Neutral Citation Number: [2024] EWHC 41 (Comm)

Case No: CL-2023-000160

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16/01/2024

Before :

SEAN O'SULLIVAN KC
sitting as a Deputy High Court Judge

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Between :

(1) ABRAAJ INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) **(2) SAGE VENTURE GROUP LIMITED**	**Claimants**
- and -	
KES POWER LIMITED	**Defendant**
- and -	
SHAN-E-ABBAS ASHARY	**Applicant**

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Vernon Flynn KC and **Daniel Warents** (instructed by **Fieldfisher LLP**) for the **Applicant**
Roger Stewart KC and **Mark Cullen** (instructed by **Simmons and Simmons**) for the **Claimants**
The **Defendant** did not appear and was not represented

Hearing date: 18 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sean O'Sullivan KC (sitting as a Deputy High Court Judge):

1. Mr Shan-E-Abbas Ashary (who I will call "the Applicant") applies for a stay of these English proceedings whilst a dispute as to who is entitled to represent the Defendant ("D") is determined in the Cayman Islands.

2. The Claimants ("the Cs") oppose that application. D has not taken any position, and has not been represented, for reasons I will explain.

3. However, there is no objection by the Cs to the Applicant's request to be joined to the action as a party, so that there is no dispute as to his standing to make this application. I therefore make that order pursuant to CPR 19.2(2), with the effect that the Applicant becomes the Second Defendant in these English proceedings. I will, however, continue to call him "the Applicant" and to refer to the First Defendant as "D".

The parties

4. The relationships between the different parties involved, or having an interest, in these proceedings are complicated. I am going to focus on the aspects which seem to me to matter for the purposes of the present application, which inevitably means that what follows is not a complete picture.

5. The Cs' substantive claim in these English proceedings concerns an alleged debt of US$41,446,114 plus interest ("the Debt") said to be owed by D to the Cs. The Debt relates to fees for services that the First Claimant (which I will call "AIML") provided to D, and expenses that AIML incurred on D's behalf, from 2009 onwards.

6. AIML was part of the Abraaj Group of companies, a private equity group which focused on investment in emerging markets. AIML was the principal investment management entity within the Abraaj Group. AIML was wound up by order of the Grand Court of the Cayman Islands on 11 September 2019.

7. The Second Claimant ("Sage") is said to have acquired the Debt in 2022. I understand Sage to form part of a group which is seeking to take control of an investment vehicle called IGCF SPV 21 Limited ("SPV21"). Specifically, on 3 August 2022, it is said that:

    7.1. AIML sold its rights and interest in the Debt (less an amount of US$1,139,526, which AIML is liable to pay to another entity) to Sage;

    7.2. AIML transferred its equitable interest in the sole voting share in SPV21 to Sage; and

    7.3. AIML received back an assignment of the Debt from Sage, as security for the consideration which will be payable by Sage for the Debt.

8. D is a Cayman Islands company which serves as a special purpose vehicle for various parties' investments in the Karachi Electric Supply Corporation Limited

("K-Electric"), an energy supply company in Pakistan. It is said that D's only substantial asset is an illiquid 66.4% stake in the ordinary shares of K-Electric.

9. There are three shareholders in D:

   9.1. SPV21. The sole voting share in SPV21 is legally held by AIML, but (as I have indicated) it is said that the equitable interest in the voting share was transferred to Sage in August 2022; and

   9.2. Al Jomaih Power Limited ("AJP") and Denham Investments Ltd ("Denham"), who the parties together call the "Original Shareholders", because they held investments in K-Electric through D before SPV21 acquired its interest in D in October 2008.

10. I am told that SPV21 owns 53.8% of the shares of D. AJP holds 27.7% and Denham 18.5%. Each of the shareholders is entitled to appoint representative directors to the board of D pursuant to the terms of a Shareholders Agreement dated 15 October 2008. SPV21 is entitled to appoint five directors, referred to by the parties as "the Abraaj Nominees", although I am told that the right to appoint one of these was transferred to the receivers of certain Abraaj Group companies (and is, or was, controlled by Mashreqbank PSC – see further below). AJP appoints three directors and Denham appoints two directors. There is no provision for a casting vote.

11. The Applicant is one of the three AJP appointed directors.

The Debt

12. The Cs' position is that the Debt had long been treated as undisputed.

13. The Debt is said to arise from a Consultancy Services Agreement entered into between AIML and D on 18 May 2009 ("the CSA"). The CSA has an English governing law and exclusive jurisdiction clause. Pursuant to the CSA, D had a contractual obligation to pay AIML a fee of US$10 million per annum for services provided under the CSA.

14. The CSA had an initial term of 5 years and covered the period from 2008 to 2012, ending on 31 December 2012. The CSA was then extended from 1 January 2013 until 31 December 2016 by way of a Side Letter dated 15 July 2015, which also contained an English governing law and exclusive jurisdiction clause. It amended the annual fee to be paid by D to US$4 million per annum.

15. I am told that, on 28 May 2012, US$20 million worth of fees owed to AIML was settled by a debt-to-equity conversion. Then, in 2015, a further US$13 million worth of those fees were settled by D using the proceeds of an accelerated equity offering. It is alleged that there is a balance of US$33 million in fees which is outstanding (i.e. 5y x $10m + 4y x $4m = $66m, less $20m and $13m).

16. In addition, it is alleged that AIML incurred expenses on D's behalf and for its benefit. The outstanding expenses are said to total US$8,446,114.

17. The Cs point out that the Debt was acknowledged in D's accounts for several years, including between 2014 and 2021, and that it featured in at least three sets of accounts which appear to have been signed by the Applicant himself. For example, D's accounts for the year ended 31 December 2021 (which were signed by the Applicant) acknowledge sums of US$25 million and US$8 million to be due as management fees. They also record another payable to AIML in the sum of US$8,446,114, which I take to be the expenses.

18. After Sage became involved, however, the Original Shareholders took the position that the Debt should be challenged. The Cs say that half of D's board of directors does not accept that the Debt should be disputed and does not accept that there is any proper basis for the present claim to be defended. I will say a little more about this in due course.

19. In any event, when it became apparent that there was a disagreement about the Debt, the Cs say it was necessary for AIML to take steps to preserve its security interest, and Sage's interest, in the Debt.

20. On 30 November 2022, a statutory demand was served by AIML on D's registered office in the Cayman Islands. The 21-day period for the statutory demand expired on 21 December 2022, without any payment being made by D.

