IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 130 OF 2023 (NSJ)

IN THE MATTER OF THE APPLICATION FOR INTERIM RELIEF UNDER SECTION 11A OF THE GRAND COURT ACT (2015 REVISION) AND SECTION 54 OF THE ARBITRATION ACT, 2012

BETWEEN

MINSHENG VOCATIONAL EDUCATION COMPANY LIMITED

Appellant

AND

(1) LEED EDUCATION HOLDING LIMITED
(2) NATIONAL EDUCATION HOLDING LIMITED
(3) HYDE EDUCATION HOLDING LIMITED

Respondents

DECISION ON NEED AND APPLICATION FOR LEAVE TO APPEAL

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1. On 3 August 2023 I handed down judgment (the ***Judgment***) on an originating summons (the ***Originating Summons***) filed by the Respondents in which they applied for an injunction pursuant to section 11A of the Grand Court Act (2015 Revision) (***Section 11A***) and to section 54 of the Arbitration Act 2012 (***Section 54***). As I noted in the Judgment, while the Originating Summons referred both to Section 11A and Section 54 during the hearing it became apparent that the Respondents' claim to injunctive relief was based wholly on Section 54. In the Judgment I

concluded that it was appropriate to grant the Respondents' application for such an injunction but to do so subject to certain qualifications and conditions. The injunction (the ***Injunction***) and these conditions have now been set out in the form of order made to give effect to the Judgment. I adopt for the purpose of this decision the terms defined in the Judgment.

2. The Appellant has indicated that it wishes and intends to appeal the Judgment "*given the relative novelty of the Section 54 jurisdiction in the Cayman Islands*". The Appellant submits that it does not require leave to appeal as it has an appeal as of right in respect of an injunction granted pursuant to Section 54 (and/or a section 11A). In the alternative, if leave is required, the Appellant seeks leave to appeal.

3. The Appellant indicated that it wished to appeal the Judgment prior to the final form of the Judgment being approved and handed down and, in accordance with the directions I had given, set out its position in its Skeleton Argument on Consequential Matters dated 4 August 2023 (the ***Skeleton Argument***). In so far as the Skeleton Argument set out the grounds for the Appellant's application for leave, I have treated the Appellant's application as having been made at the time that the Judgment was pronounced for the purpose of rule 11(5) of the Court of Appeal Rules (2014 Revision).

4. The Respondents have not made submissions on the Appellant's application regarding an appeal as they consider that such an application is essentially an *ex parte* process in which their only role is to ensure that the Court is not misled as to matters raised in the application. It is clear that respondents are not required to take any steps in response to an application for leave to appeal or in relation to an appeal although they could make written submissions on whether the grounds for granting leave are made out if they wished to do so. The Respondents have, however, chosen not to do so.

5. As regards the question of whether leave to appeal is needed, I agree with the Appellant that it is not. I agree that the decision (and the order) made on the Originating Summons is not an interlocutory judgment for the purpose of section 6(f) of the Court of Appeal Act (2023 Revision). It is to be treated as a final order for appeal purposes.

6. Section 54 gives the Court "*the same power of issuing an interim measure in relation to arbitration proceedings …. as it has in relation to the proceedings in court.*" The relief granted by the Court is "*interim*" because it regulates the position of the parties to the arbitration before the conclusion of the arbitration. An order made in exercise of the Section 54 jurisdiction is ancillary to and in aid of the arbitration. But such an order finally determines the proceedings and the dispute in this jurisdiction. The test for a final order set out in rule 12(3) of the Court of

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Appeal Rules is satisfied ("*A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it*"). It seems to me that the *dicta* from Justice Kawaley's judgment in *AncelorMittal North America Holdings LLC v Essar Global Fund Limited* [2021 (2) CILR 673] cited by the Appellant support this conclusion.

7. However, if leave to appeal is needed I would grant permission in this case.

8. In the Skeleton Argument the Appellant noted that (a) the general test for whether leave to appeal should be granted was whether the intended appeal had a real prospect of success; (b) "*real*" had been held to mean a "*realistic*" as opposed to "*fanciful*" prospect of success (this Court has consistently applied the *dicta* of Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91) and (c) in exceptional circumstances, leave may be granted even though there was no real prospect of success if the appeal concerned an issue of great public interest or importance which should be examined by the Court of Appeal. The Appellant cited in support of these propositions the note of the judgment of Sanderson J in *Telesystem International Wireless and Ors v CVC/Opportunity Equity Partner*s reported at [2001 CILR Note 21] and the judgment of Justice Quin in *Embassy Investments v Houston Casualty Company* (unreported, 3 July 2012).

9. In the Skeleton Argument the Appellant set out four grounds of appeal:

(a). the Respondents had failed to establish the need for relief under Section 54: there was an insufficient basis for exercising the Section 54 jurisdiction since the Respondents had failed to demonstrate that it was necessary to grant an order and no attempt had been made to approach the HKIAC arbitral tribunal or the CIETAC arbitral commission or CIETAC arbitral tribunal or the supervisory courts for relief and no evidence was given by the Respondents to explain the failure. Since the Appellant was a party and therefore amenable to orders from the arbitral tribunal or the relevant supervisory courts such orders would have been directly enforced if made.

