COMMONWEALTH OF THE BAHAMAS **2019/COM/com/00087**

IN THE SUPREME COURT

Commercial Division

IN THE MATTER of Diamond Cruise International Co., Limited

AND IN THE MATTER of the International Business Companies Act 2000, Ch. 45

BETWEEN

TAIHU INTERNATIONAL CRUISE CO., LIMITED

Applicant

AND

DIAMOND CRUISE INTERNATIONAL CO., LIMITED

Respondent

Before: The Honourable Brian M. Moree, Chief Justice

Appearances: E. Terry North for the Applicant
Tara Archer Glasgow and Audley Hanna Jr. for the Respondent

7 October, 2020

RULING

Moree CJ

1. The Applicant, Taihu International Cruise Co. Limited ("***Taihu***"), applied for leave to discontinue this action after obtaining an *ex parte* interim injunction against the Respondent, Diamond Cruise International Co. Limited ("***DCIC***"). The Court granted leave subject to determining the conditions, if any, to be imposed on Taihu after hearing submissions from Counsel on all related matters. The issue arose in this way.

Procedural history

2. Taihu commenced this action by Originating Summons filed on 17 December, 2019 (the "***OS***") seeking (i) an order allowing Taihu to inspect the Register of Members of DCIC or alternatively directing DCIC to send a copy of such Register to Tainu; and (ii) in the event that Taihu is not recorded as the sole member of DCIC, an order to rectify the Register of Members of DCIC to reflect that position. At the same time, Taihu filed an *ex parte* Summons (the "***Ex parte Summons***") applying for an injunction to restrain DCIC from (i) making any changes to its registers of members or directors; and (ii) disposing of, dealing with or diminishing the value of its assets including but not limited to the net sale proceeds of the motor vessel named 'Glory Sea.' .

3. Both the OS and the Ex parte Summons were supported by the Affidavit of Mr. Richard J. W. Horton also filed on 17 December, 2019. The purpose of that Affidavit was to exhibit a copy of the First Affirmation of Mr. Yu Chunlin which appeared to have been affirmed before a Notary Public in Hong Kong on 13 December, 2019 (the "***First Yu Affirmation***"). However, that Affirmation had not been apostilled and counsel for Taihu, Mr. Terry North, undertook to file the Affirmation after receiving the duly apostilled original in a form suitable for filing in this action. The original Affirmation was subsequently filed on 6 January, 2020.

4. The Court heard the Ex parte Summons on 20 December, 2019. The circumstances in which a court should grant an *ex parte* interim injunction without notice to the other party are extremely limited but I was satisfied that, based on the First Yu Affirmation and the submissions of Mr. North, a short interim *ex parte* injunction should be granted. Accordingly, I issued an interim injunction for four days. The material part of the Order (the "***Ex parte Order***") is in the following terms:

> *"Until after [24 December, 2019] [DCIC] is restrained, whether by itself its servants, agents, directors, officers, employees or howsoever otherwise, from dealing with disposing of charging or diminishing the net proceeds derived from the sale of the Bahamian registered cruise ship named the "Glory Sea".*

5. The Ex parte Order also contained this cross undertaking ("***the Undertaking***") by Taihu:

> "*If the Court later finds that this Order has caused loss to the Respondent, and decides that the Respondent should be compensated for the loss, the Applicant will comply with any Order the Court may make*."

6. I further directed that DCIC be served with the filed court documents and be given notice of the *inter partes* hearing scheduled for 24 December, 2019. The directions were followed but there was no appearance by DCIC at the hearing on 24 December, 2019. Accordingly, I extended the Ex parte Order until 14 January, 2020 and fixed the *inter partes* hearing for that date with a direction that notice of the hearing be served on DCIC.

7. Counsel for DCIC, Mrs. Tara Archer Glasgow, attended the hearing on 14 January, 2020 and sought an adjournment to obtain full instructions. She stated that DCIC would be opposing any further extension of the Ex parte Order and put Taihu on notice that her client was suffering damages as a result of the injunction although no specific information was given at that time. She expressly reserved her position to claim damages pursuant to the undertaking given by Taihu if the interim

injunction was not extended. Mr. North did not oppose the application for an adjournment and I adjourned the hearing to 18 February, 2020. The Ex parte Order was extended to that date.

8. At the hearing on 18 February, 2020 Mr. North applied for a further adjournment on the basis that the Covid 19 restrictions and 'shutdown' in China had made it difficult for him to communicate with his client. Counsel for DCIC opposed the application and the further extension of the Ex parte Order and sought costs. After hearing submissions from counsel and bearing in mind the impact of the pandemic throughout the world, I granted a further adjournment to 24 February, extended the Ex parte Order to that date and ordered Taihu to pay to DCIC the costs of the hearing thrown away as a result of the adjournment.

9. The hearing on 24 February was overtaken by procedural issues and I set a final date for the *inter partes* hearing on 2 March, 2020 to determine whether the Ex parte Order should be continued as an interlocutory injunction until the disposition of the OS or further Order. The Ex parte Order was further extended to that date.

10. At the beginning of the hearing on 2 March, 2020 Mr. North informed the court that Taihu had filed a Summons seeking leave to discontinue the action (the "***Discontinuance Application***").

11. By the time of the hearing on 2 March, 2020, a number of additional Affidavits and Affirmations had been filed. Leaving aside those which simply exhibited copies of Affidavits or Affirmations of foreign affiants which had to be signed and apostilled before filing in the Bahamas, the main Affidavits and Affirmations relied on were:

    (i) the First Yu Affirmation,

    (ii) the Affidavit of Mr. Robert Li sworn on 31 January, 2020 and filed on 5 February, 2020 on behalf of DCIC (the "***First Li Affidavit***");

    (iii) the Affirmation of Mr. Yu Chunin exhibited to the Affidavit of Richard Horton filed 21 February, 2020 on behalf of Taihu (the "***Second Yu Affirmation***"). DCIC applied by Summons filed on 24 February, 2020 to

strike out this Affidavit but the Discontinuance Application made it unnecessary to proceed with the Summons;

(iv) the Affidavit of Mr. Yu Chunin exhibited to the Affidavit of Richard Horton filed 24 February, 2020 on behalf of Taihu (the "***Third Yu Affirmation***").

(v) the Affidavit of Mr. Robert Li sworn on 25 February, 2020 and filed on 29 May, 2020 on behalf of DCIC (the "***Second Li Affidavit***");

(vi) the Affidavit of Mr. Robert Li sworn on 9 March, 2020 and also filed on 29 May, 2020 on behalf of DCIC (the "***Third Li Affidavit***");

(vii) the Supplemental Affidavit of Ms. Nia Rolle filed on 10 March, 2020 on behalf of DCIC.

12. I heard the Discontinuance Application on 2 March, 2020 (as it had overtaken the *inter partes* hearing on the Ex parte Order) and 12 March, 2020. At the hearing, Counsel for DCIC submitted that the Ex parte Order should not have been granted as this action was frivolous and vexatious from its outset. Mrs. Archer Glasgow urged the Court to impose conditions on the discontinuance of the action which would require Taihu to immediately pay to DCIC (i) its costs on an indemnity basis certified for two counsel in an amount fixed by the Court and (ii) special damages and general damages assessed pursuant to the Undertaking. For his part, Mr. North contended that Taihu had acted reasonably in commencing the action and applying for the Ex parte Order. However, he conceded that, now that it wished to discontinue the action, Taihu must pay the costs of DCIC which, on his submission, should be fixed by the Court on the usual 'party and party basis'. Mr. North did not oppose the enforcement of the undertaking and invited the Court to conduct an inquiry into damages suffered by DCIC, if any, as a result of the Ex parte Order.

