Michaelmas Term
[2025] UKPC 54
Privy Council Appeal No 0005 of 2025

JUDGMENT

IGCF SPV 21 Limited (Respondent) *v* Al Jomaih Power Limited and another (Appellants) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Sales
Lord Hamblen
Lord Leggatt
Lord Burrows
Dame Janice Pereira

JUDGMENT GIVEN ON
24 November 2025

Heard on 6 October 2025

Appellant
Iain Quirk KC
Leigh Mallon
(Instructed by Bedell Cristin and Steptoe International (UK) LLP)

Respondent
Graham Chapman KC
Scott Allen
(Instructed by Dillon Eustace)

LORD HAMBLEN:

1. The central issue in this appeal is when a party will be held to have submitted to the jurisdiction of a foreign court as a matter of Cayman Islands law.

2. The issue arises in the context of an application by the respondent for an anti-suit injunction restraining the appellants from pursuing proceedings commenced against the respondent in Pakistan. The appellants contend that no such injunction should be granted in circumstances in which the respondent has submitted to the jurisdiction of the Pakistan court.

3. The appellants submit that Cayman law reflects the common law of England and Wales as it stood in 1975, following the decision of the Court of Appeal in *Henry v Geoprosco International Ltd* [1976] QB 726 ("*Geoprosco*"). They describe the "rule" in *Geoprosco* in the following terms:

> "… where a defendant voluntarily appears before a foreign court to invite the court not to exercise its jurisdiction (under its own local laws) it will have submitted to the jurisdiction. This includes applying for relief (interim or otherwise) in the foreign proceedings, or applying for a stay in those proceedings in favour of another jurisdiction."

4. That rule was reversed in England and Wales by section 33 of the Civil Jurisdiction and Judgments Act 1982 (see para 38 below). There has been no equivalent legislation in the Cayman Islands and the appellants accordingly submit that the rule in *Geoprosco* still applies.

5. The Court of Appeal of the Cayman Islands held that *Geoprosco* should not be held to represent the law of Cayman and that there is good reason not to follow it. It decided that in all the circumstances the judge had been correct to conclude that there had been no submission to the jurisdiction of the Pakistan court by the respondent and it upheld his decision to grant an anti-suit injunction. The appellants contend that it was wrong so to conclude.

The factual background

6. The appellants and the respondent are shareholders in KES Power Ltd ("KESP"), a company incorporated in the Cayman Islands. The respondent holds 53.8% of the shares

and the appellants hold 46.2%. KESP in turn holds a 66.4% interest in K-Electric Limited ("KEL"), a valuable Pakistan incorporated utility company.

7. KEL is a company of national importance in Pakistan and is subject to statutory and regulatory control. KEL was publicly owned by the Government of Pakistan until it was partially privatised in 2005. The privatisation process was in part governed by a Share Purchase Agreement dated 14 November 2005 ("SPA"). Pursuant to the SPA, KESP acquired a majority shareholding in KEL from the Government of Pakistan. The SPA is governed by the laws of Pakistan and provides for the courts of Pakistan to have exclusive jurisdiction (clause 8.3).

8. On 26 February 2008, the respondent was incorporated in the Cayman Islands by the Abraaj Group, a private equity firm, for the purpose of acquiring an interest in KESP on behalf of itself and on behalf of the Infrastructure and Growth Capital Fund ("IGCF").

9. On 15 October 2008, KESP, the appellants and the respondent entered into a Shareholders' Agreement ("SHA") and a Subscription Agreement by which the respondent became a shareholder in KESP. The SHA and the Subscription Agreement govern the acquisition of the shares in KESP by the respondent and the regulation of the parties' conduct in relation to both KESP and KEL, including in respect of the composition and appointment process to the respective boards of both KESP and KEL. The SHA is governed by English law (clause 25.1).

10. On 30 April 2009, the SHA was amended by way of a Deed of Amendment. On 5 January 2021, the SHA was further amended by way of a further Deed of Amendment ("Second Deed of Amendment"). Clause 25.2 as amended by the Second Deed of Amendment is an exclusive jurisdiction clause and requires the parties to litigate any disputes before the courts of England and Wales or the Grand Court of the Cayman Islands ("Grand Court").

