors aligned with Sage to continue to progress a strategy concocted to advance their own interests at the expense of KESP and its shareholders.
76. They submit that the Ashary Defendants have failed to show a proper justification (let alone a sufficiently strong reason) for a stay of the Ashary Proceedings in favour of the Petition. They support the submissions made by the SPV 21 Proceedings Plaintiffs as to analysis of the case law. While the basic test is whether a case management stay has been

shown to be in the interests of justice, there remains a requirement to show strong reasons. The Ashary Plaintiffs referred to the treatment of this issue in the judgment of Mr O’Sullivan KC. He had noted (at [48]) that the case management power should be used cautiously, that (at [52]) the authorities showed that absent abuse of process the starting point was that a party had untrammelled access to a court of first instance and that English Court of Appeal authority after *Reichhold* had confirmed that a stay should only be granted in a rare and compelling case. They submitted that Justice Doyle should not be understood as seeking to set out a new test for the determination of stays or resile from the requirement that a compelling case be established. This was shown by the fact that in his judgment in *Enigma Diagnostics v Boulter* (Unreported, 8 February 2022), which was handed down just two days before his decision in *New Silk*, Justice Doyle had said that “*The jurisdiction to grant case management stays is only exercised in rare and compelling circumstances ... [it is] well established [that the jurisdiction] should be exercised with caution and only for a very good reason.*”

77. The Ashary Plaintiffs argue that the Ashary Defendants seek to halt the Ashary Proceedings to await the outcome of the Petition in circumstances where the Ashary Proceedings seek to vindicate KESP’s entitlement to take steps to defend itself in proceedings abroad brought by the petitioner (ultimately Sage) and where Sage and Mr Chishty have engineered the deadlock on which the Petition is based by unlawfully replacing a director of KESP for the purpose of preventing KESP from defending the claim made against it.
78. They say that the claim they make in the Ashary Proceedings is a good one which needs an urgent determination. The Ashary Plaintiffs need to obtain the relief they seek urgently so that KESP can properly respond to and defend the English Proceedings. They say that KESP has good defences on which it can properly rely. The Ashary Plaintiffs noted Mr Ashary has been permitted to file and has filed a defence in the English Proceedings (some three months ago) and no application for summary judgment has yet been filed. If the Ashary Proceedings are stayed until the Petition is determined, the effect will be that KESP will never have legal representation in the English Proceedings claim and the whole point of the Ashary Proceedings will be frustrated.

79. The Ashary Plaintiffs note that the unusual procedure adopted in the English Proceedings to deal with the obvious injustice of KESP being unable to defend itself is helpful but imperfect and leaves KESP exposed. KESP is not being given the opportunity to defend itself. Mr Ashary is not acting on behalf of KESP. As Mr O’Sullivan KC noted in his judgment “*The claimants’ proposal does not involve [Mr Ashary] or [Al Jomaih and Denham] defending the claim in the name of [KESP]. It envisages [them] filing evidence and making submissions in their own names as, in effect, interested parties in relation to that dispute.*” The Ashary Plaintiffs mentioned a number of particular difficulties. First, Mr Ashary has not been given the right to defend the cross-claim filed by Mashreqbank for payment of the debt which it claims is owned to it (or even to put in an acknowledgement of service) so that there is a risk of a default judgment being entered. Secondly, there is the question of how discovery will be dealt with. Mr Ashary is unable to compel KESP (and its third party corporate service providers or advisers) to extract, review and give documents by way of discovery or to enable a defence to be properly prepared and evidenced. The next scheduled step in the English Proceedings is a CMC listed in September so that time is short but there is some time to allow the Ashary Proceedings to progress. The Ashary Plaintiffs said that they had considered whether it would be possible to apply for interim relief in the Ashary Proceedings but had had concerns that it would not be possible to fashion relief that the Court could properly grant without in substance granting them the relief they ultimately sought in the proceedings (but they were reviewing the position).
80. The Ashary Plaintiffs submit that not only would the determination of the Ashary Proceedings enable KESP would remove the current deadlock on the board but that it would also fatally undermine the basis for the Petition which the Ashary Plaintiffs say is based and depends on the continuation of that deadlock.
81. They submit that the Petition turns on whether the KESP board was actually deadlocked at the 19 June Meeting or, instead, whether SPV 21 was acting in breach of its obligations under the SHA and whether the board of KESP were acting in breach of their fiduciary duties. In turn, that depends on the outcome of the Ashary Proceedings and the SPV21 Proceedings. If it is found that KPCD was unlawfully removed from the KESP board on

18 June 2023 and should be reinstated, the deadlock in the KESP board falls away and the Petition also necessarily fails.

