ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

SUIT NO. 809 of 2023

CITY SCHOOL (PVT) LTD

VERSUS

FEDERATION OF PAKISTAN & ANOTHER

Date:	Order with signature of Judge

1. For hearing of CMA No. 9966 of 2023
2. For hearing of CMA No. 9967 of 2023
3. For hearing of CMA No. 8366 of 2023
4. For hearing of CMA No. 10432 of 2023
5. For hearing of CMA No. 10433 of 2023
6. For hearing of CMA No. 13963 of 2023
7. For hearing of CMA No. 15016 of 2023

Plaintiff	:	Through Mr. Salahuddin Ahmed, Barrister-at-Law
Defendant No. 1	:	Nemo
Defendant No. 2	:	Through Dr. Farogh Naseem, Barrister-at-Law
Dates of hearing	:	11 October 2023, 12 October 2023, 13 October 2023, 21 October 2023,, 28 October 2023, 18 November 2023, 23 December 2023 and 2 March 2024
Date of Order	:	7 February 2025

O R D E R

MOHAMMAD ABDUR RAHMAN, J This order will decide CMA No. 8366 of 2023, CMA No. 9966 of 2023 and CMA No. 10432 of 2023 each being applications maintained by the Plaintiffs under Section 94 read with Order XXXIX Rule 1 and 2 and Section 151 of the Code of Civil Procedure, 1908 seeking interim mandatory and prohibitory injunctions in respect of the construction and operation of a school on a piece and parcel of land located in Air Force Housing Authority, New Malir, Karachi admeasuring 95,283 square feet (hereinafter referred to as the "Said Property") and two additional applications bearing CMA No. 13963 of 2023 and CMA No. 15016 of 2023, maintained by the Plaintiff and the Defendant No. 2 respectively, each seeking to bring certain documents on record for the

consideration of the court for the determination of the abovementioned applications and the subject *lis.*

A. Facts

2. The Defendant No. 1 is the owner of a certain piece and parcel of land that is in the control of the Pakistan Air Force and on a portion of which a housing scheme has been developed in New Malir, Karachi. Keeping in touch with the needs of the residents, an area 95,283 square feet of land has been ear-marked for the development of and use as a school. The Plaintiff claims, rather unabashedly, that they are the largest private school network in Pakistan. Keeping in mind the obvious synergy, the Plaintiff had entered into discussions with the Defendant No. 2, who is a department of the Defendant No. 1 responsible for administering the Said Property, to being granted certain rights in respect of the development of the Said Property and the subsequent operation of a school thereon. The discussions as between the Plaintiff and the Defendant No. 2 culminated in obligations, detailed in a document entitled a License Agreement dated 20 April 2020 (hereinafter referred to as the "License Agreement"), being entered into as between the Plaintiff and the Defendant No. 2 and the dispute as between the Plaintiff and the Defendant No. 1 and the Defendant No. 2 in this *lis is* primarily as to the nature of the rights that have been granted in favour of the Plaintiff under the License Agreement and whether any obligations of the Plaintiff as detailed in the Finance Agreement have been breached by it. The Plaintiff, in CMA No. 8366 of 2023, CMA No. 9966 of 2023 and CMA No. 10432 of 2023, premised on those rights, seek injunctive relief thereon. The question that therefore has to be determined, at this interim stage is, prima facie, while the document that is determining the obligations *inter se* the Plaintiff and the Defendant is entitled as a License Agreement, as to whether in substance it is actually a lease agreement and if not a lease agreement whether the provisions of Sub-Section (b) of Section 60 of the Easements Act, 1882 could be invoked to prevent a revocation of the license that has been granted to the Plaintiff. Additionally, it would also have to be considered as to whether the Plaintiff has breached any of its obligations as contained in the License Agreement and what would be the consequence of such a breach at this interim stage.

B. The Terms of the License Agreement

3. The terms of the License Agreement that are relevant to the decision in the application are reproduced as hereinunder:

> *" … WHEREAS*

A. The Licensor is in control and possession of vacant lands measuring 21.174 Kanals@225 Sft per Marala (95,283 sq feet) located at Air Force Officers Housing Scheme New Malir, Karachi (more specifically described in Schedule A hereto) together with all accesses, easements and others rights pertaining thereto (hereinafter referred to as the "Demised Premises")

B. The Licensee is a company having the experience of successfully establishing and operating a specialized and standardized network of education institutions throughout the country and has represented to the Licensor to gave the requisite experience and the financial capacity to successfully develop establish and operate an education institution upon the Demised Premises at its own cost and expense

C. On basis of the representations of the Licensee, the Licensor is desirous to let out the Demised Premises to the Licensee for the purpose o development establishment and operation of an education institution (the Educational Institution)

D. The License has agreed to grant the Demised Premises on License fee and Built operate and Transfer basis (limited to building only) subject to the terms and conditions of this Agreement and the Licensee has agreed to take in license fee and BOT basis the Demised Premises upon the terms and conditions herein stipulated.

Now, therefore in consideration of the mutual promises contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged by each Party, the Parties agree as follows

1.1 Upon signing the agreement, the Licensor hereby demises unto the Licensee, for the purposes of developing establishing and operating an Educational Institution in accordance with the terms and conditions of this Agreement License over the Demsied Premises for a term of Thirty Three (33) years (the Term) subject to the terms and conditions of this Agreement.

1.2 The commencement date of the Term of this Agreement shall be Signing Date of this Agreement, the date on which the vacant possession of the Demised Premises shall be handed over to the Licensee by the Licensor and in case some delay is occasioned in transfer of the Demised Premises, the Term shall be deemed to commence from the date of such transfer. However, the rights under this Agreement relating to the Demised Premises shall for an intents and purposes be given on the signing date of this Agreement.

2.1 The Educational Institution to be developed/constructed on the Demised Premises by the Licensee within a period of 24 months from the Signing Date shall consist of

(i) Ground + three storey

(ii) Proper drop lane and sufficient parking as appropriate for the requirement of the school.

2.2 The design, finance, development, construction and operation and maintenance of the Educational institution shall be done so by the Licensee at its own cost and expense alone.

2.3 Under this Agreement, the Licensee shall be allowed to develop the Educational Institution as per its requirements and convenience on the Demised Premises or part thereof in phases or as a whole as the Licensee may deem appropriate and convenient during the Term and the Licensee shall be entitled to construct the boundary wall and place its gate provided that the same is in accordance with the bylaws of the society wherein the Demised Premises is located. However, it is further agreed between the Parties that the Licensee shall give the plans/drawings, etc. for any such construction to the Licensor in advance and the Licensor shall within 30 days of receiving such plans/drawings, etc. provide its feedback on the same which shall be reasonably considered by the Licensee. For the avoidance of doubt it is clarified, it the Licensor fails to provide

any feedback within 30 days it will be considered that the respective drawings/plans, etc. submitted to the Licensor are acceptable to the Licensor.

2.4 The Licensee shall be entitled to make any additions, alteration, changes and modification to the approved layout/design of any construction or buildings on the Demised Premises during the Term provided that the same is in accordance with the bylaws of the society wherein the Demised Premises is located. However, it is further agreed between the Parties that the Licensee shall give the plans/drawing, etc for any such construction to the Licensor in advance and the Licensor shall within 30 days of receiving such plans/drawings, etc. provide its feedback on the same which shall be reasonably considered by the Licensee. For the avoidance of doubt it is clarified, if the Licensor falls to provide any feedback within 30 days it will be considered that the respective drawings/plans, etc. submitted to the Licensor are acceptable to the Licensor.

2.5 The Licensee shall submit detailed layout plan / design / drawings of the building which shall be vetted by the Licensor. The licensee shall have the liberty to draw and design building as he deems necessary for the best utilization of building for educational purposes. Any inputs or suggestions in the design or construction plan made by the Licensor shall be reasonably considered and incorporated accordingly in the sole discretion of the Licensee. Notwithstanding anything else contained in this Agreement, the Licensee shall complete the initial construction work at the Demised Premises within a period of 24 months from the Signing Date of this Agreement. …

2.8 That the Licensor shall support and assist for the utility connections (including but not limited to water, electricity, sewerage, gas, etc.) to the Demised Premises while Licensee shall be solely responsible for securing connections from the concerned departments within the physical limits of the Demised Premises. The Licensee shall apply directly to the concerned departments and shall bear all connection charges, fees etc.

3.1 The Licensee shall pay to the Licensor Rs.25,000,000/-(Rupees Twenty Five Million only) within 60 days along with the construction designs / drawings from the date of signing of this agreement. Lest failure of the licensee the licensor shall be entitled to delayed payment charges @1% per month and if security is not submitted within 120 days licensor may terminate the contract Agreement. The Security Money would be returned by the licensor to the licensee within 01 month of start of construction of the building by the licensee. Construction of work shall be deemed started when license. mobilizes to construct the building according to the submitted architectural drawings. Lest failure of the Licensor to return the security money within one month the licensee would be entitled for DPC @1% per month. The licensee shall pay Rs.25,000,000/- (Rupees twenty five million only) after two years of the signing of this Agreement, and that shall be deemed as advance license fee which will be adjustable against License fee (defined below) of the Demised premises commencing from fifth year subject to and in accordance with the terms and conditions of this Agreement.

3.2 The Licensee shall pay to the Licensor monthly license fee for the Demised Premises, at the rate(s) detailed in Schedule 3 hereto or 12% of the gross tuition fee collected by the Educational Institution established at the Demised Premises each year ending on June 30 whichever is higher/-(the "License fee") which shall only become due and payable upon the expiry of the grace period as detailed in Schedule B, attached to this Agreement (the "Grace Period"), which shall be considered as an integral part of this Agreement. Gross Fee for the purposes of this Agreement shall mean all tuition fees collected by the Educational Institution for each year ending on June 30 (after deduction of withholding tax). For the avoidance of doubt it is clarified that the Licensee shall pay the Licensor in accordance with Schedule B hereto by the 10th day of each following month after the expiration of the Grace Period, i.e from September 2024 and every July and January falling after the expiry of the Grace Period, the representatives of the Licensee and the Licensor shall meet to reconcile the Gross Fee and if in case 12 Percent of the Gross Fee for that 06 months is higher than the cumulative sum of the monthly License Fee paid to the Licensor in accordance with this Clause 3.3 for that particular 06 months then the Licensee shall within 30 days pay to the Licensor a sum equal to the difference of 12% of the Gross Fee along with interest @prevailing bank rate for that respective 06 months less the amount already paid

as License Fee by the Licensee to the Licensor in accordance with this Clause 3.3 for the corresponding period.

3.3 The Licensee shall pay the License fee through crossed cheques to be issued in favour of the Licensor in Bank Account 0022997000701752. Title Dte of housing, Habib Bank Limited PAF Complex E-9 Air Headquarters Islamabad. Licensee shall also provide gross fee report(s) and Bank Statement every month along with yearly audited financial statements of the Educational Institution to the Licensor

3.4 The Licensee shall pay License fee to Licensor on or before 10th of each following month. Delay payment Charges (DPC) will be charges @1% per month on delay payment of the License fee. Licensor shall be entitled to audit or inspect the accounts of the Licensee (limited to the collection of fee against number of students). In case any discrepancies are found in accounts for the purpose of calculations of 12% (as per Schedule B) of Gross Fee, the Licensor shall inform the Licensee of such discrepancies in writing with sufficient proof and the Licensee shall within 30 days reimburse the Licensor for any such shortfalls in License Fee which have been sufficiently proved. If the Licensee fails to reimburse the Licensor for any such shortfall in payment of License Fee which has been sufficiently proved) within 30 days then the Licensor may be entitled to terminate this Agreement subject to the terms and conditions contained herein. For the avoidance of doubt, it is clarified that if in case there is a dispute with regards to any payment due by the Licensee to the Licensor as Licensee Fee the same would be referred to arbitration in accordance with the terms and conditions of this Agreement and the Licensor may not terminate this Agreement prior to a determination by the arbitrator in its favour. However if Licensee with malafide intent to defraud and deprive the licensor from its just and due share in the gross fee, maintains fake accounts, falsifies records, or does any dishonest act shall enable the licensor to charge double the amount intended to be deprived of along with interest @ prevailing bank rate.

3.5 That the Licensee shall be allowed to construct the Educational Institution within a period of 24 months from the Signing Date of this Agreement ("Construction Period"), during which time, no license fee shall be payable to the Licensor. In addition, the Licensee shall be allowed a grace period of 30 months after the expiry of the Construction Period for commencing operations of the Educational Institution during which time, no license fee shall be payable to the Licensor, which period shall under no circumstance be extended. License fee of the Demised Premises shall become due and payable upon expiry of Fifty four (54) months from the Signing Date of this Agreement. In this respect, the Licensee agrees that notwithstanding any condition or situation whatsoever, the payment of License fee shall commence after the expiration of 54 months from the Signing Date of this Agreement and that under no circumstance except items covered under clause 14 dealing with Force Majeure, any further extension shall be given by the Licensor on any ground whatsoever except for the grounds contained in clause 14 below.

4.1 On the expiry of the Term of this Agreement, the Demised Premises and immovable assets limited to buildings and super structures constructed by the Licensee on the Demised Premises, shall vest in the Licensor forthwith and the Licensee shall without delay peacefully vacate the Demised Premises and shall hand over to the Licensor, free of all costs the Demised Premises with all Immovable assets limited to buildings and super structures constructed by the Licensee on the Demised Premises. For the avoidance of doubt, it is clarified that the Licensee shall be free to remove all movable assets from the Demised Premises on or before the time of vacation of the Demised Premises in accordance with the terms of this Agreement.

4.2 One year prior to expiry of the initial Term of this Agreement, provided that the Licensee is duly discharging its obligations under this Agreement, the Licensor and the Licensee would start discussion on renewal of the Term within the spirit of this Agreement on mutually agreed terms. The Licensee would have first right of refusal and shall be competent to take over the said rights etc. in case the Demised Premises along with the building and/or benefits, etc. that are to be provided by the Licensor to any other party, on the same terms and conditions as have been offered by the third party. It is agreed between the Parties that the Licensor shall only enter into an agreement for the Demised Premises and/or

provide the Demised Premises to a third party if the Licensee refuses to avail its right of renewal of this Agreement in writing.

4.3 In the event that no agreement is reached between the Parties for the purpose of renewed term, then the Licensee shall vacate the Demised Premises upon the expiry of the Term and hand over possession of the same along with any immovable assets limited to buildings and super structures constructed on the Demised Premises to the authorized representative of the Licensor underwritten acknowledgement. Notwithstanding, anything else contained in this Agreement a letter sent by the Licensor informing the Licensee about the Licensor disagreement with regard to the renewal of the License hereunder shall constitute proof of the fact that no agreement has been reached between the Parties for the proposed renewal thereof.

4.4 The Licensor agrees that all machinery, equipment, furniture or other personal property kept or installed at the Demised Premises by the Licensee from its own cost shall not become the property of the Licensor and may be removed by the Licensee, in its sole discretion, at any time. …

7.1 The Licensor represents that he is in the lawful possession of the Demised Premises and has the full right, power and lawful authority to let out the Demised Premises

7.2 The Licensor represents that, no litigation, adverse claims proceedings or Investigations of any nature whatsoever are pending or threatened against the Demised Premises and in case of any claim, proceedings, Investigation or litigation by any third party is initiated against the Demised Premises, the Licensor will make its best effort to resolve within a reasonable time.

7.3 The Licensor shall ensure that the Licensee enjoys uninterrupted quiet enjoyment of the Demised premises, including all easement rights and to do all acts and things which may be necessary or expedient for fulfilling the purposes for which the Demised Premises are being let out to the Licensee.

7.4 That since the Licensee will invest its funds for design, finance, development and construction of the Educational Institution, the Licensor assures the Licensee that it shall not terminate this Agreement, provided that the Licensee is discharging all of its obligation including regular & timely payment of license fee & service charges.

7.5 The Licensor assures the Licensee that there are no restrictions or impediments in the Licensor's right to let out the Land or construct the Building thereon and to use the same for school purposes.

7.6 That both the parties hereby agree that the registration of this Agreement shall be carried out after completion of formalities and that all the expenses, fees, charges and costs relating to the registration of this Agreement shall be borne by Licensee.

7.7 The Licensor undertakes to indemnify and hold harmless the Licensee in respect of any loss, damage or claim, the Licensee may suffer on account of any undertaking or representation of the Licensor being proved incorrect, incomplete or Inapplicable, however, the Licensee accepts the present status of the Demised Premises on as is basis subject to the terms and conditions of this Agreement.

7.8 The Licensee shall be entitled to make any structural additions, alterations or demolition to the Demised Premises or any part thereof, during the Term subject to Clause 2 above and the Licensor shall provide all necessary support and assistance, permissions, NOCs, consents, documents as may be required by the Licensee subject to such additions or alternations are in accordance with the bylaws of the Licensors and are not in deviation with plan approved by the Licensor.

7.9 It is, agreed that the Licensor shall not sell the Demised Premises before the expiry of the Term (or any extension/renewal thereof). In case of any exigency, the Licensor is required to sell the Demised Premises during the Term, the

Licensee shall have first right to purchase the Demised Premises on the same terms as are being offered to the third party. However, if the Demised Premises is sold to any third party, the Licensor shall ensure that the said sale shall be subject to the terms of this Agreement being binding on third party who is purchasing the Demised Premises. Moreover, the Licensor hereby represents and warrants that in case of such sale, the Licensor shall fully hold harmless and indemnify the Licensee for all direct, indirect and consequential losses suffered by the Licensee as a consequence of such sale including but not limited to the value of the buildings, structures, fixtures and assets, etc. of the Licensee located at the Demised Premises at the current realizable market value.

8.10 The Licensee shall reasonably permit the Licensors officers/ representatives and authorized personnel during the normal working hours to enter the Demised Premises, or any part thereof for the purpose of examining the state and condition of the Demised Premises provided that the same does not disrupt the activities of the Educational Institution. …

9.2 That the Licensee agrees, acknowledges and accepts that it shall not claim any compensation, interest or charges in installing, fixing, erecting, attaching or placing any and all kinds of buildings, structures, fixtures, infrastructure, including but not limited to the actual/market value and cost of the buildings, structures, fixtures, infrastructure and assets etc. incurred under this Agreement at the time of handing over possession of the Demised Premises along with all buildings and structures attached to it at the end of the Term (or any extension/renewal thereof). …

11.1 Notwithstanding anything else contained in this Agreement, the Licensee may, in Its sole discretion, terminate this Agreement at any time hereafter (including during any extended term of this Agreement, if any, pursuant to by serving a three (3) months' written notice on the Licensor. In such event, this Agreement shall terminate three (3) months after the date of the notice. Thereafter, the Licensor and the Licensee shall have no further rights, duties or obligations under this Agreement. In the event of such termination of this Agreement, the Licensee shall hand over the vacant and free possession of Demised Premises to Licensor with no claims as to advance license fee, security deposit and costs of construction of building or furnishing etc of the building erected thereon but shall have the right to remove all its trade fixtures, equipment, furnishings, signs, and other identifying characteristics.

