



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

FSD 23 of 2022 (DDJ)

**IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)
IN THE MATTER OF SEAHAWK CHINA DYNAMIC FUND**

Before: The Hon. Justice David Doyle

Appearances: Robert Levy KC for Hao Liang
Clare Stanley KC, Katie Pearson and Alexia Adda of Claritas Legal for
Lau Chun Shun
Alistair Abbott and Alan Quigley of Forbes Hare for Seahawk China
Dynamic Fund

Heard: 22 November 2023

**Draft Judgment
Circulated:** 27 November 2023

Judgment Delivered: 1 December 2023

HEADNOTE

Determination of issues as to whether an undertaking in damages to the Company, by an applicant who had obtained an ex parte on short notice order appointing joint provisional liquidators and in circumstances where such appointment had since been discharged and a winding up petition dismissed, should be “amended”, “extended”, “treated as given” or “implied” in favour of an individual who wished to claim damages against the applicant – whether inherent jurisdiction can be prayed in aid – directions in respect of an inquiry as to the Company’s damages and costs

231201 In the matter of Seahawk China Dynamic Fund – FSD 23 of 2022 (DDJ) - Judgment

JUDGMENT

Introduction

1. I heard submissions in respect of this matter on 22 November 2023 and reserved judgment which I now deliver.
2. By summons dated 3 February 2022 (the “JPL Summons”) Mr Lau Chun Shun (“Mr Lau”) applied for an order for the appointment of joint provisional liquidators (“JPLs”) over Seahawk China Dynamic Fund (the “Company”).
3. The JPL Summons came on for hearing on 10 February 2022 *ex parte* on short notice. I delivered an *ex tempore* judgment that day recording at paragraph 2 that “[a]t short notice Paul Smith appears on behalf of the Company and Hao Liang (“Mr Liang”).” At paragraph 6, I noted that the Company and Mr Liang “were provided on Monday, 7 February 2022 with short notice of this hearing which is taking place today, Thursday, 10 February 2022.”
4. By order made on 10 February 2022 (the “February 2022 Order”) I appointed JPLs and recorded:

“AND UPON Mr. Lau Chun Shun by his counsel undertaking for and on behalf of the Applicant [Mr Lau] to compensate for any loss or damage suffered by the Company as a result of this order if the Court considers it just in the event that the winding up petition is ultimately withdrawn or dismissed” (the “Undertaking”) (my underlining)

The February 2022 Order was amended on 23 March 2022 to delete the word “Company” where it first appeared in paragraph 9(b) and to insert the word “country”.
5. I should record that Mr Lau in his second affirmation affirmed on 9 February 2022 at paragraph 300 referred to the need to give an undertaking to cover any damage suffered by the Company and the remuneration and expenses of the provisional liquidators in the event that the winding up petition was ultimately withdrawn or dismissed. At paragraph 301 Mr Lau stated:

“I hereby confirm that I offer such an Undertaking to the Court to pay the remuneration and expenses of the JPLs and any damages suffered by the Company as a result of the appointment of the JPLs, should the Court so order.” (my underlining)

It can be seen that the undertaking as to damages offered by Mr Lau and accepted by the court was limited to any loss or damages “suffered by the Company” and it made no reference to Mr Liang, other shareholders or other third parties.

6. In respect of the winding up petition dated 3 February 2022 (filed on 7 February 2022) presented by Mr Lau as petitioner a consent order was made on 24 February 2022 and under paragraph 1 the Company was to be treated as “the subject matter of” the proceeding and “the proceedings shall be treated as *inter partes* proceeding between the Petitioner and [Mr Liang] as the holder of the management shares.”
7. The winding up petition was heard on 21-29 June and 29 July 2022 and dismissed by order made on 18 August 2022 for the reasons stated in my judgment delivered on 9 August 2022. The February 2022 Order was stated to be set aside and the appointment of the JPLs terminated and discharged on 18 August 2022 with immediate effect.
8. By notice of appeal dated 31 August 2022 Mr Lau appealed and by notice of withdrawal of appeal dated 16 January 2023 Mr Lau withdrew his appeal.

The Summons and the Amended Summons

9. By summons dated 10 June 2022 Mr Liang applied for the discharge of the February 2022 Order and for an inquiry as to the loss and damage suffered by the Company as a result of the JPLs’ appointment which he said Mr Lau was liable to compensate the Company for. Mr Liang did not apply in that summons for an inquiry as to any loss and damage he had suffered.
10. By amended summons dated 5 October 2023 (the “Amended Summons”) Mr Liang and the Company applied for an inquiry as to the loss and damage suffered by the Company and Mr Liang as a result of the JPLs’ appointment and which they say Mr Lau was liable to compensate them for.

11. The Amended Summons was listed for hearing commencing at 10am on 22 November 2023 with an estimate of 1 day and was duly heard that day.

The Issues

12. By email dated 27 September 2023 9:02AM from my PA, counsel were required “to file an agreed list of issues in respect of the hearing listed on 22 November 2023 @ 10am, within the next 21 days.”

13. A 3 page agreed list of issues was filed on 18 October 2023 (the “Agreed List of Issues”). In substance the main contentious issue is as to whether Mr Liang was or should be covered by the Undertaking. I set out a summary of the issues in the List of Issues as filed as follows:

- (1) should the court exercise its discretion and order that there be an inquiry as to the loss and damages suffered by Mr Liang? In particular
 - (a) in the circumstances, including the order made on 24 February 2022, does the Undertaking extend to Mr Liang?
 - (b) if so, did Mr Liang suffer loss and damage that was *prima facie* or arguably caused by the February 2022 Order?
 - (c) if so, are there any special circumstances that might justify the court refusing to order an inquiry?
- (2) alternatively, if the court does not wish to determine these issues at this stage, should directions be given to allow Mr Liang to participate in the inquiry in order to establish (with the benefit of all the evidence) whether or not the Undertaking extends to Mr Liang and whether or not he suffered loss and damage that was *prima facie* or arguably caused by the February 2022 Order?
- (3) what case management directions should be given to progress the inquiry?
- (4) the costs of the Amended Summons to be determined.