13. As I understood the submissions of Counsel, the contention was not over the discontinuance itself, but rather related to the terms and conditions to be imposed upon the discontinuance and the timing of the implementation of those terms and conditions.

14. In those circumstances, I granted leave for Taihu to discontinue this action subject to my decision, after a full hearing with written submissions, on (i) the conditions, if any, to be imposed; and (ii) whether the Undertaking would be enforced and, if so, the quantum of the damages to be paid by Taihu to DCIC after an inquiry. That hearing occurred on 12 March, 2020 and I reserved my decision at the conclusion of the hearing. I orally delivered my decision on the main issues arising in the Discontinuance Application on 2 June, 2020 and indicated at that time that I would address the other issues and set out my reasons for my decision in my written Ruling. I now do so.

Background

15. In view of the discontinuance of this action by Taihu, it is only necessary to provide a general overview of the factual matrix in this case and briefly summarize the transactions which are relevant to this Ruling. A number of those transactions were challenged as part of the overall dispute between the parties.

16. Taihu is a company registered in Hong Kong and, according to Mr. Yu, is a wholly owned subsidiary of Shanghai Jingzhi Diamond Cruise Management Co. Limited (formerly known as Taihu Cruise Management (Shanghai) Limited) ("***Jingzhi***"), which is incorporated in the People's Republic of China. He maintains that Taihu is, or should be, the sole registered shareholder of DCIC which is incorporated as an International Business Company under the International Business Companies Act, 2000 of The Bahamas.

17. The evidence of Mr. Yu is that in 2015, Taihu purchased the vessel 'Glory Sea' with *"…**the assistance of RMB100 million invested in Taihu by Shanghai He Ban Investment Centre,*** [another company established in the People's Republic of China] ("***He Ban***") ***in exchange for a promise by Jingzhi to transfer 51% of its shares in Taihu to He Ban**.*" The funding was made through several other corporate entities presumably owned or controlled by He Ban or in some other way affiliated to it. While Mr. Yu initially referred to those funds as "***invested***" in Taihu

by He Ban, he later refers to "***the loan of RMB100 million made by He Ban..***." The position is not clear but his evidence is that those funds were used to assist in the purchase of the vessel. According to Mr. Yu, the shares in Taihu were never transferred by Jingzhi to He Ban. He further states that Mr. Wei Tao and his wife, Ms. Liu Jian controlled Jingzhi at that time.

18. Mr. Yu further stated in his evidence that in or around February, 2017 it was discovered that Taihu *"….had secretly transferred its ownership of the Glory Sea to [DCIC] on the 24th May, 2016…."* He alleged that it was discovered by He Ban in January, 2019 that Mr. Wei and Ms. Liu were *"….secretly trying to sell the Glory Sea…"* but were unable to do so as a result of the intervention of a third party.

19. On 7 March, 2019 the 'Glory Sea' was arrested in Shanghai on the application of her crew. According to Mr. Yu, the arrest was due to the inability to pay debts incurred in connection with the vessel. The following month, He Ban obtained a Mareva injunction from the courts in Hong Kong against Mr. Wei, Ms. Liu and Taihu restraining those parties from, *inter alia,* diminishing the value of Taihu's shareholding in DCIC and from causing or authorizing DCIC to sell, charge or otherwise deal with the 'Glory Sea'. As of the date of the application for the Ex parte Order, the injunction was still in effect having been continued by subsequent orders of the Hong Kong court.

20. On 30 September, 2019, the shares of Jingzhi were sold under a Shanghai court order to Hefei Rentong Travel Management Co. Ltd. ("***Rentong***") which is represented by Mr. Yu. He maintained that Rentong, in its capacity as the new ultimate parent of Taihu, caused him to be appointed the sole director of Taihu on 11 October, 2019 replacing Ms. Liu.

21. According to the evidence of Mr. Yu, the Hong Kong lawyers of Taihu wrote to the registered agent of DCIC in Hong Kong requesting certain documents. The basis of the letter was that Mr. Yu was the sole director of Taihu which company was the sole shareholder of DCIC. The registered agent declined the request stating that it

had been rejected by their "*recorded Principal client."* Mr. Yu took this as a reference to Ms. Liu who, he claimed, had been removed as the director of Taihu by Rentong. Apparently, the corporate records of DCIC indicated at that time that Ms. Liu was the sole director of DCIC.

22. Subsequent to the arrest of the 'Glory Sea', the Shanghai Maritime Court ordered that the vessel be sold by auction. There were three attempts to sell the vessel by auction on 27 September, 2019, 24 October, 2019 and 21 November, 2019 respectively but they were all unsuccessful. There followed under Chinese law a 'sell off' proceeding which was fixed to commence on 16 December 2019 and last for up to 60 days. The evidence adduced on behalf of Taihu was that during that period, parties could submit bids and when the first bid was made there followed a 24 hour bidding process with the highest bidder winning the 'sell off.' The court was told that under this procedure, the process could take 61 days or be as short as 1 day.

23. The proceeds derived from the 'sell off' are applied to the outstanding debts and the surplus, if any, is paid to the owner of the vessel. Mr. Yu stated in his Affirmations that he expected that there would be a substantial surplus, in the region of US$4.26 million, and apprehended that, unless an injunction was granted, DCIC would facilitate the diversion of those funds to Mr. Wei and/or Ms. Liu.

24. The case put forward in the affidavits filed on behalf of DCIC is materially different to the Taihu case. The principal affiant for the Respondent was Mr. Robert Li who is the President of LZS Global Services Incorporated ("***LZS***"), a company incorporated in the State of California. According to the First Li Affidavit, on 8 March, 2019 LZS provided a line of credit to Taihu up to $30,000,000 for the business operations of DCIC which was secured by a pledge to LZS of Taihu's shares in DCIC. Mr. Li's evidence was that a Promissory Note had been executed together with a Cruise Ship Management Agreement ("***CSMA***") between LZS and Taihu on 8 March, 2019. He continued to state that on 15 April, 2019 an Amended

and Restated Promissory Note had been signed by LZS and Taihu, on similar terms as the initial Promissory Note but removing the requirement for LZS to obtain the consent of Taihu prior to selling or dealing with the collateral if there was a default by Taihu prior to the repayment of the loan. Mr. Li further stated in his Affidavit that on 6 May, 2019, LZS terminated the CSMA after Taihu failed to comply with its terms. He maintained that upon such termination, all Taihu's shares in DCIC became vested in LZS. On this basis, according to Mr. Li, DCIC became a wholly owned subsidiary of LZS.

25. Mr. Li pointed out in his Affidavit that the CSMA and the two Promissory Notes are, by their respective terms, subject to and governed by the laws of California.

