IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO 193 OF 2023 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF KES POWER LIMITED

Before:	**The Hon. Justice Segal**
Appearances:	**Stephen Rubin KC instructed by Laura Hatfield and Jonathan Stroud of the Bedell Cristin Cayman Partnership for Al Jomaih Power Limited and Denham Investment Limited** **Graham Chapman KC instructed by Conal Keane and Niall Dodd of Dillon Eustace Cayman for IGCF SPV 21 Limited**
Heard:	**11 October 2023**
Decision notified:	**11 October 2023**
Draft judgment circulated:	**29 May 2024**
Judgment delivered:	**31 May 2024**

HEADNOTE

Company law – whether the terms of a shareholder agreement should be interpreted as including a covenant by shareholders not to present a winding up petition – section 95(2) of the Companies Act (2023 Revision)

JUDGMENT

Introduction

1. On 11 October 2023 I heard an application by Al Jomaih Power Limited (***Al Jomaih***) and Denham Investment Ltd. (***Denham***) (collectively the ***Applicants***) made by summons dated 28 July 2023 (the ***Summons***) for declaratory relief and to have the Winding Up Petition (the ***Petition***) dated 11 July 2023 filed by IGCF SPV 21 Limited (the ***Petitioner***) in respect of KES Power Limited (***KESP***) dismissed or struck out, or to restrain its further pursuit.

2. At the hearing the Mr Stephen Rubin KC appeared for the Applicants and Mr Graham Chapman KC appeared for the Petitioner. At the end of the hearing, I informed the parties that the application would be dismissed and gave brief reasons. I said that I would set out my reasons in further detail in due course and I now do so in this judgment[1].

The issues and the background

3. The Petition seeks a winding up order under section 92(e) of the Companies Act (2023 Revision) (the ***Act***) on the basis that it is just and equitable that KESP be wound up. The grounds relied on are breach of legitimate expectations, functional deadlock, breach of legal bargain, breakdown of quasi-partnership and loss of substratum (see paragraph 2 of the Petition).

4. The Applicants submitted that the Petition had been presented in breach of a term in Schedule 4 of the shareholders' agreement dated 15 October 2008 (the ***SHA***) between the Applicants, the Petitioner and KESP and therefore fell to be dismissed pursuant to section 95(2) of the Companies Act (2023 Revision) (the ***Act***). Section 95(2) of the Act provides that the Court shall dismiss a winding up petition where the petitioner is contractually bound not to present it. The Petitioner disagreed and submitted that the

[1] I must apologise to the parties for the delay in providing these written reasons. The hearing took place shortly before the start of a trial of over three months in another matter which trial has caused the delay in completing and distributing this judgment.

SHA did not prohibit the presentation of the Petition in this case and that therefore the application should be dismissed.

5. The background to the dispute between the parties is summarised in my judgment dated 20 July 2023 in related proceedings in FSD 269 of 2022 and I therefore do not propose to set that out again here.

The terms of the SHA

6. The third recital to the SHA states that the parties have entered into the SHA to regulate their conduct in relation KESP and its subsidiary Karachi Electric Supply Company Limited (***KESC***). The SHA deals with, *inter alia*, representations and warranties given by the Applicants and the Petitioner as shareholders; directors and corporate governance; the conduct of KESP's business (in clause 6); the information to be provided to KESP's shareholders; the issue of new shares; the transfer of shares; the sums payable by the Petitioner to the Applicants on Exit (Exit is defined as an exit by the Petitioner from, including various events as a result of which the Petitioner would realise, its investment in KESP); the prohibition on the acquisition of interests in and the regulation of investments in businesses related to, KESC; the termination of the SHA; the relationship between the terms of the SHA and KESP's constitutional documents and states that the former prevail over any conflicting provision of the latter and the governing law of the SHA which is to be English law.

7. Clause 6 of the SHA is headed "*Conduct of Business*" and clause 6.1 deals with reserved matters and stipulates that the provisions of Schedule 4 shall apply.

8. Schedule 4 provides as follows (note that the SHA refers to the Applicants as the Original Shareholders and to the Petitioner as Abraaj):

> *"The Company covenants that and each Shareholder undertakes to exercise all his powers as a shareholder or otherwise so as to procure that none of the following matters shall be undertaken without the consent of Abraaj and the Original Shareholders. The Shareholders covenant that the following matters shall not be undertaken without the consent of Abraaj and the Original Shareholders (it being acknowledged by each party that none of the following matters are within the competence of the Board).*

FSD2023-0193 Page 3 of 20 2024-05-31

...

