**IN THE GRAND COURT OF THE CAYMAN ISLANDS**
**FINANCIAL SERVICES DIVISION**

**CAUSE NO: FSD 164 OF 2020 (NSJ)**

**IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW (1997 REVISION)**

**AND IN THE MATTER OF AN APPLICATION FOR THE ENFORCEMENT OF AN ARBITRAL AWARD DATED 22 JUNE 2020 ISSUED BY AN ARBITRAL TRIBUNAL IN AN INTERNATIONAL ARBITRATION CONDUCTED IN THE HONG KONG INTERNATIONAL ARBITRATION CENTRE, PURSUANT TO THE ADMINISTERED ARBITRATION RULES OF THE HONG KONG INTERNATIONAL ARBITRATION CENTRE**

**BETWEEN:**

**TOP JET ENTERPRISES LIMITED**

Plaintiff

**AND**

**(1) SINO JET HOLDING LIMITED**
**(2) SKYBLUEOCEAN LTD.**
**(3) JET MIDWEST GROUP, LLC**

Defendants

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| **Appearances:** | Luke Stockdale and Paul Smith of Maples and Calder for the Plaintiff |
| | Louis Mooney of Forbes Hare for the Second Defendant |
| **Hearing:** | 20 July 2021 |
| **Draft judgment Circulated:** | 21 July 2021 |
| **Judgment delivered:** | 3 August 2021 |

**HEADNOTE**

*Charging order absolute – application for order to sell the charged property – charged property being shares in private company – judgment creditor also a creditor of the company - whether to make an order for sale and if so what directions to be given for the conduct of the sale*

**JUDGMENT**

## Introduction

1. This is my judgment on the Plaintiff's application, by summons dated 17 June 2021 (the ***Summons***), for an order that the Second Defendant's shares in the First Defendant, which are subject to a charging order absolute dated 26 January 2021 (the ***Charging Order***) be sold. The application was heard yesterday and was opposed by the Second Defendant. The Plaintiff was represented by Mr Luke Stockdale of Maples and Calder and the Second Defendant was represented by Mr Louis Mooney of Forbes Hare. At the conclusion of the hearing, I informed the parties that I would grant the application but only on the basis that the directions for the conduct of the sale were amended and that I would provide the parties with the amended form of order and a short note of my reasons today, which I now do.

2. On 22 June 2020, an arbitral tribunal in Hong Kong made an award in favour of the Plaintiff against the First Defendant, the Second Defendant, and the Third Defendant (which is the Second Defendant's parent company) jointly and severally for the sum of US$76,043,750 plus interest (the ***Award***). On 2 September 2020, this Court entered judgment in terms of the Award in the amount of US$87,231,250 plus simple interest thereon from 23 June 2020 at the rate of 4.25% per annum and costs (the ***Judgment Debt***). As of 16 June 2021, the entire amount of the Judgment Debt – other than US$4,017.42 – remained due and unpaid. By the Charging Order the Court ordered that all of the shares (the ***Shares***) held by and in the name of the Second Defendant in the First Defendant together with any dividend payable in respect of the Shares stand charged with the payment of the Judgment Debt, including interest, plus the Plaintiff's costs of the charging order application. As of 16 June 2021, US$90,873,617.12 plus costs, was secured by the Charging Order. The Second Defendant failed to respond to or defend the enforcement proceedings in this Court or to pay or procure the payment of the Judgment Debt. The dispute giving rise to the Award arose out of a joint venture between the Plaintiff and the Second Defendant, which was to be carried into effect via the First Defendant. The Plaintiff and the Second Defendant have the right to appoint, and have appointed, three directors to the board of the First Defendant so that, as a result of the dispute between the Plaintiff and the Second Defendant, the First Defendant's board has effectively been deadlocked and unable to act.

3. Service of the summons and the Plaintiff's evidence in support was effected on the First Defendant on 21 June 2021 and on the Second Defendant on 18 June 2021(as well as on the

Third Defendant). When serving the Summons and supporting affidavits on those parties, the Plaintiff's attorneys requested that, if any of them intended to be represented by Cayman Islands attorneys at the hearing of the Summons, they should contact the Plaintiff's attorneys before 24 June 2021 with their availability. No response was received within the requested timeframe and so the hearing of the Summons was listed on 20 July 2021. On Saturday 17 July, the Plaintiff was served with the First Affidavit of Mr Paul Kraus, a director of the Second Defendant, in which he indicated that the Second Defendant would oppose, and which set out the Second Defendant's reasons for opposing, the Plaintiff's application. On 19 July, Forbes Hare filed a skeleton argument on behalf of the Second Defendant (the skeleton argument filed by Maples and Calder on behalf of the Plaintiff was filed on 15 July.