26. There are accusations and recriminations in the affidavits/affirmations on both sides about what actually occurred and references to numerous other disputed transactions relating to the dealings, or alleged dealings, between Taihu, LZS and a number of other companies including Shanghai Guang Xi Information Technology Ltd and Shanghai Xin Hong Shipping. In view of the discontinuance of these proceedings it is not necessary to say any more about those matters other than to record that prior to giving my oral decision I had read all of the affidavits/affirmations and noted each party's position on the disputed areas of the evidence.

27. In summary, Mr. Yu's evidence is that, as of the date of his affirmations, he is the sole director of Taihu. He maintains that Rentong owns Taihu which in turn owns DCIC. Mr. Li, on the other hand, asserts in his affidavits that LZS is the current owner of DCIC. It seems to be acknowledged that title to the vessel 'Glory Sea' is in the name of DCIC and the contest in this case was principally over the net sale proceeds of that vessel after it is sold and all debts and financial obligations are paid.

28. In her submissions, Mrs. Archer Glasgow stated that Taihu had failed to make full and frank disclosure when applying for the Ex parte Order as it did not refer to any

of the transactions involving LZS and to the governing law provisions in the relevant documents between LZS and Taihu.

29. It was in the context of the above circumstances that I considered the terms and conditions to be imposed on the discontinuance of this action by Taihu after it obtained the Ex parte Order on 20 December, 2019 and the subsequent extensions until 2 March, 2020.

30. The issues before the Court were:

(i) The basis of the costs to be paid by Taihu to DCIC;
(ii) Should such costs be certified fit for two counsel?
(iii) The amount of such costs;
(iv) Should the Undertaking be enforced and an inquiry ordered to assess the amount of damages, if any, to be paid by Taihu to DCIC?
(v) If the answer to (iv) was in the affirmative, the amount of damages, if any, to be paid by Taihu to DCIC.

Costs / Indemnity or Party and Party?

31. Counsel for DCIC submitted that Taihu should pay DCIC's costs in this action on a full indemnity basis. Taihu's counsel contended that such costs should be assessed on the usual party and party basis.

32. Costs are in the discretion of the court. Order 21 rule 3(1) of the Rules of the Supreme Court ("***RSC***") is the controlling provision with regard to the discontinuance of an action. It reads:

> *"3. (1) Except as provided by rule 2 [which does not apply in this case], a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just."*

33. Order 59 rule 3(2) of the RSC is also relevant. It provides:

> *"(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

34. The note at paragraph 21/2-5/12 in The Supreme Court Practice 1976 in England (referred to as the 1976 White Book) is also germane. It reads:

> *"Terms for Grant of Leave – The Court has a wide discretion as to the terms upon which it may grant leave to a plaintiff or defendant, as the case may be, to discontinue or withdraw the whole or part of the action or counterclaim. It may impose terms as to costs, as to the bringing of a subsequent action or otherwise as it thinks just."*

35. Bearing in mind (i) the circumstances of this case, (ii) the application by Taihu to discontinue this action, and (iii) the provisions of the RSC, Mr. North quite properly conceded that Taihu must pay the costs of DCIC. The issue was whether such costs would be paid on an indemnity basis or a party and party basis.

36. In ***Bowen-Jones v Bowen-Jones and others [1986] 3 All ER 163*** the English Court was considering two bases of taxation – the standard basis and the indemnity basis -under what was then the new Order 62 rule 12 of the English Rules of the Supreme Court which had come into force on 28 April, 1986.

37. The Rules of the Supreme Court of The Bahamas dealing with costs do not incorporate the changes made in April, 1986 to the English Order 62. Consequently, we continue to use the term 'party and party' as one of the bases for taxation and have not adopted the expression 'standard' in the context of the taxation regime in The Bahamas.

38. Justice Knox in ***Bowen-Jones*** reviewed the pre April, 1986 English Order 62 and referred to the judgment of Megarry V-C in ***EMI v Ian Cameron Wallace Ltd. [1982] 2 All ER 980*** where he stated:

> *"On a party and party taxation nothing will be included unless the taxing master reaches the conclusion that it satisfies the requirement of 'necessary or proper'…….On [the party and party] basis….the rules [do not] give the benefit of any doubt to the party in whose favour the order has been made. Nothing is included unless it satisfies the words of inclusion."*

39. Later in his judgment Knox J cited with approval the well-known statement of Brightman LJ in ***Bartlett v Barclays Bank Trust Co Ltd (No 2) [1980] CH 515*** when addressing the subject of costs:

> *"……the usual rule (subject to well recognized exceptions) in the case of fiduciary, contractual or tortious wrongdoing is that the defendant pays to the plaintiff only party and party costs.* ***It is not, I think, the policy of the courts in hostile litigation to give the successful party an indemnity against the expense to which he has been put and, therefore, to compensate him for the loss which he has inevitably suffered, save in very special cases.*** *Why this should be, I do not know, but the practice is well-established and I do not think that there is any sufficient reason to depart from that practice in the case before me."*
> [My emphasis.]

40. In the English case of ***Wailes v Stapleon Construction & Commercial Services Ltd [1997] 2 Lloyds' Rep.112,*** costs were awarded on an indemnity basis. At page 117 of the judgment Newman J said:

> *"In summary, the position appears to be that, where there are circumstances of a party behaving in litigation in a way which can be properly categorized as disgraceful, or deserving or moral condemnation, in such cases an order of indemnity costs may be appropriate".*

41. The Bahamian court had to address the issue of indemnity costs in ***Central Bank of Ecuador et Al v Ansbacher (Bahamas) Ltd et Al BS 2010 SC 83*****.** In giving his judgment Adderley J stated:

> *"On the authorities costs are assessed on an indemnity basis only if the behaviour of the party is egregious (see e.g. judgment of Sawyer, C.J., as she then was, in Levine v Callenders & Co. [1998] BHS JN 75); or comprise conduct which is unreasonable to such a high degree that it can be categorized as exceptional….."*

42. A useful summary of the principles relating to indemnity costs is set out in ***Van Oord v All Seas Ltd [2015] EWHC 3385.*** In his judgment in that case Coulson J referred to his summary of the applicable principles in his earlier decision in ***Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd [2013] 4 Costs LR 612*** when he stated***:***

> "*16…*
>
> *(a) Indemnity costs are appropriate only where the conduct of a paying party is unreasonable "to a high degree". 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight": see Simon Brown LJ (as he then was) in Kiam v MGN Ltd [2002] 1 WLR 2810.*
>
> *(b) The court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs: see Waller LJ in Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson [2002] EWCA (Civ) 879.*
>
> *(c) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. But the pursuit of a hopeless claim (or a claim which the party pursuing it should have realized was hopeless) may well lead to such an order: see, for example, Wates Construction Ltd v HGP Greentree Alchurch Evans Ltd [2006] BLR 45.*
>
> *(d) If a claimant casts its claim disproportionately wide, and requires the defendant to meet such a claim, there was no injustice in denying the claimant the benefit of an assessment on a proportionate basis given that, in such circumstances, the claimant had forfeited its rights to the benefit of the doubt on reasonableness: see Digicel (St Lucia) Ltd v Cable and Wireless PLC [2010] EWHC 888 (Ch)."*

43. The case of ***Bacon v Jones Communications Limited and another [2018] BHS J. No. 51*** in the Supreme Court of the Bahamas is instructive on the subject of indemnity costs. In that case, Justice Charles had to consider an application by the Plaintiff for an order that the Defendant pay his costs on an indemnity basis. After reviewing the authorities including ***Levine v Callenders & Co. etal [1998] BHS J. No. 75; Connaught Restaurants Ltd. v Indoor Leisure Ltd. [1992] C.I.L.L. 798;*** and ***Atlantic Bar & Grill Limited v Posthouse Hotels Ltd. [2000] C.P. Rep. 32***, the judge stated:

> *"18. A common thread running through these judicial authorities*

suggests that it is not possible to define the exact circumstances in which indemnity costs might be ordered. It therefore remains a matter for the judge exercising his discretion based on judicial principles. Typically, an award for costs on an indemnity basis can be made in exceptional cases where the conduct of a party can be considered egregious or where the conduct of a party can be properly categorized as disgraceful or deserving of moral condemnation."