Liquidation *The solvent liquidation, winding-up or dissolution of the Company or KESC."*

The terms of KESP's articles

9. KESP's articles (the ***Articles***) contain various provisions dealing with Reserved Matters. These are defined as follows:

> "*those matters which are not otherwise reserved at [sic] [pursuant to the?] Act [Companies Act] for the Members that shall not be undertaken without the consent of [the Petitioner and the Applicants] (it being acknowledged by each party that none of the following matters are within the competence of the Board) being the following:*
>
> ………..
>
> *(f) the solvent liquidation, winding up or dissolution of [KESC]"*

10. Article 15 states that the directors must obtain the approval of all shareholders before considering any Reserved Matters and under article 93 none of the directors are entitled to act in relation to any Reserved Matter unless previously approved by the shareholders.

11. Articles 145 and 146 appear under the heading "*Winding-Up*.".

12. Article 145 provides as follows:

> *"[KESP] shall be taken to have commenced a voluntary winding up and discussion [sic] [dissolution] upon the passing of a Special Resolution by the holders of the Class O Shares [being Petitioner and the Applicants] to wind up, dissolve liquidate and terminate [KESP]."*

13. A Special Resolution is defined as a resolution:

> *"(a) passed by 100% of ...Members as, being entitled to do so, vote in person or where proxies are allowed, by proxy at a general meeting of [KESP] …"*
>
> *(b) approved in writing by all the Members entitled to vote at a general meeting of [KESP] …"*

FSD2023-0193 Page 4 of 20 2024-05-31

14. Article 146 deals with how the liquidator is to apply KESP's assets if KESP is "*wound-up*"

15. Accordingly, the Articles make provision for the voluntary winding up of KESP. The effect of the requirement to pass a Special Resolution in order to commence such a winding up and the definition of Special Resolution as requiring 100% of Members to vote in favour of the resolution to wind-up, is that such a winding up can only be commenced if all shareholders agree.

The Applicants' submissions

16. The Applicants argued that their application turned on a discrete legal point that could and should be determined summarily. Disposing of the Petition summarily will, in furtherance of the overriding objective, avoid a trial or other proceeding which would plainly be unnecessary and wasteful of costs.

17. The Applicants said that section 95(2) was in mandatory terms and relied on the judgment of Rix JA in the Court of Appeal in *In re Rhone Holdings L.P.* 2016 (1) CILR 273 (***Rhone Holdings***) at [28]:

> *"Those sorts of circumstances [where an adjournment is needed to accommodate attempts at settlement, mediation or arbitration] do not detract in any way, in my judgment, from the underlying message of section 95(2), which is that where parties have agreed not to present a petition, then they are not to be permitted to act in breach of that agreement, that the court will uphold that agreement. Of course, if adjournment is necessary for something like mediation or arbitration or potential settlement, that's another matter and the court may wish to adjourn in those circumstances. But, otherwise, section 95(2) compels the court by mandatory terms "shall dismiss" to give effect to the parties' contractual agreement."*

18. The Applicants said that in English law there may be an issue as to whether an agreement by a shareholder not to present a petition was enforceable. They referred to the English Court of Appeal's judgment in *In re Peveril Gold Mine Limited* [1898] 1 Ch 122 (***Peveril***) where the Court of Appeal dismissed an application by two shareholders for a stay of a winding up petition made on the basis that the petition was presented in breach of the company's articles - which required the permission of two directors or an ordinary shareholders' resolution – holding that the company had been "*formed on the condition*

that its existence shall not be terminated under the circumstances, or on the application of the persons, mentioned in the Act [of 1862, ss.79 and 82] that is to say that it is formed contrary to the provisions of the Act, and upon conditions which the Court is bound to ignore" (per Lindley MR at 131). The Applicants submitted that subsequent judicial consideration of *Peveril* in England and Wales had clarified that the Court of Appeal had not decided that shareholders or creditors (as opposed to a company itself) could not fetter their right to present a winding up petition by contractual agreement (citing *In Re Colt Telecom Group plc (No 2)* [2002] EWHC 2815 (Ch) per Jacob J [74]) and, in any event, *Peveril* presented no obstacle to the operation of section 95(2) nor the enforceability of Schedule 4 of the SHA because (a) the Court of Appeal in *Peveril* had made clear that it was not deciding "*whether a valid contract may or may not be made between the company and an individual shareholder that he shall not petition for the winding up of a company*" (at 131 per Lindley MR) and the SHA is such a contract, given that KESP is a party; (b) the Court of Appeal did not have section 95(2) before it nor any similar provision and (c) the Court of Appeal's concern was partly with the fact that were the articles to be construed as the applicant shareholders had contended, the company would have been formed contrary to the Act whereas by contrast the SHA was a contractual agreement subsequent to KESP's formation.