The Submissions

14. I have considered all the written and oral submissions put before the court.
15. Mr Levy KC, with his characteristic robustness, relied heavily on *Gee on Commercial Injunctions* (7th Ed. 2021) (“Gee”) in particular paragraphs 11-004 to 11-006 and 11-031, and 11-034 to 11-035, and seemed reluctant to dig into the underlying caselaw. Mr Levy also relied on the findings against Mr Lau in my judgment delivered on 9 August 2022 and in effect submitted that the justice of the case demanded that Mr Liang have a remedy against Mr Lau for the loss and damage suffered personally by Mr Liang as a result of the February 2022 Order. He did not refer to it but one is reminded of Lord Mansfield’s iconic statement that “[t]here is no injury or wrong for which the law does not provide a remedy” (*Taylor v Horde* (1757) 1 Burr 292 at 303). Mr Levy submitted that the proceedings in this case were *inter partes* Mr Lau and Mr Liang and in such circumstances an undertaking to Mr Liang could be regarded as “usual”.
16. Mr Levy emphasised paragraph 11-034 of Gee “[w]henver the court grants an injunction, unless the contrary is expressly said, the applicant will be taken to have given the usual undertakings in damages by implication.” Mr Levy submitted that an undertaking to cover Mr Liang should be regarded as the “usual” undertaking in the circumstances and that would arise by “implication”.
17. Mr Levy also emphasised paragraph 11-035 of Gee which suggested, without citing any authority in support, that the “jurisdiction to amend the order” arises “whenever through a breach of duty to the court by the applicant an undertaking which otherwise would have been required has been omitted from the order.” An undertaking, of course, is not an “order”, although it usually forms part of the recitals or is recorded in a schedule to an order. Gee argues that the jurisdiction “to amend” arises because of a number of points, including the applicant’s duty to obtain “informed decisions by the court on that application in relation to the provision of undertakings to protect the respondent and anyone else who may be affected by the order. The applicant’s duty includes drawing the judge’s attention to any practice of the court relevant to undertakings (*Frigo v Culhaci* [1998] NSWSC 393, Court of Appeal of NSW) disclosing facts which are material to what undertakings should be required, and ensuring everything material to the draft order laid before the court is drawn specifically to the attention of the judge”. In somewhat sweeping terms Gee adds:

“(3) the applicant’s agreement to perform his duties owed to the court on the ex parte application implicitly includes agreement that any undertaking, which is omitted from the order as a result of his breach of duty to the court, is to be treated as given by him. Alternatively, the duty of utmost good faith, which applies to the applicant on the ex parte application, precludes him from denying that the omitted undertaking was provided by him.”

18. Gee cites no authority to support the sweeping statements quoted in (3) above. Mr Levy, however, grabs hold of them and submits that Mr Lau should “be treated” as having given an undertaking for the benefit of Mr Liang. Mr Levy says that the court can “amend the Undertaking to be in the form that extends to Mr Liang” under its inherent jurisdiction. There are a number of difficulties with those submissions which I will come to later in this judgment.
19. Mr Levy submitted that it would be too simplistic to regard the undertaking to the company in the CWR and Form 7 as the “usual” undertaking. Mr Levy submitted that the position was more nuanced and sophisticated than that.
20. Mr Levy referred to paragraph 125(1) of Mr Lau’s 52-page skeleton dated 8 February 2022 under the heading “F. SUBMISSIONS: THE BALANCE OF CONVENIENCE” where Mr Lau referred to his undertaking to the Company and the substantial economic harm Mr Lau may suffer if JPLs were not appointed and added:

“As to Mr Liang, any prejudice he may suffer is likely to be temporary: if he is not guilty of the wrongdoing alleged, he will be reinstated as a director following the discharge of the relief granted.”

At paragraph 125 (2) Mr Lau added:

“The Company is unlikely to suffer any non-financial prejudice as a result of the Court granting the relief sought. The Company does not depend upon its reputation to trade and does not have any employees, who might lose their jobs.”

21. Mr Levy submitted that in this case paragraph 125(1) of Mr Lau's skeleton argument shows that he was aware that Mr Liang could suffer damage and in such circumstances the "usual" undertaking would be in a form to cover Mr Liang and such undertaking should have been given. Mr Liang was Mr Lau's main target and an undertaking to Mr Liang should be implied, or "treated" as having been given or the Undertaking should be "amended" to include Mr Liang, according to Mr Levy.
22. Asked to refer the court to caselaw authority on the point other than simply relying on Gee, the best Mr Levy could come up with was a reference to paragraph 26 of Lewison J's judgment in *SmithKline Beecham plc v Apotex Europe Ltd* [2006] 1 WLR 972: "In some cases the court will be able to say that a cross-undertaking has been implicitly given". I will come to *SmithKline* in more detail later. Suffice to say at this stage that Lewison J at that section of his judgment was (as is plain from paragraph 33 of his judgment) dealing with cases in which no cross undertaking had expressly been given and not the position where a limited undertaking had expressly been given and accepted by the court.
23. The whole thrust of Mr Levy's engaging submissions was that the main battle in this case was, right from the outset, between Mr Lau and Mr Liang and justice required the court to somehow impose an undertaking by Mr Lau in favour of Mr Liang, otherwise Mr Liang would be without a remedy.
24. In stark contrast to Mr Levy's approach, Ms Stanley KC, in her characteristically well focused, pleasantly delivered and persuasive oral submissions, stressed that the law was against this court imposing upon Mr Lau an undertaking which he did not give. Ms Stanley submitted that this court had no jurisdiction in this case to "imply" or "amend" an undertaking in favour of Mr Liang. Retrospective impositions with hindsight should not be permitted. There was, in any event, no certainty, even with the information and arguments now put before the court in November 2023, that the court would in February 2022 have required an undertaking to cover Mr Liang and even if it had there is no certainty that Mr Lau would have offered such an undertaking. Mr Lau offered an undertaking to cover the Company in the usual terms and the court accepted it. In effect, Ms Stanley submitted that history could not be rewritten.
25. Ms Stanley rightly emphasised various paragraphs in *SmithKline*, in particular paragraphs 34 to 38 dealing with *Tucker* which she described as being on all fours with this case, with Mr Liang taking the role of Mr Lamplough. Ms Stanley also referred the court to paragraph 40 in *SmithKline* and

the reference to *Commodity Ocean Transport Corp'n v Basford Unicorn Industries Ltd (The Mito)* [1987] 2 Lloyd's Rep 197, 199-200 where Hirst J stated:

“Of course, Mr McClure [for the defendants] accepts, as he must, that the court has no power to impose an undertaking on the plaintiffs; and here I think that if I were to make this order I would in essence, *ex parte facto*, be imposing an additional term to the undertaking, without any knowledge one way or the other as to what the situation would have been if it had been sought by the defendants in the first place. That is something which I think is wrong in principle to do.”

26. Ms Stanley cautioned against using hindsight. This court, like Hirst J, should not impose an “additional term” as it would be wrong in principle to do so. There is no way of knowing what the court would have done in February 2022 and whether, if further disclosure in respect of Mr Liang and the appropriateness of an undertaking to him had been discussed further, the court would have required such an undertaking and even if it had whether Mr Lau would have been willing to give an undertaking extending to Mr Liang. The court cannot *ex post facto* with hindsight impose upon Mr Lau an undertaking to cover Mr Liang when no such undertaking had been offered.