44. Later at paragraph 32 of the judgment, Charles J distilled the principles to be gleaned from the authorities in this way:

> "*The general rule is, in most cases where the issue of costs arises, the Court will award costs on a party to party basis. The Court does so in the judicial exercise of its discretion and would only depart from this course when there are exceptional and egregious circumstances to do so. It is not possible to define the exact circumstance in which indemnity costs might be ordered. Overall, it remains a matter for the judge exercising his discretion based on judicial principles but, as a rule, an award for indemnity costs can be made in exceptional cases where the conduct of a party can be considered egregious or where the conduct of a party can be properly categorized as disgraceful or deserving of moral condemnation. Undoubtedly, each case will depend on its own peculiar facts and circumstances."*

45. I accept this statement as generally reflecting the proper approach to an order for indemnity costs in The Bahamas subject to two additional points. First, indemnity costs are also appropriate where conduct falling short of being disgraceful or deserving moral condemnation is nevertheless unreasonable "to a high degree". Secondly, there may be something in the conduct of the action, or the circumstances of the case in general which takes it out of the norm in a way which justifies an order for indemnity costs. This could include maintaining a claim or a defence that was known, or ought to have been known, to be unsustainable and doomed to fail.

46. Mrs. Archer Glasgow contended that the behavior of Taihu in this case justified an

order for indemnity costs. In this regard she submitted that (i) Mr. Yu should have known, at the latest when he read the First Li Affidavit, that the Order sought in the OS for the rectification of the share register was not sustainable as such relief is only available on a summary basis where there are no disputes of fact; (ii) counsel for Taihu failed to provide copies of the notes of the *ex parte* hearing; (iii) Taihu failed to make full and frank disclosure with regard to the interest of LZS in DCIC, the two Promissory Notes and the dealings between LZS and Taihu; (iv) this action was a 'fishing expedition' and not commenced in good faith as once Taihu obtained information from LZS it promptly applied for leave to discontinue the action; and (v) Taihu made no effort to obtain relevant information before commencing this action which, with reasonable due diligence, would have been ascertainable as evidenced in the Third Yu Affirmation.

47. The short summary of the evidence adduced on behalf of the parties which is set out above in paragraphs 16 – 27 clearly shows that this was a contentious case giving rise to factual disputes and contested legal submissions by counsel for the respective parties. Bearing in mind the early stage of this action when the Discontinuance Application was filed, the contentious matters between the parties had not been fully ventilated and there had been no judicial adjudication of those matters. Therefore, a wide range of factual disputes and legal issues in this case remained open and, it was my view, that it would not be appropriate, in the absence of the proper resolution of those matters, for the court to make summary findings or holdings against either party in respect of those matters when considering the issue of costs. In the absence of any cross examination or full discovery of documents, it was not possible to untangle the factual disputes and cross allegations against the parties and their representatives.

48. I considered Ms. Archer Glasgow's submission with regard to the unsustainability of the cause of action in this case based on section 30(1) of the International Business Companies Act, 2000 and the Privy Council judgment in ***Nilon Ltd and another v Royal Westminster Investments SA and others [2015] 3 All ER 372***. Certainly, if Taihu had intended to proceed with this action it would have had to

consider amending the OS and possibly an application to convert this to a Writ action bearing in mind the affidavit evidence filed on behalf of DCIC after the Ex parte Order was made on 20 December, 2019.

49. In ***Nilon***, the Privy Council was considering, *inter alia*, whether a claim for rectification of the share register of a company was maintainable when based on untried allegations and disputes of fact. Lord Collins referred to the many reported cases on rectification of the share register of a company dating back to cases under the 1856 and 1857 statutes on Joint Stock Companies and then stated:

> *"There are two points which emerge from the cases. The first is that from the earliest days of the legislation, the courts have made it clear that the summary nature of the jurisdiction makes it an unsuitable vehicle if there is a substantial factual question in dispute……**In such a case an issue may be directed to be tried…. or the application may be adjourned or stayed……but it may also be dismissed or struck out……."*** [My emphasis.]

50. In all the circumstances of this case, and particularly the open contentious issues between the parties which had not been ventilated, I was not prepared to conclude that the action was doomed to be struck out or that it was commenced in bad faith or was intended to be merely '*a fishing exercise'*. The state of the affidavit/affirmation evidence made it difficult to determine exactly what Mr. Yu knew about the LZS transactions (which are disputed by Taihu) when this action was commenced and until that was determined, the Court could not reasonably find that Mr. Yu had deliberately withheld information known to him when Taihu made the *ex parte* application. Also, it was unclear as to whether there was a failure to make full and frank disclosure by Taihu when making that application based on what Mr. Yu knew at that time. The filing of the affidavits by DCIC crystallized the contentious issues between the parties and gave rise to numerous material disputes as to what actually occurred in this case. In all these circumstances, I was not prepared to find that the conduct of Taihu in this case met the threshold required for an order to pay indemnity costs as summarized above. The failure of Taihu's counsel to provide the notes of the *ex parte* hearing to counsel for DCIC

did not meet that threshold, although it must be stated that counsel's notes of *ex parte* hearings should be provided to opposing counsel in the event of an *inter partes* hearing to discharge the initial order. Counsel will disregard this practice at their risk as the court may in the circumstances of a given case, in its discretion, regard the breach as a factor when making a party and party cost order, a costs order against counsel or, in exceptional circumstances, an order to pay costs on an indemnity basis.

51. After considering all of the above factors, I was of the view that the behaviour of Taihu had not been egregious or otherwise unreasonable to such a high degree that it could be categorized as exceptional in the sense of being out of the norm, disgraceful or deserving of moral condemnation. Accordingly, I made the order that Taihu would pay the costs of DCIC on a party and party basis.