21. The Cs say that they did not progress the winding up of D for non-payment of the Debt, because D's ability to pay the Debt was dependent upon a sale by D of its interest in K-Electric. The Cs suggest that a winding up of D might jeopardise D's attempts to realise its interest in the K-Electric shares, which are D's sole asset. For his part, the Applicant invites me to infer that the Cs did not progress the winding up because they recognised that there was a *bona fide* dispute about the Debt.

<u>The current proceedings and the dispute about the representation of D</u>

22. The Claim Form in the present action was issued on 21 March 2023.

23. On 9 June 2023, the Cs served the Claim Form and Particulars of Claim on D. The Claim Form and PoC were served out of the jurisdiction pursuant to CPR 6.34, on the basis that the claim was made pursuant to or in respect of a contract which contains a term to the effect that the Court has jurisdiction to determine the claim. I do not understand there to be any dispute about the validity of service.

24. On 12 June 2023, there was a meeting of D's board which was adjourned because it was inquorate.

25. The Applicant's case is that the board meeting was automatically adjourned until 19 June 2023 and that there was a valid meeting of D's board on that date. He says that the board voted in favour of a resolution that Fieldfisher should represent D in these proceedings. The Cs say that this was not a valid meeting at all and further that, if it was, the vote was deadlocked (5 vs 5).

26. To some degree, this outcome of the vote depends on whether a Mr Keiran Hutchison was entitled to cast a vote at that meeting in favour of Fieldfisher's instruction. Mr Hutchison is a partner in EY Cayman Ltd and a director of KP Corporate, which was in turn a corporate director of D. He makes various complaints about KP Corporate Director Ltd ("KP Corporate") (purported) removal from the D's board immediately before the 19 June meeting. His removal is being challenged in the Grand Court of the Cayman Islands.

27. The Applicant also argues that the directors who voted (by proxy) against the appointment of Fieldfisher were acting in breach of their fiduciary duties owed to the D when doing so, because they were (it is alleged) doing so on the instructions of the Cs, notwithstanding that it would be in the best interests of D to dispute the Debt.

28. On 30 June 2023, an Acknowledgement of Service was served on Cs, indicating an intention both to defend the claim and to contest jurisdiction. The AoS was served by Fieldfisher, apparently on behalf of D. No application to contest jurisdiction followed.

29. On 6 July 2023, Fieldfisher wrote to Simmons & Simmons (solicitors for the Cs), requesting an extension to the deadline for filing the Defence, and asking for copies of documents allegedly referred to in the PoC.

30. On 11 July 2023, Simmons & Simmons asked whether Fieldfisher considered that that firm was properly authorised to act for D, given the wider dispute between the shareholders. The same day, Charles Russell, solicitors for SPV21, wrote to Fieldfisher to suggest that the Original Shareholders did not have the authority to instruct Fieldfisher to act on behalf of D.

31. On 13 July 2023, Fieldfisher responded to say that they considered themselves to have been properly instructed on behalf of D. However, they accepted there was now a dispute as to whether the board meeting on 19 June 2023 had authorised them to act on behalf of D. Until that dispute had been resolved, Fieldfisher indicated that they would be acting on behalf of directors of D appointed by the Original Shareholders only. They invited the Cs to apply for a stay of the proceedings until determination of that dispute as to the representation of D.

32. After further correspondence between the parties, the Stay Application was issued by the Applicant on 31 July 2023.

The various Cayman Proceedings

33. Meanwhile, on 7 July 2023, SPV21 filed a petition in the Grand Court of the Cayman Islands seeking an order that D be wound up on just and equitable grounds, including on the basis that D's board is now deadlocked. I am told that the Original Shareholders unsuccessfully applied to strike out that petition, and intend to appeal that decision not to strike it out.

34. There are also proceedings in the Caymanian Court against SPV21, seeking a declaration that the (purported) removal of KP Corporate from D's board was void or voidable and should be set aside.

35. On 31 August 2023, the Applicant and the Original Shareholders issued proceedings in the Cayman Islands against D, SPV21 and all of the directors nominated by SPV21, seeking declaratory relief: (a) confirming the validity of the 19 June meeting; (b) confirming the validity of the instruction of Fieldfisher and (c) seeking the establishment of a sub-committee of the board of D to instruct Fieldfisher to defend the English claim.

36. The last is the set of proceedings in the Cayman Islands which the Applicant originally said should be determined before the current litigation could proceed. However, there is said to be significant overlap in the factual matters in the various Caymanian actions and petitions. I understand the Applicant's position now to be that, in practice, all of those Caymanian proceedings would (or at least might) need to be concluded in order for the issues about the validity of Fieldfisher's appointment to be sufficiently resolved.

37. The Cs say that the proceedings in the Cayman Islands are unlikely to proceed briskly. Apparently, the Original Shareholders have already raised a technical procedural point on the signature blocks on the defences entered to their action, which the Cs say confirms that no stone is going to be left unturned. In any event, I understand it to be common ground that, once the pleadings are closed, there will need to be discovery, affidavit evidence and then a trial in the Caymanian Court. It seems unlikely that those steps will all be completed before the end of 2024. If potential appeals are factored in, the timeframe might be extended further.

Issues which are not to be decided as part of this application

38. A number of topics have been canvassed in the evidence and in submissions, on which it does not seem to me I can, or at least does not seem to me that I should, make any decision. For the most part, this was common ground, with both parties agreeing that I was **not** being asked finally to decide these matters, albeit disagreeing about where that left me.

39. For example, the parties agreed that it was not appropriate for me to make a decision on the merits of the Cs' claim for the Debt. For completeness, I should observe that, on 13 October 2023, the Cs issued an application for default judgment. Their position was and is that there is no properly arguable defence. They sought to list that application for hearing alongside the current application, but the Court did not permit that. That being so, the Cs acknowledged that their application for default judgment will be decided by another judge in due course and that it is not appropriate for me to pre-empt that decision. They asked only that I give directions about listing in that regard.

40. In the light of that acknowledgement from the Cs, I can describe the issues about the merits of D's defence to the substantive claim shortly. I understood there to be, in effect, 4 limbs to that defence.

41. First, the Applicant says that the fees said to be due under the original CSA have not in fact fallen due for payment because (although the term of the original CSA has expired) the CSA has not been "*terminated*". On this basis, it is said that the pre-conditions for that liability to arise have not yet been satisfied.

42. Second, the Applicant says that D would (if it was able to defend itself) argue that that there was a contractual agreement to the effect that no payment of any part of the Debt would fall due for payment until there was a liquidity event that would generate sufficient funds to enable D to make payment, or alternatively that the Cs are estopped from pursuing any claim until there is such a liquidity event.