11.2 The Licensor shall have the option to terminate this Agreement, only if.

11.2.1 the Licensee is in default of payment of License Fee in accordance with Clause 3.2 above due to the Licensor hereunder for a period exceeding sixty (60) days, provided at least thirty (30) days written notice is given by the Licensor to the Licensee for curing/rectifying this default;

11.2.2 Any material breach of any terms of this Agreement by the Licensee in respect of which Licensor has served a three months' notice on the Licensee, stating therein Licensor's intention of terminating this Agreement and complete details of the default of the Licensee which merit such action being taken. If the Licensee during the said notice period of three (03) months cures the breach alleged in the said notice, then the notice sent by the Licensor shall stand revoked. For the avoidance of doubt, it is clarified that if in case there is a dispute with regards to any alleged breach of the terms of this Agreement by the Licensee the same would be referred to arbitration in accordance with the terms and conditions of this Agreement and the Licensor may not terminate this Agreement prior to a determination by the arbitrator in its favour.

11.3 If this Agreement is terminated by the Licensor pursuant to clause 11.2, then the Licensor shall pay to the Licensee the value of the super structure(limited to construction) as assessed and verified by the neutral expert at market rate at the time of termination, along with the advance license fee and the security deposit, after deduction of the outstanding license fee due to licensor (if any). On termination as per this clause, the Licensee shall promptly transfer the vacant possession of the Demised Premises along with Immovable assets limited to buildings and super structures constructed by the Licensee on the Demised Premises to the Licensor. …

12.1 The Parties shall make reasonable endeavors to settle any dispute amicably. If a dispute is not resolved within thirty (30) days of written notice of a dispute

by one Party to the other Party, then the provisions of clause 12.2 of this Agreement shall apply.

12.2 All and any kinds of disputes, controversies, claims or actions arising out of or in connection with this Agreement shall be decided by arbitrators. Each Party shall appoint one Arbitrator. Before entering upon the reference the two Arbitrators shall nominate an Umpire. In the event the Arbitrators are unable to arrive at a unanimous award, the matter shall be referred to the Umpire for his decision and whose decision shall be final and binding on both the Parties.

12.3 The venue of arbitration shall be Islamabad, Pakistan.

12.4 The seat and governing law of the arbitration shall be the substantive laws of Pakistan including Arbitration Act 1940, and the applicable rules framed there under."

C. Correspondence as between the Plaintiff and the Defendant No. 2

4. It seems that the during the term of the License Agreement, the COVID-19 pandemic delayed the construction work that the Plaintiff was obligated to carry out and also impacted the financial obligations as between the Plaintiff to the Defendant No. 2. The facts relating to these issues and the positions that were taken by the Plaintiff and the Defendant No. 2 have been made available by the Plaintiff and the Defendant No. 2 in correspondence and which are reproduced as hereinunder:

" …

Air Vice Marshall Abdul Moeed Khan, SI (M)
DG W & R. Air Headquarters' Islamabad August 5, 2020

Dear AVM Abdul Moeed

السلام و علیکم

1. We recently signed a contract with the PAF for construction of a school in AFOHS, Malir Cantt. We planned to start the construction of the campus in August, but due to Covid-19 pandemic all our plans have been put on-hold since our financial health has severely deteriorated by the pandemic. Since March, 2020 all the provinces have promulgated ordinances for fee reduction by 20% for the entire duration of the pandemic. Besides official reduction in fee, we and almost all other educational Institutions are also facing severe problems in fee recoveries: the collections have dropped to 50-60% of the reduced fee. Many parents have withdrawn their children since there is no clarity on the opening dates of the schools.

2 Our contract has a clause which requires us to make a security deposit of 25 M PKR within two months from the signing of the contract and the same amount would be returned to us at the start of the construction. Hence, the arrangement is only a guarantee for quick start of the campus construction with no financial benefit to the PAF. In the current financially difficult situation we are unable to pay the security deposit, since we are struggling to stay afloat and pay monthly salaries to our staff, which at the moment is a higher priority for us.

Current situation is an international calamity with no visible end date and its financial and social impact cannot be ascertained until it is completely over or a vaccine is invented to control the further spread of this pandemic. In this unprecedented force majeure situation, with multiple business uncertainties and considering our business losses, we request you to please facilitate us for the

following, while we are committed to adhere to the other terms and conditions of the contract related to payment of lease fee.

a. Exempt the requirement of security deposit which will allow us to better manage our cash flow situation.

b. Please extend the time period allocated to start the construction by the end of this calendar year 2020.

Yours sincerely

&

With kind regards,

FARZANA
Group Chairperson …

Mr Shahzad Muhammad Khan *04 December, 21*
Chief Operating Officer
The City School
31 Industrial Area, Gurumangat Road
Gulberg-III, Lahore

CONSTRUCTION OF CITY SCHOOL AT
FALCON COMPLEX, NEW MALIR

1. Reference is made to letter dated 05 August, 2020, AFOHS (Dett) Malir LM No.MLR/6305/1/AFOHS dated 27 October, 2020 and meeting on the subject with ACAS (Housing) on 24 December, 2020.

2. The architectural drawings submitted to this Dte vide above referred letter have been found correct and City School can proceed further for start of construction of said building with immediate effect. The request forwarded for waiver of 25 Mil security deposit has been approved by the competent authority on the condition that construction of the City School building at AFOHS New Malir will start before 30 March, 2021 and in case the said construction is not started till the aforementioned date then contract of Dte of Housing with The City School will be cancelled as agreed in the above referred meeting at Air Headquarters, Islamabad.

3. It is requested to forward your acceptance on the abovementioned agreed decisions by 31 Dec 2020.

Sd/-
(MUHAMMAD AAMER NAWAZ)
Group Captain
Director Housing
Air Headquarters, Islamabad …

Ref: TCS/AHQ/AOFHS/MALIR/2020/01
Date: 04 Jan 2021

Muhammad Aamer Nawaz
Group Captain
Director Housing
Air Headquarters
Islamabad

Subject: <u>Construction of City School at Falcon Complex, New Malir, Karachi</u>

This is with reference to your letter No:AHQ/74304/2/AFOHS (PC-09/20) dated 24-12-2020. Kindly note that The City School hereby acknowledges the receipt of said letter.

We are grateful to AFOHS Management for facilitation extended to us. We assure that The City School will start construction work at site ASAP. We are also obliged and like to convey our sincere note of thanks to AOFS Management for granting waiver of 25 Million PKR as security deposit.

The City School will ensure compliance of terms and conditions agreed upon between stakeholders at meeting held on 24 Dec, 2020 at AHQ with ACAS Housing, PAF.

I thank you for your support in this matter.

Regards,

Sd/-

Shahzad Muhammad Khan
Chief Operating Officer
The City School
31-Industrial Area, Gurumangal Road
Gulberg III- Lahore …

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AHQ/14304/2/AFOHS *05 September, 2022*

Chief Operating Officer
The City School (Head Office)
31-Industrial Area, Gurumangat Road
Gulberg III, Labore
042-111-444-123

PAYMENT OF LICENSE FEE AND CONSTUCTION OF BUILDING

1. Reference is made to License Agreement dated 20 April, 2020,

2. The referred agreement was executed between Directorate of Housing Air Headquarters, Islamabad and M/s. The City School (Pvt) Ltd for establishment of The City School on land provided by licensor at AFOHS Complex, New Malir.

3. Clause 3.1 of agreement provides that The City School shall pay an amount of Rs.25,000,000/- (Rupees Twenty five million only) as advance license fee on 21 April, 2022. The relevant portion is reproduced below-

"The licensee shall pay Rs.25,000,000/-(Rupees Twenty five million only) after two years of the signing of this, agreement, and that shall be deemed as advance license fee which will be adjustable against license fee".

4. Moreover under Clause 3.5 the Licensee had to complete the construction work within 24 months from signing date of the above referred agreement. Whereas, licensee has failed to complete construction of school building within stipulated time frame. Moreover it has been brought into licensor's knowledge that construction activities on site are closed since April, 2022 and reason to halt in construction has also not been communicated.

5. It is therefore requested, that Rs.25,000,000/-(Rupees Twenty five million only) may be deposited as soon as possible and construction work be resumed at the earliest.

6. Your co-operation in this regard will be highly appreciated.

Sd/-
(SYED ZULQARNAIN)
Group Captain
Director (Housing)
Air Headquarters, Islamabad
Tel: 051-9505213…

December 09, 2022

Group Captain Syed Zulqarnain
Director Housing-Pakistan Air Force
Alpha Techno Park Gate, Old Airport Road
Chaklala Canti, Rawalpindi.

Subject: The City School, PAF Housing Society, New Malir Karachi

Dear Sir

This is in continuation of our meeting at the PAF Housing Directorate Islamabad on October 3, 2022 regarding the delay in completion of the subject project.

We had actually put this project on fast track in Q4, 2021 with a view to ensure completion ahead of schedule. However, during the course of 2022, we had to slow down and eventually halt the construction due to wholly unseen and uncontrollable circumstances as outlined below:

The unprecedented and unabating inflation had completely eroded the financial viability of this project.

Our expense forecast had increased by 57% compared to the plan, and is expected to rise further in the coming year

During the same period, the cost of financing has doubled, further crippling our ability to sustain any capital-intensive projects for the foreseeable future

Notwithstanding the above, we recognize the critical importance of this project for the community in and around PAF Housing Society, Malir. We also remain driven by our core purpose to extend affordable world class education and uplift the standards of teaching across Pakistan.

Over the last two months, our teams have rigorously reassigned resources and re-engineered the project plan and we are pleased to propose the following time lines:

December 20, 2022	*Re-deployment of site contractors, labor and material*
January 15, 2023	*Admissions office launch with local Marketing*
May 31, 2023	*Completion of civil and MEP works, and external development*
July 10,2023	*Completion of Interior works including furnishings*
August 8, 2023	*Formal start of school terms*

December 15, 2023	*Project plan for building B based on student strength*

In order to meet the aforementioned timelines, you are formally requwted for the following approvals:

1). A roll over of one year in the schedule of payments outlined in Schedule of the License Agreement.

2). Provision of NOC for electricity connection from KE through feeds installed for PAF Housing Society, Malir.

3) Provision of metered water connection

4) NOC to connect to the PAF Housing Society sewerage system

We look forward to your favorable response and look forward to serving the community to the best of our abilities. We also take this opportunity to thank you and your team for support they have extended us.

Sincerely

Sd/-
Khan Kashif Khan
Director Strategy …

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AHQ/54207/1/ORG *25 January, 2023*

Mrs. Farzana Feroz
31 Gurimangat Road,
Industry Area, Gulberg-3
City School Head Office, Lahore.

CONTRACT OF CITY SCHOOL PAF CHAPTER FAISAL

1. Reference contract agreements signed between PAF and City School Network on 09 January, 2020.

2. Contract Agreement was signed between PAF and City School Network (CSN) for lease of 3.5 Acres land located at PAF Base, Faisal in January, 2020. According to the contract, administration of city school is under obligation to complete construction and shifting of PAF Chapter Branch at new location till 25 September, 2025.

3. It has been observed that after a considerable lapse of time, construction has not yet started at proposed land at PAF Base, Faisal by City School administration. The present state of work done viz-a-viz the completion timelines is a point of concern at Air Headquarters, Islamabad and it has been deemed appropriate to approach your office to solicit the intended course of action by CSN for realization of the contract. It may be noted that PAF will not be able to extend the possession of present school Infrastructure underutilization of CSN PAF Chapter beyond September, 2025 owing to Audit Draft Para. In case the construction as per contract for new School is not initiated/completed, the contract shall be liable for cancellation.

4. Another case in point is the suspended construction work at City School Branch, Falcon Complex, New Malir since March 2022, which was to be completed by February 2023. This has led to drawing of parallels between the two

projects and has caused an overall uncertainty in completion of the subject contracts.

5 Foregone in view. It is reiterated to review the present status of planned civil works at PAF Base Faisal & Falcon Complex, New Malir and provide consolidated plan/timelines to honour contract obligation. In case of non-compliance to the contract obligation, further modalities and necessary review would be undertaken accordingly by PAF.

6. Forwarded for an early action, please.

Sd/-
(SHAHID RAZA KHAN) …

WITHOUT PREJUDICE

February 22, 2023

Air Commodore Shahid Raza Khan
Assistant Chief of Air Staff (Administration)
Pakistan Air Force, Air Headquarters
Islamabad.

Subject: Contracts of City School at PAF Premises

Dear Sir,

We, The City Schools (Private) Limited are writing with reference to your letter No.AHQ/54207/1/ORG dated January 25, 2023.

At the outset, it is submitted that the Company has in the past and continues to endeavor to fully comply in letter and spirit, with the applicable provisions of the agreement executed between the Company and the Director Welfare Accounts, Air Headquarters of Pakistan Air force dated April 20, 2020. For your information, it is brought to your kind attention that the Company has not only been in touch with the respective officers of PAF but has also been taking on ground actions in active coordination with the PAF Housing Directorate regarding the PAF Falcon Society project.

In this regard, it is pertinent to note that we have time and again not only apprised the respected Director Housing of PAF that, "we had actually put this project on fast track in Quarter-4 of 2021 with a view to ensure completion ahead of schedule. However, during the course of 2022, we had to slow down and eventually halt the construction wholly due to unforeseen and uncontrollable circumstances beyond the control of the Company, as briefly outlined below:

The unprecedented and unabating inflation had completely eroded the financial viability of this project.

Our expense forecast had increased by 67% compared to the plan, and is expected to rise further in the coming year.

During the same period, the cost of financing has doubled, further crippling our ability to sustain any capital-intensive projects for the foreseeable future"

Notwithstanding, the foregoing and in addition thereto it is also pointed out that the current economic scenario of Pakistan has only further exacerbated the situation whereby the inflation as well as financing costs are not only rising constantly but are also forecasted to continue to rise rapidly in the foreseeable future. Moreover, the Company being an operator of a network of private educational institutes is subject to strict laws, rules and regulations which inter alia have an effect of restricting revenue streams of our educational institutions in a manner which prevents us from covering the exorbitant increase in cost of doing business.

Nonetheless, we remain driven by our core purpose to deliver affordable international education and uplift the teaching standards in Pakistan. We also recognize the critical importance of this campus to the PAF Falcon community and have therefore re-commissioned the project despite the severe financial burden on our already constrained resources. The City School PAF Malir Campus will be operational (Insha Allah) for the current academic year. We would also take this opportunity to appreciate the support that your Housing Directorate is extending us in meeting this commitment.

With regards to the new construction at PAF Faisal, we have instructed our new management in the Southern Region team to coordinate with your staff at PAF Faisal base for a fresh assessment of the project in the coming week and we look forward to amicably resolving any pending matters for a mutually beneficial conclusion.

We look forward to a continued long-term relationship with your esteemed organization.

Sincerely,

Shahzad M. Khan
Chief Operating Officer …

AHC/5: 207/1/Org *06 April 2023*

Mrs. Farzana Feroz
31 Gurumangat Read
Industry Area, Gulberg-3
City School Head Office, Lahore.

CONTRACTS OF CITY SCHOOLS AT PAF PREMISES

1. Reference 02 contract agreements and 01 Addendum to Contract signed between PAF and City School Network on 20 April, 2020, our letter No.Air HQ/14619/4/ED dated 05 January, 2023, our letter No AHQ/54207/ 1/ORG dated 25 January, 2002 and reply of City Schools (Private) Limited dated 22 February, 2023.

2. It is stated with sheer dis-satisfaction that ***City Schools (Private) Limited has failed to honour its contractual obligations*** *on all three above referred contracts City School was asked to pay annual land rent for City School, Baloch Colony Chapter (Rs.183.161 Mil) as per Clause 3.1 of Addendum VIII of Contract on 05 January, 2023. It was to be paid within 30 days, which City School has failed to ensure till date. It is pertinent to mention that Audit paras have been raised on use of their land by City School. The School is using the premises free of cost since 01 May, 2020, which is totally unjustified.*

3. The contract for construction of City School, Malir Chapter was signed on 20 April, 2020 according to which the school was to be completed and made functional within 24 months (Clause 3.5), but the school is still not complete / operational. City School was to pay Rs.25 Mil to PAF as Security Money, which was to be refunded one month after start of work, but it was never paid. As per Clause 3.1, City School was contractually bound to pay Rs.25 Mil as Advance License Fee on 01 May, 2022, which City School failed to honour as well. Therefore, PAF (Licensor) is forced to cancel this contract.

4. Contract Agreement was signed between PAF and City School Network (CSN) for lease of 3.5 Acres land located at PAF Base, Faisal in April, 2020. According to the contract, administration of city school is under obligation to complete construction and shifting of PAF Chapter Branch at new location till 25 September, 2025. It has been observed that after a considerable lapse of time, construction has not yet started at proposed land. Till now, not a single plan has been submitted to PAF, The present state viz-a-viz the completion timelines is a

point of concern. Despite your assurance vide your above quoted letter, that your team will approach PAF Base, Faisal within a week, no action has been taken from your side. PAF will not be able to extend the possession of present school infrastructure under utilization of CSN PAF Chapter owing to security movement. Since the construction as per contract for new School is not initiated, this contract is also liable for cancellation.

Present Security Environment, with specific threats to Educational Institutions on Military Lands in the country, requires proactive approach in order to safeguard our children. A security Survey was conducted of City School, Baloch Colony Chapter on 01 December, 2022 and various shortfalls in the security infrastructure were highlighted and guidelines to address the issues were given vide FSL(SECW)/7463/6/Org dated 01 December, 2022. The situation was re-assessed on 11 January, 2023 and a report was sent to the school vide FSL(SECW)/7463/6/Org dated 13 January, 2023. Sadly, the situation has worsened and no action at all was taken by the school administration on the given guidelines. The school is located on the fringes of the main road with no depth and no service lane, which makes it extremely vulnerable. Pakistan cannot afford another incident like APS, Peshawar. Either City School is not cognizant of the situation or it is not ready to take the responsibility for securing its premises. It seems the administration, due its complacency, has wasted precious time to shift the premises to a safer location. This attitude has compelled PAF to review this contract as well.

6. Foregone in view, please make arrangements to vacate the City School, Baloch Colony premises within three months.

7. Forwarded for an early action, please.

Sd/-
(SHAHID RAZA KHAN)
Air Commodore
Assistant Chief of Air Staff (Admin)
Air Headquarters, Islamabad
Tel Ext 5101 …

WITHOUT PREJUDICE

April 18, 2023

Air Commodore Shahid Raza Khan
Assistant Chief of Air Staff (Administration)
Pakistan Air Force, Air Headquarters
Islamabad.