19. The Applicants submitted that by its plain words Schedule 4 of the SHA prohibited the presentation of a winding up petition by the Petitioner without their consent. The presentation of the Petition was a reserved matter within Schedule 4 because it seeks a solvent liquidation or solvent winding up of KESP. The chapeau contained an unambiguous promise by the Petitioner that it will exercise all of its powers as a shareholder in KESP, or otherwise, to prevent a solvent winding up of KESP without the Applicants' consent. It followed that the Petitioner was "*contractually bound not to present a petition against the company*" within section 95(2) of the Act without the consent of the Applicants.

20. As regards the proper approach to construction of the SHA, an issue governed by English law as the governing law, the Applicants relied on passages in the judgment of Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 (***Rainy Sky***) at [21] – [23] and Sir Geoffrey Vos (as he then was) in *Lamesa v Cynergy* [2020] EWCA Civ 821 (***Lamesa***) at [18]. They submitted that the relevant wording in Schedule 4 was clear and

FSD2023-0193 Page 6 of 20 2024-05-31

unambiguous but that even if it was ambiguous, it should be construed in context as not permitting one party however (allegedly) dissatisfied with the other joint-venturer, to wind up the endeavour unilaterally. They submitted that the clear commercial purpose known to both parties at the time they contracted was a full exit by both parties at a profit and a just and equitable winding up was inconsistent with this. The parties plainly intended that KESP, their joint venture vehicle, was not to be wound up otherwise than by express agreement between them (under the SHA or *ad hoc*). They said that the reasons supporting this conclusion were as follows:

(a). the factual matrix suggested that it would be absurd if either party could petition to wind up KESP on just and equitable grounds if, for instance, there was a deadlock in management or some other major disagreement as was now suggested by the Petitioner. The SHA provided detailed terms for the management, exit from and termination of the joint venture (for example in clauses 5 (Directors and Corporate Governance), clause 9 (Transfer of Shares), clause 11 (Exit) and clause 14 (Termination).

(b). the Applicants' evidence filed on the Summons showed that KESP's majority shareholding in KEL was acquired originally by the Applicants in 2005 when it was a failing asset and required significant investment (see Mr Ashary's First Affirmation (***Ashary 1***) at [40]). When the Petitioner became a shareholder in KESP in 2008, after first obtaining a special waiver from the Government of Pakistan, it was the mutual understanding of KESP's shareholders that KESP was involved in a long-term turnaround project of KESC and that the SHA needed to be structured to ensure that the investment in KESC would be protected for the long term. The Applicants said that their case on the shareholders' mutual understanding (objectively assessed) was borne out by, *inter alia*, (i) the Harvard Business School article "*Abraaj Capital and the Karachi Electric Supply Company*" dated 9 February 2012 which said that when the Abraaj Group acquired a majority interest in KESP via the Petitioner in 2008, KESC faced chronic problems, financially, technically and operationally due to the difficult and unstable local and national social and political environment in which the company operated with, over two years later, continuing "*monumental*" challenges; (ii) the terms of the SHA which established the long-term nature of the investment (there

FSD2023-0193 Page 7 of 20 2024-05-31

would have been no reason to include such forward looking terms had the shareholders not intended for the investment to be protected for the long term). The contractual protections against winding up petitions in Schedule 4 were included to protect KESP's interest in KESC from being unnecessarily jeopardised by the threat of solvent winding up proceedings by shareholders and/or litigation between shareholders.

(c). Schedule 4 (including the words now in dispute) was part of the original SHA executed on 15 October 2008. Schedule 4, according to the Applicants, therefore post-dated the introduction of Section 95(2) of the Act (by the Companies (Amendment) Law 2007 which was gazetted on 13 November 2007). The relevant parts of Schedule 4 were not amended by the amendments to the SHA in 2009 and 2021. The parties must be taken, objectively, to have had section 95(2) in contemplation at the time of executing the SHA and the amendments thereto. The Applicants submitted that the decision of the Court of Appeal in *In the matter of China CVS (Cayman Islands Holding Corporation)* 2020 (2) CILR 201 (***China CVS***) (Moses JA, with whom Rix and Martin JJA agreed) (at [129]) was distinguishable. There the Court of Appeal had declined to imply an agreement not to present a petition, holding that by failing "*despite s.95(2) of the Law*" to include an express agreement not to present a petition the parties "*must be understood to have acknowledged the court's exclusive jurisdiction.*"