43. Third, it is said that the Debt (or at least the bulk of it) is now time-barred. If (contrary to the Applicant's primary argument) liability arose at the end of the initial term under the CSA, then payment was due more than 6 years before the present proceedings were commenced. That much is common ground. But the Cs respond that D repeatedly acknowledged the Debt in its accounts. The Applicant replies that, in order to rely on an acknowledgment, the Claimants would need to prove that they actually received the alleged acknowledgment before the expiry of the primary limitation period. The issue appears to concern whether Mr Sybersma also received D's accounts on behalf of AIML, or purely in his capacity as a director of D.

44. Fourth, it is said by the Applicant that any rights which AIML had to the Debt were assigned away as part of its financing arrangements in 2016. That last allegation is supported by Mr Hutchison in his (very late) witness statement dated 11 December 2023. He asserts, in effect, that the Debt had been assigned to Mashreqbank PSC ("Mashreq"). This is said to have happened because the Abraaj Group obtained finance from Mashreq and provided security to Mashreq. There would appear to be a series of disputes (both jurisdictional and substantive) between the Cs and Mashreq. Representatives of Mashreq observed (remotely) the hearing of the current application, but they did not make any submissions. They currently take the position that Mashreq has not submitted to the jurisdiction of the English Court.

45. In the light of the position adopted by the Cs, it seems to me that I should proceed on the basis that there might be a properly arguable defence to the Cs' claim in these proceedings.

46. In much the same way, it appears to be common ground that I am not in a position to form any final view of the merits of the competing arguments (a) about whether, as a matter of Caymanian company law, Fieldfisher was/is properly authorised to represent D, (b) about the current composition of D's board of directors, (c) about that board's ability effectively to direct the company, or (d) about how the directors of the D should be voting in relation to the defence of the English proceedings. All of those are agreed to be matters for the Grand Court of the Cayman Islands, to be decided in the context of the various Caymanian proceedings to which I have referred in the preceding section.

Law on stays

47. CPR 3.1(2)(f) provides that the English Court may, unless the rules provide otherwise, "*stay the whole or part of any proceedings or judgment either generally or until a specified date or event*". I am told that this power is derived from the court's inherent jurisdiction which is expressly preserved by s.49(3) of the Senior Courts Act 1981, which provides that nothing in the Act affects the power of the High Court to stay proceedings where the Court thinks fit, either on its own motion or on the application of any person, whether or not a party to the proceedings.

48. However, there is a series of authorities which suggest that, save where there is specific provision for a stay in the rules, this power should be used cautiously. In Abraham v Thompson [1997] 4 All ER 362, for example, Potter LJ said (at p.374e-g) that:

> "*In my view, the starting point in any case where a stay is sought in circumstances which are not provided for by statute or rules of court, the starting point is the fundamental rule that an individual who is not under a disability, a bankrupt or a vexatious litigant, is entitled to untramelled access to a court of first instance in respect of a bona fide claim based on a properly pleaded cause of action, subject only to the sanction or consideration that he is in peril of an adverse costs order if he is unsuccessful, in respect of which the opposing party may resort to the usual remedies of execution and/or bankruptcy if such order is not complied with. This principle is of course subject to the further proviso that, if the court is satisfied that the action is not properly constituted or pleaded, or is not brought bona fide in the sense of being vexatious oppressive or otherwise an abuse of process then the court may dismiss the action or impose a stay whether under the specific provisions of the rules of court or the inherent jurisdiction of the court*".

49. The Applicant focussed on the last sentence of the foregoing quotation, and especially the words "*if the court is satisfied that the action is not properly constituted or pleaded, or is not brought bona fide in the sense of being vexatious oppressive or otherwise an abuse of process then the court may dismiss the action or impose a stay*". Mr Flynn KC (Leading Counsel for the Applicant) made two submissions about this. The first, which I accept, is that the "*starting point*" (i.e. an entitlement to untramelled access to the Court) does not apply to a claim which amounts to an abuse of process. That is plainly right. One of the weapons available to the English Court, in the event that it forms the view that a party is abusing its processes, is to impose a stay.

50. Mr Flynn's second, and more ambitious, submission was that, if a defendant to an action is for some reason disabled from fully defending itself, that means that the action "*is not properly constituted*", such that the usual starting point again does not apply. I see no sign that Potter LJ had in mind that type of scenario. I would understand his reference to an action being "*not properly constituted*" in a more technical sense: in other words, as referring to situations such as where the wrong parties have been named, or where the claim has not been properly authorised by the party in whose name it is said to have been brought.

51. We discussed one or two hypothetical examples in oral submissions in order to ensure I understood how high Mr Flynn was putting his case in this regard. I believe he accepted that he could not say that, if a defendant did not have money to appoint lawyers, that would (without more) justify a stay, although he did suggest that, if the impecuniosity had been caused by the claimant, the position might be different. When presented with a hypothetical scenario in which a defendant company was unable to act because of internal disagreements, I understood him again to accept that this difficulty could not justify a stay in itself. If those facts alone would justify a stay, the wheels of English justice could too easily be jammed by any company that was reluctant to pay a debt: it could simply manufacture a dispute between its directors or shareholders and then seek a stay of proceedings. Mr Flynn was quick to point out that the position might be different if the internal problem affecting the defendant had been created by the claimant, but that really led back to his primary argument about abuse of process.

52. It seems to me clear from the authorities to which I was referred that, absent abuse of process or anything of that kind, the starting point is that the claimant has an entitlement to "*untramelled access to a court of first instance in respect of a bona fide claim based on a properly pleaded cause of action*". Alongside Abraham v Thompson, I would place Reichhold Norway A.S.A. v Goldman Sachs International [2000] 1 WLR 173, in which the Court of Appeal confirmed Moore-Bick J's decision to grant a stay where there were parallel proceedings in Norway, but Lord Bingham referred (at p.186C) to such stays only being granted "*in rare and compelling, circumstances*". Another example is Amlin Corporate Member Ltd v Oriental Assurance Corporation [2012] EWCA Civ 1341, in which the Court of Appeal upheld a judge's refusal of an application by insurers for a stay of proceedings brought against them by reinsurers (for a declaration of non-liability under a reinsurance contract), pending the outcome of foreign proceedings brought against the insurers. That was despite the reinsurance contract containing a "follow settlements" clause. The Court of Appeal again confirmed that a stay should only be granted in "*a rare and compelling case*" (per Longmore LJ at [19]).

Abuse of process

53. I repeat, however, that the approach will be different in a case in which the Court is satisfied that its processes are being abused. It perhaps does not matter whether abuse of process is characterised as an exception to the general rule about stays, or as an example of a rare and compelling case in which a stay may well be justified.

54. By way of example, the Applicant referred in this context to Hunter v Chief Constable of the West Midlands [1982] AC 529, in which it was made clear by Lord Diplock (at p. 536C-D) that any court of justice must possess an inherent power:

> "*…to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique.*

> *It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power*".