Subject: ***CONSTRUCTION OF SCHOOL AT PAF MALIR***

Dear Sir,

1. We, The City Schools (Private) Limited (the "Company") are writing with reference to your letter No.AHQ/54207/1/ORG dated April 06, 2023 (the "Letter") and Contract agreement signed on 20th April 2020, between the Directorate of Housing, Air Headquarters, Islamabad (the "Directorate of Housing") and the Company to establish a school at PAF Malir (the "Malir Agreement").

2. At the outset, it is submitted that this reply is limited to the extent of para 3 of the Letter dealing with the Malir Agreement and the remaining paras of the Letter will be replied to in due course. Notwithstanding the foregoing and in addition thereto, it is submitted that the Malir Agreement is a separate agreement from any other agreement including other agreement(s) executed between the Company and the Director Welfare Accounts, Air Headquarters of Pakistan Air force. Therefore, it is suggested/requested that the Malir Agreement may not be mentioned in communications in conjunction with any other agreements as the same leads to confusion...

3. It is further submitted that the Company has in the past and continues to endeavor to fully comply in letter and spirit, with the applicable provisions of the Malir Agreement. It is brought to your kind attention that the Company has not only been in touch with the respective officers of PAF but has also been taking on ground actions in active coordination with the PAF Housing Directorate regarding launch of the school pursuant to the Malir Agreement (the "Project") as committed in this Academic Year (August 2023). In fact, operations of the Project have already commenced and admissions and registrations for the same (as detailed below) have already commenced.

4. Referring to Para-3 of your Letter mentioned above, the following observations / facts are appended below for consideration:

i) The contract was signed on 20th April 2020 stating a construction period of two years but due to Covid and Government Imposed restrictions we could not start the construction. Hence, a letter was written to AVM Abdul Moeed (DG W&R), on 5th August, 2020 for extension in the construction start date. In the same letter we requested for waiver of the security money of 25 M.

ii) The letter was responded by PAF on 24th December-2020 waiving off the security money of 25M and allowing us to start construction by 30-March-2021 (an extension of one year). According to the new approved timeline we are required to complete construction in 2023 so that the school is launched. Hence, the Security money of 25M was not required to be paid.

iii) It is apprised that our Academic Session starts in August every year and we are confirming that we have already done the soft launch of the school. We have secured 100 admissions, 125 registrations and over and above we expect to receive 100 transfers from other schools. We are on-track and aim to start the school in this Academic Year, i.e., August, 2023.

iv) In this regard we also held a coordination/progress update meeting in October 2022 with the PAF authorities of Housing Directorate and submitted our plan of construction and launch of school in August, 2023. Kindly refer to our letter dated 9th December 2022

v) Reference your demand of 25M as Advance License Fee, the same has been paid vide cheque number 44824696 and we apologize for this inadvertent oversight. However, since the start of construction and launch of school has been delayed by one year due to Covid (as approved by your letter dated 24th December 2020), hence we are very much on time for this payment. In this regard, it is also pertinent to note that the Letter is the first reminder/notice received in this regard.

vi) In light of the aforementioned, the purported cancelation of the Malir Agreement as stated in para 3 of the Letter is without any justification and contrary to the express provisions of the Malir Agreement.

5. It is further highlighted that we have spent almost 250M PKR on construction of this Campus and we arranged this funding as collateral against our other schools at an extremely high markup. We have paid almost 50M PKR as advance to the labor contractor. We humbly request that we should be allowed to continue the construction as the demobilization and then mobilization costs us time and fortune (about 25M PKR). With every week increasing Interest rates we would like to close this project as soon as possible.

6. We are on track as per our commitments to start the School in this Academic Year and request you to allow us resumption of remaining construction work on the site. We are being restrained from lawfully continuing our work, which is contrary to the terms of the Malir Agreement and causing substantial delay-losses for which we cannot be held responsible. Continued stoppage will unnecessarily delay the entire project.

We look forward to a continued long-term relationship with your esteemed organization.

Sincerely,

for City Schools (Private) Limited

Sd/-
Shahzad M. Khan
Chief Operating Officer …

CONFIDENTIAL

AHQ/54207/1/Org *04 May, 2023*

Mrs. Farzana Feroz
31 Gurumangat Road
Industri al Area, Gulberg-3
City School Head Office, Lahore.

CONTRACTS OF CITY SCHOOLS AT PAF PREMISES

1. Reference 02 Contract agreements and 01 Addendum to Contract signed between PAF and City School Network on 20 April, 2020, our letter No AHQ/54207/1/Org dated 06 April, 2023.

2. A fact based wholesome letter, mentioning the established failures of commitments on your part, was forwarded to you on 06 April 2023. Unfortunately, the, reply received (dated 18 April) is found to be far from facts. An education institute, with reasonably sound repute, is expected to be fair & clear about commitments. Instead of forwarding an institutional response to each point of our letter, surprisingly you have resorted to address the Malir Project mentioning self-assumed concessions waivers. Salient observations on your reply are appended below:

(a) The reply is inconclusive and does not address the significant contractual failures as mentioned in our letter (dated 06 April, 2023)

(b) With regards to Malir Project, as claimed in your reply (Para 4, sub-clause ii) that an extension of one year was granted by PAF, is a self-assumed concession. The fact is that waiver on deposit of security money was given and no extension in project timeline was granted.

(c) It is very clear in letter dated 24 December, 2020 that no additional time was given for completion of the project. However, City School was allowed to start construction before 31 March 2021, in good esteem by PAF, to mitigate delays, which were totally attributable to City School management.

(d) Contractual fact remains that the project, being signed in April 2020, was to be completed in 02 years timeframe, to which you failed to comply and neither the building has been completed nor the session has started even after lapse of 01 year. Additionally, an Advance License Fee of Rs.25 Mil also remained pending.

(e) The main sufferers of the delays in project completion are the children of the society, who were devoid of their basic right of quality education for a complete academic year, which is attributed to mismanagement by your institute.

3. It is therefore, reiterated that keeping in view the unsatisfactory and incomplete reply from your side and perpetual failing to honor contractual obligations, the contract of construction of City School Malir Chapter is still liable to be cancelled.

4. Forgone in view, you are urged to forward a suitable and comprehensive reply on the observations mentioned in out letter by 10 May 2023. An early and wholesome reply from your side would enable PAF to make suitable decisions for the future course of action.

Sd/-
(SHAHID RAZA KHAN)
Air Commodore
Assistant Chief of Air Staff (Admin)
Air Headquarters, Islamabad
Tel Ext 5101

WITHOUT PREJUDICE

May 10, 2023

Air Commodore Shahid Raza Khan
Assistant Chief of Air Staff (Administration)
Pakistan Air Force, Air Headquarters
Islamabad.

Subject: ***PAF CONTRACTS WITH THE CITY SCHOOL***

Dear Sir,

1. We, City Schools (Private) Limited (the "Company") are writing with reference to your letter no. AHQ/54207/1/ORG dated April 06, 2023 (the "First Letter") and letter no AHQ/54207/1/ORG dated May 04, 2023 (the "Second Letter" together with the First Letter, the "Letters"). It is respectfully submitted that the Company replied to the First Letter to the extent of para 3 thereof (dealing with the Malir Agreement (defined below)) vide its letter dated April 18, 2023 (the "First Response"). The First Response may kindly be read as and deemed to be an integral part of this letter (and the contents of the same are not being repeated for sake of brevity).

2. At the outset, it is submitted that the Company has in the past and continues to endeavour to fully comply, in letter and spirit, with the applicable provisions of the agreements executed between the Company and different Directorates of PAF (as detailed below). It is brought to your kind attention that the Company has in fact signed three agreements (and not two contracts as erroneously mentioned in your Letters) in addition to the Addendum of the existing PAF Chapter contract. The third contract is of land at PAF Korangi Creek, which is not mentioned in any of your letters.

3. In order to correct the record and better understand the correct factual and legal position, it is pertinent to mention here that the Addendum to the Agreement (both defined below) and two land contracts (land at PAF Faisal and PAF Korangi Creek) were negotiated for establishing schools with the then ACAS Education, Air Cdre (Retd) Amir Sarwar under the leadership of the then DCAS (Admin), Air Marshal (Retd) Javed Saeed. All these contracts relate to Category A-1 Land. Another contract was later negotiated and signed for establishing a school at PAF Malir with the then ACAS Housing, Air Cdre (Retd) Hassan Hamzai. Details of the aforementioned contracts/agreements are as follows:

i) Contract agreement dated November 22, 1994 executed between the Pakistan Air Force ("PAF") and the Company (the "Original PAF Agreement") for land measuring 7.5 acres in PAF Base Faisal, Karachi as amended from time to time and lastly vide the addendum dated April 20, 2020 (the "Addendum", and together with the Agreement, the "PAF Agreement");

ii) Contract agreement dated April 20, 2020 executed between the Directorate Welfare Accounts, Air Headquarters, Islamabad of PAF (the "Directorate Welfare") and the Company for land measuring 3.5 acres in PAF Base Faisal, Karachi (the "Faisal Agreement").

iii) Contract agreement dated April 20, 2020 executed between the Directorate Welfare and the Company for land measuring 3.5 acres at PAF Airmen Academy (PAFAA) Korangi Creek (the "Korangi Agreement").

iv) Contract agreement dated April 20, 2020, between the Directorate of Housing, Air Headquarters, Islamabad (the "Directorate of Housing") and the Company for land measuring 21.174 Kanals at Air Force Officers Housing Scheme, New Malir, Karachi (the "Malir Agreement").

(the PAF Agreement, Faisal Agreement, Korangi Agreement and Malir Agreement shall hereinafter collectively referred to as the "Agreements" and individually as "Agreement")

4. By way of further clarification, it is submitted that Faisal Agreement, Korangi Agreement and the Addendum were signed on the same date due to Covid restrictions imposed by AHQ for visitation. The Company was ready with the agreements of PAF Chapter Addendum, PAF Faisal and Korangi Creek Lands in December 2019. However, taking care of Covid issues the signing could not be held in Air Headquarters' (as planned). Hence, we waited for the PAF Malir finalization and signed all of the aforementioned agreements in our own offices and exchanged them with each other. Both parties have one original set of these contracts.

5. Notwithstanding, the foregoing and in addition thereto, it is reiterated that the Company vide its First Response only limited its reply to the extent of the Malir Agreement because not only is the same a separate agreement from the other Agreements but the same also had no relevance to any of the other Agreements. The Malir Agreement by its very nature is different/distinct from the other Agreements as we were informed that the land being leased/licensed vide the Malir Agreement is category B-3 Land. This fact is further visible as the general terms and conditions and even the commercial terms of the Malir Agreement are inherently different from the other Agreements. On the other hand, the PAF Agreement, Faisal Agreement and Korangi Agreement have mostly similar commercial and other terms (although there are some differences with reference to location as well as concession quota for PAF wards, etc.). Hence, it is abundantly clear that each of the Agreement(s)was standalone and independent of each, other having its own respective legal standing and identity and should be dealt with accordingly. For this very reason instead of mixing the response of all your queries in one letter we felt the need to respond separately as per their respective legal standing. However, on your specific request we are now responding to all your concerns in this consolidated response.

6. Please find below our preliminary response to issues raised vide your Letters with regards to each of the Agreements:

1) <u>Response related to the matter concerning the Malir Agreement</u>

Your respected office, vide the Letters, has primarily raised two concerns, one of which relates to delay in construction period and the second of which relates to Advance rent payment:

As already mentioned in our First Response, clause 2.1 of the Malir Agreement states that "The Educational Institution to be developed/constructed within a period of 24 months from the signing date".

From a bare perusal of the aforementioned clause, it is abundantly clear that the starting date for construction was signing date and time period allocated for construction was 24 months. Therefore, once the Company was granted approval for change of start date by extending the same by one year, then it is obvious that the completion date will also change/be extended accordingly. Any other interpretation is implausible and illogical since it is not practically possible to construct and make operational an Educational Institution of such scale and caliber within one year from scratch.

With respect to your observation that the construction stopped in between in 2022, in this regard it is pertinent for us to remedy the misunderstanding by clarifying that in fact the construction did not stop but was only slowed down as a consequence of extenuating circumstances. From the April, 2022 onwards, the country went into a financial turmoil and our contractors ran away without our permission and demanded huge escalations in price. Since, we cannot finance this

huge infrastructure on leased/licensed land (like PAF Malir), hence, we renegotiated the fates with our contractors and pursued the project on accelerated pace. In this regard, we also held a meeting with Housing Director of PAF in October 2022 and agreed on many items, including launch of admissions in January 2023 and launch of school in August 2023. It may be pointed out that in the meeting we also requested for some NOCs and connections from PAF, which were given to us hence, acknowledging what all was discussed in the meeting (PAF letters of approvals are available with us). Notwithstanding the foregoing, it may also be noted that we are a Cambridge School System and, in any case, our Academic Year starts in August every year after the summer break and therefore we cannot make the institute fully functional prior to August. We are on track for full operational school by August of this year, provided the construction work (which has been stopped since one and half month) is allowed to remobilize immediately. Please note that this is the most crucial time for us and your support in this matter la critical for achieving full functionality of the educational Institution by start of academic year this year, in. August, 2023. It may also be kindly noted that we have already invested over Rs.100 million at PAF Malir. We are being restrained from lawfully continuing our work, which is contrary to the terms of the Malir Agreement and causing substantial delay/losses for which we cannot be held responsible.

With reference to your second query pertaining to advance rent, in our First Response we have clarified that it was an inadvertent oversight However, it is reiterated that the start of construction and lunch of school has been delayed by one year due to Covid (as approved by your letter dated 24 December 2020). Furthermore, we have made this payment as already informed in our First Response (which was in any case the first reminder notice received from PAF in this regard) and price to sending the First Response. However, we apologize for delay (if any) and any inconvenience caused by this inadvertent oversight.

Response related to the PAF Agreement (PAF Faisal Addendum):

The only concern raised in the Letters with regards to the PAF Agreement appears to the with regards to the non-payment of the amount Rs.183 million claimed by you and the security of premises.

With reference to payment of rent, kindly note that the Company is not in default of its obligations. It is pertinent to note that Clause 3.1 of the Addendum deals with the matter of rent amount for the concerned years and it states "That the annual rent of the Site as is chargeable to A-1 lands shall be paid each year for the Renewed Term by the First Party to the Government of Pakistan and any such annual rent charged for the Site during the Renewed Term shall be refunded by the Second Party to the First Party within 30 days from the receipt of latter from the First Party. In sight of the aforementioned, kindly provide the Company proof/evidence of the rent paid by you to the Government of Pakistan so that the same can be refunded to you.

With regards to your observation in Para 5 of the First Letter regarding security, please note that Group Captain, Officer Commanding, Security Wing, Faisal vide letter dated December 1, 2022 and letter dated January 13, 2023 written directly to our school, clearly shows improvement by us towards security concerns. The remaining issues highlighted therein have also been addressed except where PAF has pointed out discrepancies with regards to availability of Rangers/Traffic police during start and closing time of the school. The Company has time and again contacted both these organizations for the same, however, provision of resources is their prerogative and we cannot force them to comply with our demands. In this regard, the Company would also request PAF to help facilitate the matter in any way possible, Furthermore, the routine security matters are handled directly between PAF Faisal Security and School Manager Therefore, it is suggested that any security concerns which needs our attention may be addressed to the Head Office at Gurumangat Road, addressed to the Chief Operating Officer with copy to the School Principal.

With regards to your observation in Para 6 of the First Letter, please note that your demand of vacating the schools in three months is contrary to clause 10.1 (a) of the PAF Agreement (as Inserted/amended vide clause 6.1.2 of the Addendum) which states as follows:

The First Party agrees and undertakes that it shall not be permitted to terminate the Contract during the Renewed Term and it shall only be entitled to terminate this Contract, If;

(a) The Second Party for any reason or condition, whatsoever, refuses or fails to vacate and hand over the free possession of the Site along with all existing structures, buildings, and fixtures present at the Site by the expiry of the Renewed Term, i.e. 25 September 2025;

Therefore, it is submitted that the Agreement cannot be terminated by PAF as aforementioned.

Moreover, the Company cannot shutdown the school which is imparting education to about 3000 students on such a short notice.

Additionally, we have also written a letter to Air Marshall Javad Saeed (the then DCAS (Admin) on 5th August 2020 for extension even beyond September 25, 2025 for which response has not been received as yet. It is our understanding that the request is still pending.

Response related to Faisal Agreement:

With regards to your observations in Para 4 of First Letter, it appears that your only concern is that the Company has not started the construction at the allocated land. Please note that as per the terms of the Faisal Agreement, we have until Sep 2025 to complete the construction. Since the construction takes approximately 24 months, we have sufficient time for constructing a school in compliance of the terms and conditions of the Faisal Agreement. However, as mentioned below delay in construction is for reasons beyond our control.

Notwithstanding the foregoing, kindly refer to sub-clause 1.2 and sub-clause 1.3 of the Faisal Agreement dealing with handing over the possession of the land for construction. The company has till date not received any confirmation from PAF that the Oil Tank has been shifted from the location, which is of crucial importance for us considering the safety of the children. Furthermore, we are also waiting for confirmation from the PAF that all the utility services have been provided at the site to start the construction, Lastly, owing to the current instability and inflation we are unable to submit any plans as we cannot budget our construction cost due to daily increasing construction materials costs and uncertainty. Hence, in the benefit of both parties it is requested that we wait till the country's economic situation stabilizes and meanwhile PAF should work on completing its obligations under these clauses.

7. We hope you find our detailed answer to your Letters to be helpful. However, it is suggested/requested that a meeting may be scheduled in person to resolve any remaining issues and misunderstandings. We would therefore request a meeting between our Group Chairperson Dr. Farzana and the DCAS Administration, at your convenience either in Lahore or Islamabad.

Considering time constraint to launch PAF Malir School is August, 2013, we request for immediate unrestricted access to the PAF Malir site so that construction can be recommenced.