82. The Ashary Plaintiffs submit that to stay the Ashary Proceedings to allow the Petition to continue risks KESP being wound up on a premise that is to be finally determined at trial in the Ashary Proceedings. They submit that the functional deadlock issue cannot be finally determined in the Petition because the Petition does not involve all necessary parties. In particular, the SPV 21 Proceedings Plaintiffs are not parties to the Petition. Therefore, staying the Proceedings pending the outcome of the Petition risks an obvious injustice: KESP could be wound up, despite the Ashary Defendants unlawfully having removed KPCD from the KESP board, absent which, there would have been no functional deadlock, and no basis for KESP being wound up. The mere existence of that potential injustice is sufficient justification to warrant dismissing the stay application.
83. Furthermore, the Ashary Plaintiffs submit, there is no risk of inconsistent findings if the Ashary Proceedings (and the SPV 21 Proceedings) were allowed to proceed and be heard first. The factual findings would be binding on the parties in the Proceedings including SPV 21.
84. The Ashary Plaintiffs submit that the balance of convenience favours dismissing the stay application. For the reasons I have already summarised, they say that there would be considerable prejudice to the Ashary Plaintiffs if there was a stay of the Ashary Proceedings. The Ashary Plaintiffs submit that they are entitled to seek orders to vindicate their rights as shareholders in KESP and ensure the proper appointment of legal advisers for KESP in relation to the English Proceedings. They say that the continued stymying of such appointment by the Ashary Defendants is alleged to be without justification. By contrast, there is no prejudice to any party in dismissing the stay application. The Petition will be resolved in due course, probably after the Ashary Proceedings and the SPV21 Proceedings. The Ashary Defendants have not identified any prejudice as a result of the Ashary Proceedings and the SPV21 Proceedings not being stayed. Further, the Ashary Proceedings are at least as advanced as the Petition. The only substantive step taken to date in the Petition was the hearing of the application brought by Al Jomaih and Denham to strike out the Petition on the basis that the SHA prohibited

SPV 21 from presenting a winding up petition. That application was dismissed on 11 October 2023 with written reasons to follow. The written judgment has recently been handed down. The parties now need time to consider what further steps should be taken in the Petition. By contrast, the pleadings in the Ashary Proceedings are in substance closed and the pleadings are closed in the SPV 21 Proceedings. If Al Jomaih and Denham decide to appeal the judgment dismissing their application to strike out the Petition, the Ashary Proceedings and the SPV 21 Proceedings will be unnecessarily stayed for a considerable period of time, awaiting the resolution of that appeal.

*The Proceedings should not be case managed and tried together*

85. As regards the application that the Ashary Proceedings be case managed and tried together, the Ashary Plaintiffs said that they accepted that this was in many respects a matter for the Court and a determination regarding the best use of judicial resources. However, the Ashary Plaintiffs submitted that the following points could be of relevance.
86. Whilst trying cases together can *sometimes* lead to cost and time savings, that is often not the case. Joining the cases means that two sets of counsel and witnesses have to attend the entire joined proceedings. Only one person can speak at once, meaning that for much of time, a full courtroom of people will be sat waiting for their turn. That is in many cases a waste of time and cost since it means that everyone has to sit through the evidence and submissions of everyone else (rather than only those that concern their case in particular). As such, a joint trial of the Proceedings would not appear to be sensible.
87. As for joint case management, that will only be useful if there is something to be gained by having joint directions given across both sets of Proceedings. In the ordinary case, that is neither necessary nor desirable. The directions should suit the issues in the particular case, not be a compromise between two actions. Likewise, joint directions hearings suffer from the same potential difficulty as identified above – that each Court participant has to be present for everyone’s else’s submissions no matter whether they are relevant to their case or not.