Costs - fit for two Counsel? / Quantum

52. In seeking costs for two counsel, Ms. Archer Glasgow relied principally on the case of ***Nassau Cruise Ltd v Bahamas Hotel Catering and Allied Workers Union [2000] BHS J. No. 248.*** In that case Moore J ruled in favour of the defendant and thereby struck out the Statement of Claim, dismissed the action and ordered the plaintiff to pay the costs of the defendant to be taxed if not agreed. Counsel for the defendant applied for an order certifying costs fit for two counsel. The judge acceded to the application. In doing so Justice Moore stated:

> *" In Juby v London Fire and Civil Defence Authority and Saunders v Essex County Council, April 24, 1990 (unrep). Evans J. listed the most likely factors affecting the decision whether or not to instruct a leader. They include:*
>
> *(a) the nature of the case*
> *(b) its importance to the client*
> *(c) the amount of damages to be recovered*
> *(d) the general importance of the case*
> *(e) any particular requirements of the case, e.g. the need for legal advice, or for special expertise, e.g. examining or cross examining witnesses*
> *(f) other reasons why an experienced and senior advocate may be required.*

53. The learned judge continued at paragraph 88 to provide the following guidance:

> *"Reasonableness of the decision to instruct junior counsel in addition to a leader must be judged from the point of view of the lay client's interests, which are paramount. Particular reasons why a junior may be necessary for the further conduct of the case in the interest of the client include:*
>
> > *(a) To assist the court proceedings either by taking an active part or by keeping a full note of the evidence, editing transcripts etc;*
> > *(b) Dealing with the documents generally, particularly when the same junior counsel has taken part in discovery;*
> > *(c) To carry out legal or other research, e.g. on matters on which expert evidence is given;*
> > *(d) To assist leading counsel in negotiations with the other party, particularly, where, as in many accident cases, junior counsel has already advised the injured person and has become known to him. The lay client might well fail to understand why the junior who has dealt with his case up to trial should no longer be present when his claim is settled by negotiation or dealt with by judgment."*

54. In the ***Nassau Cruise*** case, the facts were significantly different to the instant case and the defendant was represented by Queen's Counsel and a junior. That was not the case here but the general principles enunciated in the ***Nassau Cruise*** were nonetheless helpful in considering whether I should certify the costs fit for two counsel in this case.

55. In the Jamaican case of ***Sharon Bennett and Charlene Thomas v Vivian Donaldson Claim No. HCV 01719 of 2008*** the Court was asked to make an order awarding costs to the Claimants on the basis of two counsel. The judge stated:

> *"[56] The Claimants submit that they are entitled to costs for two Counsel and they rely upon the decision of Evans J. sitting in the Commercial Court, of the English Queen's Bench Division, in* ***Juby v London Fire and Civil Defence Authority 24th April 1990, unreported****. This decision was considered with approval in* ***Seepersad****. In Juby, Evans J. stated that the question that the court should ask itself is not whether the work could have been done by one Counsel, but whether it was reasonable to instruct two Counsel."*

56. In ***Peter Seepersad v Theophilus Persad and Capital Insurance Limited [2004] UKPC 19; No. 86 of 2002*** the Privy Council set aside the order of the courts below

declining to certify costs fit for two counsel. In doing so the Board cited *Juby v London Fire and Civil Defence Authority (1990, unreported) per Evans J* and concluded that *"…the skill and knowledge demanded of counsel and the weight of responsibility resting upon them…*.[in the case]*"* were relevant factors in determining whether it was reasonable and proper to instruct two counsel.

57. I was mindful that this case was commenced in the midst of the Covid 19 pandemic at the end of last year. The Emergency Powers Orders made under the Regulations imposed certain restrictions on movement and limitations on working arrangements. This case involved multiple jurisdictions and in view of the Ex parte Order obtained by Taihu, it demanded urgent attention by counsel for DCIC. For the most part, the affidavits/affirmations were from persons outside of The Bahamas and the preparation of those documents involved logistical issues and procedural formalities which had to be addressed in very short time periods. Bering in mind the subject matter of this action, the short timeline in this case, the volume of documents, the related extant litigation in Hong Kong and Shanghai and the need to consult with lawyers in several other jurisdictions I concluded that it was reasonable for DCIC to engage two lawyers in the conduct of this case. For that reason, I certified the case fit for two counsel.

58. Both counsel invited the court to fix the amount of the costs in order to avoid the protracted procedure and consequential delay involved in carrying out a Taxation of the Costs. I acceded to that request. In this regard, I considered the Bill of Costs attached to the Affidavit of Nia G. Rolle filed on 10 March, 2020. In that Bill, DCIC claimed $99,855.00 in respect of fees and $1,525.44 for disbursements. I noted that the Bill referred to four lawyers in the firm of Higgs & Johnson who were involved in different streams of work throughout the period 6 January, 2020 to 12 March, 2020. Also, Value Added Tax ("***VAT***") is claimed in the Bill on the fees and disbursements at the standard rate of 12%. I indicated to counsel for DCIC that before allowing VAT on the fixed amount of the fees and disbursements, I would require submissions on whether such tax is payable at the standard rate of 12% in

the circumstances of this case having regard to the provisions of the Value Added Tax Act and the Regulations promulgated thereunder. Ms. Archer Glasgow stated that in order to avoid any further delay in this matter, she would not pursue the VAT claim.

59. After carefully considering the Bill of Costs and bearing in mind my decision that Taihu is to pay the costs of DCIC on the party and party basis, I fixed the amount of the fees at $62,400.00 and allowed the disbursements in the sum of $1,362.00. Therefore, I ordered that Taihu is to pay to DCIC costs and disbursements incurred by DCIC in connection with this action in the aggregate amount of $63,762.00.

The Undertaking / Inquiry – Assessment of Damages

60. As can be seen from the procedural history of this case set out in paragraphs 2 - 12 above, the final extension of the Ex parte Order expired on 2 March, 2020. By that time, Taihu had filed the Discontinuance Application and when the action was discontinued that wholly disposed of the issue of renewing the Order or issuing an interlocutory injunction in similar terms. In those circumstances, counsel for Taihu did not object to the enforcement of the Undertaking and an inquiry as to damages, if any, suffered by DCIC caused by the Ex parte Order. I had no hesitation in deciding to enforce the Undertaking and directing an assessment of damages on the basis of such an inquiry. Without objection from Counsel, I proceeded to conduct the inquiry on the basis of the evidence in the Third Li Affidavit. I also considered the memorandum prepared by counsel for DCIC providing particulars of the claim for labour costs in the USA and China ("***the Memorandum***") and heard full submissions from counsel on the assessment of the losses suffered by DCIC as a result of the Ex Parte Order.

61. DCIC claimed that it incurred the following losses as a consequence of the Ex parte Order:

    (i) legal fees in respect of lawyers in California - $8,633.33 ("***the California Legal Fees***");

(ii) legal fees in respect of lawyers in China - $44,669.00 ("***the China Legal Fees***");

(iii) labour costs in California - $22,999.45 ("***the California Labour Costs***");

(iv) labour costs in China - $8,400.00 ("***the China Labour Costs***");

(v) expenses incurred in engaging Ms. Lei Zhu in China - $15,000.00("***the Zhu Expenses***");

(vi) miscellaneous fees as detailed in paragraph 18 of the Third Li Affidavit - $1,707.69 ("***the Miscellaneous Fees***").

62. Additionally, DCIC claimed under the Undertaking:

(i) loss of profits by LZS - $8,000.00 - $10,000.00

(ii) unquantified damages for the heads set out in paragraphs 22 – 27 of the Third Li Affidavit ('***the Unquantified Damages***").