Sincerely,

The City Schools (Private) Limited

Sd/-
Shahzad M. Khan
Chief Operating Officer"

D. <u>Contentions on behalf of the Plaintiff</u>

(a) The License Agreement and the Background to the Impasse as <u>between the Plaintiff and the Defendant No. 2</u>

5. Mr. Salahuddin Ahmed entered appearance on behalf of the Plaintiff. He contended that through the License Agreement, the Defendant No. 2 "let" out the Said Property to the Plaintiff for a term of 33-years to build and operate a school. He contended that by it's letters dated 6 April 2023, the Defendant No. 2 communicated to the Plaintiff that it was terminating the License Agreement, alleging that the Plaintiff had breached the terms of the License Agreement. This letter was followed by a letter dated 4 May 2023, which Mr. Salahuddin Ahmed insists contradicts the letter dated 6 April 2023 inasmuch as the termination that had been pressed in that letter was disavowed and was supplanted by the Defendant No. 2 in terms that it was considered that the License Agreement was "*still **<u>liable</u>** to be cancelled*" and which sought a "*early and wholesome reply from [the Plaintiff] would enable [the Defendant No. 2] to make suitable decisions for the future course of action."* It was however when the Defendant No. 2 restrained the Plaintiffs employees and contractors from entering the Said Property and completing the construction of the buildings thereon that had compelled the Plaintiffs to maintain this *lis* and through CMA No. 8366 of 2023, CMA No.9966 of 2023 and CMA No.10432 of 2023 to seek various injunctive relief and on which interim orders dated 30 May 2023, 10 July 2023 and 24 July 2023 were passed and which were not being complied with by the Defendant No. 2.

6. He maintained that the Plaintiff, through this Suit, has sought declarations of its character as a lessee in respect of the Said Property and also seeks directions to be given to the Defendant to specifically perform on its obligations under the Agreement and, in particular, to cause for the registration of the Agreement. Alternatively, he claims that even if this court comes to a conclusion that it is prima facie not a lessee, it may be declared a licensee that has executed works of a permanent character in reliance of the License Agreement and hence the Finance Agreement as entered into between the Plaintiff and the Defendant No.2 could not be revoked on account of the prescription of sub-section (b) of Section 60 of the Contract Act, 1892. On either basis it is contended that the Plaintiff would be entitled to an injunction restraining the Defendant No. 2 from terminating the License Agreement and from evicting or interfering with the Plaintiffs possession of the Said Property and the ingress/egress of its contractors/workers, staff, students and parents on the basis of it being permitted to operate the school on the Said Property.

7. Regarding the position taken by the Defendant No. 2 in its counter affidavits to CMA No. 8366 of 2023, CMA No.9966 of 2023 and CMA No.10432 of 2023 2,

he submitted that while the Defendant No. 2 claims that the Plaintiff was merely a "contractual licensee" and that it had validly terminated the License Agreement through its letter of 6 April 2023 due to the Plaintiffs failure to perform its contractual obligations namely:

(i) non-payment of security deposit of Rs.25 million
(ii) non-payment of advance license fee of Rs.25 million, and
(iii) non-completion of School Building within the stipulated 2-years

this position was at a variance to the position taken by the Defendant No.2 in their own letter dated 4 May 2023 wherein the Defendant No. 2 had clarified that the License Agreement was *"liable to be cancelled"* and as such there had in fact not been any termination of the License Agreement that had taken place. While the Defendant No. 2 avers that this was on account of bad grammar, he placed reliance on the decision of the Privy Council reported as ***Mitsui Construction Co Ltd v The Attorney General of Hong Kong***[1] wherein it was clarified that the intention of the parties to a contract is to be ascertained from looking at the documents and that poor drafting is not to be used an excuse for deviating from that general rule it being held as hereinunder:

> " … *the fundamental rule of construction of contractual documents [is] that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situations in which the contract was made.* ***But the poorer the quality of drafting, the less willing any court should be driven to attribute to the parties an improbable and unbusiness like intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis.***"

8. It was further contended that if it was considered that the Defendant No. 2 had actually intended to terminate the License Agreement, such an act would be wrongful and of no legal effect as:

(i) the purported termination notice does not meet the conditions precedent and also did not follow the procedure prescribed in the License Agreement;

(ii) the grounds of termination were legally and factually baseless and, even if admitted, could only entitle the Defendant No. 2 to seek damages from the Plaintiff for delayed performance, and;

[1] (1986) 33 BLR 14

(iii) the purported termination violates the statutory protections afforded to the Plaintiff as a lessee or alternatively, as a licensee under Sub-Section (b) of Section 60 of the Easements Act, 1882.

On this basis it was contended that if the Court was to accept the contention of the Defendant No. 2 that it had terminated the License Agreement, this would amount to an attempt to repudiate the License Agreement and the Plaintiff would assert it right not to accept repudiation and would seek specific performance of the Agreement since pecuniary compensation would not be an adequate relief for it.

9. In this regard Mr. Salahuddin Ahmed contended that if one is to consider the language used in the letter dated 6 April 2003 and contrast it with the language used in the letter dated 4 May 2023 it would be clear that while the former contended that the Defendant No. 2 was "forced to cancel" the License Agreement the latter seemed to negate the contention that the letter dated 6 April 2023 had terminated the License Agreement as in the latter letter the Defendant No. 2 had requested the Plaintiff to forward a "*suitable and comprehensive reply*" to "*enable PAF to make suitable decisions for the future course of action.*" This he contended indicated that the Defendant No. 2 had not terminated the Agreement and that discussions as to the performance of their obligations had not been concluded. Averring to the contention of the Defendant No. 2 that the Court should not be hidebound by the substance of the letters and rather should gather the intention of the Defendant No. 2 from the document, he contended that on an objective inference clearly the latter letter indicated an intention of continuing the obligations and not terminating the License Agreement. This was further reinforced with the fact that in response to the letter dated 6 April 2023, the Plaintiff had, albeit late, deposited the sum of Rs.25,000,000 (Rupees Twenty Five Million) in the account of the Defendant No. 2 under cover of their letter dated in 18 April 2023 and which amount was not returned by the Defendant under cover of the letter dated 4 May 2023 and rather was returned as an afterthought under cover of a letter dated 2 August 2023. In the alternative he, by referring to clause 11.2.1 and 11.2.2 of the License Agreement, he contended that as the manner in which the License Agreement was to be terminated had been detailed, even if one is to assume that it was intention of the Defendant No. 2 to terminate the License Agreement, the deviation from the terms of that clause of the License Agreement by the Defendant No. 2 would in itself lend credence to the contention of the Plaintiff that the termination had been incorrectly enforced.

(b) The Breach of the Terms of the License Agreement and the <u>Termination of the License Agreement</u>

10. Regarding the allegations of breach of the License Agreement by the Plaintiff as averred by the Defendant No. 2, Mr. Salahuddin Ahmed contended that there were three separate breaches that had been alleged by the Defendant No. 2 as hereinunder:

(i) non-payment of security deposit;
(ii) non-payment of advance license fee; and
(iii) non-completion of school building.

11. Detailing each of the obligations and the alleged breaches Mr. Salahuddin Ahmed submitted that as per Clause 3.1 of the License Agreement, the Plaintiff was to pay a security deposit to the Defendant No. 2 within 60-days and advance a license fee "*after two years,*" the latter being adjustable against the actual license fee which was payable from October 2024 onwards. He maintained that the allegation levelled as against the Plaintiff was patently incorrect as, on account of the prevailing COVID-19 pandemic, the Plaintiff had specifically requested for a waiver of this condition in its letter of 5 August 2020 and which the Defendant No. 2 had expressly allowed in its letter of 9 December 2020.

12. With regard to the contention that the Plaintiff had breached the term in the contract for the completion of the construction, Mr. Salahuddin Ahmed referred to Clause 2.1 of the License Agreement which provided that:

> " … *the Educational Institute to be developed/constructed on the Demised Premises by the Licensee within a period of 24-months from the Signing Date shall consist of (i) Ground + 3-storey, (ii) Proper drop lane and sufficient parking as appropriate for the requirement of the school."*

He contended that the Plaintiff had in its letter dated 5 August 2020 pointed out the difficulties in completing the construction within the time frame on account of the Covid 19 pandemic and had requested the Defendant No. 2 to "*extend the time period allocated to start the construction.*" This concession, he maintains, was acceded to by the Defendant No. 2 in its letter dated 9 December 2020 and by which the Plaintiff was allowed to commence construction by 30 March 2021. It was maintained that as the start date for the construction had been extended, by "necessary implication", the completion date would also stand extended correspondingly. He maintains that the argument forwarded by the Defendant No. 2 that while it's letter of 9 December 2020 extended the start of the term available for construction by a year, it did not specifically extend the completion date leaving that at 20 April 2022 is not logical as the time period for completion cannot be decreased. Similarly, regarding the contention that the obligation to pay the

advance license fee was breached, Mr. Salahuddin Ahmed maintained that the Agreement required the advance license fee to be paid contemporaneously with the completion of the construction of the school building i.e., after two years. While, originally, this date was to be 21 April 2022, however, given that the time for starting construction was mutually extended to 30 March 2021 and which was confirmed by the Defendant No. 2 in two of letters dated 18 January 2023 and 25 January 2023, the Plaintiffs understanding was that both the time period for completion of construction and the time period for payment of the advance license fee stood automatically extended to 1 April 2023 i.e., two-years after starting construction and that applying the "*officious bystander*" test[2] a term should be implied into the License Agreement. In both regards, he attempted to distinguish a judgement of the House of Lords reported as ***Trollope & Colls Ltd. v North West Metropolitan Regional Hospital Board***[3] in which where a construction of a project was done in phases, it was held that the time granted for constructing one phase having been extended did not give occasion to imply a term to adjust the time frame for another phase of the same project**,** even if the latter phase of construction could not have been started without the earlier phase being completed. He drew a distinction as between the finding in that decision being premised on the fact that this was not an eventuality that the parties merely overlooked and while in that case it was held that there were at least four or five different ways in which those issues could have been resolved in the present case there was only one i.e., contemporaneous payment, and which was therefore so obvious that it went without needing to be said. He concluded on this issue by asserting mala fide on the part of the Defendant No. 2, by contending that the deviation between the earlier letters dated 18 January 2023 and 25 January 2023 with the letter dated 6 April 2023, was done to pressure and coerce the Plaintiff into agreeing to various demands that had been made by the Defendant No. 2 *vis a vis* its separate contracts with the Defendant No. 2 in respect of schools operating at other locations.

13. In the alternative, Mr. Salahuddin Ahmed maintained that in the event that the Court came to a conclusion that there had been a breach of a term in respect of the delay in the payment of the advance license fee or the time frame for the completion of the construction neither was a "*material*" breach which entitled the termination of the License Agreement. He contended that as the Advance license fee was adjustable against the actual license fee to be paid by the Plaintiff from October 2024 onwards it could not be considered that the Defendant No. 2 was out of pocket as, while Clauses 3.1 and 11.2.1 of the License Agreement expressly contemplated the termination of the License Agreement for non-payment of

[2] See ***Southern Foundries Ltd v. Shirlaw*** [1939] 2 KB 206
[3] [1973] 2 All ER 260

security deposit and actual license fee; there was no such provision for termination for the failure to pay the advance license fee. He reinforced this position by stating that such a breach cured by the Plaintiff depositing a sum of Rs. 25,000,000 (Rupees Twenty Five Million) into the account of the Defendant No. 2 and which was only returned by the Defendant No. 2 on 2 August 2023 after the subject suit had been instituted and the interim order had been passed and which must be considered as an afterthought to create a defence to an undefendable position.

14. Regarding the breach of a term in respect of the time frame for construction, Mr. Salahuddin Ahmed while conceding that the construction work was to be completed by February 2023 maintained that a delay of a "few more months" in the facts and circumstances could not classify as a "*material breach.*" He maintained that when determining the materiality of a breach the Court must consider the main underlying purpose or benefit for which both parties entered the contract. In this regard he contended that the purpose of the construction was to operate a school. To secure their rights to achieve and obtain a financial return on their investment, the Plaintiff entered into the License Agreement, primarily, to secure the Said Property for a term of thirty-three years so that it could construct and operate a school and derive profit thereon. The Plaintiffs concern was therefore to avoid premature eviction thus losing both its investment and profit-making opportunity. As far as the Defendant No. 2 was concerned it entered into the License Agreement, primarily, to derive a License Fee and hence it's main concern was the default in payment of the License Fee and which was reflected in Clauses 3.2 to 3.5 read with Schedule B and Clause 11.2.1 of the License Agreement. He maintained that had the Defendant No. 2's primary interest/benefit in the License Agreement been the timing and manner of construction or the development and operation of the school itself, then the License Agreement would surely have detailed such obligations in the License Agreement and which was lacking leaving a wide discretion to the Plaintiff to carry out each of those activities. In the circumstances, a delay of a few months in the completion could hardly be considered as having deprived the Defendant No. 2 of it's primary interest and benefit in the License Agreement and would at best have entitled the Defendant No. 2 to claim damages but not to invoke clause 11.2.2 for termination of the License Agreement. Either way, in practical terms it was clear that the operations of the school could not start midterm in the month of March and which would have been commenced if the school had become operational by August 2023 if it had not been for the Defendant No. 2's illegal termination.

15. While refuting the contention of the Defendant No. 2 that the school would not have been made operational by August 2023 as it was comprised of three building and out of which only one was complete, it was maintained that this too

was an afterthought as nowhere in the letters dated 6 April 2003 and 4 May 2003 was such a contention taken. Relying on clause 2.3 of the License Agreement which stated that "*the Licensee shall be allowed to develop the Educational Institute as per its requirements and convenience on the Demised Premises in phases, or as a whole, as the Licensee may deem appropriate and convenient during the Term…*" he maintained that the Plaintiff was well within its rights to develop and start the operation of the school in phases and an argument that all three phases had to be operational by August 2023 therefore could not be sustained.

16. Mr. Salahuddin Ahmed next detailed the manner in which the Defendant No. 2 could terminate the License Agreement. He referred to Clauses 11.2.1 and 11.2.2 of the License Agreement and clarified that the Defendant No. 2 had a right to terminate the License Agreement ***"only if":***

(i) the Plaintiff defaulted on payment of a License Fee prescribed under Clause 3.2 for a period exceeding 60-days and provided the Defendant No. 2 has served a thirty day notice on Plaintiff to rectify such default.

(ii) the Plaintiff committed a "*material breach of any terms of the Agreement*" and provided the Defendant No. 2 had served a three months notice on the Plaintiff announcing its "*intention of terminating this Agreement*" together with details of the breach alleged. If the Plaintiff rectified the breach within three months, the notice would stand revoked. However, if there was any dispute regarding the occurrence of a material breach, then the matter would be referred to arbitration and the Defendant No. 2 would "*not terminate this Agreement prior to a determination by the arbitrator in its favour*".

On this basis Mr. Salahuddin Ahmed contended that to corrrectly invoke the contractual right of termination under clause 11.2.2 of the License Agreement, the Defendant No. 2, must demonstrate that it served a notice specifying the alleged material breach of the License Agreement and thereafter allow the Plaintiff a period of three months to rectify them and in the event that the Plaintiff denied the factum of breach or that they were not material; then the matter was to be referred to arbitration to allow for an award to be passed in terms of whether the breaches were material and thereafter to allow for the termination to take effect. He contended that as the Defendant No. 2 had not invoked the mechanism provided under clause 11.2.2 of the License Agreement, the Defendants No. 2's letter of 6 April 2023 fell short of the prescriptions of clause 11.2.2 of the License Agreement as it did not allow the Plaintiff the requisite three months to rectify any alleged

material breach and instead directly announced it's intention to terminate the Agreement against the allegation that the Plaintiff had failed to pay the security deposit, the advance license fee and complete the school building within the time limit specified. It is contended that while the Plaintiff was not liable to pay the security deposit, it attempted to rectify the alleged breaches by paying the Advance License Fee but was prevented by the Defendant No. 2 from completing the construction on the Said Property as its contractors and labour were restrained from entering the Said Property and which can be verified from the Nazir Report dated 2 August 2023 and in paragraphs 11 and 12 of the Defendant No. 2's Counter Affidavit to CMA No.9966 of 2023, wherein the Defendant No. 2 admitted that the security passes of the Plaintiffs contractors/workers were cancelled after letter dated 6 April 2023 was issued by the Defendant No. 2 to the Plaintiff

17. Mr. Salahuddin Ahmed contended that as the Plaintiff had denied the factum of material breach in respect of the payment of the security deposit, the payment of the advance license fee and the breach of the time frame for the completion of construction; the Defendant No. 2 were obliged to seek to arbitrate the dispute so as to determine whether the Plaintiff had or had not materially breached the License Agreement and which was the only course of action available to it under clause 11.2.2 of the License Agreement.

18. Rebutting the contentions of Dr. Farogh Naseem that strictly enforcing the rights of the Defendant No. 2 in terms of permitting termination of the License Agreement within the confines of clause 11.2.2 would lead to an absurd consequence i.e. that the Defendant No. 2 would not be able to terminate the License Agreement for thrity three years no matter how serious or material a breach by the Plaintiff was misconceived as if the Plaintiff did materially breach the License Agreement, the Defendant No. 2 would have a contractual right to terminate the License Agreement under Clause 11.2.2. However, to do so, as envisaged in Clause 11.2.2, it must have given a three months notice allowing the Plaintiff the opportunity to cure the breach. Moreover, if the Plaintiff denied the factum of certain breaches and/or the materiality of others, then the Defendant No. 2 could not directly terminate the Agreement and instead would mandatorily have to invoke arbitration and obtain an arbitral finding that a material breach had been committed and until then the License Agreement would continue to remain in force.