The Petitioner's submissions

21. The Petitioner notes that the Summons seeks declarations that the effect of Schedule 4 of the SHA is as the Applicants contend, that the Petitioner is in breach of the SHA and not entitled to pursue the Petition and that the Petition be dismissed pursuant to s.95(2) of the Act. It said that the effect of this application was that the Applicants were seeking an order pursuant to GCR O.14A disposing of the Petition on a question of construction of Schedule 4 of the SHA and on a question of law in respect of the application of s.95(2) of the Act to the present case, on the basis that the issues were suitable for determination by the Court without a full trial of the action. The Applicants were accordingly invoking a summary procedure and not one in which any findings of fact could be made by the Court. The Applicants' position was that the effect of the contractual material they relied

FSD2023-0193 Page 8 of 20 2024-05-31

on was that the Petitioner was precluded from exercising its statutory right as a shareholder of KESP to petition for its winding up.

22. The Petitioner made two main submissions. First, there was, on the proper construction of Schedule 4, no contractual bar which precluded the Petitioner from bringing the Petition. Second, if that was wrong, and there was a contractual bar, the bar would not be subject to and prohibited by section 95(2) because that provision was directed at creditor petitions and not shareholder petitions. In respect of shareholder petitions, *Peveril* remained good law and the right of shareholders to petition for the winding up of a company could not be and had not been excluded.

23. The Petitioner submitted that the SHA should be interpreted in light of and having regard to the provisions of the Articles (which predate and provide the framework for the SHA). The Petitioner referred in particular to the definition of Reserved Matters and articles 93 and 145 and noted that nowhere in the Articles was there any restriction, express or implied, upon shareholders exercising their statutory rights to seek to wind up KESP nor any suggestion that Reserved Matters were directed towards shareholder rights other than in the sense of the right to approve (or veto) steps taken by KESP through its board of directors.

24. As regards the SHA, the Petitioner submitted that Part 5 and the clauses within it were, directed to the governance of KESP by its board of directors. They did not touch upon or govern the rights of shareholders. Clause 6.1, and all of part 6 of the SHA, was directed towards the conduct of business by KESP and not towards shareholder rights. The Petitioner noted that Schedule 4 was headed "Reserved Matters" and submitted that its function in the SHA was explained in clauses 5.1 and 6.1 and was to deal with management matters and the conduct of business; most particularly to acknowledge "*that none of the following matters are within the competence of the Board*." That is, the matters listed were not matters which the Board of KESP could undertake without shareholder approval. The Petitioner submitted that the purpose of Schedule 4 therefore was to set out an agreement as to which matters were outside the competence of the Board. It was agreed therefore that the Board was not competent to effect "*the solvent liquidation, winding-up or dissolution of [KESP] or [KESC]*."

25. The Petitioner argued that Schedule 4 did not say that shareholders were contracting (or were purporting to contract) out of their statutory right as shareholders to seek to wind up KESP in appropriate circumstances and that it could not have been in the parties' contemplation to seek to enter into an agreement whereby the shareholders contracted out of (or purported to contract out of) these rights.

26. The Petitioner argued that this was particularly the case because an agreement by a shareholder to contract out of its statutory right to petition was, at the time at which the SHA was entered into, unlawful both under the proper law of the SHA and under the law of the company's incorporation (Cayman Islands law). The Petitioner argued that the parties cannot – absent extremely clear and unequivocal language – be taken to have intended to enter into an agreement to achieve something which was a legal impossibility under the law of the contract and there was no clear and unequivocal language in Schedule 4 which could properly lead the Court to such a conclusion.

27. The Petitioner argued that under English law a clause that purported to remove a shareholder's right to apply for the winding up of a company was unenforceable as a matter of public policy. The public policy which was enforced in *Peveril* was that a company was an entity which Parliament had decided should be subject to the rights of shareholders to apply to wind it up in certain circumstances. Precisely the same public policy applied to any agreement by which that fundamental right was purportedly excluded. A company was an entity which must be subject to the oversight and control of its shareholders. There was nothing in any English authority which established or suggested that this public policy did not apply to agreements between shareholders which render the company immune from such scrutiny and control and there was no functional difference between this case and the situation which was expressly held to be contrary to public policy within *Peveril.* The Petitioner said that section 95(2) of the Act did not come into force in the Cayman Islands until 1 March 2009 and therefore after the SHA was entered into. That being so, when the parties contracted in 2008 and agreed the SHA, the position was the same under both English and Cayman law, namely, that it was impossible for a shareholder to contract out of the statutory right to issue a winding up petition.

