IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

The Honourable Justice Segal

CAUSE NO: FSD 269 OF 2022 (NSJ)

IGCF SPV 21 LIMITED

Applicant/Plaintiff

and

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

Respondents/Defendants

JUDGMENT

1. I have before me an application by the parties to deal with four matters consequential upon my judgment dated 20 July 2023 (the ***Judgment***) dealing with the Applicant's claim against Al Jomaih Power Limited (***AJPL***) and Denham Investment Ltd (***DIL***) (together the ***Respondents***) for permanent injunctive and other relief arising out of the commencement by the Respondents of proceedings in the High Court of Sindh at Karachi (the ***Pakistan Proceedings***). The four matters are set out in [5] of my order dated 16 August 2023 (the ***Order***). [1]-[4] of the Order set out the injunctive relief including a declaration that the Respondents are restrained from continuing, pursuing or taking any further steps in the Pakistan Proceedings (save to the extent permitted in [3]).

2. I adopt the same definitions as were used in the Judgment.

3. These issues are:

(a). whether the Applicant is entitled to an order that the Respondents pay as damages for breach of the SHA its costs and expenses of and occasioned by the Pakistan Proceedings (together with interest), with such costs to be assessed on the indemnity basis or whether the Applicant must first apply for an order for costs from the High Court of Sindh in the Pakistan Proceedings and is then only entitled, by way of damages, to be paid the balance of its costs above the sum awarded by that court – and whether the Court can and should summarily assess the damages now based on the evidence adduced to date by the Applicant or should make an order for the separate and subsequent assessment of the Applicant's damages.

(b). the proper order in respect of the costs of the proceedings in this Court (who is entitled to their costs and what is the basis of assessment?).

(c). whether the Applicant is entitled to an order for the payment of interim costs and the amount of such an interim payment.

(d). whether all or some of the orders referred to above should be stayed pending the outcome of the Respondents' appeal against the Judgment.

4. At Tuesday's hearing I heard submissions from Mr Graham Chapman KC for the Applicant and Mr Stephen Rubin KC for the Respondents. At the end of the hearing I informed the parties that I had reached a conclusion on issues (a) – (c) but would reserve judgment on issue (d) as I wished to have a brief opportunity to review the written evidence to which I had been referred during the hearing. I now record and provide brief reasons for my decisions on items (a) – (c) and set out my decision on the Respondents' stay application (issue (d)).

5. As regards the proper order regarding damages, I decided that the Applicant was entitled to an award of damages quantified by reference to the costs and expenses which it had incurred in the Pakistan Proceedings (which were caused by the Respondents' breach of

the SHA and were reasonably incurred) and that I was able to and should assess the damages based on the amounts paid by the Applicant to its Pakistan legal advisers in the Pakistan Proceedings. The Applicant had sought an order that it be paid as damages, and limited its claim to, the full sum charged by its Pakistan legal advisers, Khalid Jawed Khan & Associates, being US$33,754.71. It seemed to me that making an order for a separate and full assessment of damages would be disproportionate and not in accordance with the overriding objective. The costs, as I pointed out during the hearing, of dealing with this issue have already considerably exceed the sum claimed and would only be increased by requiring a separate assessment. It also seemed to me that I should apply a discount to the total sum charged by Khalid Jawed Khan & Associates to reflect the fact that I was making a summary assessment of the damages and that it was likely that at least part of their charges might be capable of being challenged as unreasonable or disproportionate. I concluded that US$25,000 was a reasonable and appropriate sum. I also decided that damages should include interest at the rate of 2.375% on the US$25,000 from (although I did not spell this out at the hearing) the date of payment by the Applicant until payment by the Respondents (I do not see that it would be appropriate for interest to start to run from the commencement of the Pakistan Proceedings, and therefore before the Applicant had paid the fees and been out of pocket, as the Applicant claimed).