11. Abraaj Investment Management Limited (in official liquidation) ("AIML") is the registered shareholder of the sole voting share in the respondent. On 3 August 2022, AIML agreed to sell its share to a British Virgin Islands registered special purpose company called Sage Venture Group Limited ("Sage").

12. In October 2022, the respondent appointed new directors to the board of KESP and attempted to appoint new directors to the board of KEL. It is the respondent's position that the appointments were made in accordance with its contractual rights under the SHA. The appellants were concerned that a change of control of the respondent had occurred, or was occurring, which would in turn give rise to a change of control of KESP and/or KEL and contended that any such change of control, including by way of the attempted

appointments to KEL, was in breach of certain agreements, including the SPA and the SHA, and which in turn could affect the national security interests of Pakistan.

13. On 21 October 2022, the appellants obtained an ex parte interim injunction against the respondent in the High Court of Sindh in Pakistan ("the Pakistan Proceedings") which prohibited any changes to the board of KEL ("the Interim Injunction").

14. On 3 November 2022, the respondent issued two applications in the Pakistan Proceedings ("the Pakistan Applications"). The first application was issued pursuant to section 4 of the Pakistan Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 to challenge the jurisdiction of the Pakistan Court to grant relief and in which a stay of the Pakistan Proceedings in favour of arbitration was sought ("the Section 4 Application"). The second application was issued pursuant to Order 39 Rule 4 of the Pakistan Civil Procedure Code and sought to recall or modify the Interim Injunction to allow for the nomination of directors to the board of KEL in proportion to the shareholding in KESP ("the Order 39 Application"). The Pakistan Applications are yet to be determined and the Interim Injunction remains in force.

15. In response to the Pakistan Proceedings, the respondent filed proceedings in the Grand Court on 24 November 2022 applying for an anti-suit injunction to restrain the appellants from continuing the Pakistan Proceedings against the respondent and from acting upon the Interim Injunction.

16. On 20 July 2023, Segal J delivered judgment in favour of the respondent and found that the appellants were contractually bound by the SHA to litigate any relevant disputes with the respondent before the courts of the Cayman Islands or the courts of England and Wales. On 16 August 2023, Segal J made an order which granted the respondent an injunction restraining the appellants from continuing the Pakistan Proceedings. The appellants appealed.

17. On 2 July 2024, the Court of Appeal, Smellie JA (Martin and Field JJA agreeing), delivered judgment dismissing the appeal.

18. On 10 January 2025, the Court of Appeal granted the appellants leave to appeal to the Privy Council.

The judgment of Segal J

19. Before the judge, it was common ground that the relevance of a submission to the jurisdiction of a foreign court to the grant of an anti-suit injunction in relation to

proceedings before that court is fairly summarised in *Briggs, Civil Jurisdiction and Judgments*, 6th ed (2015) at p 550, approved by Males LJ in *SAS Institute Inc v World Programming Limited* [2020] 1 CLC 816 at para 114. It is there stated:

> "No reported case holds, clearly and precisely, that an applicant will forfeit the right to ask for an injunction if he has already submitted to the jurisdiction of the foreign court. But if the applicant has taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction, it will be more difficult to persuade an English court that the respondent should now be restrained from continuing with those proceedings. … But the principle of the matter seems reasonably clear: an applicant who has already submitted to the jurisdiction of a foreign court should find that this is a substantial obstacle to his obtaining an anti-suit injunction from an English court."

20. It was therefore common ground that the issue of submission depended on whether the respondent had "taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction" and the judge so directed himself (at para 195).

21. It was also common ground that this was an issue governed by Cayman rather than Pakistan law, but that expert evidence on the law regarding submission to jurisdiction in Pakistan can assist, for the purpose of the Cayman law analysis, in assessing the significance and effect of steps taken in the Pakistan Proceedings (at para 194). Both sides called such evidence.

22. The focus of the appellants' case before the judge was on the Order 39 Application. It was submitted that this sought positive relief in relation to the appointment of the KEL directors and thereby involved a step in the Pakistan Proceedings which went beyond a challenge to that court's jurisdiction.