27. Ms Stanley referred to paragraph 61-63 of Lewison J’s judgment in *SmithKline* and Gee’s criticism of *Tucker*. Lewison J at paragraph 61 stated “I am not convinced that this explanation of *Tucker*’s case is correct. I am also not convinced by Mr Gee’s assertion that a court hearing an application today (or at least in 2002 or 2003) would inevitably understand a cross-undertaking as being offered in the form of para 5.1 of the practice direction.” Mr Gee had felt that unless counsel clearly excluded the undertaking set out in paragraph 5.1 of the Practice Direction, “this was impliedly being offered by the claimant... The order could therefore be amended under the slip rule.” (paragraph 60 of *SmithKline*). Lewison J was not convinced. At paragraph 62 of *SmithKline*, Lewison J referred to an argument that GSK would obviously have given the extended cross-undertaking rather than decline the injunction. Lewison J was not so sure:

“... it does not seem to me that the court should embark on a hypothetical inquiry of this kind. The point is that the hypothesis did not arise.”

28. Ms Stanley cautioned the court against embarking on a hypothetical inquiry as to whether the court would have required an extended undertaking to cover Mr Liang and if so whether Mr Lau would have provided it.

29. Ms Stanley also submitted that the slip rule could not legitimately be used, relying on the following comments of Lewison J in *SmithKline* at paragraph 63:

“The slip rule allows the court to correct an “accidental” error or omission. Was the form of the cross-undertaking an accidental error? At first blush the answer must be “No”. It was a cross-undertaking deliberately given in the form in which it was intended to be given. It was embodied in an order settled by junior counsel for each party; and approved by the judge.”

30. Ms Stanley referred to paragraph 21 of Jacob LJ’s judgment in the *SmithKline* English Court of Appeal decision (*Smith Kline Beecham plc v Apotex Europe Ltd* [2007] Ch 71) and the comments against “[t]reating or deeming a series of important procedural steps (including one as basic as making a company a party to the proceedings)”. Ms Stanley referred to *China Shanshui Cement Group Limited* 2021 (1) CILR 253 and the fact that in the case before the court Mr Liang did not apply to become and was not joined as a party to the proceedings.

31. Ms Stanley referred at paragraph 37 of Lewison J’s judgment in the English Chancery Division in *SmithKline* and his further comments on *Tucker*:

“... the Court of Appeal did not elide the two questions: what should the cross-undertaking contain and what did the cross-undertaking contain. Even though the cross-undertaking should have extended to Lamplough, it was not retrospectively extended.”

32. Ms Stanley submitted that Mr Levy was in effect eliding what he says “should” have happened and what actually happened in the case before the court and reiterated that the Undertaking was in the usual terms and the court cannot now retrospectively extend it to cover Mr Liang.

Determination

33. I now turn to the determination of the various issues before the court.

Does the wording of the Undertaking cover Mr Liang?

34. It is crystal clear, in my mind, that the express wording of the Undertaking does not include Mr Liang. Moreover it is in the usual and standard terms pursuant to Order 4 rule 3 (1)(a) of the Companies Winding Up Rules (“CWR”) and CWR Form No 7 which only requires the applicant to give an undertaking to the court to pay any damage suffered by the company by reason of the appointment of the provisional liquidator.
35. Section C8 of the Financial Services Division Guide (the “FSD Guide”) concerns applications for the appointment of provisional liquidators and C8.1 (c) refers to the “Applicant’s undertaking in damages” and states:
- “The Court will not make a provisional winding up order without requiring the petitioner/applicant to give an undertaking that he will pay (a) any damage suffered by the company as a result of the appointment and (b) the remuneration and expenses of the provisional liquidator, in the event that his petition is ultimately withdrawn or dismissed. CWR O.4, R.3 requires such an undertaking to be given in every case, but the jurisdiction to require security is a discretionary one.” (my underlining)
36. In my review of the relevant law relating to the appointment of JPLs in *Position Mobile Ltd SEZC* (FSD 79 of 2022 (DDJ), unreported judgment delivered 31 October 2023) at paragraph 133 (4) I set out the position in respect of undertakings in respect of “the company”. I did not make reference to the position of shareholders or other third parties.
37. I appreciate, as Lord Wilberforce touched upon at page 356 of *Hoffmann-La Roche v Secretary of State for Trade and Industry* [1975] AC 295, that court orders and the form and content of undertakings are tailored “to the individual requirements of each case” but it is again interesting to note that the FSD Guide refers to the usual and standard undertaking being to “the company”. There is again no reference to shareholders or other third parties. Interesting issues as to reflective loss may arise if along with a company, shareholders are covered in undertakings and claim in their capacity as shareholders in respect of the diminution in the value of their shares or in distributions. I note that Mr Laing says that he has suffered significant damages personally including:

- (a) loss of management fees;
- (b) damage to his reputation;
- (c) damage to his fund raising capabilities;
- (d) loss of profits from further investments into the Company; and
- (e) loss of compounded profits on the losses and damages.

These all seem *prima facie* to be claims made in a capacity other than as a shareholder.

38. In respect of *ex parte* proceedings for the appointment of JPLs, there is no reference in the rules, the forms, the guide, or the judgments to undertakings being extended to cover shareholders or other third parties. Mr Levy was unable to point me to any authority where that had been done but stressed in effect that each case depends on its own facts and circumstances and in this case the undertaking should have covered Mr Liang. The reality is however that Mr Lau offered an undertaking limited to the Company in the standard and usual terms of Order 4 rule 3(1)(a) of the CWR, CWR Form No 7 and as referred to in the FSD Guide, and such undertaking was accepted by the court.

