HCCT 60/2023  
 [2025] HKCFI 920

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF FIRST INSTANCE**

**CONSTRUCTION AND ARBITRATION PROCEEDINGS**

**NO. 60 OF 2023**

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IN THE MATTER of Section 45(2) of the Arbitration Ordinance (Cap. 609)

and

IN THE MATTER of Order 29 of the Rules of the High Court (Cap. 4A) and Inherent Jurisdiction

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BETWEEN

MOUNTAIN ROAD HOLDINGS LTD Plaintiff

and

PLAINVIM INTERNATIONAL SCIENCE 1st Defendant

INDUSTRIAL PARKS HOLDINGS LTD

(previously known as PLAINVIEW INTERNATIONAL

PROPERTIES DEVELOPMENT HOLDINGS

PLAINVIM INTERNATIONAL (B) LTD 2nd Defendant

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Before: Deputy High Court Judge Douglas Lam SC in Chambers (Open to Public)

Date of hearing: 29 November 2024

Date of Decision on Costs: 4 March 2025

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D E C I S I O N O N C O S T S

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*I. Introduction*

1. On 12 September 2023, the Plaintiff made an *ex parte* application without notice seeking (1) a worldwide Mareva injunction against the 1st and 2nd Defendants up to the sum of RMB 190 million; and (2) an interim injunction restraining the 1st and 2nd Defendants from allegedly breaching Clause 6.1 and Schedule 1 of a shareholders’ agreement dated 7 August 2017 (the “**SHA**”), and restraining them from causing or procuring (through their subsidiaries) Plainvim International (Nansha) Development Ltd (“**Nansha HK**”) to dispose of or deal with or diminish the value of the sum of approximately RMB 190 million (or its traceable proceeds) (the “**said Sum**”), which had been paid by Guangzhou Nansha Plainvim Automobile Industrial Park Company Ltd (“**Nansha GZ**”) to Nansha HK in or around August 2023, together with ancillary disclosure orders in relation to the whereabouts of the said Sum (together, the “***ex parte* Application**”).
2. The *ex parte* Application, which was made pursuant to section 45(2) of the Arbitration Ordinance (Cap 609) as an interim measure in aid of arbitration proceedings to be commenced in Hong Kong, was heard by Toh J, the duty judge. Her Ladyship declined to make an immediate order that day and directed that notice of the application be given to the Defendants and that the hearing be adjourned to the following day.
3. On the following day, the Plaintiff issued the Originating Summons (the “**OS**”) for reliefs against the Defendants in terms of the *ex parte* Application. At the adjourned hearing, the *ex parte* Application was further adjourned *sine die* with liberty to restore upon the 1st and 2nd Defendants’ undertaking that they shall not procure the termination or variation of the fixed deposit placed by Nansha HK with the Shanghai Commercial Bank (“**SCB**”) (comprising the said Sum) on 12 September 2023 until 11 October 2023, without giving the Plaintiff 7 days of notice in advance.
4. On 1 November 2023, Mimmie Chan J stayed the OS by consent with costs reserved.
5. On 1 February 2024, the Plaintiff’s solicitors, DLA Piper Hong Kong (“**DLAP**”) wrote to the Defendant’s solicitors, So Lung & Associates (“**SLA**”) indicating that the Plaintiff would agree to the discontinuation of the OS with costs payable by the Defendants on the grounds that it had by then been provided with sufficient information and documents about the status and intended use of the said Sum and that this would not have happened if not for the *ex parte* Application. Alternatively, the Plaintiff was prepared, solely to save time and costs, to consent to no order as to costs.
6. The Defendants disagreed and on 23 February 2024 issued the present Summons for an order that the OS be dismissed with costs on an indemnity basis, to be summarily assessed and payable forthwith (the “**Dismissal Summons**”).
7. The substantive hearing of the Dismissal Summons came before me on 29 November 2024. There was no serious dispute that the OS should be dismissed, and the only issue to be decided by the Court was the appropriate order as to costs.
8. At the outset of the hearing, I raised with the parties that as the hearing was concerned only with the question of costs, the practice of the Court in such circumstances was to adopt a broad brush approach (see e.g. *Graham M. Morley v Kwan Wo San & Ors* (unreported) HCA 4366/2003, 30 December 2009 *per* Recorder Jat SC). Neither Mr Victor Dawes SC[[1]](#footnote-1), counsel for the Plaintiff, nor Mr Look Chan Ho[[2]](#footnote-2), counsel for the Defendants, took issue with such an approach. That said, I bear in mind Mr Dawes SC’s observation that, on the materials now before the Court, I am in a similar position as if this had been a hearing of the OS on the merits and am therefore capable of determining who is the successful party and who should pay costs.
9. In the circumstances, I do not intend to cite at length each of the arguments raised in the detailed skeleton arguments filed by Mr Dawes SC and Mr Ho (consisting of some 40 pages and 30 pages respectively), which I have considered.
10. I should mention also that on 18 November 2024, the Plaintiff issued a Summons for leave to file and serve further affirmation evidence in opposition to the Dismissal Summons, together with a number of exhibits. The Plaintiff contended that this evidence was necessitated by new matters raised for the first time in the Defendant’s reply evidence filed on 10 October 2024. After considering the evidence and hearing the parties, I allowed the evidence on a *de bene esse* basis.