(b). relief under Section 54 was unavailable since the Appellant's right to enforce the Share Charges was a matter which was subject to the jurisdiction of this Court and outside any relief that could be given in the foreign arbitrations: the question for the Court was whether the jurisdiction clause in the Share Charges prevented the arbitral tribunals from making awards in relation to the disposition of the Second Tranche. The foreign arbitral tribunals were not entitled to make any orders in respect of the security affecting enforcement of the Second Tranche because that was plainly the subject matter of the competing jurisdiction clauses in the Share Charges.

(c). the Court should not have granted a proprietary injunction under Section 54 because the Respondents had no seriously arguable property right. Such an injunction required the applicant to prove a seriously arguable property claim and the Respondents had not articulated any form of proprietary claim justifying such an order prior to the hearing and had not adduced any evidence directed to such a claim. The Court had accepted that the Respondents were able to make a proprietary claim if (a) the Appellant refused or failed to comply with an order for specific performance that the HKIAC tribunal might make in the future and (b) the Respondents then chose to treat that as a repudiation of the Put Option and reclaim the Second Tranche. However, it was a necessary precondition of a property preservation order that the applicant had established a threat to an existing, seriously arguable proprietary right. In this case, the Respondents sought specifically to enforce (in the Hong Kong Arbitration) the contract under which the property was to be held by the Appellant and not the Respondents. The Respondents did not have a presently seriously arguable proprietary right to the Second Tranche.

(d). the Court should not have granted an injunction restraining the enforcement of the Appellant's security interest. The Court had erroneously held that the principle preventing a Court from enjoining enforcement of a security did not apply when the debtor argued that the secured debt had been contractually eliminated or reduced even if the secured creditor disputed that the debt had been so eliminated or reduced. But the principle preventing a Court from enjoining enforcement of a security when properly understood applied (a) so long as the secured creditor disputed the elimination or reduction of the loan as having been a sufficient payment of the loan unless or until the account given by the debtor was agreed or established by proceedings or (b) whenever the debtor claimed by a different transaction to have repaid the loan of the secured creditor to which a charge related, such as the alleged Put Option.

10. In my view, none of these grounds have a real prospect of success. Having determined that leave to appeal is not required, I can set out my reasons very briefly:

(a). the Appellant argues that the Respondents failed to establish that relief was needed from this Court because the protection the Respondents sought was unavailable from the relevant arbitral tribunals. I disagree. The burden of proof was, clearly, on the Respondents in relation to the issue of whether there were good and sufficient grounds for granting the Injunction despite the Respondents' obligation to arbitrate and in light of the status of the Arbitrations. In my view, they discharged that burden. The Respondents said that since the

PRC arbitration tribunal had not been constituted they could not seek relief in or by reference to the PRC Arbitration. The Respondents' position was that it followed from the absence of an arbitration tribunal that no relief was available in the PRC Arbitration. No arbitrators, no award or interim remedies in the PRC Arbitration. In my view it was open to the Court to accept at least as a general proposition that it followed from there being no CIETAC arbitral tribunal that relief in the PRC arbitration was not available and that the Respondents had done enough to show that there was a good reason for concluding that they were unable to obtain relief (including the interim remedies they sought) in the PRC Arbitration. The Appellant did not argue that the Respondents were wrong on this point and adduced no evidence to contradict and rebut the Respondents' assertion and position. Had the Appellant asserted or adduced evidence that under PRC law (or the CIETAC rules) there was a power to appoint emergency arbitrators or for the PRC Court to grant interim remedies of the relevant type the position would have been different. But the Appellant did not do so and was therefore unable to undermine the Respondents' claim that it was reasonable and justifiable to conclude that where there were no arbitrators there could be no (interim or other) arbitral relief. Furthermore, the Appellant's position was protected because the Injunction was (a) conditioned on the Respondents making an application to the CIETAC arbitral tribunal for permission to continue the Injunction and (b) would be discharged if such permission were refused (and also because the Appellant was given liberty to apply to discharge the Injunction if the CIETAC arbitral tribunal decided that it was unable to hear and deal with the Respondents' application). These conditions and terms ensured that the primacy of the CIETAC arbitral tribunal was preserved (so that if that tribunal concluded that the Injunction should not be granted it would be discharged and the Appellant would then be protected by the Respondents' cross-undertaking for any loss suffered in what should be the relatively short period during which the Injunction remained in force).