23. The judge, however, accepted the respondent's case, supported by their expert, Mr Shaukat, that the Order 39 Application was in substance only contesting the jurisdiction of the Pakistan Court, in reliance on the provisions of the SHA (see paras 201-202). The judge found as follows (at para 204):

> "In this case, it appears to me, having regard to the drafting and terms of the Order 39 Application and all the expert evidence, that the [respondent] was using the Order 39 Application to challenge the granting of the injunction based on the [appellants'] obligation to submit disputes to arbitration and the references to the Pakistan Court permitting the appointment of

> the [respondent's] nominees as KEL directors to proceed should be seen as relief that would flow as a consequence of the application being successful and of a stay being granted and not as substantive relief sought to enforce the [respondent's] right under the SHA to appoint the KEL directors. The drafting of the Order 39 Application, taken as a whole, makes it clear that the [respondent] relies on the arbitration clause and wishes to have the dispute with the [appellants] submitted to arbitration in accordance with the clause. It does not show that the [respondent] wished (and had elected) to have its substantive rights and claims in relation to the appointment of the KEL directors be adjudicated and dealt with by the Pakistan Court."

24. He summarised the evidence and analysis of Mr Shaukat (at paras 205-206) and found it to be "cogent and reasonable and consistent with my own assessment and analysis of the impact and effect of the steps taken by the [respondent] in the Pakistan Proceedings in general and of the Order 39 Application in particular" (at para 207). He concluded that the respondent "has not taken a step in the Pakistan Proceedings which goes beyond a challenge to that court's jurisdiction or conducted itself in a manner that was inconsistent with the contractual fora being the sole fora for the resolution of the dispute with the [appellants]" (at para 202).

25. The appellants did not cite or rely upon *Geoprosco* before the judge.

Geoprosco

26. In *Geoprosco*, Mr Henry, a Canadian, resident in Alberta, brought proceedings in the Supreme Court of Alberta, against the defendant, Geoprosco International Ltd, a Jersey company, seeking damages for wrongful dismissal in breach of a service agreement entered into in Canada. It was not in dispute that the Alberta court had jurisdiction to order service out of the jurisdiction, but Geoprosco sought to set aside service out on the grounds that the affidavit in support of the motion was defective and that Canada was not the forum conveniens; alternatively, it sought a stay of proceedings on the ground of the arbitration clause in the service agreement. Geoprosco's application was dismissed and on appeal that decision was upheld by the Court of Appeal of Alberta. Thereafter Geoprosco took no further part in the proceedings and Mr Henry obtained judgment in default. He then sought to enforce that judgment in England. Whether Geoprosco was bound by the judgment depended on whether it had submitted to the jurisdiction of the Canadian Court. The Court of Appeal (Roskill LJ with whose judgment Cairns and Browne LJJ agreed) held that Geoprosco had so submitted. The core reasoning of the judgment is accurately summarised in the headnote as follows:

> "…since the defendants had voluntarily appeared before the Canadian court to invite it not to exercise the discretion which it possessed under its own law to allow service out of the jurisdiction they had submitted to the jurisdiction of the Supreme Court of Alberta and were, accordingly, bound by the judgment…"

27. The Court of Appeal considered that it was bound to follow the earlier Court of Appeal decision in *Harris v Taylor* [1915] 2 KB 580. In that case, the plaintiff, Mr Harris, sought to enforce in England a judgment of the Isle of Man High Court in his favour whereby he had recovered damages from the defendant, Mr Taylor, for criminal conversation with the plaintiff's wife and for the loss of her society. The plaintiff had issued his writ in the Isle of Man and had sought and obtained leave to serve that writ out of the jurisdiction on the defendant in England. The defendant entered what was described as a "conditional" appearance and sought to set aside the service upon him on three grounds: first, that the rules of the Isle of Man High Court did not authorise service out of the jurisdiction upon him; secondly, that no cause of action arose within the jurisdiction of that court; and, thirdly, that he was never domiciled in the Isle of Man but was always domiciled in England. The defendant's application was dismissed, he played no further part in the action and judgment in default was given against him. It was held by Bray J, and affirmed on appeal, that the judgment was enforceable because the defendant had voluntarily submitted to the jurisdiction of the Isle of Man High Court.

