Neutral Citation Number: [2026] CICA (Civil) 2

IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CICA CIVIL APPEAL No. 0028 of 2024
(formerly FSD 0193 of 2023 (NSJ))

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF KES POWER LIMITED

BETWEEN

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

Appellants

and

IGCF SPV 21 LIMITED

Respondent

Before: **The Hon Sir Richard Field, JA**
The Rt Hon Sir Jack Beatson, JA
The Hon Sir Michael Birt, JA

On the Papers

Draft circulated: 19 January 2026

Ruling delivered: 30 January 2026

RULING ON CONSEQUENTIAL MATTERS ARISING FROM THE JUDGMENT HANDED DOWN ON 12 SEPTEMBER 2025

Sir Richard Field, JA

Introduction

1. In paragraphs 35 and 36 of the judgment given in this appeal dated 12 September 2025, it was stated that: (i) the order of Segal J made below dismissing the Appellants' application to strike

out the Respondent's winding up petition presented under section 92(e) of the Companies Act be set aside; (ii) the provisional view of the Court was that the Appellants should have their costs both of the appeal and below but the Respondent had liberty to serve short submissions within seven days setting out reasons why some other order for costs ought to be made; and (iii) the Appellants should have leave to serve within ten days drafts of such further declaratory relief and/or injunctive orders they sought in light of the judgment, together with supporting submissions to which the Respondent had thereafter within the next ten days to serve its response.

2. By letter dated 19 September 2025 addressed to the Registrar of this Court ("the Registrar"), the Respondent's attorneys (Dillon Eustace) stated that the Respondent did not object to an order granting the Appellants their costs on the standard basis and should the Appellants seek to make submissions on costs, the Respondent would request an opportunity to file more substantive submissions in due course.

3. By letter dated 22 September 2025 addressed to the Registrar, the Appellants' attorneys (Bedell Cristin) enclosed a draft Certificate of Order (the "DCoO") that they invited the Court to make, in which paragraphs 2, 5 -7 read:

> *2. "It is declared that on a true construction of Schedule 4 (Reserved Matters) (Liquidation) of the Shareholders Agreement dated 15 October 2008 (as amended) ("the SHA") the Respondent, IGCF SPV 21 Limited ("SPV 21"), is in breach of the SHA by presenting the Petition without the Appellants' consent, and is prohibited from presenting the petition (or any petition) seeking an order that [KES Power Limited] be wound up on just an equitable grounds pursuant to section 92(e) of the Companies Act".*
>
> *3. "The order of the Hon. Justice Segal dated 16 September 2024 (FSD 193 of 2023 (NSJ) (the* ***"Consequentials Order")*** *awarding costs to SPV 21 is set aside".*
>
> *4. "SPV shall withdraw its Bill of Costs dated 18 November 2024 and discontinue any application for a Default Costs Certificate or related enforcement".*

5. "SPV 21 shall pay the Appellants' costs of the proceedings in the Grand Court under FSD 193 of 2023 (NSJ) and the appeal in this Court to be taxed on the indemnity basis, if not agreed".

6. "SPV 21 shall make a payment on account of the Appellants' costs in a sum to be determined by the Court (the ***"Interim Payment").*** *SPV21 shall make the Interim Payment within 14 days from the date of the Court's determination of the quantum of the Interim Payment*

7. Order. 62, rules 18(1), 18(4) and 18(6) of the Grand Court Rules shall be disapplied such that the Appellants may recover the costs of their foreign lawyers on taxation."

4. By paragraph 1 of the Summons that underlay the proceedings in FSD N0. 193 of 2023 (NSJ) in the Ground Court, the Appellants applied for the following relief:

> 1."A declaration that on a true construction of Schedule 4 (Reserved Matters) (Liquidation) of the Shareholders Agreement dated 15 October 2008 (as amended) (the "SHA") the Respondent, IGCF SPV 21 Limited, is in breach of the SHA and prohibited from presenting the winding up petition herein of 11 July 2023 (the "Petition") seeking an order that KES Power Limited ("KESP") be wound up on just and equitable grounds pursuant to section 92(e) of the Companies Act (2023 Revision) (the "Companies Act") or at all on the grounds that the Applicants, Al Jomaih and Denham, have not consented to such presentation".