*II. Background*

1. The general background of the matter is not in serious dispute. I take the following largely from Mr Dawes SC’s submissions, with some additions and modifications.
2. The 1st Defendant and its subsidiaries (together, the “**Group**”), whose ultimate beneficial owner is one Mok Yuet Ling Peter (“**Mok**”), carries on the business of acquiring land and developing and leasing science and industrial parks in Mainland China.
3. The Plaintiff is an investment holding vehicle managed by Oaktree Capital Management, L.P. (“**Oaktree Capital**”), a well-established and well-resourced investment manager.
4. In early 2017, Oaktree Capital identified the 1st Defendant as a potential investment target. After negotiations, Oaktree Capital and the 2nd Defendant agreed that the Plaintiff would subscribe for the 1st Defendant’s shares and inject capital into the Group. One of the terms of the investment was that the 1st Defendant was required to achieve an initial public offering (IPO) by a certain date. In the event that the intended IPO could not be achieved, the Plaintiff would be entitled to exit its investment by exercising an option requiring the 2nd Defendant to acquire the Plaintiff’s shareholding at a certain price, failing which the 1st Defendant’s assets shall be transferred to the Plaintiff, which would then realise those assets to recoup its investment.
5. On 7 August 2017, the Plaintiff and the 1st and 2nd Defendants entered into: (1) a Share Subscription Agreement (“**SSA**”), by which the Plaintiff subscribed for 32.5% of the shares in the 1st Defendant; and (2) the SHA governing the rights between the Plaintiff and the 2nd Defendant as shareholders of the 1st Defendant.
6. In early 2018, the same parties negotiated an additional investment by the Plaintiff in the 1st Defendant, and on 20th March 2018, they entered into (1) the Second Share Subscription Agreement, and (2) the Supplemental Agreement to the Shareholders’ Agreement, which amended and supplemented the SHA. As a result, the Plaintiff became the 40% shareholder of the 1st Defendant, with the remaining 60% held by the 2nd Defendant.
7. For present purposes, Clause 6.1 of the SHA (as amended and supplemented) is relevant and provided as follows:

“Reserved Matters. For so long as the Investor [i.e. the Plaintiff] holds Shares [i.e. shares in the 1st Defendant], consent of both the Investor and Plainvim Parent [i.e. the 2nd Defendant] (the “**Special Consent**”) is required for any of the matters (including an agreement or undertaking with respect to such matters) set forth in Schedule 1 (the “**Reserved Matters**”) with respect to each Group Company [i.e. any company within the Group] and the Business. [The 2nd Defendant] shall vote its Shares at any Shareholders’ Meeting, and shall take all other actions necessary, to ensure that no action or decision is taken (whether by the Board, [the 1st Defendant], any other Group company or any of their directors, officers, managers, shareholders or employees) to proceed with any Reserved Matter without prior Special Consent.”

