IN THE CAYMAN ISLANDS COURT OF APPEAL
(ON APPEAL FROM THE GRAND COURT, FINANCIAL SERVICES DIVISION
CAUSE NO: FSD 140 OF 2020 (ASCJ))

CICA (Civil) Appeal 24 of 2020

IN THE MATTER OF SECTION 11 OF THE EXEMPTED LIMITED PARTNERSHIP LAW (2018 REVISION)

AND IN THE MATTER OF ASEAN INFRASTRUCTURE FUND II, L.P.

Delivery of Ruling: 23 November 2020

RULING

Moses, JA

1. By a Notice of Appeal dated 22 September 2020, the General Partner of ASEAN Infrastructure Fund II, L.P, AEI Co., Ltd (the "Appellant") seeks to appeal against the Order of the Chief Justice dated 12 August 2020. The Chief Justice dismissed the Appellant's application for an adjournment, refused a stay of the Respondent's Petition and directed that Hiroaki Ogino, a representative of one of the Limited Partners, Tokyo Century, sign a statement pursuant to Section 10(1) of the *Exempted Limited Partnership Law* (*ELP*) in respect of the removal of the Appellant as the General Partner of the Partnership and file the same on behalf of the General Partner with the Registrar of Exempted Limited Partnerships. The Chief Justice set out his reasons for the Order on 13 August 2020.

2. Two issues arise; first, whether the Appellant requires leave to appeal and second, whether if it does, the Court should grant leave.

Does the Appellant require Leave to Appeal?

3. The first issue turns on the provisions of Rules 11 and 12 of the *Court of Appeal Rules 2014*. Rule 11(2) provides:

> "*Notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below*."

4. Rule 12 provides:

"*(3) 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.*

(6) Notwithstanding anything in subrule (3), but without prejudice to subrule (5), the following judgments and orders shall be treated as interlocutory-

(i) an order staying proceedings or execution;

...

(v) an order for or relating to the fixing or adjournment of trial dates;"

5. I should note that if leave is required it is necessary to have applied to the court below:

"*11(5) In any case in which leave to appeal is required, an application for leave shall be made to the court below- (a) at the time the judgment or order is pronounced; or (b) by summons or motion issued within fourteen days from the date on which the judgment or order is filed, and if leave is granted, the appellant's notice of appeal shall be lodged within fourteen days of the date upon which the order giving leave to appeal is made*."

6. No such application has been made.

7. It is clear to me that the Order made by the Chief Justice cannot, as the Appellant would have it, be treated as final. The Appellant's application was for an adjournment of the hearing of the Petition. This is confirmed by the Notice of Appeal itself which seeks an adjournment of any rehearing of the Petition pending the Appellant's application for a stay in favour of arbitration.

8. The crucial provision is contained in Rule 12(3). The Rule requires an answer to this question: would the Petition have finally been determined *whichever way the Chief Justice had decided the issues before him?* It is plain that if the Chief Justice had acquiesced in the application for the adjournment or even the application for a stay the *entire cause or matter* would not have been determined. On the contrary the hearing of the Petition and the question of whether an order directing the signing of the statement pursuant to Section 10(1) should be made would have remained undetermined. In those circumstances, the Order of the Chief Justice cannot be treated as final. The Respondent seeks to rely upon sub-rule 6. For the reasons I have given there is no need to do so. Leave to appeal is required.

Should Leave to Appeal be Given?

9. The Chief Justice set out the relevant provisions of the *ELP* law and the Limited Partnership Agreement (LPA) all of which satisfied the Chief Justice of the lawfulness of the Termination Resolutions and that the General Partner, the Appellant, had failed to sign a Section 10 Statement in breach of the *ELP* Law and the LPA (see Reasons [27] and [28]). He then recorded that the Appellant had not taken issue with the Chief Justice's propositions as to the law and the LPA, and had not filed a formal response to the Petition although it had been filed about six weeks before. On the contrary it had, two days before, applied for an adjournment to allow the General Partner to apply for a stay in deference to arbitration proceedings which the General Partner had commenced against one of the Limited Partners (see Reasons [29] and [30]).

10. The judge refused the adjournment on the basis that there was no ground for a stay. He then proceeded to grant the relief in the absence of any basis for refusing the Petition, apart from what he regarded as a hopeless attempt to categorise the General Partner as a Limited Partner (see Note to [16(v)] of the Reasons), (see in particular the Chief Justice's Conclusions [52]-[54]).

11. The question is whether the Appellant has any reasonable prospect of success in establishing that the Petition should be stayed to arbitration. If the Appellant has no reasonable prospect of establishing that such a stay should have been granted, it would have no prospect of establishing that an adjournment should have been ordered. I should re-iterate that the reasons the Chief Justice gave for rejecting the contention that the General Partner was ~~not~~* a Limited Partner were unimpeachable. The Appellant does not condescend to any argument as to why the Chief Justice was wrong apart from a mere assertion.

12. The essence of the Appellant's argument rests on its claim that the parties had agreed that the matters in issue should be the subject of arbitration. The Chief Justice rejected that submission on two bases. First, the question of whether relief should be given on the presentation of the Petition was a matter for the Court and not for arbitration. It was not an issue which the parties had agreed should be arbitrated (see Reasoning at [34]). No plausible response to that conclusion has been advanced. Nor is the matter of such legal consequence as to warrant leave to appeal.

13. Second, the General Partner relied upon proceedings commenced in Singapore in which it had alleged that one of the Limited Partners had failed to comply with Drawdown Notices it had

issued in early 2020. That claim made no reference to the Termination Resolutions of April 2020.

14. Only one of the Limited Partners was Respondent to the arbitration. It relied, in its counter-claim, on the Termination Resolutions which, it said, preceded the Drawdown Notices.

15. Again, the Appellant has advanced no reasonably arguable contentions as to why the issues which arise in the Petition are the same or similar to those which were the subject of the agreement to arbitrate. As the Chief Justice remarked, whilst some factual issues might overlap they were clearly not the same. (Reasons [44] and [45]).

16. In my view, the grounds of Appeal now advanced, in respect of which leave is required, lack any merit and I refuse leave to appeal.

Rt. Hon Sir Alan Moses
Justice of Appeal
Dated this 13 November 2020