5. In their letter dated 22 September 2025, Bedell Cristin stated:

> "The declaration sought by the Appellants [in paragraph 2] is consistent with the finding at paragraph 35 of the CICA Judgment that the Respondent was, by virtue of Schedule 4, contractually bound not to present a petition to wind up KES Power Limited ("**KESP**") with the said petition falling squarely within the terms of section 95(2) of the Companies Act (2025 Revision) (the "**Companies Act**'). Section 95(2) of the Companies Act requires that the Court "*shall*" dismiss a petition that has been presented in breach of a contractual restriction. In light of the CICA's finding, at paragraph 35 of the CICA Judgment, that the Respondent was contractually bound not to present the winding up petition dated 7 July 2023 (the "**Petition**"), it follows that a

declaration recording that the Respondent has breached the Shareholders Agreement dated 15 October 2008 (as amended) is appropriate in the circumstances. It is also consistent with the CICA's finding for the declaration to be made that the Respondent is prohibited from presenting the Petition or any petition seeking an order that KESP be wound up on just and equitable grounds pursuant to section 92(e) of the Companies Act in the future. The declaration sought by the Appellants is consistent with the declaratory relief sought at paragraphs 1 and 2 of the summons dated 28 July 2023 (the "**Strike Out Summons**") filed by the Appellants in the Grand Court in response to the presentation of the Petition ... Whilst the Appellants are conscious that the Respondent is entitled to make submissions in response to the declaratory and/or injunctive orders sought by the Court, it cannot be properly argued that the declaratory relief sought by the Appellants is inappropriate.

Consequential Costs Matters

The Appellants note that the CICA's provisional order as to costs is that the Respondent should be ordered to pay the Appellants' costs of the Appeal and of the proceedings below (under FSD Cause No. 193 of 2023 (NSJ)) (the "**GC Proceedings**"). By way of the 19 September Letter, the Respondent accepts the CICA's provisional costs order. However, there is a dispute between the parties as to the basis for taxation. The Appellants do not accept that it is appropriate for their costs to be taxed on the standard basis. The Appellants seek an order in the Draft Order that their costs of the Appeal and the GC Proceedings be taxed on the indemnity basis. An order for interim payment pursuant to Order 62, rule 4(7)(h) of the Grand Court Rules of the Appellants' costs by the Respondent is also sought in the Draft Order. Paragraph 37 of the CICA Judgment granted leave for the Appellants to make submissions only in relation to the declaratory and injunctive orders sought. As noted by the Respondent in the 19 September Letter, under the CICA judgment the Appellants do not have leave to make submissions to the Court in relation to costs orders. The Appellants seek the leave of the Court to file written submissions in respect of the appropriate costs orders to be made to address the basis of and approach to taxation and also an interim payment. The issue of the appropriate order for costs where a petition has been dismissed pursuant to section 95(2) of the Companies Act because the petition has been presented in breach of a contractual restriction is not the subject of authority that the Appellants can find. It would be of assistance to the jurisdiction to have a costs judgment on the issue given that:

a. The presentation of the Petition in breach of contract is equivalent to acting in breach of a contractual jurisdiction clause, in which cases it is readily accepted that the successful party is entitled to its costs on the indemnity basis. The rationale underpinning such an award is that any costs that the successful party was unable to recover through the taxation process could then form the subject of a subsequent claim for damages for breach of contract to ensure that the successful party was made whole.

b. The Appellants would seek to make the above argument, as well as arguments relating to the Court's established discretion to order indemnity costs in appropriate circumstances.