Schedule 1 to the SHA provides inter alia that:

“The Special Consent shall be required to:

…

(5) declare or pay any dividend or make any other distributions or purchase or redeem any shares (including the Shares) or equity interests of any Group Company;

…

(10) enter into any transaction which is not in the ordinary course of business of any Group Company or which is not on an arm’s length basis by any Group Company;…”

1. The SSA and SHA (as amended and supplemented) contained identical arbitration clauses in favour of HKIAC arbitration.
2. Although the Plaintiff alleges that the Defendant had committed a “variety of breaches of the SHA” in the past, the apparent trigger for the *ex parte* Application was the Defendants revelation to the Plaintiff on 28 August 2023 of a transfer of the said Sum from Nansha GZ, an onshore subsidiary of the Defendants, to Nansha HK, an offshore subsidiary of the Defendants without the Plaintiff’s knowledge and consent (the “**Alleged Unauthorised Transfer**”):
   1. In August 2023, one of Oaktree Capital’s managing directors which had newly come on board, Mr Han Feng (Edward) (“**Mr Han**”) requested a meeting with Mr Mok Yuet Ling Peter (“**Mr Mok**”), the ultimate beneficial owner of the 2nd Defendant, to discuss the investment status of the Plainvim project.
   2. That meeting took place on 28 August 2023, during which Mr Mok mentioned that RMB 190 million had been transferred from Nansha GZ to Nansha HK, i.e. the Alleged Unauthorised Transfer. According to Mr Han, Mr Mok said that the transfer was a distribution of dividends from the onshore company to its offshore parent and further admitted that the Plaintiff’s prior consent (being one of the Reserved Matters in the SHA) had not been obtained.
   3. Mr Mok further stated that he did not intend to distribute the said Sum upwards to the Plaintiff and the 2nd Defendant, but rather the said Sum would be used for Nansha HK’s business operations. However, Mr Mok did not provide any details on precisely how the said Sum would be used.
3. Further discussions took place over email and in two group calls between, inter alios, Mr Han and the Defendants’ representatives, including Mr Chan Chun Sing Denis (“**Mr Chan**”), the CFO of the Group, on 30 August and 11 September 2023. In those calls, the Plaintiff’s representatives pressed for further information concerning the whereabouts and intended use of the said Sum. According to the Plaintiff:
   1. On the call on 30 August 2023 (the “**August 30 Call**”), Mr Chan confirmed that the said Sum had been transferred and had been deposited into a bank account. However, he did not provide details of the bank account or the intended use of the said Sum other than it would be for the normal operations of the Group.
   2. On the call on 11 September 2023 (the “**September 11 Call**”), Mr Chan indicated for the first time that the said Sum would be used to repay offshore loans of the Group that were about to mature. Despite Mr Han’s requests for further details of such loans, however, Mr Chan said that he would need to seek senior management approval before he could inform the Plaintiff of further details.
4. Unbeknownst to the Defendants, however, and certainly by the time of the September 11 Call, the Plaintiffs were already in the course of preparing the *ex parte* Application which, as mentioned above, was made on the following day on 12 September 2023.
5. In short, the Plaintiff submitted that the *ex parte* Application was necessary due to the (1) evasiveness of the Defendants regarding the Sum which gave rise to concerns of a risk of further dissipation; (b) the Alleged Unauthorised Transfer of the said Sum was in plain breach of Clause 6.1; (3) the quantum involved; and (d) a background of breaches by the Defendants, including payments by the Defendants to Mr Mok and other related parties not approved by the Plaintiff and in breach of the SHA.
6. On the morning of 13 September 2023, Mr Ho filed his submissions opposing the *ex parte* Application, which attached a cover email dated 12 September 2023 from the 1st Defendant to SCB attaching an undated application for a 1-month fixed deposit for the said Sum.
7. As mentioned above, at the adjourned hearing, upon the Defendant’s undertaking not to procure the termination or variation of the intended fixed deposit placed by Nansha HK with SCB until 11 October 2023 without giving the Plaintiff 7 days’ notice, the parties agreed for the application to be adjourned *sine die* with liberty to restore, and the Court made an order in those terms with costs reserved.
8. However, the Plaintiff remained dissatisfied with the Defendants’ reasons for the Alleged Unauthorised Transfer and the intended use of the said Sum, and in the ensuing months, there were numerous exchanges of correspondence between DLAP and SLA, with DLAP pressing the Defendants for further details and supporting documents concerning the reasons for the transfer and the status of the said Sum. By the end of January 2024, materials provided by SLA showed that the said Sum was eventually used for loan repayments for the Group in December and January 2024.
9. As matters stood by the time of the hearing, it was not the Plaintiff’s case that the said Sum had been misused by the Defendants. The gravamen of the Plaintiff’s complaint, rather, was that the declaration of the dividend which resulted in the Alleged Unauthorised Transfer was made without the Plaintiff’s prior consent and was thus in breach of the SHA. Further, there had been a lack of transparency and “evasiveness” by the Defendant as to the status and intended use of the said Sum which necessitated and justified the OS and the *ex parte* Application.
10. As for the Defendants, Mr Ho did not seriously dispute that no prior consent of the Plaintiff had not been obtained prior to the declaration of dividend. However, he contended that, as far as I am able to understand, there had been no breach of Clause 6.1, as the clause “is not a negative covenant not to do something, but a positive covenant to do something, i.e. to obtain the consent before such Reserved Matters can be decided.”