4. The evidence in support of the Summons included the Fourth Affidavit of Michelle Ng and the First Affidavit of Ms Margot MacInnis of Grant Thornton. The Plaintiff sought an order that Ms MacInnis and her colleague Mr Royle be appointed by the Court to conduct the sale of the Shares and Ms MacInnis' evidence set out her view as to the appropriate directions to be given and methodology for conducting the sale. She stated as follows in the First Affidavit:

> *"8. Based on my professional experience, I consider that an appropriate approach to selling theAssets would involve:*
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> *8.1 First, advertising the sale to provide broad exposure of the Assets to potential bidders.If appointed, I intend to use a mix of traditional and online advertising to the Assets through private and official national publications (e.g. official Gazettes, the Wall StreetJournal, China Daily) of relevant jurisdictions to ensure broad exposure to an international audience for potential bidders. The advertising will contain a bespoke, secure sales email address which interested parties will be required to contact and request basic information about Sino Jet (the "Teaser") as well as direction on the process to follow to become vetted as a potential bidder and to submit a bid.*
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> *8.2 I will also consider direct contact with sophisticated investors in distressed assets. However, given the financial state of Sino Jet with a very significant outstanding amount owed under the arbitral award giving rise to these proceedings, the market for sophisticated third-party investors who may have an interest is expected to be small.*
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> *8.3 I also intend to notify the parties to these proceedings of the sales process and invite them to direct any interest to the secured sales email address for further information.*
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> *8.4 In terms of timeframe, I would propose a marketing period of four weeks to allow for all interested parties to lodge their interest, formulate a bid, and to allow for Grant Thornton to undertake appropriate due diligence of the bidders and the bids. Should there be significant interest this period could be extended by a further two*

*weeks or as necessary.*

*8.5 As for the form of sale, I have carefully considered the range of available options, and I consider that the most suitable approach would be to establish a fixed deadline for bids to be submitted, such bids being sealed and confidential. To ensure that only credible bids are made, I consider that the payment of a deposit equal to 10% of the total offer would be appropriate. I understand that Top Jet intends to credit bid and soI would propose to exclude such a bid from this deposit requirement.*

*8.6 As for a formal valuation of the Assets, I do not consider that this will be necessary or appropriate in the circumstances, given that, as I understand the position, (i) the liabilities of Sino Jet significantly exceed its assets and (ii) there is no ongoing businessof Sino Jet generates any cash flows. Accordingly, I consider that seeking bids from all potentially interested parties will provide a better gauge of value in these circumstances. With that said, I would seek an appropriate level of financial informationabout the affairs of Sino Jet from Top Jet or any other party who is willing to provide it.*

*8.7 It is of course conceivable that there may need to be departures from the process outlined above. Accordingly, if appointed, I respectfully suggest that Mr Royle and I should be authorised and empowered to vary, condense, or expand the sales and marketing process at our discretion using its reasonable and professional judgement, provided that any such variation shall not cause any potential bidder to be put in an unfair position relative to other potential bidders.*

*8.8 Once a bidder has been selected, I would propose to return to Court for a further application to approve the selection of the bidder and the terms of the sale. If there has been a deviation from the process outlined above, the Court's approval for such deviation would be sought at that time."*

**The relief sought by the Plaintiff**

5. The Plaintiff sought an order for sale that reflected the approach recommended by Ms MacInnis. The relevant parts of the draft order filed by the Plaintiff were in the following terms:

*"1. Margot MacInnis and John Royle of Grant Thornton Specialist Services (Cayman) Limited (the "**Appointees**") be appointed to conduct a sale of the Assets in accordance with the terms of this Order with the power to act jointly and severally.*

*2. The Appointees shall conduct the sale of the Assets in accordance with their professional skill and judgment in order to realise the best price reasonably obtainable for the Assets. Subject to paragraph 3 below, the sale shall be conducted in accordance with the following requirements:*

*2.1 The Appointees shall market the Assets by:*

(a). *Advertising the sale in such manner and in such locations as they consider appropriate; and*

(b). *Contacting the following parties, directly or by their attorneys, to notify them of the sale: (i) each of the Defendants; (ii) Mr Woolley; and (iii) any other parties the Appointees consider may be interested in bidding for the Assets.*

2.2 *The Appointees shall allow interested bidders no less than four weeks to notify the Appointees of their interest, formulate a bid and allow the Appointees to undertake appropriate due diligence of the bidders and the bids. This period may be extended by such period as the Appointees consider appropriate;*

2.3 *The Appointees shall establish a fixed deadline for bids to be submitted. The Appointees shall require the payment of a deposit equal to 10% of the total offer (except in the case of a credit bid by the Plaintiff in accordance with paragraph 5 below, in which case no deposit shall be required). The Appointees shall require all bids to be sealed and confidential and all communication in respect of the bids shall be accessible only by the Appointees and their staff;*