19. As to whether the Defendant No. 2 had a right to terminate the License Agreement beyond the perimeters set in clause 11.2.2 of the License Agreement he referred to the contentions of Dr. Farogh Naseem and who he stated had contended that where one party has breached in the performance of the contract, then the other party has the right to terminate the contract and there was no need to adhere to the provisions of the contract in order to terminate the same. This

proposition he contended was contrary to the basic principles of contract law. He referred to the judgments relied on by the counsel for the Defendant No. 2 reported as ***Williams v. Leeds Football Club***;[4] ***Vinergy Int'l v. Richmond***[5] and ***Navayuga Machilipatnam Port v. State of Andhra Pardesh***[6] which he contended all were premised on the common law doctrine of "*repudiatory breach*" and which in light of Section 39 of the Contract Act, 1872 did not have any application in Pakistan as the preamble to the Contract Act, 1872 rendered the law as stated therein exhaustive on the principles codified in that statute. Regarding the doctrine of repudiatory breach, as understood in the United Kingdom, he contended that where a party to a contract flatly refused to perform i.e., repudiates the contract or breaches it in such a serious manner that it destroys the very "*root of the contract*" i.e., to deprive the other party of the whole of the benefit of the contract and render it practically useless to him; when faced with such a situation the other party ***could elect*** to continue with the contract, while reserving a claim for damages, or elect to accept the repudiation and bring the contract to an end. This he contended was a "common law" right and could be exercised without reference to the contract. The doctrine of repudiatory breach he contended was, as per the decisions of the House of Lords in ***Photo Production Ltd. v. Securicor Transpirt Ltd***[7] as well as ***Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale***[8] considered to be one and the same as fundamental breach. In this regard he referred to the findings of the Court in ***Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale***[9] as hereinunder:

> " … *use of the term fundamental breach is of recent origin and I can find nothing to indicate that it means either more or less than the well known type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract."*
>
> " … *there is no magic in the words 'fundamental breach'; this expression is no more than a convenient shorthand expression for saying that a particular breach [es] such as to go to the root of the contract which entitles the other party to treat such breach [as] a repudiation of the whole contract."*
>
> " … *Next for consideration is the argument based on 'fundamental breach' or, which is presumably the same thing, a breach going to 'the root of the contract'."*

20. He stated that the two judgments relied on by Dr. Farogh Nassem i.e., ***Karsales (Harrow) Ltd v Wallis***[10] and ***Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd***[11] which took a contrary view were specifically overruled by the House of Lords in the decision reported as in ***Photo Production Ltd. v. Securicor***

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[4] [2015] EWHC 376 (QB)
[5] [2016] EWHC 525 (Comm)
[6] 2023 (2) ALD 866
[7] [1980] 1 All ER 556
[8] [1966] 2 All ER 61
[9] [1966] 2 All ER 61
[10] [1956] 2 All ER 866
[11] [1970] 1 All ER 225

Transport Ltd.[12] In respect of the judgement reported as ***P.C. Rajput vs State Govt. Of Madhya Pradesh And Ors.***[13] which was relied on by the counsel for the Defendant No. 2 actually contended just the opposite as it cites a passage from Cheshire & Fifoot's Law of Contract[14] with approval and which stated that:

> " … *even if one of the parties wrongfully repudiates all further liability or has been guilty of a fundamental breach, the contract will not automatically come to an end.*"

Regarding the application of the doctrine to this suit he contended that to claim repudiation under that contract it would be necessary for the plaintiff to have flatly refused to construct the school on the Said Property i.e., destroy the root of the contract and and which not being the case here would not be a repudiation.

21. Applying Section 39 of the Contract Act, 1872 Mr. Salahuddin Ahmed contended that as per that section if a party refused to perform or disabled himself from performing his promise in its entirety, the other party had a right to end the contract. While, this statutory right, admittedly, was not dependent on the provisions of the contract, in the present case, the Plaintiff has neither refused nor disabled itself from performing on the License Agreement and at best this would be a case of a "slightly" delayed performance.

22. Regarding time being the essence of a contact, Mr. Salahuddin Ahmed referred the Court to Section 55 of the Contract Act, 1872 and contended that the Agreement did not state that time was to be of the essence. He maintained that the general presumption in agreements involving a demise being created in an immovable property was that time was not the essence unless made so through clear and unmistakable contractual language. Nonetheless, in appropriate cases, depending on the contractual language the conduct of parties both prior to and subsequent to the contract, the Court could infer time to be of the essence. In this regard he referred to a decision of the Supreme Court of Pakistan reported as ***Sandoz Limited and another v. Federation of Pakistan and others***[15] and in which it was observed that:

> " … *if the nature of the contract is such that non-performance of the same rendered the contract for the promise useless or of no benefit, the time for the performance shall be construed as of the essence... That if non-performance of the contract within the stipulated period does not cause any loss or injury to the promise, time is not regarded as of the essence of the contract even when a date for completion of the contract is specified.*"

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[12] [1980] 1 All ER 556
[13] AIR 1993 MP 107
[14] 9th Edition
[15] 1995 SCMR 1431

He maintained that as the contract was not rendered useless to the Defendant No. 2 by the delay caused by the Plaintiff or as it would still be financially compensated in terms of the License Agreement and have secured its objective to have constructed a school on the Said Property, this could not be a case where time was to be considered as essence of the contract. Referring further to the same judgment, he stated that the Supreme Court of Pakistan also observed that where time was *of the essence but the aggrieved party does not repudiate or cancel upon the failure of the other party to perform his part under the contract on the agreed time… he waives the term relating to making the time as the essence of the contract.*" In this regard he submitted that while the Defendant No. 2 is asserting that the construction was to be completed in April 2022 as the Defendant No. 2 neither canceled the Agreement and rather in its letters dated 18 January 2023 and 25 January 2023, prior to the purported termination, itself stated that construction was to be completed by February 2023, this itself was an indication that even if time was originally of essence, the condition stood waived.

23. Regarding a decision of a learned Single judge of this Court reported as ***Feroz Ali Gaba Versus Fishermen's Cooperative Society Limited,***[16] which was relied on by the Counsel for the Defendant No. 2, and in which the plaintiff sought an interim injunction against a notice threatening termination of his lease on grounds that he had violated the conditions of a lease and wherein it was observed that prima facie, the plaintiff had used the demised premises for a purpose not permitted in the lease and also that the "*license [sic] of the plaintiff has not been cancelled but plaintiff has been served with a notice in that respect. Issuance of notice for cancellation cannot be termed to be 'cancellation' which could give a legal right to aggrieved to resort to proper available legal remedy…*" and on which basis the Court held the plaintiff was not facing any irreparable harm and denied an injunction, was not relevant in the adjudication of this *lis* as the Defendant No. 2 was at all times averring that the License Agreement had been terminated.

(c) Lease or License or License Subject to the benefit of the provisions of Sub-Section (b) of Section 60 of the Easements Act, 1882

24. As to the nature of the rights of the Plaintiff, Mr. Salahuddin Ahmed contended that the License Agreement, on its true construction, was a 33-year lease of the Said Property and which warranted an injunction to be issued as against the Defendant No. 2. Alternatively, even if the Court came to the conclusion that the Defendant No. 2 was a Licensee, as it had executed works of permanent character in reliance of the License, it was entitled, under Sub-Section

[16] 2015 CLC 493

(b) of Section 60 of the Easements Act, 1882 to seek an injunction against termination of the license as it had constructed a permenant structure on the said property at it's own expense.

25. Relying on the decisions reported as ***Abdullah Bahi and others vs. Ahmad Din,***[17] ***Street v. Mountford,***[18] ***Bruton v. Quadrant,***[19] ***C.M. Beena And Anr vs P.N. Ramachandra Rao,***[20] Mr. Salahuddin Ahmed contended that it was necessary to look at the rights and obligations as conferred in the License Agreement as a whole to determine as to whether the rights conferred to the Plaintiff thereunder were that of a licensee or a lessee. He referred to various clauses of the License Agreement and impressed on the Court that on an objective inference such conditions bore the characteristics of an intent to create a lease. In this regard, the following clauses were referred to as being relevant:

(i) While the Agreement was entitled as a "License Agreement", it was asserted that Preamble A of the License Agreement described the land in question as "demised premises" and which term was more commonly used in association with the conveyance of an interest in land and also declared that it included all "accesses, easements and other rights pertaining thereto." As is well known, easements are a right that run with the land and which right would run contrary to rights under a licensee;

(ii) Preamble B of the License Agreement stated that the demised premises were being "let out" which was a term associated with a lease;

(iii) Clause 1.1 of the License Agreement again used the term "demise" which, ordinarily, meant a conveyance of interest in land;

(iv) Clause 1.2 of the License Agreement specifically contemplated that "vacant possession" i.e., exclusive possession of the Said Property was being handed over to the Plaintiff as opposed to a simple permission to use the land and which also specifically used the term "transfer of the Demised Premises" thereby creating rights in the Said Property in favour of the Plaintiff;

(v) Clause 1.1 and 2.1 to 2.4 of the License Agreement provided the tenure of the demise to for a term of thirty three years and that the Plaintiff and the length of the term coupled with the the right to raise permanent construction was more consistent with the conditions of a lease;

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[17] PLD 1964 SC 106
[18] [1985] 2 All ER 289
[19] [1999] 3 All ER 481
[20] AIR 2004 SC 2103

(vi) Clause 2.8 of the License Agreement provided that the Plaintiff would be responsible for obtaining all utility connections including sewerage, electricity, gas etc. which obligations were more akin to a lease than a license;

(vii) Clause 4.1 of the License Agreement provided that the Demised Premises and all construction raised thereon would vest in the Defendant No. 2 after the expiry of the License Agreement thereby leading to the conclusion that during the term of the License Agreement they vested in the Plaintiff and hence conferred proprietary rights in the Said Property in favour of the Plaintiff;

(viii) Clause 7.3 of the License Agreement confered upon the Plaintiff the "uninterrupted quiet enjoyment of the Demised Premises including easementary rights…" and which showed that exclusive possession was being transferred in favour of the Plaintiff and which rights were inconsistent with the rights of a licensee;

(ix) Clause 7.6 of the License Agreement contemplated that the Plaintiff would cause the License Agreement to be registered and which rights were more consistent with rights under a Lease;

(x) Clause 7.9 of the License Agreement prohibited the Defendant No. 2 from selling the Said Property during the tenure of the demise and further conferred on the Plaintiff preemptive rights of purchase and which rights were more consistent with a lease than a license; and

(xi) Finally, clause 8.10 of the License Agreement provided the Plaintiff with rights to "permit" the Defendant No. 2 to enter onto the Said Property and which rights were more akin to a lease than a license.

26. It was therefore contended that having rights in the nature of a lease or even those as a licensee having raised a permanent construction on the Said Property at considerable expense it cannot be considered that the Defendant No. 2 had a unilateral right to revoke the license. It was further contended that the Defendant No. 2 remained bound by the License Agreement and which it could terminate the same only in accordance with the clauses of the License Agreement itself. Reliance was placed by Mr. Salahuddin Ahmed on the decisions reported as ***Messrs Green Fuels vs. Shell Pakistan Limited*** [21]; ***Ram Sarup Gupta (Dead) By Lrs vs Bishun Narain Inter College & Ors***[22] and ***Jagat Singh v. District Board, Amritsar***[23] to contend that the Plaintiff had a right to seek injunctive relief.

[21] 2005 CLC 1602
[22] AIR 1987 SC 1242
[23] AIR 1940 Lah. 18

In this regard Mr. Salahuddin Ahmed also distinguished the case reported as ***M A Naser vs. Chairman Pakistan Eastern Railways and Others***[24] on its facts as not being a case that feel within the purview of Sub-Section (b) of Section 60 of the Easements Act, 1882.

(d) Breach of the provisions of the Sindh Private Educational Institution (Regulation and Control) Ordinance 2001

27. With regard to the contention that the Plaintiffs claim for injunction was premature since it had not obtained a registration to run a school on the Said Property as mandated under the Sindh Private Educational Institutions Ordinance, 2001 and had illegally taken admissions it was contended that the Defendant No. 2's understanding of the law regulating private schools was unclear as registration was not a precondition to taking admissions. Rather, prior to granting a registration to a branch of a school, the registering authority was to assess the availability and suitability of infrastructure vis a vis the number of students that were to study there and the student-teacher ratio all of which were not not possible without taking admissions.

28. Having contended that the Plaintiff had a prima facie case, it was maintained that if an injunction was not granted, the Plaintiff would be deprived of the use of the Said Property as a school and to get a return on the investment that it has made in the Said Property and would be unlikely to find any alternate land of an appropriate size that would be suitable for the construction of a school in the area and additionally the time frame for obtaining such a plot and constructing thereon would not readily be quantifiable in terms of damages. In addition, as the Plaintiff has already taken enrolled/registered hundreds of students for the branch to be established on the Said Property, the loss to the reputation of the Plaintiff due to inability to operate school on the Said Property could also not be adequately remedied in damages.

29. Regarding the balance of convenience, it was contended that hundreds of students were registered to start classes in the school by August 2023 and had the Defendant No. 2 not interfered with construction, they would have been studying there now. While, the Defendant No. 2 primary benefit from the License Agreement was the payment of license fee this would not be affected by the injunction at all. Conversely, if the Defendant No. 2 was today to attempt to develop the Said Property, it would take a much longer time to develop a school on the Said Property. He therefore prayed that CMA No. 8366 of 2023, CMA No. 9966 of 2023 and CMA No. 10432 of 2023 should be granted as prayed.

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[24] PLD 1965 Supreme Court 83

E. Contentions on behalf of the Defendant No. 2

(a) Lease or License or License Subject to the benefit of the provisions of Sub-Section (b) of Section 60 of the Easements Act, 1882

30. Dr. Farogh Naseem entered appearance on behalf of the Defendant No. 2 and contended that the main issue that the court has to determine while adjudicating CMA No. 8366 of 2023,CMA No. 9966 of 2023 and CMA No. 10432 of 2023 was as to whether the rights that had been conferred on the Plaintiff's by the Defendant No. 2 through the license agreement were in the nature of a lease or a license. Stating that the law on the proposition had been well settled, he referred to the decisions reported as ***Abdullah Bhai vs. Ahmed Din;***[25] ***Civil Aviation Authority vs. Data International***;[26] ***Zaidi's Enterprises vs. Civil Aviation Authority;***[27] ***Royal Foreign Currency vs. Civil Aviation Authority;***[28] ***Aftab Hussain v. Government of Sindh***[29] and which he contended forwarded the following propositions:

(i) to discover the real nature of relationship between parties, one may not focus on the terminology used, but rather on the actual wordings and spirit of the agreement, as there was a thin line as between the rights as contained in a lease and a licence;

(ii) in a lease there is transfer of interest in the property, whereas in a licence this element is excluded;

(iii) in a lease exclusive right of possession are granted to the lessee and the lessor totally excludes himself from this right;

(iv) the right granted to a lessee is assignable and transferrable, while in a licence it is not;

(v) a licence is personal right and there is therefore no right of exclusive possession and notwithstanding the permission, the grantor, in a licence, retains the control over the property.

(vi) the right of transfer through lease would amount to a right in rem under Section 105 of the Transfer of Property Act, 1822, while the right granted though a licence under Section 52 of the Easement Act,

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[25] PLD 1964 SC 106
[26] PLD 1993 Karachi 700
[27] PLD 1999 Karachi 181
[28] 1998 CLC 374
[29] 2015 MLD 1688

1882 is only a right in personam whereby the licensor would agree not to interfere with the doing of a particular act on the property, which was in possession of the licensee;

(vii) the principle summarised in sub-para (iv) above has further been expanded to a position where it is been held that where a person cannot transfer, sublet, sublease or rent out the premises, without first obtaining the prior permission of the owner, then what is conferred is a licence and not a lease.

31. Dr. Farogh Naseem contended that the Plaintiffs over emphasis on the expression "Demised Premises" being used in the License Agreement to define the rights of the Plaintiff thereunder was misplaced. Contending that the expression can be used interchangeably in a lease or a license he referred to the following decisions of the courts where the expression has been used to define a license:

(i) ***Malik Muhammad Khaqan vs. Trustees of the Port of Karachi (KPT)***[30], wherein it has been observed as follows:[31]

> " … *The document relied upon by him in support of his entitlements for allotment is the order conferring a right on the petitioner to use the* ***demised plot(s)*** *as a* ***licensee*** *and a* ***licence*** *neither confers any vested right in the licensee nor a licensee can claim its continuation for an unlimited period of time as the same is revocable."*

(ii) ***Nawaz Sharif Social Security Hospital vs. Additional District Judge, Lahore***[32] wherein it has been observed as follows:[33]

> " … *As per the agreed stipulation of the agreement the full tenure of the agreement was completed on 08.11.2016 and respondents were under obligation to vacate the* ***demised premises****."*

and as follows:[34]

> " … *From applying microscopic scanning of the above admitted document of the agreement and its entire stipulation it can legal (sic) inferred that agreement was a* ***license*** *and unilaterally presumption of the respondent that the agreement as a rent deed is not believable."*

and as follows:[35]

> " … *As per the stipulation of the agreement it was kind of* ***license*** *whereby a permission was granted to the respondents to avail the service of teaching Medical Doctor and other staff by fixing a specific period of ten years and*

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[30] 2008 SCMR 428
[31] *Ibid* at pg.430
[32] 2019 MLD 511
[33] *Ibid* at pg. 515
[34] *Ibid* at pg. 519
[35] *Ibid* at pg. 520

the said period of affiliation has already been expired which factum is admitted by the respondents as per their letter 22nd March 2017."

and as follows:[36]

" … *Even otherwise, after expiry of the period, no restraining order is called for as the* ***licence*** *agreement stood expired with afflux (sic) of time."*

(iii) ***Saeed Ahmad Malik vs. Naval Estate Officer***[37] wherein it has been observed as follows:[38]

" … *I do not find any substance in the contention of Plaintiff's counsel that two separate notices one under the agreement and the other under section 3 of the Ordinance separately were necessary. A bare perusal of section 3 of Central Government Lands end Buildings (Recovery of Possession) Ordinance, 1965 makes it quite clear that any officer authorised by the Central Government (a) may enter upon the* ***demised land*** *or building and recover, vacant possession of that land or building by evicting l****icensee*** *and (b) may also demolish or remove the structures if any, erected or built thereon by the* ***licensee*** *if (1) on the expiry of the period of the* ***licence*** *or (2) on the determination of such* ***licence*** *on the ground of breach of any covenant imposing an obligation on the licensee to give up possession of the* ***demised land*** *or building required for any public purpose, the licensee refuses or fails to vacate the land or building and put the Central Government into possession of the same. The only proviso under this section is that such officer before demolishing and removing any structures under this section should issue a notice to the licensee calling upon him to remove such structures within the period specified in the notice.*

Nowhere under section 3 of Central Government Lands end Buildings (Recovery of Possession) Ordinance, 1965 it is provided that a notice is necessary before entering upon a ***demised land or building*** *and before recovering its possession or a notice for determining the* ***licence*** *shall be separate and distinct from the notice before demolishing the structure or building as provided under section 3. The* ***licence*** *was not for a specified period. It was a temporary license. The occupant was liable to vacate the premises on one month's notice in advance which notice had already been given. This notice also met the requirements of the proviso to section 3 in case the defendant intended to demolish the structure of building. The contention of Mr. Bilal Khawaja that such notice should mention that it was a notice under section 3 of Central Government Lands end Buildings (Recovery Of Possession) Ordinance, 1965 also does not hold any water. It is a settled law that mere omission to mention the provision of law, under which a notice is issued, is not fatal nor would it invalidate a notice which is otherwise valid and complies with the requirements of the statutory notice."*

He reinforced his contentions by referring to Section 3 of the Central Government Lands and Buildings (Recovery of Possession) Ordinance, 1965 and Section 3 of Punjab Government Lands and Buildings Recovery of Possession Ordinance, 1966 in each of which the expression demised were used in the context of both a lessee and a licensee.