*II. Applicable Principles*

1. First, the principles for Mareva injunctions are well established and were comprehensively considered by the Court of Appeal in *Convoy Collateral Ltd v Cho Kwai Chee & Others* [2020] 6 HKC 81 at §§34-54, which I do not repeat here. It suffices here to mention that as to risk of dissipation, the burden is firmly on the plaintiff to show a solid basis for concluding that there is a real risk.
2. Second, with regards to the justification for *ex parte* applications generally, the principles were helpfully summarised by Ng J in *China Medical Technologies Inc v Wu Xiaodong & Ors* (unreported) HCA 3391/2016 and HCA 1417/2013, 22 May 2019 at §§24 – 26 as follows:

“24. … an *ex parte* application is not simply a convenient alternative to an *inter parte* application. *Ex parte* applications without notice should only be made where either the delay would cause injustice to the applicant or the defendant would take action which would nullify the effect of the injunction: *Ho Tak Eng v Fame Brilliant Ltd* [2006] 1 HKLRD 34 at [8] and [11] (CA).

25. On the question of abuse of process in making an unjustified *ex parte* application, Johnson Lam J (as he then was) observed in *Slik Hong Kong Co Ltd v Gerald Merlyn Rhoslyn Evans & Ors* unrep, HCA 1424 of 2005, 25 July 2005, at §§2-6 as follows:

‘2. *Ex parte* applications should be regarded as exceptional and the court should not entertain the same unless there are cogent justifications usually in terms of either extreme urgency or secrecy. See *Bates v Lord Hailsham of St Marylebone & others* [1972] 1 WLR 1373.

3. In *Brand, Farrar Buxbaum v Samuel-Rozenbaum Diamond*, HCA 5191 of 1998, 8 May 2002, Ma J (as he then was) said at Para 24,

‘One of the facets of equality before the law (a fundamental right guaranteed under Article 25 of the Basic Law) is that no order ought to be made by a court against anyone without his first being given a reasonable opportunity of being heard. An exception to this fundamental rule is where *ex parte* orders are made by the court. At the risk of repeating the obvious, *ex parte* orders are only made ‘where the situation is of such extreme urgency that there is literally no time to warn the defendant of what is proposed or where the purpose of the injunction will or may be frustrated if the defendant is informed of what is proposed or where the defendant simply cannot be found’: see *TRP Limited v Thorley*, unreported, 13 July 1993, English Court of Appeal, per Bingham LJ. I should perhaps out of completeness add that this salutary rule does not apply where express provisions are made in the Rules for the *ex parte* procedure to be used: see *Hong Kong Civil Procedure* at paragraph 32/6/5.’