39. I also note that at the hearing on 10 February 2022 Mr Liang did not request that the offered usual and standard undertaking be extended to cover him. I appreciate that such hearing was on short notice but the February 2022 Order at paragraph 17 expressly gave Mr Liang liberty to apply. Even with the luxury of time Mr Liang did not apply for a discharge of the order unless Mr Lau extended his undertaking to include Mr Liang. Indeed, in his initial summons dated 10 June 2022 Mr Liang only applied for an inquiry as to loss and damage suffered by the Company. It was only on 5 October 2023 that the summons was amended to seek an inquiry in respect of Mr Liang. In his third affidavit sworn on 10 June 2022 Mr Liang says he identifies factual and evidential matters which he believes were material to the court to take into account in deciding whether or not to have granted the *ex parte* relief “but which were not disclosed properly or at all” (paragraph 6). Mr Liang does not appear to rely on any lack of disclosure in respect of an undertaking to cover him. In his fifth affidavit sworn on 6 October 2023 in support of the Amended Summons (amended on 5 October 2023), under heading C, Mr Liang outlines “[t]he losses caused to me personally.” At paragraph 71 of Mr Liang’s skeleton argument dated 15 November 2023 the point is made that, at the *ex parte* on short notice hearing, Mr Lau should have drawn the court’s attention to “the fact that this was in effect a claim against Mr Liang and Mr Liang would almost inevitably suffer serious

and ongoing loss and damage as a result of the JPL Order”. Mr Levy submitted in effect that an undertaking to cover Mr Liang should have been given. At paragraph 72 it is added:

“Failure to do so was a breach of Mr Lau’s duty to the Court and the Court can amend the Undertaking to be in a form that extends to Mr Liang.”

40. It appears that it did not appear obvious to Mr Liang or his advisers, prior to October or November 2023, that he should be covered by the Undertaking or that, in the circumstances of this case it would be usual for an undertaking to cover him. At no time prior to the discharge of the February 2022 Order did Mr Liang apply to the court raising an issue as to whether in effect he could take benefit of the Undertaking or as to whether the court should require an extended undertaking from Mr Lau to cover Mr Liang as “the price” for the February 2022 Order continuing. There was no application, for example, for the February 2022 Order to be discharged on the basis that the Undertaking was inadequate in that it expressly did not refer to Mr Liang.

41. Mr Liang could have applied to the court in respect of the Undertaking prior to the discharge of the February 2022 Order. At paragraph 11-032 on page 380 of Gee the following important paragraphs, supported by authority, appear (footnotes omitted):

“... It is for the applicant to decide whether or not to provide the undertaking, bond or other security required by the court. Provision of one is the voluntary act of the applicant and cannot be ordered by the court.

If a party not included in the scope of an undertaking wishes to be so included, he must apply to the court for the relief which has been granted to be discharged unless the applicant provides a widened undertaking. In such circumstances the applicant may choose not to provide a widened undertaking even though the court seeks it from him, and in consequence the relief granted is discharged. If the relief granted has already lapsed or been discharged or has ceased to be of any value to the claimant, or if, in the case of Anton Piller relief, it has already been executed, then the court will not be in a position to stipulate for a widened undertaking, or a bond or other security in support of an undertaking, as the price for continuing the relief which has been granted.”

42. Mr Liang made no such application before the February 2022 Order was discharged.

43. The mere fact that Mr Liang says that he has personally suffered damage as a result of the February 2022 Order does not mean that the Undertaking does or must cover him.
44. Mr Levy relied heavily on his submission that the winding up proceedings were in effect a claim brought by Mr Lau against Mr Liang. Reference was made to the consent order made on 24 February 2022 to the effect that the subject matter of such proceedings were to be treated as *inter partes* proceedings between Mr Lau and Mr Liang. These submissions must be considered in their proper context. Order 3 rule 12 (1) of the CWR provides that upon the hearing of the summons for directions in respect of a winding up petition presented by a contributory this court shall give such directions as it thinks appropriate in respect of various matters including at (a):

“whether or not the company is properly able to participate in the proceeding or should be treated merely as the subject-matter of the proceeding”

and at (b):

“whether the proceeding should be treated as a proceeding against the company or as an *inter partes* proceeding between one or more members of the company as petitioners and the other member or members of the company as respondents”

and at (f):

“service of a defence by the company or the respondents (as may be appropriate in the light of the directions given under paragraphs (a) and (b) of this Rule)”.

45. Ms Stanley referred to *China Shanshui Cement Group Limited* 2021 (1) CILR 253 where Segal J made an order for the joinder of two significant shareholders in respect of a winding up petition. At paragraph 33 Segal J felt that under CWR Order 3 rule 11 it was open to a petitioner (at least initially) to identify and select the respondents to the petition. The company must always be joined as a respondent. In the case of a small company it is usual to join all the members as respondents. In the case of a larger company, it is usually only those members alleged to be implicated in the matters of which the petitioner makes complaint who are joined. Segal J added at paragraph 33(d):

“In the ordinary course, where the petitioner wishes and considers it appropriate to join other shareholders, it will do so when the petition is presented so that those shareholders will be served, even if they are outside the jurisdiction.”

46. At paragraph 33(n) Segal J also felt that the “court has jurisdiction to order the joinder of shareholders when hearing a summons for directions. This can be done whether or not the court also gives directions under CWR O.3 r.12 (1)(a) and (b) ... Where the court makes an order under CWR O.3, r.12 (1) (b) that the petition is to be treated as an *inter partes* proceeding between members as petitioners and other members as respondents, in a case where the relevant respondent shareholders were not joined by the petitioner, a necessary and consequential procedural order would be for the joinder of those shareholders (CWR O.3, r.12 (1)(b) states that the petition is to be *treated as an inter partes* proceeding between members but I do not consider that this language is intended to preclude or obviate the need for the making of an order for joinder of the relevant shareholders) ...”

47. At paragraph 33(t) Segal J added:

“The fact that the company in question is a public company and that there are some or indeed a large number of other shareholders who will not be joined does not prevent joinder of a shareholder who has been active and whose conduct is impugned and challenged ...”

48. Mr Liang had not been joined as a party to the proceedings and insofar as Mr Levy’s submissions rely on Mr Liang being a party to the proceedings they are, in my judgment, misplaced. The Undertaking does not cover Mr Liang and would not have covered him even if he had been joined as a party. The Undertaking was expressly limited to the Company, it was not expressed to cover all the “parties” to the winding up petition. I turn now to arguments arising from the cases where an undertaking is given to “the defendants”.

Undertakings and “the defendants”

49. Mr Levy referred to various cases (such as *SmithKline Beecham plc v Apotex Europe Ltd* [2005] EWHC 1655 (Ch), [2006] 1 WLR 872 and on appeal [2006] EWCA Civ 658, [2007] Ch 71, and *Berkeley Administration Incorporated v McClelland* [1996] ILPs 772 (CA)) in support of his submission that the benefit of an undertaking in damages should extend to all defendants or legal

entities who became parties while the original undertaking was in force. In those cases, however, the undertaking had been given to “the defendants”. In the case presently before me the Undertaking in accordance with usual practice was limited to “the Company” singular and not “the defendants” or “the parties” plural.