6. I did not accept the submission made by Mr Rubin KC that the Applicant should be limited to the amount of costs that would be awarded by High Court of Sindh (or payable to it on a taxation of Khalid Jawed Khan & Associates' fees in the Pakistan Proceedings). It seemed to me that the Applicant's entitlement to, and quantification of its claim for, damages was a matter for English law (as the governing law of the SHA) or Cayman law (as the law of the forum) and that this Court was not required to wait for the High Court of Sindh to adjudicate on costs or to apply limitations and qualifications in accordance with Pakistan law and procedure. The issue for this Court is whether and how much of the Applicant's legal fees were caused by the Respondents' breach and whether the Applicant had acted reasonably in accordance with the requirement to mitigate its loss. I can see that in some cases the Court may find it helpful to require a party to have its costs adjudicated in the foreign court but usually this will be unnecessary (as this Court can assess the loss flowing from the breach based on relevant evidence as to whether the relevant legal costs were properly incurred and reasonable/proportionate) and only increase costs. It would, however, obviously be wrong for the Applicant to recover its

Pakistan legal fees by way of damages in this jurisdiction and then to apply for and obtain an order for costs in the Pakistan Proceedings. I therefore decided that the order should include a proviso that the Applicant should not (or that the recitals should confirm the Applicant's undertaking that it will not) apply for costs in the Pakistan Proceedings.

7. I also did not accept the submission made by Mr Rubin KC that the Court could not award damages in a case where there was a costs regime in the foreign court that was similar to the costs rules in this jurisdiction and which provided for cost-shifting. I accept that there is some debate, at least in England and in the literature, as to the scope of the principle established by the English Court of Appeal in *Union Discount v Zoller* [2002] 1 WLR 1517 and the effect of the English Court of Appeal's judgment in *Carroll v Kynaston* [2011] KB 959 (particularly having regard to the "*doubtful cases*" discussed by Schiemann LJ in *Union Discount* at [35]-[38]) and I referred the parties during the hearing to the discussion of these cases and this issue in McGregor on Damages, 21st ed at 21-028-21-33 and Raphael, *The Anti-Suit Injunction,* 2nd ed at 14.03-14.15. However, I was satisfied that the law in this jurisdiction had been clearly set out by Mr Justice Parker in *Re BDO* [2018] (1) CILR 187 at [20]-[28] and by Mr Justice Kawaley J in *Riad Tawfiq Al Sadik v Investcorp* [2019] (2) CILR 585 (***Al-Sadik***) at [14]-[15] and that I should follow the approach that they had taken, which in my view is the correct approach and supported by the judgment of Julian Flaux QC (as he then was) in *Svenborg v Akbar* [2003] EWHC 797 and the commentary in McGregor on Damages.

8. I also concluded that since the Respondents' breach, at least as matters currently stand, is continuing that I should grant the Applicant's application for an order that the Respondents be required, by way of damages, to indemnify the Applicant in respect of its future costs and expenses of the Pakistan Proceedings with such costs to be assessed on an indemnity basis if not agreed. A similar order was made by Mr Flaux QC in *Svenborg* and it seems to me to be appropriate to make such an order in this case. Since it appears that, leaving aside the question of the stay sought by the Respondents, discontinuing the Pakistan Proceedings against the Applicant, A&M, KESP and KEL may not be a simple and rapid process because of the interventions of third parties I will give both parties liberty to apply for a variation of this order in the event that the Applicant is required to spend a material amount of time and funds in dealing with the Pakistan Proceedings.

9. As regards the proper costs in these proceedings, it seems to me that the Applicant was the overwhelmingly, albeit not the entirely, successful party. I decided that it should be awarded 80% of its costs which, if not agreed, should be taxed on the indemnity basis. An order for indemnity costs in a case in which the Court has found the paying party to be in clear (and flagrant) breach of contract is appropriate and in accordance with and justified by the authorities.

10. I also considered that it was appropriate to grant the Applicant's applications for interest on costs as set out in its draft order.

11. In my view, the Applicant is also entitled to an order that the Respondents pay US$50,000 as an interim payment on account of costs. I considered and took into account the evidence filed by the Applicant and the Respondents, including the invoices exhibited by Mr Keane to his Fifth Affidavit and also the Respondents objections and challenges set out in their evidence and submissions and concluded that the Applicant was likely to be entitled to an award of costs, following taxation, in at least this amount. I had regard in particular to the law as summarised by Kawaley J in *Al-Sadik* at [25] and note that there was no suggestion that requiring the Respondents to pay this sum would stifle their appeal. I gave particular weight to the principle that a successful party should not be kept out of his costs.

12. It was not in dispute that the Respondents have a right of appeal against the Order. They have confirmed (in their initial skeleton argument) that they will file a notice of appeal shortly and proceed with the appeal with reasonable diligence seeking expedition. They also confirmed that they were willing to request a special sitting of the Court of Appeal should that be considered necessary. In these circumstances the Respondents seek a stay of the injunctive relief granted at [1]-[4] of the Order pending the outcome of the appeal.