4. It follows that the first thing the court should ask when it is faced with an *ex parte* application is whether the applicant can show such exceptional circumstances which justify him proceeding on *ex parte* basis. If he could not cross that hurdle, the court should not be concerned about the substantive merits of his application.

…’

26. Where it is found that there is no justification, either on the ground of urgency or the need for secrecy, to make the application *ex parte*, the Court will set aside an order obtained on this ground alone: *Luck Continent Ltd v Leonora Yung & Ors* unrep, CACV 42 of 2010, 22 October 2010 at [19]; *Yifung Developments Ltd v Liu Chi Keung Ricky* [2014] 4 HKLRD 483 at [15]-[16].” (emphasis added).”

See also *Success Lane Development Ltd v Ferguson Hong Kong Ltd* (unreported) [2024] HKCA 839 at §23.

1. Third, where a party decides to withdraw or discontinue an application, generally speaking, the discontinuing party will be required to pay the costs of the other party. The burden is on the party who seeks to withdraw to persuade the Court to depart from this starting point. It has been said that “exceptional circumstances” need to be shown, and the fact that the discontinuance was caused by the issues becoming academic may not by itself justify departure from the general rule (see e.g. *Huangfu Chuangxin v Ni Yongkang & Ors* (unreported) [2022] HKCFI 1721 at §§11-14). Of course, much will depend upon on how and why the application or the issues have become academic. Needless to say, the Court has a broad discretion on costs and will look at all the circumstances in determining what would be a fair order.