The Appellants propose that their submissions on the appropriate costs orders be filed and served within two (2) days from the date of the Court's direction, with the Respondent to file and serve its responsive submissions five (5) days thereafter".

The Respondent's objections to paragraphs 2, 5 – 7 of the DCoO

6. The Respondent's objections to the DCoO are set out in a letter dated 2 October 2025 from Dillon Eustace to the Registrar as follows.

Paragraph 2

7. The words "or any petition" should be excised on the ground that such relief was not sought in the summons issued by the Appellants which was before the Grand Court.

Paragraph 5

8. The Appellants are not entitled to indemnity costs, only costs on the standard basis for the following reasons. (i) the Respondent succeeded in resisting the Appellants' strike out application in the Grand Court; (ii) Order 24, rule 8(2)(b) of the Companies Winding Up Rules (2023 Consolidation) (the "**CWR")** provides that where a winding up petition is treated as an *inter partes* proceeding between members, the unsuccessful party shall pay the successful party's costs to be taxed on the standard basis unless agreed; and (iii) there are no "*exceptional*

and special circumstances" which justify the Court departing from Order 24, rule 8(2)(b) of the CWR (see Order 24, rule 8(4) of the CWR).

9. This reasoning is incontestable and accordingly the Appellants ought not to be permitted to mount a case for indemnity costs which would involve the unnecessary incurring of yet more costs. That said, if the Court be willing to grant such leave, it is submitted that a truncated timetable for submissions (as suggested by Bedell Cristin) is unnecessary. A period of 7 days for the Appellants to file their submissions on costs would be appropriate together with a further 7 days for the Respondent to reply.

<u>Paragraph 6</u>

10. Whilst the principle that an interim payment can be ordered in appropriate circumstances is not disputed, it will be incumbent on the Appellants to properly prepare and serve an application providing sufficient supporting material for the quantum of the interim payment sought and the Respondent should have the opportunity to respond to the same, including, at that time, filing evidence (if necessary) on the timing for making the payment (see paragraph 25(i) of *Al Sadik v. Investcorp Bank B.S.C. and Others* [2019] (2) CILR 585, cited with approval by this Court at paragraph 54 of *Scully Royalty Limited & Anor. v. Raiffeisen Bank International A.G.* [2022] 1 CILR 572, along with paragraph 20 of *In the Matter of Principal Investing Fund I Limited et al* (Unreported, FSDs 268, 269 & 270 of 2021 (IKJ), delivered 26 January 2024)).

<u>Paragraph 7</u>

11. As already submitted, costs should be ordered against the Respondent on the standard basis from which it would follow by reason of the application of Order 62, rule 18(1) that recovery of foreign attorneys' fees could not be ordered.

Discussion and decision

12. In my opinion, paragraph 1 of the Summons tried in the Grand Court is not to be construed as seeking a declaration that not only was the actual petition presented by the Appellants to wind up KESP on just and equitable grounds pursuant to section 92(e) of the Companies Act in breach of the SHA but also the presentation of any other petition to wind up KESP would be in breach of the SHA. The whole focus of the Respondent's strike out application was the actual petition presented by the Appellants to wind up KESP under section 92 (e) and the Appellants

do not need the extended declaration they seek. Accordingly, I would direct that the words "or any petition" be excised from paragraph 2 of the DCoO.

The dispute as to costs

13. In my judgment, the Court is not in a position on the material before it to determine in the absence of submissions from the Appellants that it is incontestable that the Appellants are restricted to an order for costs on the standard basis as contended by the Respondent in the letter to the Registrar dated 2 October 2025. Accordingly, I propose that the Appellants be given leave to serve within 7 days of the date of this ruling concise submissions in support of their contention that they are entitled to the costs of the appeal and below on the indemnity basis and for a specified interim payment to which the Respondent must reply within 7 days thereafter, followed by a ruling by this Court without an oral hearing.

Sir Michael Birt, JA

14. I agree.

Sir Jack Beatson, JA

15. I also agree.