50. Ms Stanley was right in her submission that these cases are distinguishable or in her colourful language the undertakings in *Berkeley* and *SmithKline* are “a million miles from the undertaking” in this case. In this case Mr Lau offered the standard and usual undertaking in respect of the Company and the court accepted it. Ms Stanley submitted that Mr Liang’s position was materially identical to the position of D3 (Lamplough) in *Tucker v New Brunswick Trading Company of London* (1890) 44 Ch D 249. In that case, D3 did not ask for the undertaking to cover him, and because of that the English Court of Appeal held that he was not a beneficiary of it. Cotton LJ on page 252, with admirable conciseness characteristic of the 1890s before skeleton arguments had been invented, stated:

“As regards *Lamplough*, I am of opinion that his appeal fails; for we cannot impose on the Plaintiff any undertaking which he has not given. If a defendant applies for an undertaking, the plaintiff may decline to take any order. The Court only makes the undertaking a condition of granting an injunction; if the plaintiff refuses to give it the Court can refuse the injunction, but it cannot compel the plaintiff to give an undertaking.”

51. Lindley LJ at page 253 added:

“An undertaking is the price of an injunction, and if a man gets an injunction he must pay the price. *Lamplough* did not ask for an undertaking, and for anything we can tell, if he had done so the Plaintiff would have declined to take an injunction. I think, therefore, that the undertaking can only be extended to *Matthews*.”

52. Lopes LJ was of the same opinion.
53. The undertaking was extended to Matthews as in the court below an undertaking was given to cover Matthews but it inadvertently had not been recorded in the order. No undertaking had been offered in respect of Lamplough.

54. Counsel also referred to Kawaley J's oft cited judgment in *Atom Holdings* (FSD 54 of 2023 (IKJ), unreported judgment delivered 18 May 2023). It is interesting to note that, in Kawaley J's comprehensive treatment of the subject of cross-undertakings in the context of applications to appoint joint provisional liquidators, reference was only made to undertakings in favour of the target company. There was no reference to undertakings being extended to shareholders or other third parties. Although I do not draw too much into this it is also interesting that Kawaley J referred in his *Atom* judgment at paragraph 31 to *Abbey Forwarding Limited (in liquidation) v Her Majesty's Revenue and Customs* [2015] EWHC 225 (Ch) and the judgment of David Richards J (as he then was). The English judge referred to the position in England and Wales in respect of the appointment of provisional liquidators and the usual requirement for a petitioner to give "an undertaking in damages to the company as a term of the appointment." Again no reference to shareholders or third parties.
55. I do not accept Mr Levy's submission that if the Undertaking is construed according to authorities such as *SmithKline* and *Berkeley* it should be extended to Mr Liang as, in effect, Mr Liang was a party to the proceedings. I do not accept the argument that the Undertaking applies to Mr Liang as he was added as a respondent to the winding up proceedings. The Undertaking was given in respect of the Company and not in respect of any other "defendants", "respondents", "parties", shareholders or third parties, and in any event Mr Liang had not been formally joined as a party to the proceedings. Mr Lau offered no undertaking to Mr Liang. There are no grounds upon which this Court can unilaterally and retrospectively "extend" the Undertaking to Mr Liang. The proper construction of the Undertaking makes it plain that it is in the usual and standard terms and is limited to the Company.

Is there room for an implied undertaking in favour of Mr Liang?

56. Frankly, I found it difficult to follow Mr Levy's alternative submission that somehow an extension of the Undertaking to Mr Liang is implied. The extract from *Gee* at paragraph 11-034 which Mr Levy relied so heavily upon includes the words "unless the contrary is expressly said." In this case the contrary was expressly said. There was an express undertaking that did not include Mr Liang. Moreover it was in the usual and standard terms. I do not think there is any room for the court, in this case, to extend by implication an undertaking to a legal entity not covered by the express terms of the Undertaking offered, and accepted by the court.

57. It is correct as Mr Levy highlighted that, at paragraph 26 of the English Chancery Division decision in *SmithKline*, Lewison J stated “[i]n some cases the court will be able to say that a cross-undertaking has been implicitly given.” This case is not however one of those cases. In this case an express undertaking was given. It was limited to the Company. It did not cover Mr Liang.

58. Lewison J in *SmithKline* dealt with *Tucker* from paragraph 34 onwards. At paragraph 37 Lewison J stated:

“In light of *Tucker’s* case, it seems to me that if a limited cross-undertaking is offered and accepted by the court, there is in general no room for implying some further offer of an undertaking beyond that which is expressly offered and accepted.”

59. Lewison J at paragraph 38 stated:

“The cross-undertaking has been described as the “price” of an injunction. If the applicant is unwilling to pay the price, he does not get the injunction. But as *Tucker’s* case demonstrates the court has no power to compel the giving of a cross-undertaking. Its only choice, if no cross-undertaking is given, is to withhold the injunction.”

60. Lewison J at paragraph 41 stated:

“Since a cross-undertaking cannot be imposed, it follows that a fortiori it cannot be imposed retrospectively.”

61. At paragraph 56(iv) Lewison J stated that a third party adversely affected by the order could apply to the court for the discharge of the order, unless the cross-undertaking were extended for his benefit.

62. At paragraph 58 Lewison J agreed that “an express offer [of an undertaking] must displace any implied offer.”

63. At paragraph 65 Lewison J stated “[i]f I were now to amend the form of cross-undertaking, I would be retrospectively imposing on GSK an undertaking that they did not give; and could not have been made to give.”
64. The law and practice of England and Wales as set out by Lewison J in *SmithKline* at paragraphs 25-52 of his judgment has been described as accurate at the highest level. Lord Mance in *PricewaterhouseCoopers v Saad Investments Co Ltd (No 2)* [2016] UKPC 33; [2017] 1 WLR 953 stated:

“15 Should the judge have extracted an undertaking at the inter partes stage against the possibility of a successful appeal? And is any undertaking to be implied when he did not do so? The basic position is that undertakings are voluntary. Orders may be made conditional upon their giving, but the person required to give an undertaking as a condition of obtaining an order has the opportunity to consider whether or not to forego the order or give the undertaking. In an English context, the law and practice regarding the giving of a cross-undertaking as the “price” of an injunction pending trial was examined fully, and in the Board’s view accurately, by Lewison J in *SmithKline Beecham plc v Apotex Europe Ltd* [2006] 1 WLR 872, paras 25-52. He considered a passage in *Gee, Mareva Injunctions and Anton Pillar Relief*, 4th ed (1998) adopted by Laddie J in *Bank of Scotland v A Ltd* [2001] CP Rep 14 and explained this in the light of prior authority not all of which had been cited to Laddie J. This included *Tucker v New Brunswick Trading Co of London* (1890) 44 ChD 249. On appeal, Lewison J’s reasoning was effectively uncontroversial: see [2007] Ch 71, paras 23-32.