3. *The Appointees shall be permitted to vary, condense, or expand the sales and marketing process at their discretion using their professional skill and judgement, provided that any such variation shall not cause any potential bidder to be put in an unfair position relative to other potential bidders. To the extent the Appointees deviate from the requirements in paragraphs 2.1 to 2.3 above they shall notify the Court of that deviation and the reasons for it at the further hearing to be fixed in accordance with paragraph 6 below.*

4. *For the purposes of the sale, the Appointees shall be permitted and empowered to:*

4.1 *Take all necessary steps to obtain information from the parties or any other appropriate source concerning the financial position of the First Defendant ("**Sino Jet**") in order to assess the value of the Assets;*

4.2 *Provide information regarding the Assets to interested purchasers and engage in discussions with such parties (including the Plaintiff) on such non-disclosure terms as the Appointees consider appropriate;*

4.3 *Conduct due diligence on prospective purchasers of the Assets and require the provision of documents and information from such parties to enable the Appointees to satisfy themselves as to the financial standing and complete all necessary verification and compliance checks on any prospective purchaser;*

4.4 *Negotiate with any prospective purchaser over the terms of any offer for the Assets and negotiate with the preferred bidder over the terms for the sale of the Assets.*

4.5 *Obtain assistance from the Plaintiff's Cayman Islands attorneys, Maples and Calder (Cayman) LLP, with the conduct of the sale or*

*otherwise engage a separate firm of attorneys to assist with any particular aspect of the sale where the Appointees consider it necessary to do so;*

*4.6 Take any other step that may be necessary or incidental to the sale of the Assets.*

*5. The Plaintiff be permitted to offer to purchase the Assets as a credit bidder by way of a reduction of the judgment debt it is owed by the Second Defendant under the Order dated 2 September 2020.*

*6. The Plaintiff's Summons be adjourned for further hearing on a date to be fixed for the purposes of the Court considering whether to approve the sale of the Assets on the terms proposed by the Appointees.*

*7. The Appointees' remuneration and expenses shall be paid by the Plaintiff in the first instance, without prejudice to the Plaintiff's right to seek orders at the further hearing to be fixed in accordance with paragraph 6 above that the Appointees' remuneration and expenses be paid by the Defendants or be met from the proceeds of sale.*

*8. Costs reserved.*

*9. The parties and the Appointees shall have liberty to apply for any further directions as may be necessary in connection with the sale of the Assets."*

**The Plaintiff's submissions**

6. The Plaintiff noted that the application for an order for sale in the present circumstances was governed by paragraph 3(5) of Schedule 3 of the Judicature Act (2021 Revision), GCR O.50, r.9(1) and GCR O.31. The relevant parts of these provisions are as follows:

(a). paragraph 3(5) provides that "*Subject to this Schedule, a charge imposed by a charging order made in relation to any property other than land shall have the like effect and shall be enforceable in the same manner as an equitable charge created by the debtor by writing under the debtor's hand.*"

(b). GCR O.50, r.9(1) provides that "*An application for an order for sale of any property other than land made subject to a charging order shall be made by summons and Order 31 shall apply, with such variations as may be necessary, as if the charged property were land.*"

(c). GCR O.31 r.1 provides that "*Where, in any cause or matter relating to any land, it appears necessary or expedient for the purposes of the cause or matter that the land or*

*any part thereof should be sold, the Court may order that land or part thereof to be sold, and any party bound by the order and in possession of that land or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct."*

(d). GCR O.31 r.2 provides:

(1). *Where an order is made, whether in Court or in Chambers, directing any land to be sold, the Court may permit the party or person having the conduct of the sale to sell the land in such manner as he thinks fit, or may direct that the land be sold in such manner as the Court may either by the order or subsequently direct for the best price that can be obtained, and all proper parties shall join in the sale and transfer as the Court shall direct.*

*(2). The Court may give such directions as it thinks fit for the purpose of effecting the sale, including, without prejudice to the generality of the foregoing words, directions –*

*(a). appointing the party or person who is to have the conduct of the sale;*

*(b). fixing the manner of sale, whether by contract conditional on the approval of the Court, private treaty, public auction, tender or some other manner;*

*(c). fixing a reserve or minimum price;*

*(d). requiring payment of the purchase money into Court or to trustees or other persons;*

*(e). for settling the particulars and conditions of sale;*

*(f). for obtaining evidence of the value of the property;*

*(g). fixing the security (if any) to be given by the auctioneer, if the sale is to be public auction, and the remuneration to be allowed him.*"

7. Mr Stockdale said that as far as he was aware there were no reported or unreported decisions in this jurisdiction concerning an application to enforce a charging order or an order for sale under GCR O.31. He submitted however that based on an analysis of the legislative provisions I have just described and authorities from England and Wales, the Court was required to conduct a two-stage enquiry. First, should the Court grant an order for sale? Secondly, if so, what, if any, directions should be given regarding the sale?