FSD2023-0193 Page 10 of 20 2024-05-31

28. The Petitioner argued in the alternative that if, contrary to its primary submission, the Court held that Schedule 4 to the SHA was to be read as a clause which prohibited shareholders in KESP from presenting a petition, *qua* shareholder, to wind up KESP, then that contractual obligation was not enforceable as a matter of both English and Cayman law. The Petitioner submitted that if it had been the intention of the Cayman legislature for section 95(2) to overturn a centuries old prohibition (under English law followed in the Cayman Islands) on the exclusion of shareholders' rights, then (a) the statutory provision itself would have been drafted so as to make express that this was its intention – i.e. it would have stated expressly that the section applied to shareholders rights to bring winding up petitions and (b) that intention would have been recorded expressly within the pre-legislative material by which the relevant statutory provision was explained and introduced, along with an explanation as to why this longstanding rule of law, based on the public policy of shareholder protection, was being overturned in the Cayman Islands. As to (b), the Petitioner's research had not disclosed any mention in any of the pre-legislative material to suggest that the legislators intended section 95(2) to overturn the well-established law in respect of shareholder rights, or to erode shareholder protection within the Cayman Islands. Such material as did exist suggested that section 95(2) was aimed at a different matter altogether.

29. The Petitioner referred to the Report of the Law Reform Commission dated April 2006 entitled *"Review of the Corporate Insolvency Law and Recommendations for the Amendment of Part V of the Companies Law"* and to the second reading of the Companies (Amendment) Bill, 2007 in Parliament. The Petitioner submitted that this material was an admissible aid to the Court in identifying the mischief which section 95(2) was designed to address and the purpose behind that statutory provision and demonstrated that the introduction of section 95(2) was aimed at institutional investors in CDOs, with the aim of increasing the attractiveness of the Cayman Islands jurisdiction to CDO business. CDO structures are bespoke and discrete arrangements under which investors have particular and strong reasons for contracting out of the usual creditor right to petition for the winding up of the company (i.e. the CDO structure should be bankruptcy remote). Accordingly, the Petitioner argued, section 95(2) does not apply to petitions brought by shareholders.

Discussion and decision

30. At the end of the hearing I read a short summary of my decision into the record as follows:

> *"The Applicants contend that the Petitioner has agreed not to present a winding-up petition without their consent by reason of and that the Petitioner is in breach of the terms of Schedule 4 of the shareholders' agreement dated the 15th of October 2008, as amended, the SHA. In these circumstances, the Petitioner should be restrained from proceeding with the Petition, which should be struck out.*
>
> *The Petitioner disagrees and relies on two main arguments. The first is what I shall call the construction point. The Petitioner contends that on the proper construction of the relevant provisions of the SHA, there is no such contractual prohibition. The second is what I shall refer to as the unenforceability point. The Petitioner submits that even if the SHA properly interpreted does contain a covenant by it not to present a petition on the just and equitable ground, such an agreement is unenforceable as a matter of Cayman law and also as a matter of English law.*
>
> *Therefore, the Petitioner submits the application should be dismissed and the winding-up petition should be permitted to continue.*
>
> *I accept the Petitioner's submissions with respect to the construction point, albeit, as will become clear when I set out my reasons, I don't accept all of the arguments that the Petitioner has put forward, but nonetheless, I accept that on the proper construction of Schedule 4 and the definition and reference to liquidation in reserved matters set out therein. There is no agreement by the Petitioner, and the Petitioner did not agree, that it would not present a winding-up petition and in those circumstances the Applicants' application falls to be dismissed.*
>
> *It also follows that I do not need to decide the unenforceability point, but I propose in my reasons, since the parties have argued the point at some length, although on occasion [in] somewhat speculative [terms], I will in my reasons make some comments on that particular argument on the unenforceability point. I would say that my inclination is to agree with the Applicants on that particular point and to say that it seems to me that the scope and effect of Section 95(2) is settled [up to] and at least clearly indicated by the Court of Appeal decision in Rhone Holdings. Although, as I say, it's not a point which I have to decide, having held for the Petitioner in relation to the construction point, [so that I regard] that conclusion [as] somewhat tentative, preliminary, and not a final view.*
>
> *So that is my decision on the application. I will, as I say, provide written reasons in due course. In terms of where we stand with respect to the directions for the further conduct of the Petition, perhaps the most appropriate way to proceed is to give the parties an opportunity to certainly wait to see my written reasons before deciding how they wish to proceed, and whether or not the draft directions, which they've previously discussed and in principle agreed, remain appropriate in the circumstances."*