*III. Discussion*

1. As mentioned above, the Defendants seek the costs of the OS on an indemnity basis. Mr Ho relies on a number of grounds, including that (1) as the Plaintiff decided no longer to pursue the OS or the *ex parte* Application, that amounted to an effective withdrawal or discontinuance and costs should follow the event; (2) the *ex parte* Application was unjustified as there was no risk of dissipation, extreme urgency or need for secrecy; and (3) there had been serious material non-disclosure in the OS. I address (2) and (3) first.
2. Despite Mr Dawes SC’s persuasive submissions, I am not convinced that the Mareva injunction sought against the Defendants in the *ex parte* Application was justified.
3. On the risk of dissipation, the Plaintiff contended that the Defendants “are of low commercial morality”, based upon the fact that the Alleged Unauthorised Transfer was the latest in a pattern of breaches of contract by the Defendants giving rise to a serious concern that the said Sum would be further dissipated.
4. I have considered the alleged breaches of contract, which were set out in detail in the Affirmation of Li Zhengyi, a managing director of Oaktree Capital (“**Mr Li’s Affirmation**”) in support of the *ex parte* Application, including inter alia “various unauthorised drawings” by Mr Mok from the 1st Defendant, “numerous related-party transactions” without the Plaintiff’s consent and the Defendants’ failure to provide information concerning such transactions in breach of their obligation to do so under the SHA. It does not appear that any legal proceedings had been commenced in respect of those alleged past breaches or that the Plaintiff had sought to exercise its rights to exit the investment pursuant to Clause 12.1(c) of the SHA (which provides that any unremedied breaches of the SHA by the Defendants would constitute an “exit event” entitling the Plaintiff to exit the investment).
5. Further, the Plaintiff does not go as far to allege fraud or dishonesty on the part of the Defendants or Mr Mok in respect of the past transactions, or indeed the present. In any event, even had dishonesty or serious misconduct been asserted, as Lam VP emphasized in *Convoy*, it is necessary to scrutinise the evidence carefully to see whether the dishonesty in question points to the conclusion that assets may be dissipated.
6. It is also relevant to note that on the Plaintiff’s own case, it was Mr Mok who voluntarily disclosed the Alleged Unauthorised Transfer to Mr Han at the meeting on 28 August 2023 rather than the Plaintiff’s discovering the transfer on its own. Moreover, even if the said Sum had been transferred from Nansha GZ to Nansha HK in breach of the SHA, both were subsidiaries in the Group and said Sum remained within the Group rather than being dissipated to some third party.
7. Having regard to all the circumstances, including inter alia (1) the longstanding and continuing relationship between the parties; (2) the continued discussions concerning the transfer (which, as can be seen from the transcript of the September 11 Call, remained reasonably amicable) leading up to the *ex parte* Application; and (3) the substantial business operations and financial position of the Group (which does not appear to be seriously disputed despite the Plaintiff’s complaints of lack of transparency due to the Defendants’ failure to provide it with adequate financial information), I am not persuaded that there the Plaintiff is able to discharge its burden of showing a solid basis for concluding that there is a real risk of dissipation on the part of the Defendants.
8. On this ground alone, I would have no hesitation in refusing the Mareva injunction had this been a live issue before the Court.
9. Mr Ho also contended that the Plaintiff was unable to show a good arguable case of damages to support the intended Mareva injunction given that its claim for misappropriation at the subsidiaries’ level would *prima facie* be barred by the principle of reflective loss, irrespective of whether it had an independent cause of action for breach of the SHA.
10. Mr Dawes SC’s response is that the Plaintiffs suffered an independent loss as had the said Sum been misappropriated, that would have resulted in a depression of the value of the 1st Defendant’s subsidiaries and thus the 1st Defendant and in turn a lower exit consideration for the Plaintiff under the terms of the SHA.
11. I have some reservations as to the merits of Mr Dawes SC’s argument since a depression in value of the Group caused by any misappropriation would be remedied by the restoration of the said Sum or the recovery of a similar value in damages. However, in the light of my findings above, it is unnecessary for me to form any concluded view on this issue.
12. As to the interim injunction restraining the breach of Clause 6.1 of the SHA, the considerations are of course different from the Mareva injunction – there is no need to show a risk of dissipation, and the usual *American Cyanamid* principles apply.
13. I accept that the Plaintiff has shown at least a serious issue to be tried that there has been a breach of the negative covenant in Clause 6.1. Mr Ho’s argument that the clause in not a negative covenant not to do something but merely a positive covenant to obtain prior consent is unconvincing. Although the dividend had already been declared by the time of the *ex parte* Application, any misuse of the said Sum would potentially amount to a transaction which would not be “in the ordinary course of the business of any Group Company...” and thus a reserved matter. Given the quantum of the said Sum, unless it is shown that the said Sum was to be used for the normal operations of the Group, I can see that damages would not be an adequate remedy. Further, given that details on the status and intended use of the said Sum had not been immediately forthcoming from the Defendants, the balance of convenience would lie in favour of some guardrails being imposed on its use.
14. That said, I am not persuaded that there was sufficient justification for the application being made *ex parte* without notice. At the very least, short notice could and should have been provided to the Defendants. This is especially so when the parties remained, as mentioned above, in reasonably amicable communication even up to the day before the *ex parte* Application.
15. By 11 September 2023, the Plaintiff had been told that the said Sum had been placed in a fixed deposit and that the said Sum was intended to be used to repay certain offshore loans that were coming up to maturity. Although the Plaintiff complains that they had not been provided with particulars of the loans, Mr Chan indicated that he would seek senior management to provide the same to the Plaintiff. In response, Mr Han indicated that the Plaintiff would wait for the approval from the 1st Defendant’s senior management to provide the information to them:

“行，好，那你--我們就等你們這邊高管這個批准之後給我們，我就沒有其他問題了，我可能就是最後再強調一下，就我剛才說過的，就是make sure大家知道，因為誒我們希望能夠把那信息能夠透明呀，你們儘快找--找老闆問一下，首先這個一--一點九個億，從境內到境外，這個Oaktree沒有批准，okay，這個第一個，有--有兩個問題，第二個就是說，你這個一點九個億怎麼用，也需要Oaktree的批准，如果沒有我們批准的話，你用了，也是--也是違反那個合同的，我--我大概是先說到這，誒我沒有其他問題了。” (emphasis added)