55. The Applicant submitted, and I accept, that the categories of abuse of process are not fixed. It is not a bar to a finding that there is an abuse of process that there is no reported case on all fours with the present.

56. However, it was noteworthy that several of the examples on which the Applicant relied, where stays were granted, concerned claims/ petitions **brought in the name of a company**, where there was a dispute as to whether those proceedings had in fact been brought with the authority of that company.

57. For example, in Danish Mercantile v Beaumont [1951] Ch 680, the starting point for the Court of Appeal's consideration of whether the bringing of the action could be ratified after the event was that, if proceedings had been started in the name of a plaintiff without proper authority, the action was not properly constituted (see the Headnote). Against this background, Jenkins LJ referred (at p.686-7) to a:

> "*well-settled practice of the court in cases in which, in proceedings brought by a company, a dispute arises as to the authority with which the company's name has been used as plaintiff. It is common practice in such cases to adjourn any motion brought to strike out the company's name, with a view to a meeting being called to see whether the company desires the action to be brought or not.*"

58. It was submitted on behalf of the Applicant that this situation is analogous with a case where the **defendant** to an action is said not to have authorised the solicitors on the record. I cannot accept that submission. There is a fundamental difference: if an action is brought in the name of a party who has not authorised it, that action cannot proceed. Unless ratified, the unauthorised action would have to be struck out. An issue about the authority of the defendant would not have the same effect, because a **defendant** does not have to take any positive step in order for the action against it to be properly constituted.

59. Danish Mercantile might therefore be said to be an example of a type of case where Potter LJ in Abraham v Thompson was suggesting the English Court "*may dismiss the action or impose a stay*", because the action was not "*properly constituted*". It is not that the English Court treats all scenarios in which there is an issue about the authority of a corporate party as involving something akin to an abuse of process. It is rather that the English Court treats scenarios where a claim is brought in the name of someone who has not authorised it, as being susceptible to being struck out, but might be willing to stay the claim (rather than immediately strike it out) where there is uncertainty about whether the action has been (or will be) authorised.

60. The cases of Airways Ltd v Bowen [1985] BCLC 355 and Re Oriental Gas Co [1999] BCC 237 are further examples of the same point. In the former, the issue was whether an objection that an action was not properly constituted, because the

action was not authorised by the company, should be raised by way of substantive defence, or raised at the outset of proceedings by way of procedural application. The Court of Appeal made clear that it should be raised at the outset, pointing out that the effect of a finding that the plaintiff had not authorised the commencement of proceedings was that the plaintiff's name would be struck out and: "*…that must be the end of the action. It becomes a headless corpse*" (see p.358e).

61. In Re Oriental Gas Co, one issue concerned the naming of a petitioner in a petition alleging unfairly prejudicial conduct under s.459 of the Companies Act 1985. Uncertainty about whether the presentation of this petition had been authorised at a meeting (which was held to be irregularly convened and constituted), and about what might be decided by the company in due course, caused Ferris J to conclude that a stay was more appropriate than simply striking out the petition. But, again, those were, in effect, the only available options. Obviously, where the alternative to a stay would be to strike out the petition, concerns about the prejudice to a litigant of being denied access to justice do not arise.

62. None of these cases seem to me to be analogous to the present. That being so, it is perhaps worthy of note that there are plenty of examples of cases in which issues about the authority of solicitors to represent claimants (or plaintiffs, or petitioners) have resulted in stays, but Counsel have turned up none where the issue concerned the authority of solicitors to represent defendants (or respondents). For the reason I have indicated, I do not find that surprising.

63. Against that background, however, the Applicant relied quite heavily on Fusion Interactive v Venture Investment [2006] BCC 187. That was a rather complicated case, in which the claimant company (Fusion) was deadlocked because two B shareholders and directors of Fusion had a 50 per cent representation at shareholder and board level and the other 50 per cent representation was controlled by the defendant company (Pertemps). Fusion sought to bring injunction proceedings against Pertemps which had not been authorised by Fusion's board, because 50% of the board voted against those proceedings. Peter Smith J held that Fusion was entitled to bring those proceedings.

64. I would be cautious about treating the decision in Fusion Interactive as involving any real point of principle. In Smith v Butler [2012] Bus LR 1836, the Court of Appeal made clear (at [24] and [37]) that Fusion Interactive is not authority for any broad principle to the effect that "*directors acting in breach of duty could not claim that other directors lacked authority to commence proceedings to remedy the breach without the approval of a board resolution*".

65. The Applicant nevertheless relied on Peter Smith J's comments in Fusion Interactive at [49]:

> "*It must be borne in mind, in my view, that blocking of a legitimate cause of action Fusion might bring by Messrs Bacon and Watts given their conflict would in my view be a breach of the fiduciary duty of directors that they owe to Fusion. It cannot be right that they take advantage of their own breach of duty in blocking*

a legitimate challenge against a company in which they are also interested. The courts will not allow such a position to happen."

66. I understood the Applicant's submission to be that the last sentence amounted to the learned Judge characterising that behaviour (i.e. taking advantage of a breach of duty to block a legitimate challenge) as amounting to an abuse of process which would not be permitted. That seems to me something of a leap of faith. Peter Smith J was not finding, or even being asked to find, that there was an abuse of process, or that a stay should be granted. He actually resolved the issue over Fusion's authority in a different way, by finding that Pertemps had acknowledged that Fusion would be entitled to instruct solicitors, and hence that the proceedings were properly authorised as against Pertemps.

67. Indeed, Peter Smith J specifically referred (at [57]) to the way forward being for the B shareholders: "*to seek to bring either a derivative action or s.459 or other relief complaining about the actions of Messrs Bacon and Watts in blocking legitimate challenges to issues raised by Pertemps*". He was not suggesting, for example, that the "*issues raised by Pertemps*" would be stayed as an abuse of process. He was pointing out that the English Court, at least in the context of an English company like Fusion, had mechanisms available to it to prevent directors wrongfully blocking legitimate legal action against another company in which they had an interest. It seems to me that that must have been what he had in mind when he said (in [49]) that "*The courts will not allow such a position to happen*".

The Applicant's allegations

68. The allegations which the Applicant and the Original Shareholders are making in their Cayman proceedings were outlined to me in some detail. I understood these allegations to be the foundations on which the case of abuse of process was built.

69. The central allegation was that the current proceedings are intended as a way of applying pressure to the Original Shareholders, so that they withdraw any objection to the transfer of control of SPV21 to Sage. It was suggested that, if the Cs were able to obtain a judgment of the English Court in respect of the Debt, they would be able to use it to wind up D and thereby secure access to D's shareholding in K-Electric.