63. The judicial approach to an inquiry as to damages under an undertaking given when obtaining an injunction was considered by the English Court of Appeal in ***Abbey Forwarding Ltd (in liquidation) and another v Hone and others (no 3) [2014]EWCA Civ 711.*** For my purposes, the facts of the case can be briefly stated. Abbey Forwarding Ltd conducted a freight forwarding and warehousing business which included a bonded warehouse. The tax authorities in England made nine assessments against Abbey totaling 7,547,359 pounds sterling for unpaid duty in respect of goods allegedly sold in the United Kingdom. After issuing the assessments the tax authorities applied to the court for the appointment of a provisional liquidator of Abbey. The application was granted and then the provisional liquidator, acting for Abbey, immediately applied for worldwide freezing orders against the appellants who were said to have dishonestly or negligently breached their duties to Abbey in permitting it to become subject to the tax assessments. The freezing orders were granted with the usual undertaking by Abbey which was in almost the exact terms of the Undertaking by Taihu in this case. Additionally, and unusually, there was in the order an undertaking to the

court by the tax authorities to indemnify Abbey in respect of its undertaking in damages which was given in view of the fact that Abbey was alleged to be insolvent. The case eventually went to trial and the judge dismissed Abbey's action and discharged the freezing orders. The trial judge granted the defendants permission to proceed to an inquiry as to what, if any, damages had been caused by the freezing orders. The inquiry was conducted and it gave rise to the appeal involving a range of issues including the approach to the assessment of damages under an undertaking in a freezing order, or as it is still called in this jurisdiction, an injunction.

64. In delivering the judgment of the Court McCombe J helpfully reviewed the development of the law on undertakings in damages when obtaining interim or interlocutory injunctions. He briefly traced the evolution of the standard terms of such undertakings and continued:

> *"29. Not surprisingly, the judge in the present case took, as his starting point for the principles as to the recoverability of compensation under such undertakings, the final sentence of the dictum of Lord Diplock in* ***F Hoffmann-La Roche & Co AG v Secretary of State for Trade and industry*** *[1975] AC 295, 361, which (in rather fuller terms than quoted by the judge) was as follows:*
>
> *"The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made on the same basis as that on which damages for breach of contract would be*

assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction: see Smith v Day (1882) 21 Ch D 421, per Brett L J, at p 427."

65. The following paragraph is instructive where McCombe J recited with approval certain submissions by counsel and expressed his view in these terms:

> *"31. Of course, the injunction creates no contract and that gives rise to certain uncontroversial propositions. They are, in effect, stated in the first three and in the fifth of the propositions, presented by Mr. Coppel and Mr. Marshall, as follows. The undertaking is given to the court and not to the injuncted party. Non-performance of the undertaking is a contempt of court, not a breach of contract. The undertaking is, in effect the "price" which the applicant for the injunction pays in return for the grant of the injunction. It is designed to protect the injuncted party from loss arising from the injunction, which is caused by the order, and which the court decides ought to be paid by the party who obtained it.* ***The application of contractual principles is, therefore, "by analogy'" which one sees from the very case to which Lord Diplock referred, namely Smith v Day."*** *[My emphasis]*

66. After considering the effect of later cases on the dictum of Lord Diplock in ***F Hoffmann-La Roche & Co AG v Secretary of State for Trade and industry*** McCombe J concluded:

> *"63. In the result, therefore, and perhaps not surprisingly, I reach the conclusion that the law as to the recoverability of loss suffered by reason of a cross-undertaking is as stated by Lord Diplock in his dictum in the Hoffmann-La Roche case, but with this caveat. Logical and sensible adjustments may well be required, simply because the court is not awarding damages for breach of contract. It is compensating for loss for which the defendant "should be compensated" (to apply the words of the undertaking). Labels such as "common law damages" and "equitable compensation" are not, to my mind, useful. The court is compensating for loss caused by the injunction which was wrongly granted. It will usually do so applying the useful rules as to remoteness derived from the law of contract, but because there is in truth no contract there has to be room for exceptions.*
> *64. In my judgment, the law also meets the justice of the matter. A defendant wrongly injuncted should be compensated for losses that he should not have suffered, but a claimant should not be saddled with losses that no reasonable person would have foreseen at the time when the order was*

made, unless the claimant knew or ought to have known of other circumstances that was likely to give rise to the particular type of loss that occurred in the case at hand. A claimant may, however, find himself liable for losses which would not usually be foreseen in particular cases. One such case may be if a loss, not usually foreseeable, arises before a defendant has had any real opportunity to notify the claimant of the likely loss or sensibly to apply to the court for a variation."

67. In the case of ***Thomas James Love v The Honourable Johnstone William Thwaites and Roads Corporation S APCI 2012 0025*** the Court in Victoria had granted Mr. Love, the plaintiff, an interlocutory injunction to prevent the demolition or disturbance of a part of a property described in the Order. He provided the customary undertaking in damages. Ultimately, Mr. Love was unsuccessful at the trial and the injunction was discharged. Subsequently, the Court conducted an assessment of the damages incurred by the defendant as a result of the injunction and ordered that Mr. Love pay to the defendant the amount of $3,420,389.70 together with interest in the amount of $2,427,258.47. Mr. Love appealed the decision on the assessment. The Court of Appeal dismissed the appeal and speaking through Tate JA gave the following admonition:

> *"While there is no suggestion that the usual undertaking was here given lightly, the consequences that have flowed from the failure of Mr. Love to make out his case at trial have been significant.* ***In my view, these consequences provide a salutary lesson to practitioners and their clients to appreciate the conditions governing the grant of an interlocutory injunction. The usual undertaking carries serious risks; it would be wholly erroneous to view it as no more than a ritual or a formality."*** [My emphasis]

68. This judicial pronouncement is as applicable to practitioners in The Bahamas today as it was, and continues to be, to their counterparts in Victoria. It is a counsel of caution for all to ponder when seeking an injunction.

69. In applying the above principles to the specific claims made by DCIC in the assessment of damages caused by the Ex parte Order I had in mind that the court is compensating DCIC for its actual losses which are the natural consequences of

the grant of that Order which could have been foreseen from circumstances known to Taihu when it was made. On the basis of the ***Abbey Forwarding Ltd case***, the assessment is to be carried out by reference to *"….the law as to the recoverability of loss suffered by reason of a cross-undertaking….as stated by Lord Diplock in his dictum in the Hoffmann-La Roche case…..with….[l]ogical and sensible adjustments……because the court is not awarding damages for breach of contract. It is compensating for loss for which the defendant "should be compensated".* This will include principles of causation, mitigation and remoteness, although these principles should be applied with some flexibility to take account of the fact that the analogy with breach of contract is not exact. With regard to remoteness, in line with ***Abbey Forwarding Ltd***, DCIC was only required to show that Taihu should have reasonably foreseen loss of the type which it actually suffered and was the subject of its claim for compensation under the Undertaking and not the particular loss within that type. The onus of proof in respect of the damage claimed lied on DCIC as the party who was asserting that it sustained damage by reason of the making of the Ex parte Order. I also had regard to the specific language of the Undertaking (which relates only to DCIC) and the fact that LZS was not a party to the proceedings.