1. No indication was made in that call by the Plaintiff’s representatives imposing any deadline or that unless that deadline was met, the Plaintiff would initiate legal proceedings. Yet, by that time, the Plaintiff must already have been finalising the papers for the *ex parte* Application. Looking at the tenor of the conversations from the transcripts, the *ex parte* Application would have come as a complete surprise to the Defendants. Perhaps this was the intended effect, but in my view, this was an unwarranted ambush. There was no proper basis, either as a matter of extreme urgency or secrecy, for the Plaintiff to have proceeded *ex parte* without notice.
2. Finally, Mr Ho relies also on the fact that there had been serious material non-disclosure in the *ex parte* Application such as to warrant indemnity costs. Mr Ho raised a number of complaints, but in my view, those that have greater substance are that:
   1. Although Mr Han disclosed in his supporting affirmation that he was told by Mr Chan in the August 30 Call that the said Sum “was deposited in a bank account”, he made no mention that he was in fact told that the said Sum had been placed in a fixed deposit (定全);
   2. As mentioned above, although Mr Li’s Affirmation disclosed that during the September 11 Call, Mr Chan had said that he would need to seek the Group’s senior management approval before he could provide more details of the offshore loans, the Affirmation made no mention that Mr Han indicated his agreement to wait for such approval, as mentioned above.
3. Whilst these matters may not have had a very significant bearing on the overall merits of the Plaintiff’s case of breach of Clause 6.1, they were in my view plainly relevant to the Court’s weighing process of the Mareva injunction application and whether the circumstances justified the application for the injunction to restrain the breach of Clause 6.1 to be made *ex parte* without notice.
4. That said, I do not believe that the non-disclosure was necessarily intentional or deliberate. The telephone calls were not short and involved a number of individuals speaking, and therefore, not everything that was said may have registered in everyone’s minds. It has not been suggested that the Plaintiff’s representatives had recorded the telephone conversations, and it was only in the Defendants’ subsequent evidence that a verbatim transcript was produced based on recordings of the August 30 and September 11 Calls by the Defendants.
5. Having regard to all the circumstances, it seems to me the fairest order would be for the Defendants to have 80% of the costs of the OS, including all reserved costs, the Dismissal Summons and the costs for this hearing, to be taxed on a party and party basis.
6. The reason for the apportionment is that although the I have come to the view that the Mareva injunction application was unjustified and that the interim injunction application restraining the breach of Clause 6.1 should not have been made *ex parte* without notice, had the latter application been made on an inter partes basis, it would not have been devoid of merit.
7. As mentioned above, I find that there is at least a serious issue to be tried as to the breach of Clause 6.1 by the Defendants. Further, I agree that the Plaintiff could and should have been more transparent and forthcoming as to details and particulars of the whereabouts and intentions as to the use of the said Sum. This is particularly so having regard to the Plaintiff’s entitlement to financial information concerning the Group contained in clause 11.3 of the SHA.
8. Hence, although the Plaintiff no longer pursued the *ex parte* Application on 13 September 2023 as a result of undertaking provided by the Defendants and no longer pursued the OS after further information and documents had been produced by the Defendants subsequent to the *ex parte* Application, it cannot be said that the OS was entirely academic.

*IV. Conclusion*

1. In the circumstances, I made an Order that:
   1. The Originating Summons filed on 13 September 2023 be dismissed.
   2. The 1st and 2nd Defendants do have 80% of the costs of these proceedings, including the costs of the Dismissal Summons and any reserved costs, to be taxed on a party and party basis, with certificate for two counsel, if not agreed.
2. Although the Plaintiff seeks the summary assessment of costs, bearing in mind that the entire OS has been dismissed, I think that the more appropriate course would be for the matter to be taxed in the usual manner before a taxing master. I so order.
3. Last but not least, I thank both teams of counsel for their assistance.

(Douglas Lam SC)

Deputy High Court Judge

Mr Victor Dawes SC and Mr Brian Lee, instructed by DLA Piper Hong Kong, for the Plaintiff

Mr Look-Chan Ho and Mr Joshua Yeung, instructed by So, Lung & Associates, for the 1st and 2nd Defendants

1. Leading Mr Brian Lee [↑](#footnote-ref-1)
2. Together with Mr Joshua Yeung [↑](#footnote-ref-2)