70. Against this background, it was said that the Cs were using their control of SPV21 to prevent D from defending the English proceedings, by purporting to replace KP Corporate (and hence Mr Hutchison) as a director of the D with someone who would vote as ordered by SPV21, and by ordering the other directors of D appointed by SPV21 to vote against the instruction of lawyers for the English proceedings. The Applicant says that SPV21 was not entitled to remove/ appoint directors in order to secure an advantage for one shareholder. It also says that the directors of D appointed by SPV21 were in breach of their fiduciary duties owed to D, because they were not exercising any independent judgement when they voted against the instruction of Fieldfisher.

71. There are also issues about the validity of the meeting of D's board on 19 June 2023, although these seem to me to be secondary to the two main complaints I have just outlined. Unless the Applicant and the Original Directors succeed in showing that SPV21 was not entitled to replace KP Corporate, or that the directors of D which SPV21 had appointed were acting in breach of their fiduciary duties, it probably does not matter whether the meeting on 19 June 2023 was valid or invalid. On its own, that could not affect whether and how D is able to defend the claim.

72. It should be noted that SPV21 alleges that D is functionally deadlocked and should be wound up for that reason. More generally, the directors of D appointed by SPV21 say that the Debt is obviously due and owing by D and has been acknowledged on multiple occasions by the directors of D, such that it would not be appropriate, or in D's best interests, for D to defend the English proceedings, because there is no valid defence to those proceedings. SPV21 also says that it was entitled to remove KP Corporate as a director of D and denies that there is any restriction of the type alleged on its power to remove directors.

73. In any event, the Applicant relies upon the foregoing allegations as justifying a stay, primarily on the basis that what is happening here amounts to an abuse of process. The Applicant says that the Cs have deliberately engineered a situation in which the D is unable to defend itself in these English proceedings, or even to appoint lawyers to advise it. In those circumstances, the argument goes, the pursuit of these proceedings is an abuse of this Court's processes.

74. At the outset of his oral submissions, Mr Flynn KC colourfully described what is happening as follows (p.15-16):

> "*To put it in energetic terms, what the claimants have basically done is tied up and gagged the defendant, and now they want to hit him with a baseball bat whilst chastising him for not defending himself.*"

75. He submitted that the Court should not allow that to happen. It is an emotive image and a clever submission. But I am not sure that it is appropriate to equate bringing proceedings against someone in the English Court with hitting them with a baseball bat and, as I have just indicated, there is considerable controversy as to whether the Cs can properly be said to be responsible for "tying up and gagging" D.

(1) Allegations, not facts

76. The first problem for the Applicant is that he is, in effect, asking me to assume that the allegations which he has made in Cayman about the Cs, SPV21, and the directors appointed by SPV21, are all true. If the Cs have not, through SPV21, ordered the directors of D which SPV21 had appointed to vote against the instruction of Fieldfisher – in other words, if the directors had voted in accordance with their own assessment of D's best interests – it is difficult to see how there could be said to be any abuse of process.

77. I am happy to accept that the Applicant's case (i.e. that those directors are following orders from SPV21, rather than complying with their duties to D) is properly

arguable. The Cs did not suggest that it is not. Nor did Mr Stewart KC, for the Cs, spend very much time trying to distinguish between what the Cs might want and do, and what SPV21 might want and do. By way of example, it does seem likely that the removal of KP Corporate by SPV21 was a response to Mr Hutchison indicating an intention to vote in favour of the instruction of Fieldfisher. As Mr Flynn KC put it, the timing of that removal cannot really be coincidental.

78. However, Mr Stewart KC did emphasise that the Debt has been repeatedly acknowledged in D's accounts. This is not a case in which it is obvious that there is a valid defence to a claim, such that an inference might be drawn about the directors' motivation if they were to oppose the company instructing lawyers to advance that defence. As Mr Stewart put it in his oral submissions: "*It is not the purpose of any honest individuals, companies or otherwise, to dispute debts which are due and payable*". That must be right. With that in mind, it seems to me entirely possible that what has happened is that the directors appointed by SPV21 have genuinely taken the view that there is no defence to this admitted claim and that it is not in D's interests to spend money and energy pretending that there is. It could even be that the reason for the split across the board by reference to the two sets of appointing parties is that the directors appointed by the Original Shareholders are wrongfully obeying orders given by the Original Shareholders, rather than because they are the ones complying with their duties as directors. I simply do not know.

79. The Applicant submits that it cannot be the case that, where there is uncertainty as to whether a factual allegation which underpins an allegation of abuse of process is true, no interlocutory relief can be granted. I agree, but that uncertainty must be a relevant consideration when deciding whether to grant relief and (if so) what relief should be granted. There is something uncomfortable about the Applicant being able to obtain much of the substantive relief he seeks (i.e. preventing judgment being entered in England against D in favour of the Cs) by raising issues about the conduct of the Cs and others which can only be determined in the Cayman Islands.

(2) Not abuse of process in any event

80. The second problem for the Applicant, as it seems to me, is that, even if the allegations were all well-founded, it is doubtful whether it would be right to describe what is happening as amounting to an abuse of the processes of the English Court.

81. Importantly, the Applicant acknowledged that the initial commencement of the English proceedings did not involve any abuse of process. I understood it to be said that pursuing this claim was only said to become abusive once the Cs (allegedly) prevented D from defending itself. It follows that the behaviour which is said to be wrongful is not really anything to do with the fact or manner of **the prosecution of this claim by the Cs**. Indeed, it is doubtful whether there is even anything wrong with the Cs indicating to directors of D who SPV21 had appointed that the Cs would prefer not to see any defence advanced to their claim. The complaints primarily concern the conduct of the **directors**, who are said to have prioritised the Cs/ SPV21's wishes over the duties they owed to D, and perhaps the conduct of SPV21, when making decisions about the removal and replacement of one of those

directors. Without being overly technical about it, this cannot be treated as the conduct of the Cs in the current claim.

82. In my judgment, the more natural place to look for a remedy, where the real complaint is about the conduct of the directors, or concerns the appointment of a director, is within the corporate structure. I would expect the proper way forward to involve the seeking of (urgent?) relief in the Cayman Islands in respect of the operation of D. Mr Stewart KC pointed out that the Applicant had not put forward any evidence about what would or would not be available by way of urgent relief in the Cayman Islands. I find it hard to accept that there is no way of breaking a deadlock, or policing the behaviour of directors, other than via proceedings which might take more than a year to be resolved.