28. Roskill LJ set out what he considered was decided in that case in the following terms (at p 738G-H):

> "It seems to us of crucial importance, when considering the ratio decidendi of *Harris v Taylor* [1915] 2 KB 580 to observe, first, that the Isle of Man High Court had by its own local law jurisdiction over the defendant; secondly, that that court had a discretion whether or not to exercise that jurisdiction over the defendant; thirdly, that that court having heard a plea by the defendant that it could not and should not do so decided both that it could and should exercise that jurisdiction; fourthly, that it was not argued in the English action that that decision was in any way wrong by the local law, and, fifthly, that the defendant, having voluntarily invited the Isle of Man High Court, by the appearance which he made, to adjudicate upon his submission that that jurisdiction of that court could not and should not be exercised over him and having lost, had voluntarily submitted to the jurisdiction of that court so that thereafter the defendant could not be heard to say that that court did not have jurisdiction to adjudicate upon the entirety of the dispute between him and the plaintiff."

29. Roskill LJ noted that the decision in *Harris v Taylor* had been "much criticised" and that it had been "strongly and frequently criticised by writers or editors of textbooks of great distinction" (at p 735E-F). As stated in the first edition of *Dicey* on *The Conflict of Laws* (1896) ("*Dicey*"): "A defendant who appears only to protest against the jurisdiction of a Court manifestly does not submit himself to it" (p 376). The first edition of *Cheshire* on *Private International Law* (1935) ("*Cheshire*") was to similar effect: "On principle it would seem that appearance limited to a protest against the foreign jurisdiction cannot properly be said to constitute submission" (p 494). To the extent that *Harris v Taylor* decided otherwise, both leading textbooks were highly critical of it. The first edition of *Cheshire* stated that it "reduces to an absurdity the underlying principle upon which the English doctrine of the [sic] jurisdiction has always been rested" (p 495). The ninth edition of *Dicey* (1973) referred to it as being "revolting to common sense" (p 996).

30. Despite these trenchant criticisms, Roskill LJ considered that the court was bound to follow *Harris v Taylor*. He concluded that it supported the following proposition of law (at p 747A):

> "The English courts will enforce the judgment of a foreign court against a defendant over whom that court has jurisdiction by its own local law (even though it does not possess such jurisdiction according to the English rules of conflict of laws) if that defendant voluntarily appears before that foreign court to invite that court in its discretion not to exercise the jurisdiction which it has under its own local law."

31. Applying that statement of law to the facts of the case, the Court of Appeal held that Geoprosco had submitted to the jurisdiction of the Canadian Court by:

> (1) Applying for a stay under section 4(1) of the Arbitration Act of Alberta, coupled with the submission that the arbitration clause was a *Scott v Avery* clause (ie a clause which provides that no action shall be brought until an arbitration award has been made) (p 750A-C).
>
> (2) Applying to set aside the order for service out on the ground that the affidavit in support of the motion was defective (the "second" ground) and that Canada was not the forum conveniens (the "third" ground) (p 750D-E). At p 734E Roskill LJ described these grounds as inviting "the Supreme Court of Alberta to divest itself of the jurisdiction which [the defendant] accepted that that court possessed".

32. The Court of Appeal also held that neither *Harris v Taylor* nor any other case had decided "whether where a defendant appears in a foreign court solely to protest against

the jurisdiction of that court (whether or not by its own local law that court possesses such jurisdiction) and such protest fails and judgment is then given against him, such appearance under protest amounts to a voluntary submission to the jurisdiction of that court" (p 747B-C). The court therefore drew a distinction between challenges to the existence of jurisdiction and to the exercise of an admitted jurisdiction.

33. The drawing of such a distinction led to immediate criticism. For example, Lawrence Collins, in an article entitled "Harris v Taylor Revived" (1976) 92 LQR 268, commented as follows:

> "[None of the original judgments in *Harris v Taylor*] draws the distinction, which in *Henry v Geoprosco International* was said to be so crucial to the decision in *Harris v Taylor*, between a protest against the *existence* of jurisdiction and its *exercise*" (p 276).

> "…in any event it is not a realistic distinction. Even in the case of a protest against the English jurisdiction, there is no clear distinction between the existence and exercise of jurisdiction. …The true basis of the decision in *Harris v Taylor* is that the defendant was treated as having entered a conditional appearance in the foreign court which became unconditional when his challenge to its jurisdiction failed, and that such an unconditional appearance is a submission. … That reasoning is fallacious, because in deciding what is a submission in the international sense the English court should not be influenced by what amounts to an appearance in domestic English procedural law. … The distinction between the existence and exercise of jurisdiction is blurred in English law and unknown in many systems and does not provide a rational basis for a rule of private international law" (pp 285 to 287).