13. The Respondents submitted that the relevant considerations for the granting of a stay of execution pending appeal are set out in *Heriot African Trade Finance Fund Limited v. Deutsche Bank (Cayman) Limited* 2011 (1) CILR 34). Pursuant to section 19(3) of the Court of Appeal Act (2011 Revision), the Court may only grant a stay if good cause (i.e., good reasons) have been shown. In considering whether good cause had been shown, the

Court should have regard to (a) whether the appeal would be rendered nugatory if a stay were refused, (b) whether the appellant has a good arguable case on appeal, (c) the purposes for which the appeal was brought and (d) the balance of convenience. The Respondents submitted that there were good grounds for a stay in this case, in particular because the appeal would be rendered nugatory if a stay is refused.

14. The Respondents say that it is self-evident (or at least sufficiently clear from the evidence filed at the trial) that if they are required to discontinue the Pakistan Interim Injunction, then the Applicant will proceed to procure the appointment of the new directors to the board of KEL, including Mr Chishty, and that the new directors will be able to act without restraint so that there will at least be a serious risk that they may (with others) take action in relation to the management and affairs of KEL that would be prejudicial to the interests and position of the Respondents and that may well be incapable of being reversed. They say that the real dispute with the Applicant relates to the attempted takeover by entities controlled by Mr Chishty, and the change of control, of KEL and that allowing Mr Chishty to be appointed to the board (and to act without restraint) would to a substantial degree give the Applicant (and Mr Chishty) much of what they have been seeking, at least for a period of time before the appeal can be determined. Accordingly, in the event of a failure to grant the stay the appeal would (or there was a serious risk that the appeal would) be rendered nugatory and the Respondents would suffer serious prejudice.

15. The Respondents accept that during the stay they would be required to refrain from taking any steps in the Pakistan Proceedings and have proposed the following paragraph to be included in any order for a stay (the ***No Further Steps Paragraph***):

> *"... the [Respondents] must not pending appeal or until further order in the meantime take any further steps in the Pakistan Proceedings save for the purpose of informing the High Court of Sindh at Karachi of this order and to seek consequential temporary stays if necessary in respect of any upcoming hearings or steps in those proceedings."*

16. The Respondents say that this provision will ensure that the Applicant is not prejudiced and the status quo is preserved pending the outcome of the appeal. The balance of convenience therefore strongly favours the grant of the stay. They also claim that the Applicant cannot seriously argue that it will be prejudiced by having its right to procure

the appointment of directors to the KEL board suspended when the Applicant is taking action that will have the same effect – the Applicant now seeks a winding up order in respect of KESP, which the Respondents say will deprive the Applicant of the ability to exercise and enforce its right to cause KESP to appoint directors to the KEL board.

17. The Respondents further submit that they have a good arguable case on appeal. As I have noted, they have not yet filed a notice of appeal setting out precisely their grounds of appeal but have identified four grounds in their supplemental written submissions. These can be summarised as follows:

(a). that I erred in finding that the Pakistan Proceedings fell sufficiently within the exclusive jurisdiction clause in the SHA to justify the injunction granted. The Respondents argue that the references to the SHA in the Plaint in the Pakistan Proceedings are merely collateral to the central allegations in the Respondents' claims in those proceedings.

(b). alternatively, even if there were significant references to the SHA in the Plaint, that it was wrong rather not to order the excision of references to the SHA and to preclude ongoing reliance on the SHA. The Respondents argue that it was wrong and unnecessary (so as to give proper effect to the SHA) to make orders preventing the Respondents litigating claims against the Applicant under Pakistan law and the SPA.

(c). that the Applicant had submitted to the jurisdiction in Pakistan and/or had acted inconsistently with the relief it seeks from this Court.

(d). that I gave insufficient weight to the fact that the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue and that it would be contrary to the interests of justice to allow or encourage a procedure which permitted the possibility of different conclusions by different tribunals, perhaps on different evidence. The only tribunal with sufficient jurisdiction to undertake this task is the High Court of Sindh, being the only tribunal capable of being seized of the Pakistani statutory, regulatory and public interest aspects of the

dispute and being the tribunal to which the SPA parties agreed to submit their disputes under the SPA. At least some of the claims in Pakistan will, as the Court has ruled, be permitted to continue in any event so that the injunction granted could well lead to the unwelcome result of different parts of the dispute being determined in different courts which may make different findings of fact.