83. Indeed, the Applicant indicated that the Original Shareholders may in due course make an application under s.96 of the Cayman Companies Act to restrain the Cs from pursuing these English proceedings. That provision is relevant where a winding up petition has been presented, but no winding up order has been made, and provides (at (b)) that a party can: "*where any action or proceeding is pending against the company in a foreign court, apply to the Court for an injunction to restrain further proceedings therein*".

84. I did not follow the Applicant's submission that, having regard to principles of comity, I might choose to act as if such an application had been made and had succeeded in the Caymanian Court. For a start, the Original Shareholders have so far chosen not to make any such application, because to do so would be inconsistent with their position that the winding up petition should be struck out. More importantly, I have no way of knowing whether such an application would be likely to succeed, especially in relation to proceedings in a foreign court which are currently directed to the principle of whether, as a matter of English law, the Debt is due and owing, not enforcement.

85. All of that said, this seems to me an illustration of the point that relief of some kind might be available in the Caymanian Court in an appropriate case, where alleged misconduct by, or deadlock among, the directors of a company might result in the company suffering a loss.

86. By contrast, describing misconduct by directors as involving an abuse of the processes of the English Court, and staying the English proceedings on that basis, seems to me to be an attempt to bang a square peg into a round hole. It is difficult to think of any other example of abuse of process which does not involve the complaint being about the way the judicial process is being used. Moreover, a stay feels like the wrong remedy. If there genuinely were an abuse of process, the most natural remedy would be to strike out the abusive claim (or statement of case, or whatever). But here the suggestion is that the proceedings should be paused until a decision can be made about the instruction of English lawyers, whereupon (whatever is decided in that regard) those English proceedings will finally be allowed to continue.

(3) Discretionary factors

87. Even if I were in no doubt that the Applicant's complaints about the directors appointed by SPV21 were well-founded, I would think long and hard before granting a stay of these proceedings. I would be looking for some other way in which the English proceedings could go forward, which addressed the specific problems raised by those complaints without putting the English proceedings into the deep freeze. It does not seem to me that justice is best achieved by labelling behaviour by those directors as "abuse of process" by the Cs, and holding up the prosecution of an English claim which everyone accepts has been properly commenced and needs to be resolved.

88. When I adjust the question further, to reflect the reality that the Applicant's complaints are presently just allegations, I struggle to see how I could properly decide to grant a prolonged stay. It might be different if what was being sought was a short pause to enable some accelerated procedure in the Cayman Islands to be completed. I note, for example, that the limited extent of the anticipated delay was an important factor for the Court of Appeal in Reichhold Norway. But what is being sought here is a prolonged delay to the English action, while complicated substantive proceedings make their way through the Grand Court.

89. The Applicant nevertheless argued that there would be no prejudice to the Cs if there was a stay. It pointed out that Mr Sybersma, providing evidence on behalf of the Cs, said at one point that these proceedings had been issued to "*minimise the risk of any potential limitation challenge*". If that were the only reason for commencing proceedings, I can see that a stay might not prejudice the Cs. Either the claims were time-barred when the proceedings were issued, or they were not. A stay of the proceedings after they were commenced could not affect the position in that regard.

90. The Applicant argued that, even if the proceedings were to continue, and the Cs obtained a judgment against D, in practice the Cs could not obtain payment of the sums said to be due in respect of the Debt. That was on the basis that any actual payment would depend on the resolution of a "*highly complex*" process of realising value from K-Electric (said to include regulatory issues arising from the potential disposal of shares in a company which the Pakistani government regards as a national security asset).

91. However, the Cs do not accept that they would not suffer any prejudice as a result of a stay. They say that, even if D's sole asset is an illiquid stake in K-Electric, there is a need to resolve any substantive dispute about the Debt. The Cs are seeking a determination that the Debt is due and owing, so that the focus of the parties can then move to discharging the Debt, in recognition of D's current liquidity position.

92. I accept that the Cs have a legitimate interest in having any issue about whether the Debt is due determined by the English Court as soon as possible. I do not understand it to be disputed that the Cs have validly issued and served proceedings in England, which is the agreed contractual forum in which to determine the substantive disputes relating to the Debt.

93. In those circumstances, it does seem to me that the Applicant needs to show that pursuing those proceedings would amount to an abuse of process, or (failing that) to point to rare and compelling circumstances which favour a stay. I do not think that the existence of a deadlock among directors, preventing instructions to defend the proceedings being given on behalf of D, is sufficient, even if that deadlock might arguably be causatively linked to the Cs.

(4) C's proposed way forward

94. Any lingering doubts or concerns which remain in that regard seem to me to be fully addressed by the C's proposal to consent to the Applicant advancing arguments on behalf of D at their application for default judgment and (if that application fails) thereafter. This seems to me a very sensible approach for the Cs to have adopted and I propose to make their consent the basis for my refusal of the Applicant's application for a stay, as the Cs in effect invited me to do.

95. At the heart of the Applicant's argument is the proposition that, unless a stay is granted, there cannot be an effective determination of the issue as to whether the Debt is due and owing. We can all agree that, if the D is deadlocked and, in practice, unable or unwilling to defend itself, that would be unsatisfactory from the perspective of getting to the right answer. The Applicant's best point is that, if it was subsequently decided in the Cayman Islands that D should have appointed lawyers to dispute the Debt, it would be disappointing if there had already been a final resolution of the question as to whether the Debt is due and owing, on the basis of a one-sided hearing.

96. I have already made clear that I doubt that amounts to a sufficient justification for a lengthy stay, even if there were no other way of enabling any and all issues about the Debt to be decided on the merits. If a party was struggling to raise finance to appoint lawyers, and by the time it had managed to do so, the case had already been heard, that would also be unfortunate. But justice is not simply a matter of arriving at the right answer, no matter how long that process takes. Justice delayed can also be justice denied and there is always a balance to be struck.

97. Happily, it seems to me that it is possible to provide the Applicant with an opportunity to assist with a fair resolution of the question as to whether the Debt is due and owing. As I say, the Cs have indicated a willingness to agree to a procedural workaround which enables the Applicant and/or the Original Shareholders to take part in any relevant hearing in order to present the evidence and arguments, in effect as interested parties.

98. To be precise, the Cs have put forward a proposal whereby the Applicant and/or the Original Shareholders (and/or Mashreq) can be joined as parties to the proceedings, so that they can advance, if so advised, any defences D may have to the claim. The Cs say that the Court can order the joinder of the Applicant and/or the Original Shareholders (provided they were willing to accept service), and the Court would then decide the issue of whether the Debt is due and owing based on all of the submissions before it. They confirm that they would take no issue with the Applicant being joined as an interested party so that he can advance, if so advised,

any defences D may have to the claim, or with the Applicant taking the other procedural steps which would be required to respond to the substantive claim. The D would remain a party to the proceedings, but without being required to spend company money on defending them.