8. On the first issue, and in relation to the test to be applied by the Court in deciding whether to make an order for sale, the Plaintiff referred to and relied on the following extract from the current 2021 edition of the White Book (the commentary on CPR 73.10C.1) and Atkin's Court Forms (2018 edition at [232]) (underlining added by me):

> *"It is one thing to make a charging order giving security to the judgment creditor and quite another thing to order a sale of the judgment debtor's property. Just as the Court has a discretion whether or not to make the charging order so it has discretion whether or not to order the sale. It would be an extreme sanction and all circumstances would have to be considered. Where the property is the debtor's home the Court will have to consider the provisions of art.8 European Convention on Human Rights. To order sale is a draconian step to satisfy a simple debt and is likely to be ordered for example, in a case of the judgment debtor's contumelious neglect or refusal to pay or in a case where in reality without a sale the judgment debt will not be paid (see, e.g. Barclay's Bank v Hendricks [1996] 1 FLR 258 where the court ordered a sale even though the proceeds would amount only to about 20% of the debt). Even where a sale is ordered the Court could suspend the order on terms as to payment by instalments, or postpone the sale until a specified future date (see e.g. Austin-Fell v Austin-Fell [1990] 2 All ER 455). Of course different considerations would apply if it were not the debtor's home and they held the property as a second home or as an investment. The court might decline to make an order for sale in circumstances where the sale would be unlikely to realise sufficient funds to settle or significantly reduce the debt secured by the charge (see Amari Lifestyle Ltd (T/A Amari Super Cars v Warnes) [2017] EWHC 1891 (Ch)).(**Amari**)] In all cases relevant factors will include the size of the judgment debt and the value of the property.*
>
> *"The remedy is equitable and therefore within the discretion of the court whether or not to grant it. A balance has to be struck between a debtor being deprived of his property and a creditor being deprived of his remedy."*

9. The Plaintiff submitted that in the present case the Court should make an order for sale. The Judgment Debt, other than US$4,017.42 which was obtained by garnishing the Third Defendant's bank accounts in the United States, remained unpaid and no action had been taken by any of the Defendants to arrange for payment or indeed to respond to the Award, the judgment in these proceedings or the Charging Order. The Plaintiff was left with no alternative or choice but to enforce the security it had obtained, and a sale of the Shares was the enforcement method it had selected, which it considered to be appropriate.

10. Until Mr Kraus' affidavit had been belatedly served just before the hearing, the Second Defendant had been wholly unresponsive. Mr Kraus had now given very brief and unverified (save for a print-out of a bank account balance) statements regarding the nature and possible value of the assets and financial position of the First Defendant, in particular he had stated that:

(a). the First Defendant owned *"tens of thousands of aircraft parts with a list-price of hundreds of millions of US dollars …[which on a rough approximation using [his] experience in the aircraft parts industry [he] would conservatively estimate [to be worth] perhaps US$35,000,000 [although depending on the state of the market at the time of sale and the sale and advertising process employed, they could be worth many of millions more*."

(b). the First Defendant's shares in Jet Midwest International, a corporation not party to the present proceedings, were valuable since the assets of Jet Midwest International "*might be valued as at least approximately US$78,000,000"* and that "*to the best of [his] understanding*" Jet Midwest International *"had some US$33,000,000 cash-on-hand [although that number will have changed since he was last aware of the correct figure]*" and "*approximately US$10,391,779 cash*" was held for Jet Midwest International by another non-party, Jet Midwest Inc.

(c). as far as he was aware, Jet Midwest International did not have any significant liabilities and the First Defendant did not have "*any mentionable liabilities*" save for its liability in respect of the Judgment Debt.

11. However, the Plaintiff submitted, this evidence should be given very little weight. There were no verified or other financial statements or documentation, the bank statement exhibited to Mr Kraus' affidavit did not properly identify the account holder and the financial information provided was based on estimates and not up to date. The Plaintiff accepted and its position was that the Court should proceed for the purpose of the application on the basis that the First Defendant was probably insolvent, in view of the size of the Judgment Debt, although at this stage, in the absence of further evidence, it was impossible to form a final and firm view on the First Defendant's solvency. The Plaintiff noted that the arbitration tribunal had recorded in the Award (at [19.9]) that it had been argued that the Plaintiff had failed to prove that the assets of the First Defendant were insufficient to pay the sums owed to the Plaintiff, but the Tribunal failed "*to see how there could be any doubt on this point*." The expert evidence filed as to the First Defendant's financial position had "*confirmed the obvious [and] to the extent Mr. Kraus [had] attempted to suggest otherwise, [the Tribunal considered] his testimony speculative and contrary to the documentary evidence*." The Plaintiff also accepted that it followed that the Shares might well have no value, at least to anyone other than the Plaintiff and that a sale to a third party might well be impossible or difficult. But, the Plaintiff submitted, the Court should not prejudge this issue and should allow a properly structured sale process to be conducted to

see whether offers were obtained. The Plaintiff, where there were multiple co-obligors, was entitled to select which co-obligor to pursue and which assets to go against, and it had decided that its interests were best served by enforcement of the Charging Order over the Shares. Mr Stockdale also noted that there were serious doubts as to whether the funds referred to by Mr Kraus were in fact available to Jet Midwest International as the Plaintiff had claimed that the funds were the result of the improper conduct complained of in its dispute with the Defendants.