32. Referring to the terms of the License Agreement, Dr. Farogh Naseem stated that:

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[36] *Ibid* at pgs. 523 & 524
[37] 1989 CLC 1056
[38] *Ibid* at pg1059

(i) Recital A of the Licence Agreement mentioned that the Licensor was in control and possession of the Said Property in question together with all accesses, easements and other rights pertaining thereto;

(ii) No where in the Licence Agreement has it been provided that:

(a) the control of the Said Property has been transferred to the Licensee; or
(b) exclusive possession of the Said Property has been transferred to the Licensee;

(iii) In Recital B of the Licence Agreement it has been stated that the Licensee has represented that it has the experience and financial capacity to develop, establish and operate an educational institution upon the Said Property at its own cost and expense;

(iv) Recital C of the Licence Agreement only spelt out the desire of the Licensor i.e. to let out the Said Property to the Licensee for a particular purpose i.e. development of an educational institution;

(v) Recital D of the Licence Agreement only confirmed as to what the Licensor had actually agreed, which was the ***grant*** of the Said Property against a licence fee and which in terms of Section 52 of the Easement Act, 1882, would be the right under a licence and which should be considered in distinction to the word “transfer” to define a right under a lease as contained in Section 105 of the Transfer of Property Act, 1882;

He maintained that as no where in the Licence Agreement had it been stipulated that the Licensee has been transferred the exclusive vacant possession of the immovable property or any right or title in the Said Property, it must be considered that the rights of the Plaintiff in the property are that of a licensee and not a lessee;

(vi) He submitted that Clause 1.1 of the Licence Agreement was pivotal as it provided that the Licensor had given to the Licensee, a licence over the premises to develop, establish and operate an educational institution and as such **what** has been transferred or demised under the Licence Agreement was not any right in to property but only a licence to develop, establish and operate an educational institution by the Licensor to the Licensee for a period of thirty three years;

(vii) While Clause 1.1 of the License Agreement stated that the vacant possession of the demised premises had been handed over to the Licensee, this was not to equated with exclusive possession of the Said Property having been given to the Licensee;

(viii) Clauses 7.1 and 7.5 of the Licence Agreement confirmed that while the Licensor was in the lawful possession of the demised premises and had full right, power and lawful authority to let out the Said Property to the Licensee as there was no restriction in this regard, it fell short of transferring exclusive possession of the Said Property to the Plaintiff;

(ix) Clause 7.3 of the License Agreement clarified that the Licensor was to ensure that the Licensee enjoyed uninterrupted and quiet enjoyment of the Said Property, including all easementary rights but as it had not been stated that the right to uninterrupted and quiet enjoyment of the property and easementary rights in respect of the land in question had been transferred to the Licensee meant that the Plaintiff enjoyed his possession at the behest of the Defendant and which again confirmed that the License Agreement conferred rights of the nature of a Licence and not a Lease;

(x) Clause 8.4 of the Licence Agreement had restricted the Licensee right to use of the property i.e., for educational purpose;

(xi) Clause 8.6 of the License Agreement provided that the Licensee would not sub-let the Said Property to any person without written consent of the Licensor and which would confer rights in the nature of a license and not a lease in favour of the Plaintiff;

(xii) Clause 8.9 of the Licence Agreement stated that the licensee would not have the right to mortgage, encumber or raise any finances over the Said Property or even the building which is to be constructed on the Said Property under any circumstances or conditions whatsoever and which would again indicate that the rights conferred were that of a license and not a lease; and

(xiii) Clause 8.10 provided that the Licensee would reasonably permit the Licensor, its officers and representatives and authorized personnel to enter into the premises during normal working hours for the purposes of examining the state and condition of the Said Property

subject to educational activities not being disrupted and which clause was a clause which was standard in a license.

On the basis of the abovementioned conditions it was summarised that Clause 1.1 of the License Agreement conferred only a grant or permission or privilege to build and operate an educational institution; no exclusive possession has been granted to the Licensee; ownership and control had not divested to the Plaintiff and even the right of uninterrupted and quiet enjoyment of the property had not been transferred to the Licensee, but rather it was obligation that the Licensor had to perpetually secure in favour of the Licensee. This coupled with a bare permission to carry out a specific purpose i.e. constructing, establishing and running of a school with no right to sub-let the property or raise finances thereon confirm that the rights conferred were that of a license and not a lease. With regard to clause 7.9 of the License Agreement and which stated that the licensor was prohibited from selling the Said Property before the expiry of term of the Agreement, Dr. Farogh Naseem contended that the clause was void being in violation of Articles 18 and Article 23 of the Constitution of the Islamic Republic of Pakistan, 1973 void and hence in view of section 23 of the Contract Act, 1872 inoperative and was irrelevant when construing the existence of a lease or license.

33. Regarding the rights of a license coupled with an interest, Dr. Farogh Naseem referred the court to the decision reported as ***Abdul Rashid Khan v. President, Services Institute PAF Base Lahore***[39] wherein he contended it was held that:

(i) if the licence was for a particular term, it would be construed as a revocable license in view of section 60 read with section 62 of the Easement Act, 1882;

(ii) if an agreement provides that a licence is revocable, then section Sub-Section (b) of Section 60 of the Easement Act, 1882 would only be applicable.

He maintained that the very fact that admittedly the Licence Agreement was expressly for a term of thirty three years confirmed that it was revocable and hence no injunction could be granted to prevent the revocation of the said licence. He referred the Court to a decision reported as ***M.A. Naser v. Chairman, Pakistan Eastern Railway*** [40] wherein it has been held as follows:

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[39] 1999 MLD 1870

[40] PLD 1966 Dacca 69; the decision was upheld by the Supreme Court of Pakistan in the decision reported as ***M.A. Naser v. Chairman, Pakistan Easter Railway*** PLD 1965 SC 83

> " ... *Where a licence is prima facie irrevocable either because it is coupled with a grant or interest or because the licensee had erected works of a permanent nature, there is nothing to prevent the parties from agreeing expressly or by necessary implication that the licence nevertheless shall be revocable.*
>
> *There was, on the same reasoning nothing to prevent the parties from agreeing expressly or impliedly that a licence which was prima facie revocable being not within either of the categories of irrevocable licence should nevertheless be irrevocable.*
>
> *Where a licence is revocable, the licensee is entitled to reasonable notice. If, however, the licence is revoked without such notice, the remedy was by way of damages and not by way of injunction.*
>
> *Where, however, the licence was irrevocable and its enjoyment was obstructed by the licensor, the remedy of the licensee was either by way of injunction or in damages."*

He submitted that as per the above-mentioned judgment of the High Court of Dacca even where a licensor may have carried out construction work of a permanent nature, the parties could agree for the license to be revocable. He contended that in the present case, through the License Agreement, the parties have agreed that the license is revocable and which was inferable from the following:

(i) in view of clause 1.1, which says that the duration of the license is 33 years;

(ii) in view of clause 4.1, which provides a consequence of expiry of the license i.e. that upon the expiry, the super structure constructed shall vest in the licensor;

(iii) in view of clause 7.4, which says that the licensor shall not terminate the Agreement provided the licensee discharges all its obligations under the contract, including regular and timely payment of the license fee and service charges;

(iv) in view of clause 11.2, which provides for the licensor's option to terminate;

(v) in view of clause 11.3, which provides for compensation to the licensee of the value of the super structure at market value, in case the licensor terminates the contract prior to the expiry of 33 years.

34. Regarding the Plaintiff claiming rights in the alternative as a licensee having constructed on the Said Property and therefore entitled to the benefit of Sub-Section (b) of Section 60 of the Easements Act, 1882 reference was made by Dr. Farogh Naseem to Clause 4.1 of the License Agreement and which envisages that upon the expiry of the term of the Licensee Agreement, the building constructed

by the licensee was to be transferred to and would vest in the licensor. On the basis that the property would revert to the Defendant No. 2 it was contended that this would amount to an acceptance on the part of the Plaintiff that it had "agreed" to opt out of its rights as recognised by Sub-Section (b) of Section 60 of the Easement Act, 1882 in terms of the judgement in ***M.A. Naser vs. Chairman, Pakistan Eastern Railway***.[41] While also referring to the decision reported as ***Messrs Green Fuel vs. Shell Pakistan Limited*** [42] he contended that while in the case an injunction was granted on the basis of there being a finding of construction of a permanent nature have been raised, he maintained that in that matter there was no allegation that the license conditions were not breached and which would imply that if the license conditions are breached then the contract can be terminated by the licensor. Thus, following the decision reported as ***M.A. Naser v. Chairman, Pakistan Easter Railway*** [43] no injunction could be granted to prevent the termination of a revocable license and even where the revocation was improper the remedy available to the Plaintiff would be to claim damages.

(b) The Breach of the Terms of the License Agreement and the Termination of the License Agreement

35. Regarding the contentions regarding the manner in which the Defendant No. 2 could affect the termination of the License Agreement, Dr. Farogh Naseem referred to Clause 7.4 of the License Agreement and which he submitted obliged the Licensor not to terminate the Licence Agreement on the condition that the Licensee discharged all its obligations, including the regular and timely payments of the licence fee and services charges and contended that the delay of such payments would therefore constitute a ground to terminate the License Agreement. It was therefore submitted that the contention of the Plaintiff that the Defendant No. 2 could not terminate the License Agreement outside of the eventualities specified in Clause 11.2 of the License Agreement was not correct. Interpreting Clause 11.2.2 of the License Agreement, Dr. Farogh Naseem contended that the clause should be interpreted as having two parts:

(i) In the first part the clause could be invoked by the Plaintiff in case of a material breach;

(ii) the second part of the clause was with regard to the procedure of revocation or termination and which mandated that arbitration

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[41] PLD 1966 Dacca 69; the decision was upheld by the Supreme Court of Pakistan in the decision reported as ***M.A. Naser v. Chairman, Pakistan Easter Railway*** PLD 1965 SC 83

[42] 2015 CLC 1602

[43] PLD 1966 Dacca 69; the decision was upheld by the Supreme Court of Pakistan in the decision reported as ***M.A. Naser v. Chairman, Pakistan Easter Railway*** PLD 1965 SC 83

proceedings should be invoked in the event that material breach was disputed.

He contended that the argument of the Plaintiff, that the contract could not be terminated until such procedure was followed was premised on an absurd consequence that no matter how material or serious the breach would be, the Defendant No. 2 would not be able to revoke or terminate the contract till the efflux of a period of thirty three years and which interpretation should be avoided.

36. Aside from the interpretation of Clause 11.2.2 of the License Agreement, the additional argument of the Plaintiff, that unless and until the procedure provided in clause 11.2.2 was adopted by parties, the answering Defendant could not terminate or revoke the License Agreement was incorrect. Relying on a judgment of a learned single judge of this Court reported as ***Feroz Gaba v. Fishermen's Cooperation Society Limited***[44] and others judgements of courts in the United Kingdom reported as ***Williams v. Leeds Football Club;***[45] ***Vinergy Int'l v. Richmond***[46] and in India reported as ***Navayuga Machilipatnam Port v. State of Andrha Pardesh***[47] he advanced the proposition that where one party has breached its obligations under a contract, then the other party has the right to terminate the contract and there is no need to adhere to the provisions of the contract in order to terminate the same.

37. Regarding the breaches in terms of the construction to be carried out on the Said Property, he contended that the Plaintiffs contention, premised on Clauses 2.1, 2.3 and 2.5 of the License Agreement, that it was under no obligation to construct the entire school premises, but rather that it could undertake construction as per its "requirement and convenience" was incorrect. It was argued by Dr. Farogh Naseem that what was agreed as between the Plaintiff and the Defendant No. 2 was that the Plaintiff would, within 24 months of the commencement of the License Agreement, complete the construction and establishment of the entire school premises and would start operations in the same. Referring to photographs, images from the google map application and construction plans that have been approved by the authorities, as appended to CMA 15016 of 2023, he contended that the entire school was a composite building, with blocks attached and connected to each other and the space in which was to be used indiscriminately for the entire school. As completion of certain facilities had not commenced it could not be stated that the construction was complete as the school, as an institution, could not be constructed or run in piece meal. Regarding

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[44] 2015 CLC 493
[45] [2015] EWHC 376 (QB);
[46] [2016] EWHC 525 (Comm)
[47] 2023 (2) ALD 866

the interpretation cast by Mr. Salahuddin Ahmed on the expression "as per its requirements and convenience" in clause 2.3 of the License Agreement, Dr. Farogh Naseem maintained that this only meant that ***during the period of construction of the entire school***, the plaintiff could exercise its own discretion and convenience to construct in the order and manner as it may find expedient for itself but it was at all times still obligated to complete the construction within a period of 24 months. As to the existence of a material breach the Defendant No. 2 had carried out its own assessment of the work and had concluded that to date only 23.69% of the work has been completed and which would amount to more than a material breach in terms of clauses 7.4 and 11.2.1 of the License Agreement.

38. Dr. Farogh Naseem also referred to Clause 11.3 of the License Agreement and with reference to which he contended that if the License Agreement was terminated by the licensor in terms of Clause 11.2, then the licensor would be obligated to pay to the licensee the value of the super structure at the market value and who would also be liable to refund the advance licence fee and security deposit less any outstanding license fee due to the licensor. As such, there being a mechanism provided for obtaining "adequate compensation" under the License Agreement, the remedy of an injunction was therefore not available to the Plaintiff.

39. Regarding the contention of the Plaintiff that the Defendant No. 2 by its letters dated 9 December 2020 having accepted the delayed start of the construction had impliedly agreed to the delayed completion, relying on the decision reported as ***Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board***[48] he said that the Court would not readily imply a term where a contract detailed obligations as between parties, it being assumed that such a term would not be so obvious that the court readily imply it into the agreement. As the completion date had not been extended the construction was liable to be completed by April 2022 and hence the contract was not terminated after 37 days after breach but rather was terminated one year after the date for completion. In the alternative it was contended that even if a term was found to be implied, a material breach had occurred by March 2023 as the Plaintiff had completed only 23.69% of the construction that it was obliged to complete under the License Agreement.

40. Referring to Clause 3.1 of the License Agreement it was contended that while the Plaintiff was obliged to pay an advance license fee to the Defendant No. 2 amounting to Rs. 25,000,000 (Rupees Twenty Five Million) within 2 years of the

[48] [1973] 2 All ER 260

signing of the License Agreement i.e., by or before 20 April 2022 it had failed to adhere to its obligation and had defaulted on its payment. It was considered that the Plaintiff's contention that as the final date of completion of the contract had been extended, the time to deposit Rs. 25,000,000 (Rupees Twenty Five Million) as advance license fee also stood extended, was incorrect. He contended that the Defendant No. 2 in its letters dated 5 September 2022 and 4 May 2022 had been objecting to this default, the Plaintiff on being served with a termination notice on 6 April 2023, attempted to remedy this defect by depositing a sum Rs. 25,000,000 (Rupees Twenty Five Million) on 18 April 2023 into the account of the Defendant No. 2 and which was returned by the Defendant No. 2 on 2 August 2023. It was therefore maintained that it was not open to the Plaintiff to remedy this breach in the manner that it has chosen and which material breach having occurred was not capable of being cured by a post facto compliance.

41. Regarding the contradictions as between the letter dated 6 April 2023 and the letter dated 4 May 2023 Dr. Farogh Naseem attributed such a contradiction to bad grammar and maintained that a contract once cancelled or brought to an end, could not be revived. Reliance in this regard was placed on the decision of the Supreme Court of India reported as ***Nandkishore Lalbhai Mehta vs New Era Fabrics P.Ltd.& Ors***[49] and which he contended could only be "restored" by a fresh agreement be entered into between the parties and which was not the case over here. In addition, regarding any alleged waiver of the terms of the License Agreement Dr. Farogh Naseem referred to Clause 16.1 of the License Agreement and maintained that the waiver of any right or remedy under this Agreement would only be effective if it was in writing and communicated in the manner prescribed in the clause and unless done in such a manner would not under clause 16.2 of the License Agreement be valid unless it was in writing and registered when such registration was required. This he contends should be the basis of determining the timeline mentioned in the License Agreement with regard to the completion of the contract by April 2022 and which could not have been altered and no implication could be inferred in this regard and which would also confirm that time was the essence of the License Agreement. Concluding on this issue he referred to sub-paragraph (xvi) of paragraph 4 of the Counter Affidavit filed to CMA No. 8366 of 2023 and stated that the averments made therein should be construed as a clear termination of the License agreement and which can be sustained by this Court in accordance with the decisions of the Supreme Court of Pakistan reported as ***Mst. Samina Riffat vs. Rohail Asghar***[50] and ***Muhammad Jamil Versus Muhammad Arif***[51] in which it was held that pleadings and affidavits could be construed as valid notices.

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[49] AIR 2015 SC 3796
[50] 2021 SCMR 7
[51] 2021 SCMR 1108

(c) Breach of the provisions of the Sindh Private Educational Institution (Regulation and Control) Ordinance 2001

42. Dr. Farogh Naseem also contended that the injunction applications were premature as the Plaintiff has failed to obtained the mandatory permission required under the provisions of the Sindh Private Educational Institution (Regulation and Control) Ordinance 2001 and which in terms of Sub-Section (3) of Section 4 mandates that every campus of a school is required to obtain a separate registration prior to commencing operations and which has not been applied for by the Plaintiff and which further indicated its intention not to commence operations within the time frame specified. In addition, reference was also made to proviso number (ii-a) of Sub-Section (1) of Section 6 of of the Sindh Private Educational Institution (Regulation and Control) Ordinance 2001 to emphasize that every educational institutions was to provide and maintain infrastructure of the school including building, classrooms, laboratories, libraries, playgrounds, canteens and a safe drinking water and which were obviously not available at the Said Property.

(d) Unclean Hands – Preventing Injunctive Relief

43. Dr. Farogh Naseem also contended that the Plaintiff had not come to the court with clean hands and emphasized that:

(i) the Plaintiff had wrongly stated that the contract had not been terminated and therefore it obtained an ex-parte ad-interim order on 30 May 2023 and which amounted to misleading the Court;

(ii) the Plaintiff had not obtained any registration from the authorities under the provisions of the Sindh Private Educational Institution (Regulation and Control) Ordinance 2001 and had proceeded to carry out admissions in violation of law, which was a criminal offence under sections 11 and 12 of the of the Sindh Private Educational Institution (Regulation and Control) Ordinance 2001;

(iii) the Plaintiff had misled the Court by stating that the School was complete and was operational when only 23.69% of the total construction was complete;

(iv) the Plaintiff has attempted to run the school with ongoing construction, which was safety and security hazard for the children who would attend the school;

(v) the plaintiff had represented that the School was complete notwithstanding that the entire school with all its amenities were not functional and it would take many more years before the entire school in its proper perspective would attain completion in a befitting manner so as to be run.

Each of such mis averments would amount to conduct that would disentitle the Plaintiff to seek injunctive relief. He also maintained that as the Plaintiffs had failed to demonstrate that they had a prima facie case each of the applications maintained by them should be dismissed and in addition there was no question of the balance of convenience being found in their favour or for that matter, them suffering irreparable loss. He concluded by contending that the Defendant no. 2 had never violated any of the orders passed by the Court inasmuch as it had never restrained any personnel of the Plaintiff from entering the premises after the court orders and in fact it was the Plaintiff itself who did not have the funds to meet the construction expenses.