34. The tenth edition of *Cheshire* (1979) stated that the distinction "cannot be sensible" and that it "bisects jurisdictional issues" (p 640). The latest fifteenth edition (2017) maintains that criticism and describes it as "illogical", "unjustifiable" and leading to "the absurd result that, in certain circumstances, a defendant who appeared before a foreign court to protest that it had no jurisdiction over him would be deemed to have submitted to that court's jurisdiction" (p 534).

35. The Board agrees with these criticisms. The distinction is not only difficult to draw but it is also both unrealistic and irrational. If the substance of an application is a challenge

to the jurisdiction of a court, it should not matter whether that challenge is to the existence or to the exercise of that jurisdiction. Both amount to a protest against the assumption of jurisdiction. A classic example of the falsity of the distinction is an application for a stay of proceedings in favour of arbitration. This is clearly a protest against rather than an acceptance of jurisdiction. Such a challenge does not deny that the court has jurisdiction. It asserts that, in the light of the parties' agreement to arbitrate, the court should exercise its jurisdiction to stay the proceedings before it. The same applies where a stay is sought in favour of proceedings before another court because of a jurisdiction clause.

36. The drawing of fine distinctions such as these had already been subject to pointed criticism by the Court of Appeal in *In re Dulles' Settlement (No 2)* [1951] Ch 842. As Denning LJ stated at p 850:

> "I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all."

37. The widespread criticism of the decision in *Geoprosco* led to its reversal by statute in section 33 of the Civil Jurisdiction and Judgments Act 1982 ("the CJJA"). When introducing the substantive Bill in Parliament Lord Hailsham LC explained the need for this provision as follows:

> "Further down, Clause [33] reverses the law of England and Wales and Northern Ireland as stated by the Court of Appeal in a case called *Henry v Geoprosco*, decided in [1975], on which my predecessor received representations from the two branches of the legal profession. As I mentioned earlier, one of the grounds on which the jurisdiction of a foreign court will be recognised for the purposes of enforcement here is that the parties submitted to the jurisdiction. But of course the question then arises as to what is submission to the jurisdiction and, as stated in *Henry v Geoprosco*, the law stretches the idea of implied submission too far. In that case it was held that a defendant who appeared in a foreign court to argue that that court should not entertain the case should, if the contention were rejected, be treated as having submitted to the jurisdiction.

> Clause [33] will now prevent this." (Hansard (HL Debates), 3 December 1981, col 1133)

38. Section 33 of the CJJA provides:

> "(1) For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely—
>
> (a) to contest the jurisdiction of the court;
>
> (b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;
>
> (c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings."

39. Other common law countries have adopted legislation to similar effect to section 33 of the CJJA: see, for example, sections 7(5) and 11 of the Foreign Judgments Act 1991 (Australia); the Reciprocal Enforcement of Foreign Judgments Act 1959 (as amended) (Singapore); section 1E of the Protection of Businesses Act 99 of 1978 (as inserted by the Protection of Businesses Amendment Act 1987) (South Africa); and section 4 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46) (Hong Kong).

40. In some other common law jurisdictions, there has been no legislation but the courts have declined to follow *Geoprosco*. A striking example of this is the 2012 British Virgin Islands decision of Bannister J in *Star Reefers Pool Inc v JFC Group Co Ltd* (unreported) 2 April 2012 in which he stated:

> "6. There are obiter dicta of the English Court of Appeal to the effect that an appearance under protest solely for the purpose of challenging the jurisdiction of a foreign Court is not to be

treated by the English Court as a submission to the jurisdiction of that Court. (fn: *Henry v Geopresco International Ltd* [1976] 1 QB 726 at 748F. The Court of Appeal did not explain what form such an application would take). There is clear English Court of Appeal authority that an appearance for the purpose (whether solely or in addition to a challenge to the jurisdiction of the foreign Court) of persuading the foreign Court that it should not exercise jurisdiction over the defendant will amount to a voluntary submission. (fn: *Harris v Taylor* [1915] 2 KB 580, 587; *Henry v Geopresco* (supra) at 747A, 750 C-D) There are also English Court of Appeal obiter dicta to the effect that if a defendant appears conditionally in order to persuade the foreign Court to set aside its order permitting service upon him outside its jurisdiction and that application fails, he will be treated as having submitted to its jurisdiction, apparently on the grounds that in applying to set aside an order for service out the applicant is inviting the Court to exercise a discretion. (fn *Henry v Geopresco* (supra) at 748G and 747E)