12. The Plaintiff noted that Mr Kraus had also said in his First Affidavit that on 16 July 2021 in his capacity as a director of the First Defendant he had convened a meeting of the directors of the First Defendant to take place on 16 August. Mr Kraus had exhibited the notice which stated that the "*purpose of the meeting will be to discuss how [the First Defendant] can best realise its assets to pay its liabilities, particularly the [Judgment Debt].*" However, the Plaintiff submitted, the fact that so little had been done so late confirmed that there was no serious and real intention to take action to arrange for payment of the Judgment Debt and that since the First Defendant's board was deadlocked, absent a radical change in approach and cooperation from the Second Defendant, of which there was no evidence or sign, there was no real or realistic prospect of any steps being taken that would result in the Judgment Debt or a substantial part of it being repaid.

13. On the second issue, the Plaintiff had relied on the professional views of Ms MacInnis and invited the Court to make the order sought and give effect to the sale process which she had recommended. Mr Stockdale indicated, however, that the Plaintiff was not submitting that the proposed approach was the only acceptable methodology to adopt and said that the Plaintiff would support any amendments which the Court considered to be necessary.

**The Second Defendant's submissions**

14. Mr Mooney for the Second Defendant argued that there were eight main reasons why the Court should not grant the application. They were as follows:

(a). that the Second Defendant was a joint obligor in respect of the Judgment Debt and its only asset was the Shares. It would be unfair and inappropriate for the Court to order the sale of the Shares before giving the First Defendant, which Mr Kraus' evidence indicated had substantial assets, the opportunity to take steps to realise its assets and pay the Judgment Debt. The proper course was for recourse first to be had to the First Defendant's assets. Mr Kraus' evidence showed that such steps were now being taken.

Mr Mooney was not aware, and he submitted that there was no evidence to show, that the First Defendant's board was deadlocked. In any event, if after the board had been given an opportunity to act, they failed to do so then the proper course would be for an independent liquidator or even receiver to be appointed over the First Defendant or its assets to allow the assets to be realised.

(b). the Shares, on the Plaintiff's case, had little or no value. As the extract from the White Book quoted above showed, the Court should decline to make an order for sale in circumstances where the sale would be unlikely to realise sufficient funds to settle or significantly reduce the debt secured by the charge.

(c). the Plaintiff was seeking an order to sell the Shares for an improper purpose. It really wanted to acquire the remaining fifty percent of the share capital of the First Defendant for little or no consideration so that it could obtain control of the First Defendant (there was also a risk that the Plaintiff would acquire the Shares for less than their true value and then extract value by way of dividend or otherwise from the First Defendant). As Mr Stockdale had said in his written submissions, the Plaintiff considered that by acquiring control it could obtain information from the First Defendant which would assist it in pursuing other claims. In [18.4] of the Plaintiff's Skeleton, Mr Stockdale had said as follows:

> *"Nevertheless, Skyblueocean's shares in Sino Jet may have some value to Top Jet (being the other 50% shareholder of Sino Jet), because, if Top Jet acquires Skyblueocean's shares, Top Jet will become the sole shareholder and thereby be in a position to control Sino Jet, which may assist Top Jet in obtaining information and pursuing further recovery efforts. For that reason, Top Jet seeks orders that it be permitted if advised to making an offer for the shares, by way of a credit bid, for a reduction of the Judgment Debt. Of course, if there is a superior cash offer for the shares from a party affiliated with Skyblueocean or (more unlikely) a third party, then that would allow some reduction of the Judgment Debt."*

(d). the Plaintiff had failed to approach, seek the cooperation of, and make inquires of the directors of the First Defendant. It should have done so and should not be entitled to an order for sale without first doing so.

(e). as noted above, if after the Plaintiff had been required to approach the directors of the First Defendant and they had been given an opportunity to take steps or make detailed proposals for the realisation of the First Defendant's assets, then a more suitable remedy, less draconian in its effects on the Second Defendant and giving rise to less

risk of a windfall for the Plaintiff, would be the appointment of a receiver over the First Defendant and its assets or of a liquidator.