16 In the English legal context, there are practice notes or rules which in certain contexts make clear that an interlocutory application will carry with it, unless the contrary is made clear, an implied cross-undertaking by the applicant. In those contexts, consent is taken as existing. It is still not imposed against the applicant’s will, and, if the applicant makes clear that he does not consent, the order will not be made. Lewison J referred to cases of undertakings which can be taken as implied, on the basis of such notes or rules or by invariable custom and common understanding, in paras 26, 30 and 32 of his judgment: [2006] 1 WLR 872. But he also made clear that he was speaking throughout of interim injunctions pending trial (see e g paras 25, 31-32, 34 and 44), and that, even then, it was

necessary to examine closely the contexts in which and extent to which it had become standard practice to extract a cross-undertaking (see e.g. paras 50-52 and 55-57).”

65. The law is against Mr Liang and Mr Levy. In the circumstances of the case presented before me I do not accept that there is any room to “imply” an undertaking in favour of Mr Liang. The undertaking offered was plainly expressly limited to the Company and there is no room, despite Mr Levy’s persistent eloquence, to “imply” an extension to Mr Liang.

Lack of remedy?

66. Neither do I accept Mr Levy’s argument that the Undertaking must cover Mr Liang otherwise he is left without a remedy. I was not addressed in any meaningful detail on whether any of the economic torts would provide a remedy for Mr Liang against Mr Lau or others, although I note that for the purposes of her submissions Ms Stanley accepted that there was no such remedy available to Mr Liang, except perhaps an action for potential negligence against Mr Liang’s former attorneys which I had lightly touched upon in my exchanges with Mr Levy. Be that as it may, just because a legal entity may have no other remedies is no justification for a court to conclude that an undertaking not expressed to cover that remedyless legal entity must be extended to cover such entity. Mr Levy relies on an authority in the Supreme Court of New South Wales Court of Appeal in *Friigo v Culhaci* [1998] NSWSC 393 (17 July 1998). In that case no undertaking appears to have been offered or recorded leading the appellate court to state:

“The absence of an undertaking as to damages is a severe detriment to a defendant who, if the proceedings fail, will be left without a remedy against the plaintiff with respect to any loss flowing from obedience to the injunction. Before us, counsel for the plaintiff offered the undertaking *nunc pro tunc*. In the circumstances of this case, where the omissions to give the undertaking at the outset and on 5 June were not an oversight, we would dissolve the injunction on this ground alone.”

67. That Australian case is an authority for the proposition that if an undertaking is not given when an *ex parte* injunction is sought the injunction could be “dissolved”/discharged. It is not authority for the proposition that if on an *ex parte* short notice application for the appointment of JPLs the undertaking is given in the usual terms covering the company it should be extended after the

discharge of the appointment to cover a shareholder or other third party as otherwise the shareholder or other third party may have no remedy. It is, thus, of no assistance whatsoever to Mr Levy.

Alleged breach of duty and can and should the court “amend” the Undertaking?

68. I was not persuaded by Mr Levy’s further alternative submission, that the court can and should “amend the Undertaking to include Mr Liang” because Mr Lau breached his duty to the court in not making the true nature of the proceedings clear or in not properly highlighting potential loss to Mr Liang.
69. Mr Levy spent 3 pages of his 26 page skeleton argument referring to “other multiple serious breaches of full and frank disclosure” (paragraphs 73-82). These points and the general appeal to the court’s sympathy (“Mr Liang is without a remedy”) and the “justice” of the case are more in the nature of what could derogatorily be described as “jury points”, appealing to human sympathy and lacking a solid legal foundation.
70. At various stages in his written and oral submissions Mr Levy suggested that the court could “amend” the Undertaking. I found that a curious submission. A court can vary or discharge its orders. An applicant gives an undertaking in the terms the applicant chooses to give it. If it is appropriate the court may accept the undertaking offered. If an appropriate undertaking is not offered the court may decline to make an interim order. I find the concept of a court “amending” an undertaking a difficult one to grasp. It may be helpful to revisit the basic position in respect of undertakings.
71. Undertakings are offered by applicants as the price to obtain *ex parte* relief. The court can indicate that relief will not be granted unless an undertaking is given. A court cannot otherwise compel an applicant to provide an undertaking. In this case Mr Lau provided the usual undertaking as required by the CWR and the relevant form. If Mr Liang wanted to argue that in addition to the usual and standard undertaking to the Company, an extended undertaking to him in his capacity as a shareholder or in some other capacity should be provided then he should have produced those arguments at or shortly after the hearing in February 2022. I say at or shortly thereafter as I appreciate that Mr Liang and his lawyers may have been on the back-foot with the short notice given. But if the extended undertaking was such an obvious point one would reasonably have expected it to be raised on behalf of Mr Liang at the hearing. If this is to demand too much then if

not at the hearing shortly thereafter. Mr Liang could have put forward such arguments in an endeavour to persuade the court not to grant or to discharge the order unless an undertaking was given to cover his position. I leave open the question as to whether such arguments would have been successful. The CWR do not provide for undertakings to shareholders or third parties and the court would have to consider whether such were appropriate. Where is the line to be drawn? Should undertakings also be extended to cover the creditors of a company? I do not rule out in future cases the possibility that the court could require an undertaking to cover persons other than the Company prior to making an appointment of JPLs. I also do not rule out that where an appointment has already been made and there is an application made to discharge such appointment unless an undertaking is extended to cover other persons, the court may require such an extended undertaking and if it is not given the court may then discharge the appointment. In this case, it is by no means certain that even if Mr Liang at the hearing or shortly thereafter raised an argument that the court should require the undertaking to cover him that such argument would have been successful. It would have involved an extension of the usual and standard undertaking, which is normally limited to the company. There is also no certainty as to whether Mr Lau would have offered such an undertaking. There are many imponderables.

72. Nothing I say in this judgment should be taken to belittle the onerous duties on applicants for *ex parte* relief. In *Wang v Credit Suisse AG; In the Matter of Principal Investing Fund I Limited et al* (FSD 262, 268, 269 and 270 of 2021 (DDJ), unreported judgment delivered 8 April 2022) I referred to the relevant general law in respect of the duty to make full and frank disclosure of material facts in *ex parte* applications. In *Raier v Correa & Ors.* (FSD 50 of 2022 (DDJ), unreported judgment delivered 9 June 2023) I discharged *ex parte* orders granted following failures in respect of the duties of full and frank disclosure of material facts and fair presentation. Applicants seeking the appointment of JPLs on an *ex parte* basis should refer the court to the likely damage that may be caused by the appointment and what undertakings may be necessary. The usual remedy for serious failings of such duty is a discharge of the order with an adverse costs order. The court does not normally grant retrospective “amendments” or “extensions” to express undertakings given in respect of orders that have already been discharged. In this case the court cannot turn the clock back. Mr Lau gave an express undertaking in the usual and standard terms and the court accepted it. That is the reality of the situation and no matter how hard Mr Levy attempted to engage the court’s sympathy and sense of justice I am duty bound by my oath to apply

the law. As the authorities make plain, this court cannot retrospectively impose upon Mr Lau an undertaking he did not give.