70. For convenience I set out again the material part of the Undertaking:

> *"If the Court later finds that this Order* ***has caused loss to the Respondent****, and decides* ***that the Respondent should be compensated*** *for the loss, the Applicant will comply with any Order the Court may make."* [My emphasis]

71. The compensation which is recoverable under the Undertaking is losses suffered by DCIC caused by the Ex parte Order which the Court finds should be paid by Taihu, not losses consequential to the commencement of the action itself. This point was made by Mason J in ***Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd (1981) 146 CLR*** when he said:

> *"The object of the undertaking is to protect a party, normally the defendant, in respect of such damage as he may sustain by reason of the grant of the interim injunction in the event that*

> *it emerges that the plaintiff is not entitled to relief. It is no part of the purpose of the undertaking to protect the defendant against loss or damage which he would have sustained otherwise, as for example, detriment which flows from the commencement of the litigation itself. That is loss or damage which the defendant must bear himself, as he does when no interim injunction is sought or granted. Consequently, it is for the party seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the injunction."*

California Legal Fees / China Legal Fees / Miscellaneous Fees

72. In considering the claims for the California Legal Fees and the China Legal Fees incurred in connection with the Ex parte Order, I was satisfied that they were reasonable, foreseeable and flowed directly from the making of that Order. The nexus between this action and China and. after the first Li Affidavit was filed, California is pellucid from the background set out above and it was entirely foreseeable and understandable that DCIC would have required legal advice in those jurisdictions. In paragraphs 12 and 13 of the Third Li Affidavit, it is said that the legal fees of $8,633.33 and $44,669.00 in California and China respectively were incurred by DCIC (referred to therein as the Respondent) **and/or** LZS. In this regard, I noted that the Representation Agreement and the Attorney Fee Agreement with the law firm in China, which are attached at Tabs 2 & 3 respectively to the Third Li Affidavit, are between DCIC and that law firm thereby evidencing, in China, that the client was DCIC. The evidence is not as definitive in California and the Billing Statement at Tab 1 of the Third Li Affidavit refers to LZS rather than DCIC. However, it will be recalled that Mr. Li's evidence is that LZS is the parent company of DCIC and therefore, notwithstanding the equivocal language of paragraphs 12 and 13 of the Affidavit, I accepted that the California Legal Fees and the China Legal Fees were losses incurred by DCIC (even though they may have been funded by LZS) as a result of the Ex parte Order. Accordingly, I ordered that Taihu must compensate DCIC for those losses under the Undertaking in the amounts of $8,633.33 and $44,669.00 respectively.

73. The Miscellaneous Fees included courier fees, Notary fees, Apostille fees, copies, gas and attorney supplies. In my view, these expenses were reasonable and flowed from the Ex parte Order. I had initial reservations about the claim for gas in the nominal amount of $175.00 but ultimately I allowed it as part of the full amount of the claim in the sum of $1,707.69.

California Labour Costs / China Labour Costs / Zhu Expenses

74. I did not accept the claims by DCIC for compensation in respect of the California Labour Costs in the amount of $22,999.45 or the China Labour Costs in the sum of $8,400.00. The evidence in support of those claims is set out in paragraphs 14 – 16 of the Third Li Affidavit and the Memorandum.

75. Copies of six cheques (all redacted to conceal the identity of the payee) issued by LZS are attached to the Third Li Affidavit at Tab 4 which, according to Mr. Li, are payments to three independent contractors who had to be hired in California to assist in the response to the Ex parte Order. According to Mr. Li, additional resources were required in California to deal with the necessary work to challenge the Ex parte Order within the tight time lines applicable to the action. The initial evidence in the Third Li Affidavit on the California Labour Costs claim was extremely sparse; there was no indication as to (i) whether the three workers were new hires or existing staff members, (ii) how many hours of work were covered by the claim, (iii) the basis of their compensation, or (iv) the scope of their work. At that time, there was clearly no basis to allow this claim. Subsequently, additional information was provided through the Memorandum. According to that document, the three contractors were hired in late December, 2019 until the end of February, 2020. Two of them were involved in communicating and coordinating the teams in China and the U.S.A. and translating documents. Between them they worked 119.88 hours. The scope of the work of the third contractor was described as dealing with administrative and legal issues including notary, apostille, courier and proof reading services. The claim was for 80 hours.

76. The claim for compensation in respect of the China Labour Costs is also supported by the Memorandum together with paragraph 16 of the Third Li Affidavit and the Bill of Service from Shanghai Guangxi Information Technology Company ("***SGIT***") attached thereto at Tab 5. That one page document is dated 6 March, 2020 and is between DCIC and SGIT. It provides for a flat charge of $8,400.00 and merely records that SGIT has (i) ……hired a Chinese law firm to assess all legal aspects surrounding the case….and all its lawsuits in China; and (ii) assisted "DIAMOND [i.e. DCIC] in all other related issues in China. No other material particulars are provided.

77. Additionally, DCIC sought compensation for the Zhu Expenses on the basis of the evidence in paragraph 17 of the Third Lia Affidavit together with the Letter of Authorization dated 15 July, 2019 and the Memorandum. On Mr. Li's evidence, Mrs. Zhu is the sole director of DCIC and she began working in China for DCIC and LZS in July, 2019. Mr. Li states in his affidavit that she assisted LZS in dealing with this action and "…billed to LZS the sum of $15,000.00." This was not supported by a copy of the invoice or any other documentation. The Letter of Authorization refers to the "CLIENT" without identifying whether that is a reference to DCIC or LZS.

78. The California Labour Costs, the China Labour Costs and the Zhu Expenses relate to four different persons and one service company. In addition to those resources, DCIC had lawyers in California and China dealing with this case. There was no evidence of the size of the staff of DCIC in California or China prior to the Ex parte Order and therefore the court was unable to assess the need for DCIC to engage four outside independent contractors (i.e. the three persons in California and SGIT in China) to assist in the response to the Ex parte Order.

79. As stated above, the Undertaking relates only to compensation to DCIC for losses caused by the Ex parte Order (not the action) which the Court determines should be paid by Taihu. From the limited information made available to the Court relating to these three claims, it seems that LZS paid the California Labour Costs and the

Zhu Expenses were billed to LZS. However, apart from that position, the only documentation produced in connection with the three contractors in California were the copies of the six redacted cheques at Tab 4 of the Third Li Affidavit. There was no evidence on the rates which were used to pay those persons. With regard to SGIT, the only document produced in support of that claim was the Bill of Service at Tab 5 of the Third Li Affidavit and, again, there is no information on rates, hours worked or how the flat fee of $8,400.00 was calculated. Also, it is clear from the Bill of Service that the scope of work and fee related to "all [DCIC's] lawsuits in China" and not just the Ex parte Order. There was even less documentation relating to the Zhu Expenses and no explanation on how the fee of $15,000.00 was calculated.

80. The Court did not have adequate documentation establishing those claims and there remained the unanswered questions set out above. I was of the view that those claims had not been proved and therefore did not allow the California Labour Costs, the China Labour Costs or the Zhu Expenses.