7. These authorities and dicta are no longer part of the law of England, having been abrogated by the United Kingdom Civil Jurisdiction and Judgments Act 1982. No such legislation exists here in the BVI. Ms di Iorio submits that the cases referred to in the preceding paragraph, although not binding on me, comprise highly persuasive authority and that I should apply them in applications made here under the Act. If I do, there can be no doubt that JFC's application to Andrew Smith J for a stay on forum grounds will be caught by the second of the two propositions which I have extracted from those authorities.

8. So far as the researches of Ms di Iorio have been able to establish, there is no authority dealing with the topic in this jurisdiction. I have come to the conclusion that I should not follow these decisions here. The reason is that they have now become dead letters in the jurisdiction in which they previously applied and that for me to apply them here, where they are not binding, would be to introduce into the law in this jurisdiction an archaic rule which would throw English and BVI practice and procedure out of alignment…In my judgment it would be a retrograde step and contrary to the spirit of these provisions of our legislation, for me to introduce into the law of the BVI rules which ceased to be part of the law of England thirty years ago.

> 9. Asking a foreign Court to set aside an order for service out on jurisdictional grounds or to divest itself of jurisdiction on forum grounds cannot, except by resort to the most pedantic logic, be seen as a submission to the jurisdiction of that Court. No litigant would by the light of nature regard that as being the case…."

41. The courts of Bermuda have adopted a similar position to those of the BVI – see the decision of the Court of Appeal of Bermuda in *Kader Holdings Company Limited v Desarrollo Inmobiliario* [2013] CA (BDA) 13 CIV, in which the *Star Reefers* decision was referred to approvingly by Bell (Acting JA) who stated (at para 24):

> "It seems to me sensible that the position in Bermuda should mirror that in England [as amended by section 33 of the CJJA], as well as that in other common law jurisdictions, and for my part I do not understand the rationale for applying any different test. I therefore turn to consider the different cases as set out in *Dicey, Morris & Collins*."

42. The appellants were not able to point to a single common law jurisdiction in which the rule in *Geoprosco* has been followed.

The decision of the Court of Appeal

43. Before the Court of Appeal, the appellants did not challenge the conclusion of the judge on submission to the jurisdiction on the basis of the evidence and the agreed legal position before him. They now contended, however, that that agreed legal position was wrong and that a contrary decision should be reached because of the rule in *Geoprosco*. The Court of Appeal summarised the position as follows (at para 71):

> "On the appeal, the Appellants have not sought to suggest that the Judge was wrong to have arrived at that conclusion on the issue of submission to the Pakistan Court, on the basis of the evidence before him and the case law as it was presented to him. Instead, the Appellants now argue that the Judge's conclusion that SPV21 had 'not taken a step in the Pakistan Proceedings which goes beyond a challenge to the court's jurisdiction or conducted itself in a manner that was inconsistent with the contractual fora' was plainly wrong as a matter of Cayman law because the Judge misdirected himself by failing to apply the rule in *Henry v Geoprosco* [1976] 1 QB 726 (CA). This rule would apply such that, in summary, simply

> by having applied by way of the section 4 Application for a stay in Pakistan in favour of an arbitration under the contract between the parties - the SHA - or for relief pursuant to Order 39 rule 4 of the CPC, SPV21 must be regarded as having submitted to the jurisdiction of the Pakistan Court."