88. The Ashary Plaintiffs said that they were agnostic as to which judge the cases are allocated to. They simply want the Ashary Proceedings to be determined as expeditiously as possible so they want them allocated to a judge who has the best capacity. They noted that aside from me both the Chief Justice and Justice Kawaley had dealt with related cases.
89. The Ashary Plaintiffs submit that in the absence of a compelling reason, the Court may conclude (as they had done) that the case management directions sought by the Ashary Defendants are not appropriate. The Ashary Plaintiffs only asked that the Ashary Proceedings be allowed proceed, and can be determined, as expeditiously as possible and are assigned to the Judge with the best availability to ensure that that objective is achieved.
90. At the hearing, the Ashary Plaintiffs indicated that they could see that it might be appropriate to have the case management and trials of the Proceedings allocated to the same judge but not necessarily heard together. Adopting this approach would substantially eliminate the risk of inconsistent findings because if the same judge would be deciding them in both cases and it means that each case can move at its own pace without the other being slowed down unjustly. Such an approach would also limit the number of counsel at hearings and reduces the difficulty in scheduling hearings when all counsel have to be involved .
91. They submit that there is no need to make a decision on having a joint trial at this stage and indeed it was inappropriate to do so in view of the status of the Proceedings. The Court can always order a joint trial in the future. SPV 21 and the Ashary Defendants had not relied on points about witnesses and whether there will be overlap and duplication. A decision on this and the benefits and disadvantages of a joint trial could be taken after discovery and witness statements had been exchanged when the position would be clearer.

## Discussion and decision

### *The applications to stay the Proceedings*

92. In my view, as I explained at the end of the hearing, SPV 21 and the Ashary Defendants have failed to establish that a stay of the Proceedings pending the trial and final determination of the Petition, is justified and appropriate. In my view, the interests of justice, after carefully weighing the benefits and prejudice likely to result from a stay, require that a stay not be granted.
93. It is clearly established that the test to be applied by the Court when considering a case management stay is whether the stay is, in the relevant circumstances, in the interests of justice. It is also established that (as Justice Doyle said in *Enigma Diagnostics v Boulter*) that the jurisdiction should be exercised with caution and only for a very good reason (where there are strong reasons). There is however no separate requirement of rare and compelling circumstances.
94. The need for strong reasons was made clear in a number of the Cayman authorities. For example, by Moses JA in *Nanfong* (at [43]) where he found in that case that there were “*compelling and very strong reasons for granting a temporary stay in order to manage the order of proceedings ... to ensure that the issue is decided in the order that will most likely further the ends of justice.*” In *Port Fund* at [71] Justice Parker said that the question he asked himself was “*whether in all the circumstances there [were] strong reasons for granting a stay to further the ends of justice carefully weighing the benefits and any prejudice which are likely to result.*” This seems to me to be an accurate summary of the law. I do not see that there is a distinction of substance between the references to strong and very strong reasons. The applicant for a stay must overcome a high bar and establish serious prejudice and factors of considerable weight that demonstrate why the plaintiff’s important right to litigate its claim is, in the interests of justice, to be subordinated. I would also note that I sought to summarise the law in my judgment in *Tianrui (International) Holding Company Limited v China Shanshui Cement* [2020] (2) CILR 6] at [141].



95. As we have seen, the recent appellate decisions in England make the same point. In *Athena Capital Males LJ* said that there it was only in rare and compelling cases that it would be in the interests of justice to grant a stay on case management grounds in order to await the outcome of foreign proceedings since the usual function of a court was to decide cases and access to justice was a fundamental principle to be taken into account. It seems to me that, at least as a general matter, the same reasoning will apply in a case involving an application for a case management stay to await the outcome of other domestic proceedings.
96. I agree with the submission made by the SPV 21 Proceedings Plaintiffs and the Ashary Plaintiffs that neither Justice Doyle (in *New Silk*) nor Justice Parker (in *Port Fund*) intended to reformulate or lower the threshold to be satisfied in the core test for granting a case management stay. Both of my brother judges were concerned, in my view rightly, to emphasise the importance of the Court's role in actively case managing proceedings and how this impacts on the dynamics of and the Court's consideration of a stay application. The Court will be proactive and will not hesitate to order a stay in an appropriate case. But in order to show that the interests of justice are satisfied in denying a party the right to proceed to trial with proceedings properly commenced in this jurisdiction strong reasons must be shown.
97. In the present case, I accept the submissions made by both the SPV 21 Proceedings Plaintiffs and the Ashary Plaintiffs that a stay of the Proceedings pending the outcome of the Petition would in the circumstances cause each of them severe prejudice and would not be in the interests of justice. It would be wrong in my view to permit SPV 21 (and the parties that control it, which as matters currently stand appear to include Sage) to block or substantially delay a challenge to its removal of KPCD simply by presenting the Petition. It is clear that there is a genuine need to have the validity of that removal urgently determined by the Proceedings in view of the prejudice being suffered by KESP (and through KESP to Al Jomaih and Denham and ultimately to the SPV 21 Proceedings Plaintiffs) in the English Proceedings. I accept the submission made by the Ashary Plaintiffs that the procedural mechanism established by Mr O'Sullivan KC in the English Proceedings is only of limited assistance and what might colloquially be described as a short-term fix. It does not provide KESP with complete or adequate protection.