73. I have already referred to *SmithKline*, which is a significant authority against granting the relief Mr Liang seeks, but it may also be useful to consider the well known House of Lords case of *Hoffmann-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295. In the main that authority concerned whether public bodies should be required to give undertakings. Walton J at first instance referred to undertakings in respect of injunctions generally and at page 303 stated:

“Such an undertaking cannot, of course, be imposed by the court upon any applicant for an injunction; he must offer it, or be willing to submit to it. Be his case never so strong, if he is unwilling to proffer such an undertaking then he will not, in general, obtain his injunction.”

And at page 304:

“For, quite clearly, as I have already noted, the court can never force, and never attempt to force, anyone to give the usual cross-undertaking in damages; that must be given voluntarily; all that the court does is to refuse (in general) to grant an interim injunction unless the undertaking is given.”

And at page 307:

“But Mr Jupp, on behalf of the Department, resolutely refuses to give a cross-undertaking; and, of course, nobody can make him.”

74. Lord Denning MR in the English Court of Appeal at page 318 stated:

“In the case of an ordinary litigant who applies for an interlocutory injunction, it is the usual practice not to grant it unless the plaintiff gives a cross-undertaking in damages.”

75. In the House of Lords, Lord Reid at page 341 stated:

“It is not in doubt that in an ordinary litigation the general rule has long been that no interim injunction likely to cause loss to a party will be granted unless the party seeking the injunction undertakes to make good that loss if in the end it appears that the injunction was

unwarranted. He cannot be compelled to give an undertaking but if he will not give it he will not get the injunction.”

76. Lord Wilberforce at page 355 referred to the court’s long standing jurisdiction to grant interim injunctions and the need “to think of the other party’s position and rights”. At page 356 Lord Wilberforce referred to the procedure “of matching the injunction with an undertaking to pay any damage which it is just should be paid if it should turn out that the injunction was unjustified. Precisely because this procedure is so obviously just, it is almost universal: no interim injunction is given unless accompanied by the undertaking. The courts have considerable liberty of action, described as discretion, in adapting both injunctions and undertakings in their form and content to the individual requirements of each case ...”.

77. Lord Diplock at page 361 stated:

“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 extracts the undertaking for the defendant’s benefit ... 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 ...”

78. For the sake of completeness I should also refer to *The Financial Services Authority v Sinaloa Gold plc & Ors* [2013] UKSC 11 which considered the *Hoffmann-La Roche* case and also the position of undertakings in favour of “third parties”. Lord Mance at paragraph 15 referred to the position under the English PD 25A 5.1(1) requiring, unless the Court orders otherwise, an undertaking “to pay any damages which the respondent sustains which the court considers the applicant should pay” and the “modern practice” reflected in PD 25A 5.1A that when the court orders an injunction “it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order.” Lord Mance at paragraph 17 referred to the history of undertakings in favour of “third persons” tracing it back to a statement by Lord

Denning MR in *Prince Abdul Rahman Bin Turki Al Sudairy v Abu-Taha* [1980] 1 WLR 1268 at 1273. Lord Mance at paragraph 39 stated:

“The cross-undertaking is to the court. Liability under it, when the court in its discretion determines that the cross-undertaking should be enforced, is in a sum assessed by the court, albeit using similar principles to those by which it measures damages ...”.

I am also aware of the giving of undertakings in respect of *Norwich Pharmacal*, asset freezing (formerly *Mareva*) and *Anton Piller* orders to include third persons and sometimes there are arguments in respect of the extent of such undertakings. Suffice to say I do not rule out undertakings in respect of *ex parte* applications for the appointment of JPLs extending to shareholders or other third persons but it would be unwise to assume that such would follow as night follows day, even in a case such as the one presently before the court.

79. I do not accept Mr Levy’s submission that the court can and should “amend” the Undertaking, in the case presently before me, to cover Mr Liang. This would in effect be retrospectively imposing on Mr Lau an undertaking which he did not agree to give. If a court has no jurisdiction to compel an applicant to provide an undertaking in certain terms it is difficult to see how a court can, without the consent of the applicant, “amend” an undertaking previously given and accepted by the court.

Can inherent jurisdiction come to Mr Liang’s rescue?

80. Mr Levy submits that the court has an inherent jurisdiction where through breach of duty to the court by the applicant an undertaking which would otherwise have been required has been omitted from the order. In this case Mr Lau did offer the usual and standard undertaking and the undertaking to the Company was included in the recitals to the February 2022 Order. Furthermore if Mr Liang had felt that Mr Lau had breached his duty to the court the remedy was for an application to be made to discharge the order or only continue it if Mr Lau offered an undertaking to cover Mr Liang. The remedy is not, after discharge of the order, to belatedly seek an order “amending” or “extending” the undertaking.

81. It is worth reminding ourselves of the observations of Jacob LJ in *SmithKline* in the Court of Appeal of England and Wales at paragraph 82:

“Mr Strauss also made some appeal to the inherent jurisdiction of the court. But important and powerful though this is (see the article by my late father Master I H Jacob, “The Inherent Jurisdiction of the Court” [1970] CLP 23) it cannot seriously be suggested it goes so far as to create positive legal rights for non-parties. The inherent jurisdiction is essentially procedural – a tool in the administration of justice – not part of substantive law creating freestanding rights for third parties of the kind claimed here.”

82. I do not think that a, somewhat desperate, plea to the inherent jurisdiction of the court assists Mr Liang in the circumstances of this case. Inherent jurisdiction cannot come to Mr Liang’s rescue.

Defer the question?

83. In my judgment it was not appropriate to accept Mr Liang’s invitation, in fairness only gently raised by Mr Levy in his oral submissions, to “defer the question of [Mr Lau’s] liability [to Mr Liang], ... as well as the extent of Mr Liang’s losses, [to] be considered as part of the inquiry into [the Company’s] loss.” (paragraph 83 (a) of Mr Liang’s skeleton argument dated 15 November 2023). Mr Liang had the opportunity to present his case in respect of the Undertaking on 22 November 2023 and Mr Levy raised every conceivable point in support of Mr Liang’s case by way of written and oral submissions at such hearing.
84. I have heard argument as to whether the Undertaking did or should cover Mr Liang and there is no good reason to delay determination of that issue until the inquiry in respect of the Company’s loss. Such delay would involve unnecessary time and costs and be contrary to the overriding objective of dealing with cases in a just, expeditious and economical way.