31. In my view, the application gives rise to a short point of construction. How are the relevant words in Schedule 4 to be interpreted, applying the approach to interpretation set out in the authorities (and as I understand it there was no disagreement as to the applicable rules and principles or that they were accurately summarised in the passages from the judgments in *Rainy Sky* and *Lamesa* relied on and quoted by the Applicants).

32. Lord Clarke JSC said in *Rainy Sky* at [21]-[23] that:

> *"The language used by the parties will often have more than one potential meaning … the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense*
> *and to reject the other. ... Where the parties have used unambiguous language, the court must apply it."*

33. At [25] Lord Clarke JSC had agreed with the following statement made by Lord Steyn:

> *"… commercially minded judges would regard the commercial purpose of the contract as more important than niceties of language. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties."*

34. In *Lamesa* Sir Geoffrey Vos had summarised the law by quoting the following passage from the judgment under appeal of Judge Pelling QC:

> *"The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of : (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see Arnold v. Britton [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph".*

35. It seems to me, applying these rules and principles of construction, that the relevant wording of Schedule 4 needs to be considered and interpreted in light of the natural and ordinary meaning of the language used; the other provisions of the SHA; the terms of and wording in the Articles (recognising that the relationship between the shareholders of KESP is to be regulated by the regime established both by the SHA and the Articles operating together subject to the requirement set out in the SHA as regards the provisions of the Articles, that where those provisions conflict with the SHA, the terms of the SHA prevail) and the overall commercial purpose of the Schedule 4 wording in the context of the SHA as a whole and the Articles.

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

37. The key words in Schedule 4 are as follows (reversing the word order for clarity): "*The solvent liquidation, winding-up or dissolution of [KESP] or KESC shall [not] be undertaken without the consent of [the Petitioner] and the [Applicants].*" The defined term is "*Liquidation*."

38. KESP agrees to this covenant and the shareholders agree to procure that KESP performs it. The shareholders also and separately agree to the covenant. KESP and the shareholders each acknowledge that the prohibited action is not within the competence of the KESP board.

39. The words used in the Schedule 4 covenant are the same words as are used in the definition of Reserved Matters in the Articles, which only deal with KESC: that "*the solvent liquidation, winding up or dissolution of [KESC] …. shall not be undertaken*

FSD2023-0193 Page 14 of 20 2024-05-31

without the consent of [the Petitioner and the Applicants] (it being acknowledged by each party that none of the following matters are within the competence of the Board)….."

40. The Articles make provision for the winding-up of KESP. The winding up is expressed to be a voluntary winding up. It is a voluntary winding up pursuant to section 116(c) of the Act (which provides that a company may be wound up voluntarily if the company resolves by special resolution to be wound up voluntarily). Article 145 is headed "*Winding-Up*." The words used in article 145 (below) are similar (but not identical) to the words used in Schedule 4 (underlining added):

> *"[KESP] shall be taken to have commenced a voluntary winding up and discussion [sic] [dissolution] upon the passing of a Special Resolution by the holders of the Class O Shares [being Petitioner and the Applicants] to* <u>*wind up, dissolve liquidate and terminate*</u> *[KESP]."*

41. The words used in Schedule 4 do not mention the presentation of a winding up petition or a winding up by the Court.

42. The unanimous agreement of the shareholders is required by the Articles before a voluntary winding up can be commenced and Schedule 4 also seek to require unanimity before the type of winding up referred to in Schedule 4 can be commenced.

43. It seems to me that the Schedule 4 covenant refers and is intended to refer (and cross-refer) to the type of winding-up regulated and dealt with by the Articles. It mirrors but uses different wording to achieve the effect of the Articles, namely that the winding up referred to can only be commenced with the agreement of all the shareholders. The only winding up discussed and referred to in the Articles is a voluntary winding up and in the absence of any language in the SHA which refers, expressly or implicitly, to a winding up petition or winding up by the Court, the reference to winding up in Schedule 4 is, in view of the alignment between the SHA and the Articles and the similar words used in the relevant provisions in the SHA and the Articles, to be understood as a reference to a voluntary winding up. It is reasonable to conclude from the words used and the context, that had the parties intended to extend the restrictions on the commencement of a winding up to the presentation of a winding up petition they would have said so and referred either to such a petition or to a winding up by the Court. It would have been easy for them to

FSD2023-0193 Page 15 of 20 2024-05-31

do so but they did not. They must be taken to have been aware of the different types of winding up and of the separate jurisdiction for a winding up by the Court and yet they made no reference to it.