44. The court did not accept that *Geoprosco* reflected Cayman law on submission to the jurisdiction but held that in any event it should not be followed. As the court stated at para 112:

> "In my view *Geoprosco* should not be regarded as representing the law of Cayman, either on submission for the purposes of the recognition and enforcement of foreign judgments, or on submission to a foreign court as a consideration for the grant of an anti-suit injunction. My reasons are the following:
>
> > (i) As a decision of the English Court of Appeal, while of highly persuasive and respectable value, it is not binding on our Courts. Our Courts will depart where… '*there is good reason to do so*.'
> >
> > (ii) While not overruled in England, as the foregoing review of the cases show, nor has it been expressly approved or applied by the House of Lords.
> >
> > (iii) Having been '*negatived*' there…by Parliament by the passage of section 32 and 33 of the CJJA, not only is it no longer to be followed in England but its policy must have been regarded as unsound.
> >
> > (iv) The Court of Appeal itself in *Geoprosco* had recognized the tautology of its reasoning – (why should a party merely by applying to a foreign court for a stay on the basis that it ought not to exercise jurisdiction over the proceedings in question because of an exclusive jurisdiction or arbitration clause be regarded as having submitted to its jurisdiction for all purposes of an action?) – but felt constrained to follow a settled, albeit doubtful, line of case authority.

> (v) …the case has been the subject of justified widespread criticism by judges, textbook writers and academics."

45. The court concluded that the judge had identified and applied the proper test and that there was no error in his approach or conclusion. As stated at para 114:

> "…it cannot be said that the Judge was wrong in principle to regard SPV21's Order 39 and Section 4 Applications as genuine attempts '*to do what it can to resist the (Pakistan Court's) assumption of jurisdiction*' and as not being '*inconsistent with treating the contractual forum as the primary forum for resolution of the parties substantive disputes.*'"

Is the Court of Appeal decision wrong?

46. In order to succeed on the appeal, the appellants need to show that the Court of Appeal was wrong to determine that *Geoprosco* should not be followed and to persuade the Board that *Geoprosco* is, and should be, Cayman law. This is ambitious.

47. It is well established and was not in dispute that the Cayman courts may decline to follow English court decisions where there is good reason to do so. Relevant authorities were considered in detail by Doyle J in *In the Matter of HQP Corporation* Limited [2023] (2) CILR 203 (at paras 24 to 38, and 70 to 73 in respect of the Cayman Islands, and paragraphs 39 to 69 in respect of other common law jurisdictions). At para 70(3) he set out, by reference to case law, a number of examples of what may constitute good reason. It is striking that a number of them apply in this case, such as:

(1) "(f) if the English decision has been abandoned or invalidated by the UK Parliament or not followed in other great common law courts such as the High Court of Australia".

(2) "(i) where the English decision has been 'much criticized' and can be said to 'affront common sense and any sense of justice'.

(3) "(j) where it is undesirable to 'cling to obsolete English common law cases which have ceased to be authoritative in England and Wales'".

Other potentially applicable reasons are "(e) there is some 'compelling reason' not to follow it…such as the reasoning being 'fundamentally flawed'" and "(n) if the English decision is obviously wrong or otherwise not persuasive".

48. In their written case, the appellants sought to support the reasoning in *Geoprosco* on the basis that otherwise the defendant has it both ways. If the defendant succeeds in a challenge to the jurisdiction before the foreign court, then that is the end of matter; but even if the challenge fails the defendant is left free to raise a jurisdictional objection at the enforcement stage. That is, however, true of every case in which a defendant decides to challenge jurisdiction rather than playing no part in the proceedings. *Geoprosco* recognises, however, that a challenge to the existence of jurisdiction is not a voluntary submission. The argument therefore proves too much. In any event, a decision by a foreign court that it has and should exercise jurisdiction under its own law should not and does not mean that a judgment in the exercise of that jurisdiction is binding as a matter of domestic law.

49. In their oral submissions, the appellants changed their case yet again. They argued that all that *Geoprosco* decided was: (i) a challenge to jurisdiction is not a submission, (ii) it is not necessary to join issue on the merits for there to be a submission, and (iii) a stay application may be a submission if it goes beyond a challenge to jurisdiction (as, for example, where a *Scott v Avery* clause is relied upon). The question is simply whether there has been a challenge which goes beyond one to jurisdiction. In this connection, it was submitted that a forum conveniens challenge does not do so (although *Geoprosco* clearly decided otherwise) and that the application which did so in this case was the Order 39 application, not the stay application (although both were contended to fall foul of the rule in *Geoprosco* before the Court of Appeal and in the appellants' written case). The Order 39 Application sought to allow the respondent to appoint directors and should be regarded as a positive step in the proceedings. The judge had erred in failing to so conclude and had wrongly focused on whether the application involved joining issue on the merits.