(b). I do not accept that it is seriously arguable (so as to satisfy the real prospect test) that the asymmetric jurisdiction clauses in the Share Charges created a hermetic seal that prevented an award by the CIETAC arbitral tribunal that the Loans had been discharged by set-off or application from affecting the Appellant's right to enforce the Share Charges. The PRC Arbitration relates to the Respondents' claims under the Loan Agreements that the sums owing thereunder have been discharged as a result of their exercise of the Put Option and service of the Written Confirmations. The Loan Agreements are governed by PRC law. The CIETAC arbitral tribunal would not be making an order "*in respect of the security affecting enforcement of the Second Tranche*" or adjudicating on matters or disputes which could only be adjudicated by proceedings in this Court by virtue of the jurisdiction clauses

in the Share Charges. The CIETAC arbitral tribunal will be adjudicating on matters properly within its remit, namely the construction and effect of the set-off and application provisions in the Loan Agreements. The effect on the Appellant's enforcement rights will be indirect because those rights are dependent on the Loans remaining unpaid.

(c). nor do I consider that it is seriously arguable (so as to satisfy the real prospect test) that the Respondents failed to establish a sufficient proprietary interest in the Second Tranche to justify the granting of the Injunction. The Respondents hold and own the equity of redemption in the Second Tranche and that is a sufficient interest. It is that interest which was at risk and needed protection. The Appellant is right that the primary relief that the Respondents seek in the Arbitrations is to require the Appellant to purchase the Second Tranche (at the price determined in accordance with the Put Option) and that if the Appellant performs its obligations thereunder the Respondents will cease to hold any interest in and it will acquire the Second Tranche. But the Respondents' case was that the Appellant was opposing and resisting the completion of the sale pursuant to the Put Option and that in certain circumstances, in particular if the Respondents succeeded in establishing that the Put Option had been properly exercised and that the price payable for the Second Tranche thereunder was owed by the Appellant, but the Appellant refused to pay, it was at least arguable that the Loans would be treated as discharged and the Respondents would have the right to terminate the Put Option with respect to further and future performance and claim damages, such that the Respondents would be left with the full unencumbered interest in the Second Tranche (which would be at risk of serious and substantial prejudice if the Appellant was permitted to enforce the Share Charges at this point). There was in fact only a very limited discussion of the applicable law and no serious consideration of the relevant authorities or indeed the extent to which PRC or other foreign law might be relevant. But the Respondents clearly did enough in my view to establish a sufficient proprietary interest to support and justify the grant of the Injunction.

(d). it seems to me that the authorities on which the Appellant relied at the hearing do not establish the propositions which it now asserts, namely that where a chargee disputes that a contractual set off or appropriation/application provision (to which it is a party) has been effective to discharge or reduce the secured debt and the chargor's position has been agreed or established by proceedings the Court *is prevented from* and has no power to grant an injunction restraining enforcement of the charges (or other security interest). This ground of appeal therefore also does not have a real prospect of success.

11. As the Appellant has pointed out, the Court may still grant leave to appeal even where the Court concludes that the grounds on which leave is sought do not have a real prospect of success. In *Telesystem International* Justice Sanderson, as recorded in the CILR note (I have not been provided with a copy of the full judgment), said that such leave was only to be granted in exceptional circumstances. Justice Sanderson considered and applied the guidance given in the Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments) [1999] 1 WLR 2 for England and Wales. The Practice Direction deals with this issue as follows:

> *"10. …… Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case raises questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for reconsideration.*
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> *11. The approach will differ depending on the category and subject matter of the decision and the reason for seeking leave to appeal, as will be indicated below. However, if the issue to be raised on the appeal is of general importance that will be a factor in favour of granting leave. On the other hand, if the issues are not generally important and the costs of an appeal will far exceed what is at stake, that will be a factor which weighs against the grant of leave to appeal."*

12. As I have noted, the Appellant stated in its Skeleton Argument (at [8]) that it was "*seeking leave to appeal given the relative novelty of the section 54 jurisdiction in the Cayman Islands*." It then went on to set out its grounds of appeal without elaborating on this alternative ground for leave. I suspect that the Appellant regards it as self-evident that the Section 54 jurisdiction has not before been the subject of analysis and review in this Court or by the Court of Appeal and that the scope and juridical nature of that jurisdiction and the approach to be adopted by the Court when exercising the jurisdiction, is both unclear (having regard to the open drafting of Section 54, in particular the reference in section 54(2) to the need for the Court to consider "*the specific principles of international arbitration"*) and of considerable commercial importance. The statute has been drafted so as to require and allow the Courts to establish the proper approach and develop the applicable principles to be applied. It seems to me that it can fairly be said that these matters, in the context of this dispute, raise an issue which in the public interest should be examined by the Court of Appeal and have the benefit of appellate review. It does not seem to me that the costs and adverse impact on the Respondents of an appeal would outweigh the need for appellate review and justify a refusal of leave. The question arises as to whether it would be preferable to leave it to the Court of Appeal to decide and take its own view on whether there is a point of sufficient public interest to justify the grant of exceptional leave. If in doubt on the point, and recognising the need (and indeed duty of a first instance judge) to avoid giving leave where that cannot properly be justified. But in this case, had leave been required, I would have granted it on the basis that this is a case raising a question of public importance which would

benefit from appellate review (and full argument – even dare I say it fuller argument and citation of authority than in the hearing before me).

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
31 August 2023