(f). the Plaintiff's application to be permitted to credit bid for the Shares was impermissible in law since it would involve a sale by a mortgagee to itself. Mr Mooney had cited in his skeleton argument various authorities dealing with this rule. Furthermore, giving the Plaintiff the opportunity to credit bid when the Judgment Debt was so large would result in a substantial and serious chill on bids.

(g). the directions proposed by the Plaintiff for the sale process were manifestly incapable of achieving the best price reasonably obtainable for the Shares. The Plaintiff had not provided for a valuation of the Shares at any stage in the process (based on Ms MacInnis' evidence) and the proposed marketing process was inadequate and too short. There was no provision for a data room for bidders or involving an investment banker or broker. Furthermore, the proposal that bidders be required to provide a ten per cent deposit with their bid was also unreasonable and likely seriously to prejudice and chill the bidding process. The bidding procedures failed to include adequate safeguards to protect the position of the Defendants. The proposal to give the conduct of the sale to Grant Thornton was also unacceptable in view of the conflict of interest disclosed by Ms MacInnis in her First Affidavit. She had said as follows (at [7]):

> *"For completeness, I note that Grant Thornton in the United States (i) was retained by Jet Midwest International (a wholly owned subsidiary of Sino Jet) and its former counsel, Dorsey & Whitney LLP as of January 19, 2017 and subsequently (ii) was retained by Top Jet and its current counsel, Pillsbury LLP, as of December 20, 2018 to provide forensic accounting and expert witness services in connection with various related legal actions filed in the United States against various parties, including Sino Jet. However, I do not consider this affects my ability to conduct a sale of the Assets in a fair and transparent manner."*

(h). the paucity of proposed safeguards combined with the Plaintiff's acknowledgement that it had an ulterior motive for seeking an order for sale and its failure to consult the directors of the First Defendant were indicative of a lack of good faith on its part.

**Discussion and decision**

15. In general, I accept the Plaintiff's submissions on the first issue, and am satisfied that the Court should make an order for the sale of the Shares in the circumstances of this case.

16. There is a substantial body of English case law on the issue of when the Court will make an order for sale to enforce a charging order (or an equitable charge). As a charge imposed by a charging order has the like effect and is enforceable as if were an equitable charge, the Court has an inherent jurisdiction to order a sale. But only a limited number of authorities were cited to me on this application. Nonetheless, it seems to me that the commentary in the 2021 White Book, which was relied on by both Mr Stockdale and Mr Mooney, is a reliable and useful guide (even though there are differences between the procedural rules set out in the CPR and the GCR). I have taken into account the guidance set out therein. Both parties also relied on the following passage from the judgment of Stephen Jourdan QC, sitting as deputy judge, in *Amari* (at [66]) (my underlining):

> *"..... An order for sale is the ultimate sanction for which powerful reasons are required, and which should be seen as extreme order which should be resorted to only in extreme cases, particularly where the property to be sold is the debtor's home. The rights of those living in the property to respect for their home under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms must be taken into account. However, although it is a draconian step to satisfy a simple debt, it may be justified in the case where in reality without a sale the judgment debt would not be paid."*

17. It seems to me that in considering whether to order a sale, all of the circumstances need to be taken into account (see *Forrester Ketley v Brent* [2009] EWHC 3441 (Ch.) at [52] per Vos J). It is necessary to have regard to the interests of the Second Defendant, who opposes the order for sale and to the fact that the order will have serious consequences for it. There must be powerful reasons justifying a sale, particularly an immediate sale. In this case, I consider that there are. I consider that the Second Defendant's complete failure to respond to the enforcement proceedings in this jurisdiction until the very last minute and then to offer up only the most modest and limited of responses demonstrates that absent an order for a sale of the Shares nothing will be done by the Second Defendant (and perhaps the other Defendants) towards paying the Judgment Debt. The Second Defendant has not even put forward proposals that would or could realistically lead to the realisation of the First Defendant's assets. It could easily have offered to cooperate with the Plaintiff and arranged for the First Defendant's directors nominated by it to cooperate with the directors nominated by the Plaintiff and indeed made arrangements for that cooperation to commence so that detailed information regarding the assets and financial position of the First Defendant could have been produced and verified and it could have made and produced reasonably detailed proposals for realising the First Defendant's assets with an outline timetable and estimated values. The Second Defendant has had plenty of time but has clearly chosen not to do so. Mr Kraus' last minute convening of a board meeting for 16 August appears nothing more than a gesture designed for the purpose of

making an argument to the Court on this application. I appreciate that the meeting could only have been held without the need for the usual formal notice if all the directors had consented and that the consent of the Plaintiff's directors was required. But that is not the point. If the Second Defendant had wanted to persuade the Court that an order for sale should not be made or at least deferred, it needed to do much more and show that it was genuinely prepared to take the necessary steps required to enable the Judgment Debt to be paid. To my mind, it has conspicuously failed to do so.