F. <u>The Order of the Court</u>

(i) <u>CMA No. 13963 of 2023 and CMA No. 15016 of 2023</u>

44. CMA No. 13963 of 2023 and CMA No. 15016 of 2023 have been maintained by the Plaintiff and the Defendant No. 2 respectively seeking to bring on record various documents and which they wished to refer to during the hearing of CMA No. 8366 of 2023, CMA No. 9966 of 2023 and CMA No. 10432 of 2023 and also to be considered in the decision of the subject Suit. No material objection has been maintained to prevent such documents from being taken on record. Hence each of these Applications are allowed without prejudice to the other parties right to contest their veracity in evidence.

(ii) CMA No. 8366 of 2023, CMA No. 9966 of 2023 and CMA No. 10432 of <u>2023</u>

45. Each of these Applications have been maintained by the Plaintiffs under Section 94 read with Order XXXIX Rule 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908. While each of these applications have to be considered as against the threshold of prima facie case, balance of convenience and irreparable loss as various arguments have been advanced by Mr. Salahuddin Ahmed and by Dr. Farogh Naseem on various issues each is dealt with in turn while determining the order to be passed on each of the obligations in terms of the arguments advanced.

(a) <u>Unclean hands</u>

46. Dr. Farogh Naseem has maintained the following objections stating that the Plaintiff is not entitled to be granted the relief sought in these applications as it has made various misstatements in its pleadings and in the course of arguments and which would in itself disentitle the Plaintiff to the relief sought in these applications. The misstatements are detailed as hereinunder:

(i) the Plaintiff had wrongly stated that the contract had not been terminated and on which basis it had obtained an ex-parte ad-interim order on 30 May 2023 and which amounted to misleading the Court;

(ii) the Plaintiff had not obtained any registration from the authorities under the provisions of the Sindh Private Educational Institution (Regulation and Control) Ordinance, 2001 and had proceeded to carry out admissions in violation of law, which was a criminal offence under sections 11 and 12 of the of the Sindh Private Educational Institution (Regulation and Control) Ordinance 2001;

(iii) the Plaintiff had misled the Court by stating that the school was complete and was operational when only 23.69% of the total construction was complete;

(iv) the Plaintiff has attempted to run the school with ongoing construction, which would be a safety and security hazard for the children attending the school;

(v) the Plaintiff had represented that the school was complete notwithstanding that the entire school with all its amenities were not functional and it would take many more years before the entire school in its proper perspective would attain completion in a befitting manner so as to be run.

47. I have considered each of the objections raised by Dr. Farogh Naseem. To my mind objections no (i), (iii) and (v) are mixed questions of fact and law and which are being interpreted by both the Plaintiff and the Defendant in the context of their own interpretation of the License Agreement. They are therefore not statements that, objectively on the basis of the facts available on record, can be considered to be factual misstatements to disentitle the Plaintiff from obtaining

interim relief. The remaining objections no. (ii) an (iv) both relate to the regulation of the Plaintiff under the provisions of the Sindh Private Educational Institution (Regulation and Control) Ordinance, 2001 at a time when the school would be operational and which, to my mind, would be within the domain of the regulator to regulate. The statutory prescriptions contained therein would not determine ***the legality of the License Agreement or the obligations contained therein and at best would render the Plaintiff subject to the consequences of such action as mentioned in that statute***. I do not therefore think that the omission to disclose such approvals will have any bearing on the determination of the obligations under the License Agreement. Each of the objections to the maintainability of the applications under order on the ground that the Plaintiff had not come to Court clean hands are for the foregoing reasons not sustainable.

(b) Lease or License or License Subject to the benefit of the provisions of Sub-Section (b) of Section 60 of the Easements Act, 1882

48. What is a license has been defined in Section 52 of the Easements Act, 1882 as hereinunder:

> *" … **52. "License" defined.***
>
> *Where one person **grants** to another, or to a definite number of other persons, **a right to do, or continue to do**, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement **or an interest in the property**, the right is called a license."*

As is apparent the basic feature of a license is that it is a "grant" made by the owner of a property to another permitting them to do an act on immovable property belonging to the owner of the property and which without such grant having been given would unlawful and amount to a trespass. By contrast a lease is defined in Section 105 of the Transfer of Property Act, 1882 reads as hereinunder:

> *" ... **105. Lease defined.***
>
> *A lease of immovable property is **a transfer of a right to enjoy such property**, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered, periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms*

A lease is therefore distinguished from a license by the act of there being "a transfer of a right to enjoy property" by the owner for a period of time against a consideration i.e., rent. The difference as between a lease and a license has been defined by the Supreme Court of Pakistan reported as ***Abdullah Bhai vs. Ahmed Din***[52] and in which it was held as hereinunder:

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[52] PLD 1964 SC 106

> " … *the line of demarcation between a lease and a license will sometimes be very thin though there is not doubt as to the principle applicable. A lease will appear from section 105 of the Transfer of Property Act is a transfer of an interest in immovable property. Ownership of physical property consists of a number of rights and the owner of such property when he creates a lease, transfers to the lessee a part of the rights of ownership, i.e., the right of enjoyment of the property for a period, for consideration. During the continuance of the lease the right of enjoyment of the property belongs to the tenant and not to the landlord. The right of ownership as well as the eights of which it is composed are rights in rem and not in personem and by the lease a right in rem is transferred to the lessee. On the other hand a "license" as will appear from its definition in section 52 of the Easements Act is merely a competence to do something which except for this permission would be unlawful. It does not confer any rights in physical property. There is in the case of a license only a personal agreement between the licensor and the licensee whereby the licensor agrees not to interfere with the doing of particular acts on property which is in his possession. No right in rem passes to the licensee. Examples of a license are a permission to cut gram from the land of another or to hold fares or run stalls on land in the possession of another. The right to cut grass from land belongs to the owner of land, being a part of the right of ownership. When the owner grants to another person a license to cut grass, it does not even mean that the right to cut grass in so far as it is a right in the land (a right in rem passes to the licensee. If a right in the land itself passed an interest in the land would pass it would not be a license. When the owner of land grants license t another to cut grass there is a simple personal contract that they owner will not interfere with the cutting of grass by the licensee. This contract may be specifically enforced, but it grants only a right in personem.*
>
> *As will appear from what is stated above the criterion from distinguishing between a lease and a license is simple i.e., whether any right in immovable property itself, a right in rem, has passed to the person concerned, but the termination of this question may be difficult in circumstances of a particular case. It will be a matter of inference from all the attendant circumstances. Where there is a document, of course the evidence will be considered with due regard to the provisions of section 91 and 92 of the Evidence Act."*

While deciding the Appeal in favour of the Appellant the Supreme Court of Pakistan also held that as the term of the lease was over a period of one year, no right in the property in the nature of a lease could be created until the instrument was registered under Section 17 of the Registration Act, 1908. As the instrument on the basis of which leasehold rights were claimed had not been registered, the appeal was allowed and the occupant evicted.

49. In terms of the decision of the Supreme Court of Pakistan what therefore first needs to be determined is as to whether the rights conferred on the Plaintiff are in the nature of a license or a lease. While Dr. Farogh Naseem and Mr. Salahuddin Ahmed are at a variance in respect of much that has happened as between the Plaintiff and the Defendant No. 2, one thing that they do agree on is that the right to an injunction would be determined on the nature of the rights that have been conferred on the Plaintiff by the Defendant No. 2 under the terms of the License Agreement.

50. I must admit that when I first looked at the transaction as a whole, I thought that the nature of the relationship as between the Plaintiff and the Defendant was more akin to a partnership in the sense that there was a contribution of capital from

both sides and a sharing in the profits generated from the enterprise. However, it seems that the terms of the preamble of the License Agreement confirmed otherwise. Dr. Farogh Naseem correctly referred the Court to Recital D of the Preamble of the License Agreement, which he contended defined the nature of the relationship as between the Plaintiff and the Defendant No. 2 and which reads as hereinunder:

> " … *D. The License has agreed to **grant the Demised Premises** on License fee and **Built Operate and Transfer basis** (limited to building only) **subject to the terms and conditions of this Agreement** and the Licensee has agreed to take on license fee and BOT basis the Demised Premises upon the terms and conditions herein stipulated."*

As correctly pointed out by Dr Farogh Naseem, the preamble refers to there being a grant in terms of Section 52 of the Easements Act, 1882 and not a transfer of a right in terms of Section 105 of the Transfer of Property Act, 1882. I am, however, careful when referring to the Preamble as it is not the operational part of the agreement.[53] That being said, clearly the preamble refers to the rights created as being in the nature of a grant with rights given to the Plaintiff to Build and Operate the buildings housing the school and which buildings would, after the term of the Agreement, be transferred to the Defendant No. 2. These rights were, however, declared as being "Subject to the terms and conditions" of the License Agreement and which terms and conditions would therefore obviously be more relevant in determining the true nature of the right of the Plaintiff in the Said Property and the obligations as between the Plaintiff and the Defendant No. 2.

51. Regarding such terms and conditions, Clause 1.1 of the License Agreement states that the Licensor *"demises unto the Licensee… license over the Demised Premises for a term of 33 years."* The expression demise has been defined to mean as hereinunder:[54]

> " … *Demise.*
>
> *1. The conveyance of an estate. usu for a term of years, a lease."*

The definition of the expression would certainly support the contentions advanced by Mr. Salahuddin Ahmed that a right in the Said Property was given by the Defendant No. 2 in favour of the Plaintiff and which clause would on a proper construction, to my mind, have to be read to override the "grant" as referred in Recital D of the preamble. This is further reinforced by the definition given to the expression "Demised Premises" in Recital A to the Preamble and which while used

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[53] See ***Mst. Rehmat Begum. Vs Mehfooz Ahmed*** PLD 2024 Supreme Court 1108; ***Director General, FIA vs Kamran Iqbal*** 2016 SCMR 447; ***Mst Gulshan Bibi vs. Muhammad Sadiq*** PLD 2016 Supreme Court 769; ***Mumtaz Hussain vs. Dr. Nasir Khan*** 2010 SCMR 1254; ***Ghulam Mustafa Insari vs. Government of the Punjab*** 2004 SCMR 1903;

[54] Garner, B.A (2019) **Blacks Law Dictionary**, 11th Edition

in the License Agreement to define the Said Property has also included in such a definition the rights in respect of "*all accesses, easements and other rights pertaining thereto."* On a literal reading of Clause 1.1 of the License Agreement the definition of that expression would therefore clearly indicate an intent to create a right in the Said Property in favour of the Plaintiff for a defined term of 33 years and which right would be coupled with the right of "access" to the Said Property and would give a very strong indication that the rights that were being created were in the nature of a lease.

52. But what was the demise for? The language of the clause states that the ***demise*** was for a *"**License** over the **Demised Premises** for a term of Thirty Three (33) years (the Term) **subject to the terms and conditions of this Agreement**."* When read literally this could only mean that what was transferred was rights in the nature of a license but which again have to be read "subject to the terms and conditions" of the License Agreement, to my mind, rendering the use of the expression License in that clause as inconclusive. When one is to read Clause 1.2 of the License Agreement, this confers on the Plaintiff the right to "vacant possession" of the Said Property and which Dr. Farogh Naseem states does not mean "exclusive possession" so as to determine the rights of the Plaintiff as a lessee. The term "vacant possession" in the context of a lease came to be interpreted by the Court of Appeal in the United Kingdom in the decision reported as ***NYK Logisitcs (UK) Limited vs. Ibrend Estates BV***[55] as hereinunder:

> " … *The concept of 'vacant possession' in the present context is not, I consider, complicated. It means what it does in every domestic and commercial sale in which there is an obligation to give 'vacant possession' on completion. It means that at the moment that 'vacant possession' is required to be given, **the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it**. It must also be empty of chattels, although the obligation in this respect is likely only to be breached if any chattels left in the property substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property."*

I am inclined to agree with the interpretation that was cast in this decision on the expression "vacant possession" in the context of the possession of an immovable property and which must mean the same as a person having both exclusive possession over the immovable property and having control over the piece and parcel of land to the exclusion of others. The logic behind this would seem to be that if one is being handed over vacant possession, the intention in such act would be to ensure that no other person can interfere with the persons possession of that immovable property and hence lead to the conclusion that they are in exclusive possession. In this regard I have also considered the reference that has been made by Dr. Farogh Naseem to clause 7.1 and 7.5 of the License Agreement and

[55] (2011) EWCA Civ 683

which clauses are really in the natures of representations that have been made by the Defendant No. 2 of its right of ownership and which would come into play where it was found that the Defendant No. 2 did not have the requisite authority to create rights over the Said Property and as a consequence of which it could be held in breach. I do not however think that they have any bearing whatsoever in respect of considering whether or not the right of exclusive possession has been given to the Plaintiff. Similarly, I cannot agree with Dr. Farogh Naseem interpretation of Clause 7.3 of the License Agreement. This is a clause representing that the Plaintiff would have *"uninterrupted quiet enjoyment" of the Said Property* and which has been relied on by Dr. Farogh Naseem to mean that as such rights are being guaranteed by the Defendant No. 2 it cannot mean that exclusive possession was being handed over to the Plaintiff. I see the clause as being a representation on the part of the Defendant No. 2 that they are "conferring on the Plaintiff" the right to exclusive possession of the Said Property and the language employed "*to do all acts and things which may be necessary or expedient for fulfilling the purposes for which the Demised Premises are being let out to the Licensee*" would be interpreted by me to include a restraint even on the part of the Defendant No. 2 to interfere with the "exclusive possession" of the Said Property by the Plaintiff.

53. The remaining contentions of Dr. Farogh Naseem in respect of the clauses of the License Agreement do merit consideration. He points out that Clause 8.4 of the License Agreement restricted the use by the Plaintiff of the Said Property to that of educational use. Similarly, Clause 8.6 of the License Agreement restricts the right of the Plaintiff to sub-let the Said Property without the written consent of the Licensor. Clause 8.9 of the License Agreement restrains the Plaintiff from using their rights in the Said Property or in the buildings as collateral to secure financing. Finally, clause 8.10 authorises the Defendant No. 2, on giving reasonable notice, the right to inspect the Said Property to verify the "state and condition" of the Said Property. Mr. Salahuddin Ahmed has not replied to the contentions raised in respect of Clause 8.4, 8.6 and 8.9 of the License Agreement and with regard to Clause 8.10 of the License Agreement has stressed on the word "permit" as used in that clause to state that the discretion vested with the Plaintiff as to when to allow the Defendant No. 2 onto the Said Property thereby indicating the right of the Plaintiff in the property as a lessee. I have considered the contentions of each of the counsel. Clause 8.4 of the License Agreement does indeed restrict the usage of the Said Property to educational use. However, I do not think that such a restriction in the License Agreement would go so far as to disturb rights of the Plaintiff as a Lessee as it is often a covenant in a deed of lease as to the manner in which the lessee is to use the property and therefore I do not find such a term as being inconsistent with the terms of a lease. Similarly, Clause 8.10 is a term often found in a lease and as correctly stated by Mr. Salahuddin Ahmed, being exercised at the discretion of the Plaintiff would indicate the control

over the possession of the Said Property vesting in the Plaintiff. That being said I have no doubt that Clauses 8.6 and 8.9 of the License Agreement do however restrict the right of the Plaintiff as a lessee. The restraint in respect of creating a charge over the rights secured by the Plaintiff under the License Agreement and the prohibition to sub-let would indicate that a fetter over such rights would be of a nature that would be inconsistent with that of rights of a lessee. In the context of the License Agreement as between the Plaintiff and the Defendant No.2, I do not think that the intent was to restrain such rights and it rather seems that such clauses were inserted to ensure the financial capacity on the part of the Plaintiff to complete the construction of the buildings on the Said Property and so as to also ensure that the Plaintiff would not sub-let the said property and would therefore be personally liable on payments to be made to the Defendant No. 2 on under the License Agreement and not to per se restrict the rights of the Plaintiff as a licensee.

54. Having considered each of the clauses, I have come to the conclusion that the License Agreement although entitled as such, in fact and in law attempted to create rights the nature of a lease in favour of the Plaintiff. That being said, admittedly the License Agreement has not been registered and hence as per the decision of the Supreme Court of Pakistan in ***Abdullah Bhai vs. Ahmed Din***[56] applying Section 49 of the Registration Act, 1908 no rights can be created in favour of the Plaintiff until that instrument was registered as mandated under Section 17 of the Registration Act, 1908. The decision of the Supreme Court however was not on an interim injunction application and rather was against a decision on final decree in a second appeal. Additionally, in that case the tenant had not sought for the specific performance of a clause in an agreement to register a document from which it claimed rights as a leseee. It seems that being aware of this Mr. Salahuddin Ahmed has relied on Clause 7.6 of the License Agreement and has contended that the Defendant No. 2 had an obligation to cause the License Agreement to be registered and has sought relief in prayer clause B of the suit seeking specific performance of this clause. I have no doubt that Mr. Salahuddin Ahmed has considered the rule of the courts in the United Kingdom settled in ***Walsh v. Lonsdale***[57] and ***Maddison v. Alderson***[58] wherein rights secured under an agreement of lease were, on a suit for specific performance, given effect notwithstanding the fact that the agreement of lease was not registered or not attested in a statutorily prescribed manner. However, as I am sure he is also aware, the law in Pakistan is not the same as in the United Kingdom. Section 53 A of the Transfer of Property Act, 1882 was inserted into that statute in 1929 and which reads as hereinunder:

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[56] PLD 1964 SC 106
[57] [1882] 21 Ch D 9
[58] (1883) 8 App Cas 467

" … ***53-A. Part performance.***

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty; and the transferee has, in part performance of the contract, taken possession of the property or any part thereof or the transferee, being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract,

Then notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof"

When considering this section, it is to be remembered that this section can only be used as a "shield and not a sword"[59] and hence Mr. Salahuddin Ahmed has correctly not pleaded any contention on this basis. However when considering the application of the rule settled in ***Walsh v. Lonsdale***[60] and ***Maddison v. Alderson***[61] he may have been minded to consider the decision of the Privy Council reported as ***G.H.C. Ariff v. Jadunath Majumdar Bahadur***[62] and in which where a tenant on a monthly lease had not sought specific performance on an oral contract within the time mandated under Section 3 read with Article 112 of the First Schedule of the Limitation Act, 1908, while considering the application of the rule ***Walsh v. Lonsdale***[63] and ***Maddison v. Alderson***[64] in respect of Section 53A of the Transfer of Property Act, 1882 the Privy Council had opined as hereinunder:

" … *21. Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well be doubted; but that an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract, should, be applied by, analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible. Whether any such authority, exists will be considered later.*

22. Their Lordships find themselves in agreement with the High Court in the view that Walsh v. Lonsdale [1883] 21 Ch. D. 9 has no application to this case, ***owing to the fact that the respondent's right to enforce the verbal contract had been barred long before the commencement of the present suit. The respondent was not in a position to obtain specific performance of the agreement for a lease from the same Court and at the same time as the relief claimed in this action. Had he been so entitled, the position would be very different, for then the respondent, could claim to have executed in***

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[59] See ***Amirzada Khan vs. Ahmad Noor*** PLD 2003 Supreme Court 410; ***Muhammad Yousaf vs. Munawar Hussain*** 2000 SCMR 204

[60] [1882] 21 Ch D 9

[61] (1883) 8 App Cas 467

[62] AIR 1931 PC 79

[63] [1882] 21 Ch D 9

[64] (1883) 8 App Cas 467

> ***his favour by the appellant an instrument in writing which he could duly have registered, the appellant's ejectment action being stayed in the meantime.*** *In these circumstances the respondent would obtain complete protection, but consistently with and not in violation of the provisions of the Indian statute."*

I am inclined to agree. While the Courts in Pakistan would not be able to enforce what has come to be known as an "equitable lease" as in the United Kingdom, the Courts can at all times enforce specific performance of an agreement seeking registration of a lease under the Specific Relief Act, 1877 and during the determination of such a *lis* a litigant would be entitled to seek an injunction to prevent their ejectment. It would therefore seem that the Plaintiff is well within his right to maintain the suit seeking registration of the License Agreement and to maintain these applications to prevent his ejectment. It is noted that the Supreme Court of Pakistan in ***Abdullah Bhai vs. Ahmed Din***[65] when confronted with the similar situation, on account of there not being a registered document in favour of the tenant, granted a decree for ejectment stating that the tenant having failed to register a compromise agreement, had no right in the immovable property and could only be treated as a licensee and hence was liable to being evicted. It is noted that the tenant in that matter had not secured any right under the compromise agreement to have it registered and which makes the decision in that case distinguishable on the facts.