99. For completeness, the Cs have also made clear that they do not object to the Applicant's lawyers appearing at the hearing of the default judgment application to make submissions as to why default judgment should not be granted. The Cs have also said that they do not object to Mashreq also making submissions as to why the Debt is allegedly owed to Mashreq (rather than to Cs), at least if Mashreq is willing to submit to the jurisdiction of the English Court (and to be joined to the proceedings for making submissions as another "interested party").

100. The Applicant contends that the Cs' proposal is unsatisfactory. Several of the Applicant's objections to the proposal seemed to me largely to fall away in the course of oral submissions, but I will deal with all of them for completeness.

101. First, the Applicant observed that the Cs' proposal, at least as originally formulated, was stated to be available only if it was first established that "*the Court is not minded to enter default judgment*". But, whatever their position before, at the hearing, the Cs made clear that they would consent to the Applicant and/or the Original Shareholders making submissions about whether default judgment should be entered. Accordingly, that problem falls away.

102. Next, it was said that the Cs' proposal would not provide any mechanism for D to advance a stakeholder application under CPR Part 86, because such applications can only be made by the person who is said to be under the relevant liability (see CPR 86.1(1)(a)). As a matter of strict procedure, that may be right. But a stakeholder application is simply a procedural means by which (if the English Court has jurisdiction over all the relevant parties) a party which is holding, but has no beneficial interest in, an asset can leave it to those who say they do have an interest to fight the issues about ownership out between them. That seems to me exactly what the Cs' proposal seeks to achieve; leaving D on the sidelines, while those with an interest of one kind or another in the dispute fight it out. I do not know whether or not Mashreq will be content to, or can be compelled to, litigate in the English Court these issues about the alleged assignment, but, if so, it seems to me that the functional equivalent of a stakeholder application (what Mr Warents, Junior Counsel for the Applicant, sensibly described as a "*quasi-stakeholder application*" using declaratory relief) can be put in place for that purpose. If Mashreq will not come to England for this, I am not sure I see how any better result could be achieved via a stakeholder application.

103. Third, the Applicant submitted that the Cs' proposal did not address the detailed procedural consequences of a situation in which D would not play an active role in the proceedings. The Applicant pointed out that D would not file a Defence, participate in a CMC, or play any active role in any of the procedural steps up to trial, including disclosure. It was suggested that the integrity of the trial process could not be maintained in those circumstances.

104. I explored this with Mr Warents, who dealt with this aspect of the submissions on behalf of the Applicant. He focussed his fire on disclosure, recognising that there was no reason why the Applicant or the Original Shareholders could not file a form of Defence, or participate in a CMC, in exactly the way on which D would have done. Even in relation to disclosure, however, I found it difficult to understand why there should be any insuperable practical problem. It was not immediately obvious, from what I have been told about the potential defences available to D, that there would in fact be any relevant documents held by D which would not (also) be in the possession, custody, or control of the Cs, or of the Applicant. But if there were, I did not follow why an order could not be made by the English Court requiring D to disclose those documents.

105. It is important to remember that the Cs' proposal is not that D ceases to be a party to the proceedings. Quite the contrary: the Cs ultimately seek judgment against D and it is common ground that D has been properly served on the basis of an English Court jurisdiction clause. So there would be nothing to prevent the English Court making an order which would have to be complied with by D.

106. Mr Warents' answer to that was that the directors appointed by SPV21 might not want to give disclosure, and might seek to prevent D from complying with any procedural order in that regard. However, there is a difference between directors taking a view as to whether a debt should be contested, and directors deliberately preventing compliance with an Order made by a Court which is agreed to have jurisdiction over the company.

107. There is no doubt that the Cs' proposal is procedurally unusual and would require careful and creative case management. However, it seems to me that the parties most directly affected by the unusual procedural features are going to be the Cs. In circumstances where that proposal has come from the Cs, it will be difficult for them to object to sensible procedural workarounds which are designed to keep the claim on track.

108. With those three points answered, the Applicant was left with what Mr Warents described as an objection of principle to the Cs' proposal: it was said that it was simply not open to the English Court to allow a director or a shareholder to be added to proceedings for the purpose of advancing substantive defences in the capacity of (in effect) an interested party. Mr Warents did not shy away from submitting in terms that it was "*jurisdictionally improper*" and that the English Court did not have the power, even when both the claimant and the proposed "interested" party consented, to permit that course to be adopted.

109. Indeed, Mr Flynn KC, in his oral reply, ended up expressing the Applicant's submission in terms that would not have sounded out of place in a Dickens novel about the practice of law in the 1850s: "*…it seems odd to a commercial practitioner, not so much a chancery practitioner, I can tell you that now, but that seems odd, that you can't just [say], "Oh there's a practical solution". The Commercial Court is all about practical solutions for commercial parties. But it's come up against here a chancery company principle. That is a principle*".

110. This contention about a supposed principle was primarily founded on some remarks made by the Court of Appeal in Abdelmamoud v. The Egyptian Association [2018] EWCA Civ. 879. In that case, the claimant had loaned some money to the defendant. The claimant issued proceedings and, when no acknowledgement of service was served, entered default judgment. Some of the directors of the defendant applied to set aside that judgment and they succeeded before the deputy master. On first appeal, it was held that they did not have locus standi to make that application and the Court of Appeal confirmed that decision.

111. The Applicant acknowledged that the specific grounds for the finding that the directors did not have locus standi was that, in that capacity as directors of the company, they were not "directly affected" for the purposes of CPR 40.9, which specifically permits a non-party who is "directly affected" by a judgment or order to apply to set the same aside. That is not exactly the issue here. The Cs' proposal does not require me to find that the Applicant, as a director, would be "directly affected" in that capacity by a judgment in these proceedings, or that he is automatically entitled, purely because he is a director, to intervene in these proceedings. Everyone agrees that "*The management of a company is conventionally entrusted to its board as a whole rather than to one or more individual directors*" and further that "*Their status as directors would give them neither a personal interest nor decision-making powers except as members of the wider board*" (per Newey LJ at [29] and [31]). But it does not follow that a director cannot, with the consent of the opposing party and the permission of the Court, be joined as a party and then permitted to file evidence and make submissions.

112. The Applicant focussed on a comment in Newey LJ's judgment at the end of [31]: "*That point is underlined by the fact that such an application* [i.e. to set aside default judgment] *would seem to make little sense unless the applicant director(s) could be given permission to defend the claim in the company's name (as the deputy master ordered in this case), yet the director(s) will have no right to do so under the company's articles. The intentions of the corporate organ to which such matters are entrusted (viz the board) would be liable to be frustrated*". I read this as making clear that a director has no right, by virtue of holding that role, to defend a claim **in the company's name**. That is because the board as a whole, which is the "*corporate organ to which such matters are entrusted*", might have a different intention, and a single director cannot be allowed to frustrate that intention.