18. I have carefully considered the Second Defendant's objections based on the likely low value of the Shares and the concern that since the Shares will not or are most unlikely to generate any real value (since the value is all in the assets of the First Defendant), a sale should not be ordered. But it seems to me that the objections and concerns can be removed by adopting suitable safeguards in the procedures for conducting the sale (which I discuss below). These procedures will ensure that a final decision on the sale will be deferred until the result of a proper marketing and sales process has been concluded and the Court is able to see whether the process was fair and appropriate (and whether if the purchaser selected is the Plaintiff, that the price paid for the Shares represents proper and fair value). Furthermore, I am satisfied that in this case a sale of the Shares (even if to the Plaintiff) is likely to be a useful and perhaps important step in the process leading to the payment of (at least part of) the Judgment Debt. It may be, as the Plaintiff submitted, that one or more of the Defendants will wish to make a bid either to ensure that the Plaintiff is required to credit bid in a proper amount or as a means of dealing with the Judgment Debt. Furthermore, I do not accept that, at least on this application, the Second Defendant is entitled to require the Plaintiff to enforce the Judgment Debt against another co-obligor. Which co-obligor to go against is a matter for the choice of the creditor, the Plaintiff (as I pointed out during the hearing, paying co-obligors who pay more than their share will have rights of contribution against the others and it has not been suggested at this stage that any one of the Defendants is a principal obligor with the others being secondarily liable).

19. I do however, accept that the proposed directions for the conduct of the sale are unsatisfactory. The conduct of the sale is within the direction of the Court. In the more usual case where the asset to be sold is land, or another asset that is readily saleable and for which there is a ready market, the process is relatively straightforward. The Court will usually direct that the conduct of the sale is to be given to the attorneys for one of the parties and permit the sale to be concluded by private treaty, subject to a reserve price to protect the party who does not have conduct of the sale and will direct how the proceeds of sale are to be applied. There is, in

England and Wales, a standard but not prescribed and mandatory form of order annexed to the relevant practice direction (see order for sale following a charging order and PD 73).

20. In the present case, the assets to be sold are shares in a private company, representing fifty per cent of the company's capital, with the other fifty per cent owned by the Plaintiff, who is also the largest and a substantial creditor of the company. Furthermore, the Plaintiff is a secured creditor of the Second Defendant. This means, as I indicated during the hearing, that it is likely that the only possible purchaser of the Shares is the Plaintiff. It certainly means that any other bidder would need the support of the Plaintiff. This raises a question as to whether there can be a proper and genuine sale process, particularly if the Plaintiff is allowed to credit bid (I do not consider that the Second Defendant is right that a sale to the Plaintiff would involve a breach of the self-dealing rule by involving a sale by the Plaintiff to itself since that rule does not prohibit a sale pursuant to an order of the Court and the Court can if required, I believe – although this issue was not the subject of submissions at the hearing and will need a proper review of the applicable law and authorities – make a vesting order in favour of the Plaintiff). But I consider that, as the Plaintiff submitted, this can be dealt with by adopting suitable sale procedures. The Plaintiff emphasised that it was proposing a two-stage process which would first involve an exercise conducted by Ms MacInnis and Mr Royle to solicit and obtain bids, followed by a negotiation with those who put forward a bid and a decision as to whether the offer made or which offer if there are more than one offer, should be accepted and would result in the best price reasonably obtainable being paid for the Shares. Ms MacInnis and Mr Royle would then decide whether to proceed with a sale and if so to whom and on what terms. Any agreement to sell would be conditional on Court approval. The second stage would therefore involve a further application to Court. Ms MacInnis and Mr Royle would file evidence explaining the steps they had taken, the bids they had received, the reasons for the decision and dealing with other relevant matters which would be served on all parties. The parties would then be able to appear and make submissions as to whether the conditional sale should be approved or whether an alternative order should be made, including perhaps, if the Plaintiff chose to make the relevant application, an order for the appointment of a receiver over the First Defendant and its assets.

21. It seems to me that the sale process must involve the following elements:

(a). there must initially be a proper information gathering exercise so that the party conducting the sale is able to make an informed assessment of the value of the Shares and the assets and liabilities of the First Defendant. Those conducting the sale need to

have a full and proper understanding of what is to be sold. Subject to the requirement to obtain an independent valuation referred to in paragraph (e) below, those conducting the sale may, but are not required to, obtain an independent valuation but if they do not do so they must prepare their own valuation of the Shares for the purpose of deciding or assisting in a decision as to how to structure and conduct the sale process and for assessing expressions of interest from interested parties.

(b). the parties to the proceedings, including primarily the First Defendant, will need and will be obligated to provide and deliver up the requisite information reasonably required by those conducting the sale.