55. I am also of the opinion that even if the Plaintiff would not have been able to secure its rights as a lessee, it would have in its status as a licensee been able to secure itself as against revocation of the license under Sub-Section (b) of Section 60 of the Easements Act, 1882. That section which should be read along with Sections 61 and 62 of the Easements Act, 1882 reads as hereinunder:

> *"* … ***60. License when revocable.***
>
> *A license may be revoked by the grantor, unless–*
>
> *(a) it is coupled with a transfer of property and such transfer is in force:*
>
> *(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.*
>
> ***61. Revocation express or implied.*** *The revocation of a license may be express or implied.*
>
> *Illustrations*
> *(a) A, the owner of a field, grants a license to B to use a path across it. A, with intent to revoke the license, locks a gate across the path. The license is revoked.*
> *(b) A, the owner of a field, grants a license to B to stack hay on the field. A lets or sells the field to C. The license is revoked.*
>
> ***62. License when deemed revoked.***
>
> *A license is deemed to be revoked–*

[65] PLD 1964 SC 106

> *(a) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license:*
>
> *(b) when the licensee releases it, expressly or impliedly, to the grantor or his representative:*
>
> *(c) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled:*
>
> *(d) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right:*
>
> *(e) where the licensee becomes entitled to the absolute ownership of the property affected by the license:*
>
> *(f) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable:*
>
> *(g) where the license is granted to the licensee as holding a particular office, employment or character, and such of office employment or character ceases to exists:*
>
> *(h) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee:*
>
> *(i) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist"*

The law in this regard, as far as I am concerned, is quite well settled. A license being a grant does not transfer any right or interest in an immovable property in favour of the licensee and unless the licensee can show himself to come within the prescriptions of clauses (a) and (b) of Section 60 of the Easements Act, 1882 he cannot restrain the revocation of the license and hence his eviction from an immovable property.

56. Dr. Farogh Naseem has placed reliance on a decision of the Lahore High Court, Lahore reported as ***Abdul Rashid Khan v. President, Services Institute PAF Base Lahore.***[66] In that matter a person had initially obtained a lease to run a petrol pump on an immovable property and after the expiry of the term of the lease, had entered into successive License Agreements and during the term of the license agreement had died. His legal heirs sought renewal of the license in their favour during the term of the license and which subsequently lapsed. When the offer for renewal was also rejected they maintained a claim under Sub-Section (b) of Section 60 of the Easements Act, 1882 contending that they could not be ejected as construction of a permanent nature had been raised on the immovable property. The learned single judge of the Lahore High Court, Lahore while dismissing the Petition held as hereinunder:

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[66] 1999 MLD 1870

> " … *14. From the principle of law with regard to the license, it appears that the grant of license may be (i) a grant of simplicitor of (ii) the grant may be coupled with a transfer or (iii) the grant may be coupled with an agreement.*
>
> *15. As regard the grants coupled with agreement are concerned, they may be of two types: (1) grant and agreement acting upon which a licensee may carry out work of a permanent nature and incur expenses thereon without providing any period of license and with no provisions for its revocation; (2) grants with some other agreements, such as, relating to time for the subsistence of the licence and its termination.*
>
> *16.* ***Section 60 read with section 62 leave no doubt that any licence with an agreement, say for term of a year, would always be revocable at the volition of the grantor****. This is further shown by various contingencies mentioned in section 62, thus, when the licence is for a limited period of time, then the licence is deemed to have been revoked when the period expired. in this case, there is period provided in the licence and, consequently. on the expiry of such time, it would be deemed to have been revoked irrespective of fact whether any superstructure has been raised by the licensee and section 60(b) would have no application."*

Respectfully, I cannot agree with the entire finding of the learned single judge of the Lahore High Court, Lahore. By the use of the expression "*A license may be revoked by the grantor, unless*" in Section 60 of the Easements Act 1882, I am clear that the licensor has an absolute right to the revoke the license, unless the provisions of Sub-Section (a) and (b) of Section 60 of the Easements Act, 1882 are attracted. By contrast Section 62 of the Easements Act, 1882 is a deeming clause and which are to be interpretated in the manner as has been clarified by the Supreme Court of Pakistan in the decision reported as ***Dr. Abdul Nabi, Professor Department of Chemistry, University of Balochistan, Sariab Road, Quetta vs. Executive* Officer, *Cantonment Board, Quetta***[67] as hereinunder:

> " … *According to* ***Black's Law Dictionary****, Ninth Edition, Pg. 477-478, the meaning of the word* ***"Deem"*** *is to treat (something) as if it were really something else, or it has qualities that it does not have. "'Deem' has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by 'deeming' something to be what it is not or negatively by 'deeming' something not to be what it is...". In order to interpret the statute, the Court is obligated to give effect to the deeming provisions while taking into consideration the object of such legal fiction and also dredge up the rationales of statutory fiction to its cogent finale vis-à-vis the intention of legislature so it should not cause any injustice. Legal fictions give rise to explicit objectives restricted to the purposes which should be construed contextually but should not be elongated further than the legislative wisdom for which it has been created."*

It would follow that the provisions of a deeming clause are a legal fiction made by Parliament and which has to be given effect to by the courts. In the context of Section 62 of the Easements Act, 1882 this would mean that in the situations indicated in Sub-Section (a) to (f) a license will be ***deemed*** to be revoked in the circumstances that are identified in that section. The interpretation that seems to be cast by the learned Single Judge of the Lahore High Court, Lahore is that the deeming clause in Section 62 of the Easements Act, 1882 when read with Section

[67] 2023 SCMR 1267

60 of the Easements Act, 1882 will override Section 60 of the Easements Act, 1882 and give an absolute right to revoke irrelevant of the restrictions contained in Sub-Section (a) and (b) of Section 60 of the Easements Act, 1882. While I can understand the logic in the argument to the extent of the provisions of Section 62 of the Easements Act, 1882 on account of the deeming clause overriding Section 60 of the Easements Act, 1882, but I do not see how the argument "*that any licence with an agreement, say for term of a year, would always be revocable at the volition of the grantor"* follows. Clause (c) of Section 62 of the Easements Act, 1882 clarifies that a license will be deemed to revoked *where it " has been granted for a limited period …. **and the period expires** …."* To my mind in this situation the license will be deemed to expire only after the expiration of the period and cannot therefore be considered to be a right that "*would always be revocable at the volition of the grantor.*" In the case in hand construction has admittedly occurred on the Said Property which is of a permanent character and which has been raised at the expense of the Plaintiff thereby calling into play the provisions of Sub-Section (b) of Section 60 of the Easements Act, 1882. The term of the License Agreement being for thirty three years, it would only naturally follow that the deemed revocation would occur after the expiry of that period and not before and which period has not lapsed. The Defendant No. 2 clearly could not invoke the termination clause on the basis of clause (c) of Section 62 of the Easements Act, 1882 and the decision of the learned Single Judge of this Court as ***Messrs Green Fuel vs. Shell Pakistan Limited***[68] would be applicable.

57. An alternate argument regarding the implied revocability of the License Agreement was pleaded by Dr. Farogh Naseem. Relying on the decision of the Dacca High Court reported as ***M.A. Naser v. Chairman, Pakistan Eastern Railway***[69] he maintained that irrelevant of the fact that the Plaintiff had constructed work of a permanent character it was open to the Licensor and the Licensee to either way "contract out" of that statutory right and which had occurred on account of Clause 1.1. read with Clause 4.1, Clause 7.4, Clause 11.2 and Clause 11.3 of the License Agreement. He read these clauses so as to read that the Defendant No. 2 had a right to terminate the License Agreement and after which termination the construction would vest in the Defendant No. 2 against compensation paid to the Plaintiff. While I am in agreement that the decision, as relied on by Dr. Farogh Naseem, clearly does state that it is open for the Licensor and Licensee to either way "contract out" the statutory right as conferred in Sub-Section (b) of Section 60 of the Easements Act, 1882 and which was approved by the Supreme Court of Pakistan in the decision reported ***M.A. Naser vs. Chairman Pakistan***

[68] 2015 CLC 1602

[69] PLD 1966 Dacca 69; the decision was upheld by the Supreme Court of Pakistan in the decision reported as ***M.A. Naser v. Chairman, Pakistan Easter Railway*** PLD 1965 SC 83

Eastern Railways and others[70] I do not agree that there is either a term of the License Agreement that explicitly reads as such or that such an intention can be found from the clauses of the License Agreement that have been relied on by Dr. Farogh Naseem. The interpretation that has been cast fails to consider the right to terminate as contained in the License Agreement is conditional as it has been stated in clause 11.2 of the License Agreement that *"The Licensor shall have the option to terminate this Agreement,* ***only if*** *…".* To my mind, on account of the words "only if," the right to revoke the License Agreement has in fact been curtailed by contract and which therefore can only be invoked by the Defendant No. 2 if the prescriptions of Clause 11.2.1 and 11.2.2 of the License Agreement are both met and which by not referring to either Clause 4.1 and Clause 7.4 of the License Agreement exclude the consideration of those clauses when interpreting the License Agreement. Prima facie a case would therefore have been made out by the Plaintiffs that having raised a construction of a permanent character on the said property, even if considered to be a license the License Agreement could not have been revoked during the term of the License Agreement in terms of Sub-section (b) of Section 60 read with Sub-section (c) of Section 62 of the Easements Act, 1892.

(c) The Breach of the Terms of the License Agreement and the Termination of the License Agreement

58. This contention, that the License Agreement was only terminable in accordance with the prescriptions of Clause 11.2 was raised by Mr. Salahuddin Ahmed. Dr. Farogh Naseem after interpreting both Clauses 11.2.1 and 11.2.2 of the License Agreement put forward a proposition that if the contract could not be terminated until such procedure was followed, was absurd as a consequence of such an interpretation would be that no matter how material or serious the breach would be, the Defendant No. 2 would not be able to revoke or terminate the contract till the efflux of a period of thirty-three years. I must admit that I do not see how that follows. The terms of Clause 11.2.1 of the License Agreement stipulate that the Defendant No. 2 would have a right to terminate the License Agreement where the Plaintiff defaults in payment of his license fee in terms of Clause 3.2 of the License Agreement for a period of sixty days and then on being given a notice of default fails to cure that breach within a further period of 30 days. In addition, as per clause 11.2.2 of the License Agreement, where there is a "material breach" then the Defendant No. 2 can issue a notice detailing the breach and whereafter the Plaintiff would have a period of three months to cure the breach. In the event that there was a dispute as to whether the breach was material or not, the matter would be referred to arbitration for determination. While I would be willing to accept that an absolute embargo on termination for a period of thirty three

[70] PLD 1965 Supreme Court 83

years, even in the event of material breach, would be onerous if not absurd; on a reading of these clauses, I do not see that such an absolute embargo exists. What has been agreed is a procedure to both resolve disputes and failing which a procedure to terminate in Clause 11.2.1 and a procedure to arbitrate in terms of Clause 11.2.2 both of which avenues are available to the Defendant No. 2 all of which is completely reasonable keeping in mind the extent of the investment being made by the Plaintiff in the said property.

59. The second question is as to whether there exists a right to terminate the Agreement outside of the prescriptions of Clause 11.2 of the License Agreement. Dr. Farogh Naseem in this regard relied on a judgment of a learned single judge of this Court reported as ***Feroz Gaba v. Fishermen's Cooperation Society Limited***[71] and others judgements of courts in the United Kingdom reported as ***Williams v. Leeds Football Club***;[72] ***Vinergy Int'l v. Richmond***[73] and in India reported as ***Navayuga Machilipatnam Port v. State of Andrha Pardesh***[74] to advance the proposition that where one party has breached its obligations under a contract, then the other party has an absolute right to terminate the contract and there is no need to adhere to the provisions of the contract in order to terminate the same. I must admit that I cannot accept this argument. Where the terms of the License Agreement specifically clarify the manner in which a contract is to terminated, the parties to that License Agreement are obligated to follow the prescription of those terms as that was what they had agreed and which formed the basis on which each of them undertook to perform obligations. The proposition was correctly stated by Lord Wilberforce in the decision reported as ***Photo Production Ltd. v. Securicor Transport Ltd***.[75] wherein he held that:

> *" … But I do not think that I should be conducing to the clarity of the law by adding to what was already too ample a discussion a further analysis which in turn would have to be interpreted. I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract,* ***is a matter of construction of the contract****."*

A court, therefore must, when considering a termination of an agreement on the basis of a breach of agreement, simply look at the terms of the agreement and enforce the terms of that agreement by simply interpreting the contract in terms of the intention of the parties. In the case in hand this would mean that the Court should only consider the terms of the License Agreement i.e., Clauses 11.2.1 and Clause 11.2.2 and if there is a material breach which is in dispute the matter must

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[71] 2015 CLC 493
[72] [2015] EWHC 376 (QB);
[73] [2016] EWHC 525 (Comm)
[74] 2023 (2) ALD 866
[75] [1980] 1 All ER 556

be sent for arbitration and which would be applicable to each of the breaches highlighted i.e., non-payment of security deposit of Rs. Twenty Five Million, non-payment of advance license fee of Rs. Twenty Five Million and non-completion of School Building within the stipulated two years as well as to whether there was a waiver of the terms or terms to be implied into the License Agreement as whether time was the essence of the agreement. The termination letter dated 6 April 2023 was therefore issued prima facie in breach of Clauses 11.2.1 and Clause 11.2.2 of the License Agreement and was therefore prima facie issued illegally.

(d) Breach of the provisions of the Sindh Private Educational Institution (Regulation and Control) Ordinance 2001

60. Dr. Farogh Naseem also highlighted various violations that had been made by the Plaintiff of the provisions of the Sindh Private Educational Institution (Regulation and Control) Ordinance, 2001. The proposition of law is more than well settled that the violation of statutory provisions, while holding the persons liable under the provisions of the statute, would not render the contract unenforceable under Section 23 of the Contact Act, 1872 as long as the obligations being performed are themselves not illegal in nature. Clearly, the construction of a school on a piece and parcel of land designated for a school and the provision of the service of education cannot be considered to be an illegal act so as to render the contract unenforceable. Reference in this regard can be placed on the decision of the Supreme Court of Pakistan reported as ***Mansoor Hussain and others vs. Wali Muhammad and others***[76] in which it was held as hereinunder:

> *" … Regarding these provisions as a whole it would appear that the Foreign Exchange Regulation Act does not forbid the making of a contract which may contemplate doing a thing which is contrary to the provisions of the Foreign Exchange Regulation Act, for, that thing can still be done by ex post factor permission of the State Bank of Pakistan. The scheme of the Foreign Exchange Regulation Act, therefore, is not to forbid the making of a contract but merely to insist that the contract shall be performed in a particular manner, namely, by taking the necessary permission of the competent authority. It cannot, therefore, in the circumstances, be said that a contract which violated any of the terms of the Foreign Exchange Regulation Act is ex facie or ab initio void or comes within the mischief of a contract prohibited by section 23 of the Contact Act. It is not well settled that the provisions of Section 23 of the Contract Act have to be construed strictly and the Courts should not invent new categories or new heads of public policy in order to invalidate a contract."*

I am therefore of the opinion that the breaches of the provisions of the Sindh Private Educational Institution (Regulation and Control) Ordinance 2001 would in no way impact the determination of obligations inter se the Plaintiff and the Defendant No. 2 under the terms of the License Agreement and hence have no relevance to the determination of the applications under order.

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61. To conclude, I am of the opinion that the Plaintiffs have made out a prima facie case that the termination letter that has been sent by the Defendant No. 2 has been issued illegally and in violation of the provisions of Clause 11.2.1 and Clause 11.2.2 of the License Agreement. On the issue of balance of convenience and irreparable loss, I am of the opinion that in terms of economic loss suffered by the Plaintiff on account of delays in construction, reputational loss and revenue from schools will be far greater than any loss that can be suffered by the Defendant No. 2 which is only financial and which the Plaintiff is prima facie willing to perform. I am therefore of the opinion that the Plaintiff has made out a case to be granted an injunction and hence each of the listed applications are liable to be allowed.

62. For the foregoing reasons CMA No. 13963 of 2023 and CMA No. 15016 of 2023 are allowed without prejudice to the other party's rights. In addition the Plaintiffs CMA No. 8366 of 2023, CMA No. 9966 of 2023 and CMA No. 10432 of 2023, each being applications under Section 94 read with Order XXXIX Rule 1 and 2 and Section 151 of the Code of Civil Procedure, 1908 maintained by the Plaintiffs, are allowed as prayed.

J UD G E
(Mohammad Abdur Rahman, J)

Karachi dated 7 February 2025

ANNOUNCED BY

J UD G E
(Muhammad Jaffer Raza, J)