Conclusions

Undertaking does not cover Mr Liang

85. In my judgment, for the reasons stated, I have concluded that the Undertaking does not cover Mr Liang and cannot now be “amended” or “extended” to cover him. The court should not therefore order that there should be an inquiry as to any loss and damages suffered by Mr Liang.

Inquiry as to damages in respect of the Company

86. As indicated at the hearing, I am however content to order that there should be an inquiry as to any loss and damages suffered by the Company and I was content to exercise my discretion in favour of such inquiry having regard to the evidence in this case and having considered the authorities including *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545, *Balkanbank v Taher* [1994] 4 ALL ER 239, *Yukong Line Ltd v Rendsburg Investments Corp* [2001] 2 Lloyd’s Rep 113 and *Malhotra v Malhotra* [2014] EWHC 113 (Comm).

Directions in respect of the inquiry

87. I note that ultimately there was common ground between counsel in respect of the directions especially the length of time for pleadings. I make the following directions in respect of such inquiry:

1. the Company shall file and serve points of claim by 3pm on 12 January 2024;
2. Mr Lau shall file and serve points of defence by 3pm on 12 March 2024;
3. the Company shall file and serve any points in reply by 3pm on 12 April 2024;
4. the Company and Mr Lau shall (if possible by agreement, if not then separately) file a draft of proposed further directions by 3pm on 26 April 2024;
5. the parties shall before 3pm on 26 April 2024 provide details of any non-availability and time estimates, and issues for determination and apply for a case management hearing to be fixed for the first available date after 1 May 2024;

6. liberty to apply.

Costs

88. In respect of costs as to Mr Liang's involvement regarding the Amended Summons and the Agreed List of Issues I am minded, based on what I have read and heard to date and noting that Mr Liang has been unsuccessful, to make an order that Mr Liang should pay the costs of the Company and Mr Lau of and incidental to Mr Liang's involvement in the Amended Summons and the Agreed List of Issues, such costs to be taxed on the standard basis in default of agreement. Any written submissions to the contrary should be filed and served within 14 days of the delivery of this judgment with any written submissions in response to be filed and served within 14 days thereafter.
89. Mr Abbott on behalf of the Company submitted that as the Company had been successful in obtaining an order for an inquiry Mr Lau should pay the Company's costs relating to the Amended Summons and the hearing. Mr Abbott also submitted that as Mr Lau had acted unreasonably to a high degree in refusing to agree to a consent order giving effect to the inquiry for the Company such costs should be on the indemnity basis.
90. I have, sadly, had to spend some considerable and scarce judicial time descending into the detail of the attorney – attorney correspondence in respect of the arguments as to costs.
91. Mr Abbott referred to the Amended Summons originally dated 10 June 2022 and in effect submitted that Mr Lau had wasted over a year and only finally accepted that an inquiry in respect of the Company should be ordered when the revised Agreed List of Issues was provided on 16 October 2023. He referred to what he described as Mr Lau's spurious assertion that the summons had been compromised when it had not been.
92. Ms Stanley submitted that there had been some confusion over whether settlement to drop the appeal also involved the summons. Ms Stanley referred to a troublesome recital (unnecessarily recording (a) a breach of duty of full and frank disclosure by the Company (b) no risk of dissipation and/or misuse of the Company's assets by Mr Liang (c) the appointment of JPLs should not have been sought and (d) liability on Mr Lau to compensate the Company) that the Company was insisting upon until recently. Mr Abbott described the troublesome recital as a red herring.

93. I have considered the protracted correspondence and I note in the letter dated 20 September 2022 to Harneys, Appleby (the then attorneys for Mr Lau) indicated that “our client consents to Orders 3 and 4 as sought in the Summons”. Paragraph 3 related to Mr Lau paying the remuneration and expenses of the JPLs and paragraph 4 that there be an inquiry as to the loss and damage suffered by the Company as a result of the JPLs’ appointment and which Mr Lau was liable to compensate the Company for. Further correspondence between the attorneys followed. Harneys by email dated 15 February 2023 to Appleby noted that “certain matters between the parties have been settled” but the discharge summons remained before the court and asked for Appleby’s confirmation as to whether the revised order was agreed. A gentle reminder was sent on 27 March 2023 which was acknowledged on 1 April 2023. On 3 April 2023 Appleby emailed Harneys: “We are instructed that the Discharge Summons was resolved as part of the settlement between the parties and that a Consent Order should therefore be filed simply dismissing the Discharge Summons with no order as to costs. Could you please confirm your instructions in this regard”. On 13 April 2023 Harneys responded indicating that the Discharge Summons had not been resolved and sought Appleby’s client’s agreement to a consent order which still contained the troublesome recital. By email dated 2 May 2023 Appleby maintained that their client’s understanding was that the Discharge Summons was compromised by settlement and that the principals were discussing the position further. On 31 May 2023 Forbes Hare appear on the scene for the Company and indicate that the Discharge Summons had not been compromised by any settlement. A revised copy of a consent order was enclosed again with the troublesome recital still included and an inquiry in respect of Mr Liang added but not highlighted. By email dated 7 June 2023 Appleby indicate that they are taking instructions. On 20 June 2023 Forbes Hare send a chaser. The Discharge Summons is amended on 5 October 2023. Mr Abbott says that on 16 October 2023 Claritas (for Mr Lau) provided a revised list of issues and accepted that an inquiry should be ordered in respect of the Company.
94. I note all that is said in respect of the correspondence including the troublesome recital and the reference to but lack of any settlement in respect of the inquiry and the submissions in respect of costs. I have to say both sides have been dilatory in the progression of the summons and the correspondence is not an impressive read through the lens of the overriding objective.
95. In my judgment Mr Lau should pay the Company’s costs in respect of its inquiry up to 20 September 2022, the date when the point was effectively conceded, on the standard basis and the costs thereafter be costs in the inquiry. I do not think the confusion over whether the summons was part

of the overall settlement or not is enough to justify indemnity costs or to make any other order as to costs. I am not persuaded that costs should be ordered on the indemnity basis. There was no unreasonable conduct to a high degree outside the norm, which would justify indemnity costs in this case.

Orders

96. Counsel should within 5 days from the delivery of this judgment file orders agreed as to content and form reflecting the determinations contained herein.

David Doyle

**The Hon. Justice David Doyle
Judge of the Grand Court**