98. Granting the stay would mean that the English Proceedings would continue and possibly be concluded before the Ashary Plaintiffs and the SPV 21 Proceedings Plaintiffs had been able to have a trial of their claims, which if upheld at trial would probably have a significant impact on the conduct of the English Proceedings. It is even possible that KESP will be subject to a default judgment. A stay would also prevent the Ashary Plaintiffs and the SPV 21 Proceedings Plaintiffs from seeking interim relief should they choose to make an application.
99. The prejudice suffered by SPVI 21 in refusing the stay is minimal and much less by comparison. The proceedings in the Petition will continue in parallel with the Proceedings. At this stage it is difficult to predict whether the Petition will be ready for trial before one or both of the Proceedings. A refusal to grant the stay does not preclude the Petition being promptly progressed.
100. It is clear that the Petition covers a much wider range of issues than just those relating to the removal of KPCD. The Petition is a response to the dispute between SPV 21 (and Sage) and Al Jomaih and Denham concerning the Sage Transaction and is based on a wide range of allegedly wrongful actions said to have been taken by Al Jomaih and Denham (including a number of distinct breaches of the SHA). The allegedly wrongful removal of KPCD is just one step in a course of allegedly wrongful action relied on.
101. This means that I accept that the determination of the Proceedings and the question of whether KPCD was wrongfully removed will not of itself resolve the issues raised in, and cause the dismissal of, the Petition. It appears at this stage to be likely that even if the Proceedings are successful, the factual findings and decisions will not prevent SPV 21 having a *prima facie* basis for and maintaining its case that it is just and equitable to wind up KESP. Of course, a proper assessment of the merits of the Petition will need to wait until another hearing, and a proper assessment of the impact on the Petition of findings and decisions in the Proceedings will need to wait until such findings and decisions are actually made.
102. But the issues arising in the Proceedings have a narrower focus and to that extent it is more efficient to allow them to proceed independently of the Petition. The Proceedings

focus on the removal of KPCD in June 2023. The Ashary Proceedings will involve evidence being adduced as to the relevant factual matrix surrounding the SHA and the KESP Articles and therefore some of the history and context of the relationship between SPV 21 (Abraaj) and Al Jomaih and Denham, and it appears will touch on the statements made and action taken by the KESP directors appointed by SPV 21 but, nonetheless, they are still likely to involve a narrower range of issues and evidence than will need to be adduced in the Petition (although the position will only become clear after further progress has been made in the Proceedings and the Petition).

103. In this case, I give considerable weight to the injustice of permitting SPV 21 to halt or significantly delay the determination of the dispute as to its removal of KPCD by itself commencing a parallel set of proceedings in this jurisdiction in circumstances where the resolution of that dispute is highly material to the conduct of the English Proceedings commenced by those who control SPV 21 and the interests of the SPV 21 Proceedings Plaintiffs and the Ashary Plaintiffs.

*The applications for the joint case management of the Proceedings*

104. It seems to me that the overriding objective is best served by making an order for the joint case management of the Proceedings.
105. There is clearly a substantial overlap between the Proceedings. As SPV 21 and the Ashary Defendants maintained, the Proceedings arise out the same core facts and raise the same core issue. They seek in substance the same relief and both rely and focus on the actions taken by and purpose/motives of SPV 21 in removing KPCD in June 2023. It can be expected that material parts of the evidence in both Proceedings will overlap. Mr Skelton, Mr Hutchison and Mr McDonald will be key witnesses in both sets of Proceedings and it is at least likely that costs will be saved and the risk of inconsistent findings will be avoided if directions are given to allow their witness statements to stand as evidence in both Proceedings.
106. This substantial overlap, and the likelihood that significant parts of the documentary evidence adduced, and a significant number of the witnesses providing witness

statements and to be cross examined in one set of the Proceedings, will be adduced, provided, and cross examined in the other Proceedings, means that there is a need for coordinated case management to reduce costs, avoid wasting the time of the parties and their witnesses by making them duplicate their work and efforts, avoid unnecessary inconsistencies in the evidence, avoid wasting Court time and generally to ensure the efficient and fair administration of both sets of Proceedings.