Loss of Profits

81. The claim for Loss of Profits in the sum of $8,000.00 - $10,000.00 was completely undocumented. There was no indication of the methodology used to arrive at that figure or any rationale for it. In paragraph 20 of the Third Li Affidavit it is candidly stated that it is *"…difficult to ascertain….the profits which have been lost "*by LZS. In that paragraph Mr. Li makes the point that this action demanded his sustained and time consuming involvement to protect the interest of DCIC to the detriment of his 'regular functions' for LZS which meant that *"…certain important business contracts/deals couldn't be attended or negotiated, resulting in loss of contracts in most cases."* However, no details or information was provided with regard to the 'contracts/deals' which were allegedly lost or the value of those potential transactions leaving the court with only the terse general statements in paragraph 20 of the aforementioned Affidavit. Even on the basis of a' liberal assessment'[1] as

[1] see *Les Laboratoires Servier v Apotex Inc* [2008] EWHC 2347 (Ch)

the Court defined it in ***Fiona Trust & Holding Corporation v Privalov & Others,*** DCIC had not met the threshold to prove its claim for damages for loss of profits. Quite apart from the fact that this does not even purport to be a loss by DCIC but only LZS, there was simply no basis to allow this claim. Accordingly, I denied this claim in the assessment.

Unquantified Damages

82. Similarly, I did not allow the claim for Unquantified Damages. The evidence on this claim is found in paragraphs 22 – 27 of the Third Li Affidavit. In paragraph 22 Mr. Li states that the Ex parte Order *"…has had a profound impact upon me personally and to LZS. It has necessitated a significant alteration in my life due to the attention which I have had to place on this action. It has also caused significant embarrassment and stress."* He then refers to the disruption of his family ski trip, the alteration in the holiday plans for LZS's staff and the *'…profound emotional toll on [him and] key members of [the] team'*. Mr. Li further states in the last sentence of paragraph 25 that *'[t]here have been reports of anxiety, insomnia, depression, health issues and, to some degree, family disarray."* This latter statement is unusual in that it refers to *'reports'* which are not sourced or verified and, at face value, does not speak to the veracity of those *'reports'*. This substantially compromised the probative value of that statement and I was not prepared to accept it as a basis to partially ground the claim for unquantified damages.

83. The scope of the Ex parte Order was narrow and related only to the net proceeds of the sale of the 'Glory Sea' when it was sold. It did not restrain the sale of that vessel, or pertain to any other assets of DCIS or impose any restrictions or restraints on any part of its business. Under the Ex parte Order, DCIC was left to deal with its affairs in all respects but for the use of funds which it did not have but expected at some future date to receive after the sale of the 'Glory Sea'. There was no evidence from DCIC as to when it expected to receive those funds.

84. In this regard, it is axiomatic that there was a world of difference between the freezing order in the ***Abbey Forwarding case*** (which was in place for approximately 19 months and had the effect of virtually closing down the business of the appellants) and the Ex parte Order in this case (which was in place for approximately two and a half months – 20 December, 2019 to 2 March, 2020 - and related only to the net surplus of the sale proceeds of the 'Glory Sea' which had not been received during the time when the order was in effect).

85. Mr. Li states in paragraph 20 of the First Li Affidavit that LZS had *"secured two potential purchasers for the vessel. LZS is not, however, able to proceed with a sale to either party due to the Injunction Order. Specifically, neither party is prepared to take any further steps with a sale while the Injunction Order remains in place."* As stated above, the Ex parte Order did not, by its terms, prevent or restrain the sale of the vessel although a prospective purchaser would have had to form his own view on whether he wished to pursue a possible transaction involving the vessel in view of the Ex parte Order and/or the commencement of the action. The difficulty for DCIC is that, apart from the statement in paragraph 20, there was no evidence with regard to the '*two potential purchasers*' or any potential transaction involving either of them. No documents (i.e. correspondence, emails, notes of discussions, term sheets, memorandums, notes, etc.) were produced in connection with this claim. There was no indication as to the state and stage of the discussions with the '*potential purchasers'* when the Ex parte Order was made or the level of interest expressed by those parties by that time. No information was given relating to the antecedents (even without revealing the identity) of the '*potential purchasers'* or why those parties were not '*prepared to take to take any further steps with a sale while the Injunction Order remains in place'* particularly as the Order did not restrain or otherwise prevent the sale of the vessel. The reference in paragraph 20 to not '[*taking*] *any* ***further*** *steps'* to proceed with the sale clearly suggests that certain steps had been taken prior to the Ex parte Order but no evidence was adduced as to what those steps were and what had actually occurred between DCIC and each of the '*two potential purchasers.*' All of this left

the Court in a position where it had virtually no evidence and no documentary support for this claim.

86. Additionally, Mr. Yu stated in his Affirmations that the vessel was subject to arrest in Shanghai and specifically to the 'sell off' process, but no reference was made to that process by Mr. Li with regard to the '*potential purchasers*'.

87. Bearing in mind all of the above matters, I did not accept the claim for Unliquidated Damages. I was mindful of the need to avoid being '*over eager'* in scrutinizing the evidence in connection with the assessment, as was said by the Court in ***Fiona Trust & Holding Corporation v Privalov & Others***, but the claim must nonetheless be proved. It was my view that the claim for Unliquidated Damages in this case had not been proved.

88. Apart from the above factors, there was another difficulty with the claim for Unliquidated Damages. Mr. Li is the President of LZS which, he says, is the owner of DCIC. Neither he nor LSZ is a party to the action or covered by the Undertaking. Therefore, quite apart from the issue of remoteness, the claims for compensation in respect of the family ski trip, the disruption on his holiday plans and the emotional impact of the Ex parte Order on Mr. Li were outside the scope of the Undertaking. I have already indicated my view on the unverified and unsourced '*reports*' mentioned in paragraph 25 of the Third Li Affidavit.

Conclusion

89. By way of summary:

(i) I granted leave to Taihu to discontinue this action subject to the payment of the amounts set out in sub paragraphs (iv), (vi), (vii) and (viii) below within five (5) working days of 8 September, 2020;

(ii) I directed that Taihu was to pay the costs of DCIC of this action on the party and party basis;

(iii) I certified the costs fit for two counsel;

(iv) I fixed the costs in the amount of $62,400.00 for legal fees along with the sum of $1,362.00 for disbursements;

(v) I directed that the Undertaking was to be enforced and conducted an inquiry to assess the damages thereunder;

(vi) I allowed the claim for the California Legal Fees in the amount of $8,633.33;

(vii) I allowed the claim for the China Legal Fees in the amount of $44,669.00;

(viii) I allowed the claim for the Miscellaneous Fees in the amount of $$1,707.69;

(ix) I did not allow the claims for the California Labour Costs, the China Labour Costs, the Zhu Expenses, Loss of Profits and the Unliquidated Damages.

90. In the result, under the Undertaking, Taihu was ordered to pay compensation to DCIC in the aggregate amount of $118,772.02 within five (5) working days of 8 September, 2020.

91. This case is another one in the line of authorities reminding litigants and counsel of the real and potentially substantial risks associated with a cross-undertaking in damages when obtaining, seeking to continue or considering reasonable variations to injunctive relief. The cases of ***Thomas James Love v The Honourable Johnstone William Thwaites and Roads Corporation S APCI 2012 0025*** and ***SCF Tankers Limited (formerly known as Fiona Trust & Holding Corporation) and Others v Yuri Privalov and Others [2017] EWCA Civ 1877*** are two compelling examples of these risks.

Brian M. Moree
Chief Justice