44. The Schedule 4 covenant refers to a "*solvent liquidation, winding-up or dissolution*" of KESP. The adjective "*solvent*" is probably to be understood as qualifying and applying to each of the three modes of "*Liquidation.*" But the reference to a solvent winding up is not determinative of whether the form of winding up referred to is a voluntary winding up commenced by special resolution or a winding up by the Court commenced by petition. This is because both a voluntary winding up and a court ordered winding up on a contributory's petition can be commenced in respect of a solvent entity. The solvency condition in the Schedule 4 covenant can be understood as carving out from the requirement to obtain unanimous shareholder consent the case where KESP is insolvent. This would obviously makes sense and be important to ensure that the shareholders (and KESP's directors) could take steps to commence a winding up where KESP has become insolvent and the interests of creditors (and the directors' duties to have regard to the interests of KESP's creditors) requires urgent action (although there is no express authority in the articles permitting the directors to present a winding up petition without a shareholders resolution authorising them to do so – see section 94(2) of the Act).

45. It seems to me that the Schedule 4 covenant is a provision relating to corporate governance and the regulation of the powers given to the shareholders by the SHA and the Articles.

46. This construction seems to me to fit with a reasonable and realistic understanding of the purpose of the Schedule 4 covenant. It is intended to reinforce and reiterate in the dominant document (the SHA, as I have noted, takes priority over the Articles where there is a conflict) that a decision to bring the joint venture to an end using the power given by the Articles must be unanimous. The winding up power in article 145 involves collective decision making by the shareholders in the ordinary course (by special resolution) and the Schedule 4 covenant reflects the parties' agreement as to how that collective decision making should be made. But it was not intended that shareholders be deprived of their statutory right to apply to court for a winding up order in circumstances of equitable wrongdoing justifying a winding up on the just and equitable ground. That

would be something much more onerous and different. It would involve not merely giving up the right to end the joint venture because of commercial, financial or operational reasons but giving up the right to do so and seek recourse from the Court in a case of equitable wrongdoing in the conduct of the joint venture or fundamental problems which meant that a shareholder was entitled to withdraw from the corporate enterprise.

47. That is why in my view a covenant covering a winding up petition on the just and equitable ground would need to be clearly and explicitly expressed. The Court should only take away the important statutory right if clear words are used. The Court would only be justified in interpreting the Schedule 4 covenant's reference to "*winding up*" as extending to a winding up by the Court if there was a clear indication in the SHA (or non-conflicting provisions in the Articles) or the relevant factual matrix that a winding up by the Court (and a winding up petition) on the just and equitable ground was contemplated and intended to be covered. There are no such indications in this case. While the facts and issues in *China CVS* are different from those in this case (the Court of Appeal was considering whether a covenant not to petition could be implied because and of in circumstances where there was a term requiring a reference to arbitration) the comments of Moses JA at [129] do support the view that a failure to make an explicit reference to a winding up petition will be taken to be significant. Moses JA said that:

> *"In the SHA, the parties could have expressly chosen to agree not to present a petition against the company. But they did not do so, despite s.95(2) of the Law. By failing to do so, they must be understood to have acknowledged the court's exclusive jurisdiction to determine whether the facts justify winding up the company on just and equitable grounds .."*

48. It follows that I reject the Applicants' submissions as to the proper construction of the Schedule 4 covenant. I do not accept their case as to the commercial purpose to be ascribed to Schedule 4 covenant. I do not accept that the factual matrix shows that it would be absurd if either party could petition to wind up KESP on just and equitable grounds. For the reasons I have given, it seems to me to be consistent with the agreement between the joint-venturers that they wished to regulate and exclude in the absence of mutual agreement their rights to terminate the joint venture and to wind up KESP in the event of commercial, financial or operational disputes and problems but not to remove their right to have recourse to the Court in the event of equitable wrongdoing or other

FSD2023-0193 Page 17 of 20 2024-05-31

circumstances justifying a winding up order on the just and equitable ground. For the same reason, the contractual protections against winding up in Schedule 4 can be seen as not extending to a winding up petition on the just and equitable ground.