107. It is also clear that the overlap between the Proceedings is not complete. The SPV 21 Proceedings also require factual matrix evidence relating to the Deed and raise points of interpretation of the Deed. But they are not quite as insulated from the disputes relating to the actions of the KESP directors and the steps taken in the English Proceedings as the SPV 21 Proceedings Plaintiffs sought to make out. As was noted by SPV 21 and the Ashary Defendants, the pleadings in the SPV 21 Proceedings refer to the actions of, and statements made by, the KESP directors appointed by SPV 21 (save for KPCD), and the action taken by AIML and Sage in the English Proceedings as evidencing the purpose for which SPV 21 removed KPCD. The role of Mashreqbank in the English Proceedings will probably also be relevant. The Ashary Proceedings also require different factual matrix evidence relating to the SHA and the KESP Articles (to the extent that such evidence can properly be adduced in relation to the construction of articles of association). But in my view the overlap is sufficient to show that there will be substantial benefits to be derived from joint case management and that the benefits outweigh the disadvantages, in particular the additional cost that the Ashary Plaintiffs and the SPV 21 Proceedings Plaintiffs will incur by having their counsel attend parts of the case management hearings that do not directly relate to their clients. But this additional expense is not high.
108. The need to avoid SPV 21, as the core defendant in both sets of Proceedings, having the burden and additional costs of managing its defence of the Proceedings separately and independently is also a factor of some weight in favour of joint case management.
109. As I indicated at the hearing, the fact that there will be joint case management does not mean that the timetable for each of the Proceedings needs to, or will, be identical. Co-ordination to promote the overriding objective is key and the procedural framework for joint case management is sufficiently flexible to ensure a fair and appropriate procedure

in each of the Proceedings. If separate timetables are needed and justified, the directions in each set of Proceedings can accommodate that. Having said that, it is likely that a common timetable and the common adjudication of preliminary issues will be desirable. So, for example, to the extent possible, it is likely to save time and expense if evidence on the same or similar issues and relating to the same facts is produced at the same time in both sets of Proceedings and, probably, treated as admissible in both Proceedings.

*Joint trials of the Proceedings*

110. I agree with the SPV 21 Proceedings Plaintiffs and the Ashary Plaintiffs that it is too early to tell whether a joint trial of both sets of Proceedings is justified and that a decision as to this is best deferred until after discovery and the production of witness statements. At that stage, it will be possible to review, in light of the evidence that has been produced, and a better appreciation of the factual disputes and legal issues to be dealt with in the trials, and of the further steps required before each of the Proceedings is ready for trial, whether a joint trial is needed. At this stage, and as a preliminary matter, I would say that it seems to me that a joint trial may be justified but a decision as to this will need to await further developments in the Proceedings.
111. As matters currently stand, the Petition will proceed independently of and without there being any direction requiring co-ordination with the Proceedings. It seems to me that it will be necessary to keep this under review to ensure that where appropriate there is in practice some co-ordination to ensure that the requirements of the overriding objective are observed.

*Single Judge to deal with joint case management and to preside at both trials or a joint trial*

112. If there is to be joint case management of the Proceedings there needs to be one Judge assigned to deal with applications for directions and CMCs in both sets of Proceedings. One of the benefits of joint case management is that one Judge will have a clear view of the state of play in both Proceedings and will be able to decide what is needed to co-ordinate them and ensure that the requirements of the overriding objective are observed.

This was recognised by the parties when they agreed that the summonses be heard by the same Judge.

113. Having dealt with the summonses, and it having been agreed with Justice Kawaley that I should do so, it seems to me to be right that I should continue to deal with joint case management issues (but I shall consult with and confirm the position with Justice Kawaley).
114. If in due course an order is made for a joint trial then consideration will need to be given as to which Judge should be assigned to preside over the joint trial. This will ultimately be a matter for the Chief Justice. It is an issue that can be addressed if needed in the event that an order for a joint trial is appropriate and made.



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**Justice Nick Segal**  
**Judge of the Grand Court, Cayman Islands**  
**14 June 2024**