50. The Board rejects this revised case. It is premised on a wrong interpretation of *Geoprosco* and what it decided. It is also contrary to the general understanding of what *Geoprosco* decided, the basis upon which legislative steps have been taken to reverse it, and the appellants' own case hitherto. Having made one volte-face in these proceedings by advancing an entirely new case before the Court of Appeal, the appellants now seek to do so again. This is not how appellate litigation should be conducted. The decision in *Geoprosco* turned on the false distinction between challenges to the existence and to the exercise of jurisdiction. No such distinction should be drawn.

51. In this case, the judge found that no steps were taken in the Pakistan proceedings which went beyond a challenge to jurisdiction. The Order 39 Application was to be seen as seeking relief that would flow as a consequence of a successful challenge to the

jurisdiction rather than as a claim for substantive relief (see para 204). Contrary to the appellants' submission, the judge did not direct himself that going beyond a challenge to the jurisdiction involves a joining of issue on the merits. There is no basis for going behind what the judge found and the findings which he made mean that there was no submission to the jurisdiction, even on the appellants' revised case.

52. Even if *Geoprosco* would otherwise represent the common law of Cayman, the Court of Appeal had good reason not to follow it and gave cogent reasons for not doing so. They did not err in law. Their decision was justifiable and indeed correct. *Geoprosco* has rightly been reversed in England and Wales and, by statute or case law, it has been reversed or not followed in other common law jurisdictions. It should form no part of Cayman law.

What amounts to a submission to jurisdiction?

53. So far, the Board has been focusing on what Cayman law is not; it will now address what Cayman law is.

54. The Board considers that Cayman law on submission to jurisdiction should reflect what the law now is in England and Wales. As was common ground, the relevant principles were set out by Lord Collins in his judgment in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 ("*Rubin"*):

> "159. The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have 'taken some step which is only necessary or only useful if' an objection to jurisdiction 'has been actually waived, or if the objection has never been entertained at all': *Williams & Glyn's Bank plc v Astro Dinamico Cia Naviera SA* [1984] 1 WLR 438, 444 (HL) approving *Rein v Stein* (1892) 66 LT 469, 471 (Cave J).
>
> 160. The same general rule has been adopted to determine whether there has been a submission to the jurisdiction of a foreign court for the purposes of the rule that a foreign judgment will be enforced on the basis that the judgment debtor has submitted to the jurisdiction of the foreign court: *Adams v Cape Industries plc* [1990] Ch 433, 459 (Scott J) and *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 96-97 (Thomas J); see also *Desert Sun Loan Corpn v Hill* [1996] 2 All ER 847, 856 (CA); *Akande v Balfour Beatty Construction Ltd* [1998] IL Pr 110; *Starlight International Inc v Bruce* [2002]

> IL Pr 617, para 14 (cases of foreign judgments) and *Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader)* [1996] 2 Lloyd's Rep 585, 601 (a case involving the question whether the party seeking an anti-suit injunction in support of an English arbitration clause had waived the agreement by submitting to the jurisdiction of the foreign court).
>
> 161. The characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on English law. The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts."

55. As Lord Collins made clear, the same general rule applies regardless of the context in which the issue of submission to the jurisdiction of the foreign court arises. The rule is the same in anti-suit injunction cases as it is in enforcement cases – see Lord Collins' citation in para 160 of *Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader)* [1996] 2 Lloyd's Rep 585, 601 ("*The Eastern Trader*"), an anti-suit injunction case.

56. The general rule can be expressed in positive rather than negative terms. In the *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 96-97 ("*Akai*") case, also cited in para 160 of *Rubin*, Thomas J put it as follows (at p 97 LHC):

> "A step that is not consistent with or relevant to the challenge to the jurisdiction or obtaining a stay will usually be a submission to that jurisdiction."

57. It is the conclusion of the Board that the law of Cayman is as stated in *Rubin*.

58. The judge found that no step had been taken which went beyond a challenge to jurisdiction. That means that the respondent did not take any step which was only necessary or only useful if it was waiving an objection to jurisdiction. As both courts below held, there was no submission to the jurisdiction of the Pakistan court. If so, then the basis of the appellants' challenge to the decision to grant an anti-suit injunction falls away.

Conclusion

59. For all the reasons set out above, the Board will humbly advise His Majesty that the appeal be dismissed.