49. The Petitioner argued that the state of English law (as the proper law of the SHA) as to the enforceability of a no-petition covenant by a shareholder was relevant to the construction of the Schedule 4 covenant. The Petitioner submitted that properly understood under English law such a covenant was at the time of the SHA (and remains) unenforceable a matter of public policy. The parties as shareholders therefore should not be taken to have agreed to enter into a no-petition covenant since they would have been agreeing to an obviously unenforceable term. It would be inappropriate for the Court, applying the objective approach to construction, to interpret a term as involving an agreement to enter an obviously unenforceable term.

50. There are a number of difficulties with this argument and I do not give any weight to it. Merely because a term as construed might be unenforceable does not mean that parties can never in fact have agreed to it. Parties may in particular circumstances in fact agree to terms that are in law unenforceable. It all depends on the relevant facts. This is particularly so where the effect in law of a term is unclear. In this case, the law in England as to the enforceability of no-petition covenants by shareholders in shareholder agreements was unsettled and remains to be finally settled and shareholders could be taken to have agreed to a no-petition covenant with a view to arguing about its validity at a later date in the event of a dispute. I do not see that it can be said that because it was at least arguable that under the proper law of the SHA (and in the Cayman Islands) a covenant by the shareholders not to present a winding up petition on the just and equitable ground would be unenforceable it must follow that the shareholders did not agree, and would not have agreed, to such a covenant. Furthermore, in this case there was added uncertainty as to the position because at the time the SHA was entered into the introduction of Section 95(2) of the Act by the Companies (Amendment) Law 2007 had been gazetted (on 13 November 2007) but the amendment had not come into effect. In addition, it is not clear to me (at least at this point where there has been no argument on the point) that the enforceability of a no-petition covenant by a shareholder would in all respects be a matter for the proper law of the contract or the law of incorporation as the law governing the constitution and winding up of KESP.

FSD2023-0193 Page 18 of 20 2024-05-31

51. Since I have found that the Schedule 4 covenant, properly interpreted, does not prohibit shareholders from presenting a winding up petition on the just and equitable ground, it is not necessary to decide whether the Petitioner's alternative argument that section 95(2) of the Act does not apply to agreements by shareholders not to present a winding up petition is correct. However, I would say, without deciding the point, that it seems to me that this argument cannot be supported. Section 95(2) is by its terms unqualified. It refers without qualification to "*petitioners*" who are "*contractually bound*" not to present a petition. It is hard to say that could be interpreted as referring only to petitioners who are creditors. Furthermore, *dicta* in the Court of Appeal support that construction. The passage from the judgment of Moses JA in *China CVS* is an example. The learned Justice of Appeal said that the shareholders in that case could have agreed not to present a petition by virtue of the terms of section 95(2) of the Act. The judgment of Rix JA in *Rhone Holdings*, although the case involved a limited partnership and not a company, also supports the view that section 95(2) of the Act applies without qualification. It also makes it clear that a covenant not to petition is not contrary to public policy and indeed represents the public policy of this jurisdiction. At [22] Rix JA said as follows (underlining added):

> *"I turn to Mr. Asif's second submission, that … the provisions of s.95(2) of the Companies Law should simply be ignored on the grounds that an agreement not to present a petition against an exempted limited partnership is contrary to public policy. But that submission is an impossible submission where s.95(2), which applies generally, of course, to companies but also expressly by reason of the provisions of the Exempted Limited Partnership Law to exempted limited partnerships, makes it plain that such a contract or agreement not to present a petition against a company or an exempted limited partnership is not contrary to public policy but, on the contrary, represents the policy of the law by express enactment because the express terms of s.95(2) give statutory strength to what would otherwise merely be a contractual agreement not to present a petition by stating that the court shall dismiss a petition or adjourn it when the parties have bound themselves contractually not to present such a petition. So such an agreement not to present a petition cannot possibly be contrary to public policy."*

Next steps

52. As I said at the conclusion of the hearing, the parties now need to consider whether the directions for the further conduct of the Petition which they had previously agreed remain appropriate and should be made. I shall invite them to seek to agree the directions and an appropriate order as to the costs of the application within 14 days from the date on which

FSD2023-0193 Page 19 of 20 2024-05-31

this judgment is handed down. If they are unable to reach agreement they should each file a copy of the directions and costs order they seek with brief reasons for their position on issues in dispute and I shall settle the directions and make an appropriate costs order without the need for a further hearing.

The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands
31 May 2024

FSD2023-0193 Page 20 of 20 2024-05-31