113. Plainly, it does not follow that a director can never be joined as a party to proceedings involving that company, nor does it mean that no-one can ever be joined as an additional defendant to a claim in which a company is the defendant. The Cs' proposal does not involve the Applicant, or the Original Shareholders defending the claim **in the name of D**. It envisages the Applicant and/or the Original Shareholders filing evidence and making submissions in their own names as, in effect, interested parties in relation to that dispute.

114. The concept of an "interested party" is of course most familiar in the context of judicial review, where it has a defined meaning and where there are detailed rules about who qualifies and how they are to be treated. But it does not seem to me that there is any rule that prevents a party from being joined in other circumstances,

where it appears to the Court that to do so would be convenient and consistent with the overriding objective. I do not accept that there is any formal fetter on the Court's power to make orders for this purpose, even if it is a power that, for obvious reasons, will be used sparingly. For example, in the context of procurement claims in the TCC, other bidders (and especially the successful bidder) are sometimes added as interested parties. It is recognised that they may need to be given an opportunity to participate, even if no relief is sought against them by the party challenging the procurement decision.

115. When I asked Mr Warents where I would find this (as he called it) "*basic fundamental principle of company law*" – this supposed fetter on the power of the Court to join a party to proceedings, or to permit evidence to be filed, submissions to be made, etc., by that party – he referred me back to the decision in Abdelmamoud and suggested that this fetter on the powers of the Court was in some way a product of the rule in Foss v Harbottle (1843) 2 Hare 461. I am entirely willing to accept that the fact that a company has a legal status which is independent of its directors, even if those directors are the agents through which the company acts, means that a director is not automatically entitled to defend a claim in the company's name. But I do not accept that it follows that a director, or a shareholder, or anyone else for that matter, cannot, in special circumstances, be added as a party to a claim against a company, and then given permission to take steps such as filing evidence and making submissions relevant to the defence of that claim. I accept Mr Stewart KC's submission that the Court's power to add a party (in CPR 19.4) is very widely expressed.

116. The special circumstances here, of course, are (a) the fact that the board of D is deadlocked, such that it can have no contrary intention until that deadlock is resolved and, especially, (b) the fact that (in order to ensure that their claim can be properly and efficiently resolved) the Cs are consenting to the Applicant and/or the Original Shareholders taking on a role equivalent to that of an interested party.

117. To summarise, I do not see any insuperable practical difficulty with implementing the Cs' proposal and I do not accept the submission that it is not open to the English Court to adopt it. It seems to me a sensible way of addressing any lingering concern that it would not be satisfactory, in circumstances where it is being contended that D has defences to the Cs' claim, but is unable to put them forward because of the related dispute between directors and shareholders, if there were to be a final adjudication of the Cs' claim without those defences being considered.

118. Of course, the Applicant and the Original Shareholders may choose not to take the Cs up on their proposal, as has been the Applicant's position to date. But if they ultimately decline to do so, that will ease my mind as to whether they ever really believed that D could defend the present claim. It will cause me to suspect that all of this is more to do with causing delay or securing a procedural advantage in the Caymanian proceedings. I was certainly not pressed with any procedural disadvantage for the Applicant or the Original Shareholders with adopting the Cs' proposal. It was not being said, for example, that it was unfair to ask them to pay the costs, or be exposed to costs, as the price of being allowed to participate in the substantive proceedings.

119. On the contrary, the Applicant offered an alternative way forward which (the Applicant said) would enable a stay to be avoided, namely that the Original Shareholders would agree to pay all of D's legal costs and to indemnify D in full for any adverse costs that may be made against it in these proceedings, if the Cs (through SPV21) "*make formal arrangements to enable [D] to defend these proceedings with instructions being provided to [D]'s lawyers by a sub-committee of [D]'s board*" (i.e. a sub-committee consisting of the directors nominated by the Original Shareholders).

120. The short answer to the Applicant's alternative proposal is that, unless there is a reason for the Court to reject the Cs' proposal as a way of meeting any remaining concern, I do not need to trouble myself with other possible solutions which are **not** being offered by the Cs. I have already made clear that I consider the Cs' proposal satisfactorily to address any concern that genuine defences to the Debt might not be properly presented or explored. It is sufficient to enable me to be satisfied that there will be no abuse of process and no need for a stay.

121. However, for completeness, I will add that the Applicant's proposal seems to me to involve a much more obvious inconsistency with the rule in Foss v Harbottle than the Cs' proposal. It amounts to assuming that the Cs can order the directors nominated by SPV21 to agree to D instructing Fieldfisher for the purpose of defending the English proceedings, and to appoint a sub-committee of the board for that purpose. Yet the Original Shareholders' main complaint, at the risk of oversimplifying matters, is about the Cs supposedly giving orders of exactly that kind (through SPV21) to the directors of D, rather than allowing those directors to exercise their independent judgement when deciding what D should do about these English proceedings. No doubt, from the perspective of the Original Shareholders, the Applicant's proposal can be justified on the basis that they allege it amounts to SPV21 merely countermanding a previous order which should not have been given. But that is to assume the facts which the Original Shareholders will be seeking (in the Caymanian proceedings) to prove. I am left suspecting that the reason for the Applicant's support for this way forward, and vigorous objection to the Cs' (functionally equivalent) proposal, is a hope that the adoption of the former would strengthen the Original Shareholder's position in the Cayman proceedings.

Disposal

122. For the reasons I have given, I dismiss the application for a stay. I do so on the basis that the Cs have undertaken to consent to the Applicant and/or the Original Shareholders and/or Mashreq participating in these English proceedings (if they are willing to do so) in the manner discussed above. That undertaking should be recorded in a recital to the Order which I will make dismissing the application. I invite Counsel to seek to agree an appropriate form of words, failing which they should identify any areas of disagreement in order that I might rule on the same by reference to what I understood the Cs to have offered to the Court.

123. I will also hear Counsel on any issues as to costs (including summary assessment thereof) and any other consequential orders, if agreement cannot be reached between the parties following consideration of this judgment in draft. By way of example, my initial impression is that I ought to make an order about the listing of the Cs' application for default judgment, but, if that remains controversial, I will hear further submissions in that regard.

124. It would be wrong to conclude this judgment without paying tribute to the very high standard of preparation and advocacy, both oral and written, on both sides. It has made what might have been a very difficult exercise a great deal easier for me.