18. The Applicant made some submissions on the stay application. It argued that the Respondents had failed to adduce any evidence to show why they would be prejudiced if a stay was refused. They had not filed evidence to show what the consequences would be for KEL or themselves of a refusal to grant the stay and made a bald assertion of prejudice and the risk of adverse consequences. Their case was based on pure speculation. An appeal does not ordinarily operate as a stay (see rule 20(1) of the Court of Appeal Rules (2014 Revision)) since the successful party is entitled to the benefit of a judgment in its favour and this was all the more so in a case where the successful party has obtained interim and final injunctive relief restraining the pursuit of proceedings brought in breach of contract. In such circumstances, the successful party has been vexed by proceedings which should never have been brought and the maintenance of those proceedings constitutes a continuing breach of contract. The Court should not countenance permitting the contract breaker to continue to act in breach of contract. Furthermore, the Respondents had not established a good arguable case in relation to their grounds of appeal, which were bound to fail. The Applicant also submitted that there was evidence setting out the prejudice that they had suffered and would continue to suffer by being prevented from being able to exercise their contractual rights and the risks and prejudice arising from their inability to regularise the position and complete the appointments to the KEL board. The Applicant referred to the adverse consequences to it (and KESP and KEL) flowing from the failure to fill the vacancies on the KEL board explained in Mr McDonald's Third Affidavit at [15] and [16] (including a breach of section 155 of the Pakistan Companies Act 2017 which could result in a fine).

19. The Applicant also referred me to certain steps taken by a number of individual shareholders in KEL to intervene in the Pakistan Proceedings and in the process to challenge and criticise the decisions of this Court. The Applicant noted that these intervenors were using a Pakistan law firm that had been instructed by the Respondents and that it had a concern as to whether the Respondents had any connection with the

intervenors and the action they had taken. The Respondents noted that they had invited the Applicant to be clear as to the allegation it was making as to the Respondents' relationship with the intervenors and if it alleged that the Respondents had acted improperly and in breach of any orders of this Court the Applicant should say so and adduce evidence in support of such a serious claim, but the Applicant had not done so (I was referred to [30] of Bedell Cristin's letter to the Court dated 19 September 2023 in which they gave further details of the Respondents' relationship with the Pakistan law firm concerned). The Applicant said that the concerns it had expressed would require further investigation but that it considered it important that the Court was aware of these developments and that the action taken by the intervenors could mean that despite the No Further Steps Paragraph being included in any stay order the Pakistan Proceedings might not be put completely on hold pending the outcome of the appeal. The Applicant was unaware of the implications of action taken by the intervenors and did not propose at this stage to adduce further evidence as to Pakistan law on the issue. The Applicant submitted that the Court was at least able to conclude that if the stay was granted and the Pakistan Proceedings were not rapidly withdrawn the Applicant might be prejudiced because the continuation of the Pakistan Proceedings might allow the intervenors to take steps in and to prolong the proceedings in a way that would not be possible if the Pakistan Proceedings were discontinued.

20. The Respondents referred me to the judgment of Mr Justice Doyle in *Re Aquapoint LP (in official liquidation)* (5 October 2022, unreported) in which he clearly and comprehensively set out and considered the applicable law and the approach to be adopted by a first instance judge in dealing with an application for a stay pending appeal. I have taken into account the law as so stated and note in particular Mr Justice Doyle's helpful summary of the position at [20]. He noted at [20(4)] that the Court is likely, all other things being equal, to grant a stay where the appeal could otherwise be rendered nugatory or deprived of much of its significance and at [20(5)] that in deciding whether or not to impose a stay the Court will consider the grounds of the appeal, their likelihood of success and the balance of convenience having regard to the interests of the relevant parties and that "*The overriding feature is the interests of justice*."

21. I have concluded that, on balance, the Respondents have established good cause and that it is in the interests of justice to grant the stay pending appeal sought by the Respondents

(subject to the inclusion of the No Further Steps Paragraph and the Respondents undertaking to prosecute the appeal expeditiously and to seek a special sitting and proceed with a special sitting if the Court of Appeal is prepared to allow it).