(c). once the requisite information has been obtained, then those conducting the sale can form a view on the most appropriate steps for marketing and soliciting interest in and bids for the Shares. They can, after seeking (but without being required to wait for) the views of the other parties including the directors of the First Defendant, decide who might be interested in making a bid and who should be approached, how and when. They can also decide on where and how to advertise. They can also decide how long to give and what deadlines should be given to interested parties. They will prepare a suitable information memorandum to be provided to interested parties (under appropriate confidentiality restrictions) and if appropriate populate and make available to interested parties a data room of documents and information.

(d). interested parties should not be required to provide a non-refundable deposit with their initial bid. This would in my view result in a further chilling of bids/expressions of interest in what is already a sub-zero environment. Those conducting the sale should, however, be permitted to require evidence of the financial resources and commitment of interested parties to proceed and to require a deposit (refundable or non-refundable) at an appropriate time after interested parties have been given a proper opportunity to progress their interest and make an initial bid.

(e). the Plaintiff should be permitted to credit bid but if it does so and if no other bids (or no other independent and substantial bids) are received, then those conducting the sale will be required to obtain, if they have not previously obtained one, an independent valuation of the Shares which they will take into account when deciding whether to accept the Plaintiff's credit bid and at what price and which will be put in evidence and available for the further Court hearing.

(f). once those conducting the sale have concluded a conditional agreement with a purchaser at a price that in the opinion of those conducting the sale represents the best price reasonably obtainable for the Shares or they have otherwise concluded that it is likely that no bids will be received or that the bids received are too low having regard to any independent valuation of the Shares, then they will need to prepare a suitable report, to be exhibited to an affidavit, explaining, as noted above what has happened in and the result of the sales process and setting out their decision and reasoning, to be served on all parties no less than 21 days before the further hearing and the Plaintiff will need to list and give notice to the Defendants of the further hearing and agree with the Second Defendant and any other Defendants who wish to be represented at the hearing a timetable for the filing of further evidence and submissions in advance of the hearing (if agreement cannot be reached the parties concerned will need to file a short note setting out their position and the directions they seek and the Court will then give suitable directions in light of these position papers without the need for a hearing).

(g). those conducting the sale and all parties will have liberty to apply.

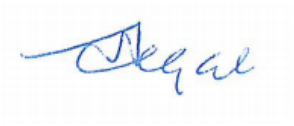
(h). Ms MacInnis and Mr Royle will be permitted and directed to conduct the sale, but they will need to acknowledge that their task is to obtain the best price reasonably obtainable for the Shares in the interests of all the parties to these proceedings and that they must act independently, in particular independently of the Plaintiff. I note that the authorities indicate that as between the seller in a Court supervised sale and the purchaser, the party, usually the solicitors to one of the parties, conducting the sale is deemed to be the agent of all the parties to the action, who will be bound by the Court's order and the sale made pursuant to it (see Halsbury, 4th edition, reissue, Vol 42 at [135]). They should instruct separate and independent counsel for this purpose.

22. I have endeavoured to capture these requirements and points in the amended form of order which is attached as an annex to this judgment.

23. I have noted above that the usual order made when the Court orders the sale of property subject to a charging order is brief and conclusive, in the sense that the Court directs that sale be effected without giving detailed or further directions as to the manner in which the sale process is to be conducted. In the present case, the form or order sought by the Plaintiff was, and the order I propose to make is, very different. The order involves detailed directions for the conduct of the sales process and the need for the filing of further evidence (and possibly independent

valuations) and for further hearings. I appreciate that these steps will involve further, not immaterial, expense and a good deal of further Court time. I have considered whether this is appropriate and in accordance with proper practice and the overriding objective. But I have concluded that the form of order I propose to make is necessary to do justice in this case and to ensure that a sale process with suitable safeguards is put in place. As I noted during the hearing, a more direct route for enforcement and arguably a less costly option would be for a receiver to be appointed over the First Defendant and its assets. But the Plaintiff has not chosen that route (I recognise that the assets of the First Defendant comprise shares in subsidiaries and that enforcement through the receiver route may therefore be less than straightforward). The form of order proposed by the Plaintiff, again as I mentioned during the hearing, in some respects represents a halfway house between an order for sale and an order for the appointment of a receiver over the Shares. Nonetheless, I am satisfied that an order in the form I propose to make is permitted by the wide powers granted by GCR O.31 r.2 and is appropriate in the circumstances of this case.

24. I do not propose to deal with the issue of costs in this judgment. I will invite Mr Stockdale and Mr Mooney to discuss costs and see whether they can agree on the order to be made. If not, they should file brief written submissions within 21 days of the date on which this judgment is handed down and I shall deal with the issue on the papers.




**THE HON. JUSTICE SEGAL**
**JUDGE OF THE GRAND COURT**