22. It seems to me that there is a real risk that if the Applicant is permitted to proceed with the appointment of new directors to the KEL board without restraint (and I note that no undertakings were offered by the Applicant as to how the new directors would act and to limit the action they could take pending the outcome of the appeal) that action will (or could) be taken by them in relation to KEL that could well be difficult to unwind after a successful appeal. It was unfortunate and unhelpful that the Respondents failed to adduce evidence to explain more fully the types of action of which they were concerned and to provide more of the relevant (real world) facts and background. I have considered whether I should refuse the stay as a result and in light of the evidence which has been adduced by the Applicant regarding the continuing prejudice to it from being unable to proceed with the appointments to the KEL board. On balance, it seems to me that the risk to the Respondents is sufficiently clear and real from the evidence and the context. Allowing Mr Chishty on to the board now and allowing the Applicant to proceed with the appointments will give them a substantial benefit and an opportunity to take action affecting KEL's business, rights, relationships and reputation which could well be difficult to reverse after, and would cause material damage to the Respondents despite, a successful appeal. I recognise and take into account the adverse impact on KEL (and the Applicant and KESP) of allowing a further delay in making the appointments to the KEL board and that based on my decision the Applicant is being prevented from exercising its contractual rights.

23. As I noted during the hearing, it would be possible to impose as a condition of granting the stay that the Applicant and the Respondents give undertakings that they will cause their nominees to the KEL board, to the extent that doing so is lawful and otherwise permissible, to ensure that KEL will only be managed in the ordinary course of business during the period of the stay, so as to maintain the status quo during the stay and ensure that during the stay no out of the ordinary course of business transactions were entered into (in a way that changed the business or the financial position of KEL). I was concerned that the effect of the stay might be to deprive the Applicant of being able to prevent the KEL board taking decisions which it considered to be damaging and

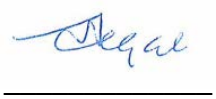
unsuitable. However, as I also noted during the hearing, the Applicant had not suggested that this was a concern which it had and had not adduced evidence on this point and did not seek any such undertakings or that assurances be given by the Respondents as parties to these proceedings regarding the action to be taken by their nominees to the KEL board. I appreciate that there are thirteen directors on the board of KEL, a company incorporated in Pakistan, including independent directors and directors appointed by the Pakistan Government, so that it may be expected that proper independent decision making will continue during the period of the stay and the kind of restrictions or undertakings I have mentioned are not needed or not possible to obtain.

24. So it seems to me that the Respondents have shown a real risk that a refusal to grant the stay will at least deprive the appeal of much of its significance and risk their suffering serious and irremediable prejudice and that while the Applicant will also suffer material prejudice as a result of the stay the risk of irremediable prejudice to the Respondents is greater and more serious (particularly where the No Further Steps Paragraph is included in the stay order so as to keep the Pakistan Proceedings on hold). I do have a concern as to the risk of prejudice to the Applicant arising from the action taken by the intervenors but note that at this stage the impact on and implications for the Applicant (and KESP and KEL) are unclear. It seems to me that if matters develop such that the intervenors take action in the Pakistan Proceedings which could make it impossible or more difficult to discontinue them in the event of an unsuccessful appeal (so that the failure to discontinue the Pakistan Proceedings now will turn out seriously to prejudice the Applicant) it would be appropriate to reconsider the continuation or at least the terms of the stay and I shall give the Applicant liberty to apply for a variation or discharge of the stay in such circumstances.

25. I have reviewed the Respondents' grounds of appeal (of course, the Respondents have a right to appeal and the appeal will go ahead). Unsurprisingly, I remain unconvinced of the merits of any of the grounds and it seems to me that the Respondent has not raised any new point or formulated its position in a way that causes me to reconsider my decision. Nonetheless, I accept that each of the grounds it has put forward are not unarguable or fanciful and that in a complex case of this kind they raise points on which the Court of Appeal may come to a different conclusion and differ from me. So I take the likelihood of success of the appeal, as so assessed into account. It seems to me that the

Respondents have done enough on prospects of success of the appeal to support their case for a stay.

26. I shall invite the parties to prepare and to seek to agree a revised form of order for my approval including an order dealing with costs. If the parties are unable to reach agreement they should file a draft order identifying the paragraphs that are agreed and those which each party seeks to have included with a brief explanation of each party's position. This should be done by 4pm Cayman time on Thursday 19 October. I shall then settle the order on the papers.



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
17 October 2023