IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE No. FSD 25 of 2017 (IMJ)

BETWEEN

(1) XIE ZHIKUN
(2) FORTUNE FAVORS HOLDINGS LIMITED
(3) SHENGSHI VIEW INTERNATIONAL HOLDING LTD

Plaintiffs

(1) XIO GP LIMITED
(2) JOSEPH PACINI
(3) ATHENE (XIANG) LI
(4) DORSEY VENTURES LIMITED

Defendants

IN CHAMBERS AND IN PRIVATE

Appearances: **Lord Goldsmith, QC. PC and Mr. Colin McKie QC, instructed by Mr. Luke Stockdale and Mr. Paul Smith of Maples and Calder on behalf of the Plaintiffs.**
Mr. Stephen Atherton, QC and Mr. Tony Heaver-Wren, instructed by Mr. Andrew Bolton and Ms. Sally Peedom of Appleby for the 1st and 2nd Defendants.
Ms. Blair Leahy, Counsel and Mr. Mark Goodman, instructed by Mr. Michael Popkin of Campbells on behalf of the 3rd Defendant.
Mr. Peter Sherwood of Carey Olsen for the 4th Defendant (28, 29 and 31 March 2017 hearing only).

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **28, 29 and 31 March 2017 and 23rd May 2017**

Supplemental Written Submissions received from the 1st and 3rd Defendants on 6 April 2017 and from the Plaintiffs on 12 April 2017

Preliminary Skeleton Argument and Skeleton Argument received from the Plaintiffs on 16 and 22 May 2017 and Skeleton Argument received from the 1st and 3rd Defendants on 22 May 2017

Draft Judgment
Circulated: **6 June 2017**

Judgment Delivered: 9 June 2017

HEADNOTE

Interlocutory Injunction – Continuation of Ex Parte Injunction - Discharge - Whether Failure of Duty of Full and Frank Disclosure. Whether Case an exception to the guidelines in American Cyanamid - Whether Serious Issue to be tried - Company Law - Reflective Loss Rule - Whether serious issue as to Exception to the Rule since claim is for Permanent injunction - Whether Damages an Adequate Remedy - Balance of Convenience - Fortification.

JUDGMENT

The Parties

1. The First Plaintiff, Xie Zhikun ("**Mr. Xie**") is the Chairman and founder of Zhongzhi Enterprise Group Limited ("**ZEG**") which is a private company and one of the largest asset management groups in the People's Republic of China ("**PRC**") with diverse operations including asset management and financial services. The Statement of Claim indicates that Mr. Xie wholly controls, directly or indirectly, ZEG.

2. The Second Plaintiff, Fortune Favors Holdings Limited ("**Fortune**") is a Limited Company incorporated in the British Virgin Islands. Its registered office is at Akara Building, 24 De Castro Street, Wickhams Cay 1, Road Town, Tortola, British Virgin Islands. Mr. Xie claims to be the beneficial owner of Fortune.

3. The Third Plaintiff, Shengshi View International Holding Ltd ("**Shengshi**") is a Hong Kong Limited Liability Company incorporated in Hong Kong. Its registered office is at Unit 917, 9/F Block A Mandarin Plaza, No. 14 Science Museum Road, Tsim Sha Tsui, Kowloon, Hong Kong. Mr. Xie claims to be the beneficial owner of Shengshi.

4. The First Defendant, XiO GP Limited ("**XiO GP")** is an Exempted Limited Cayman Islands Company with its registered office at the offices of Intertrust (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman, KY1-9005, Cayman Islands.

5. The Second Defendant, Joseph Pacini ("**Mr. Pacini**") is an Italian citizen. Mr. Pacini is the Chief Executive Officer ("**C.E.O.**") and Partner of the group of entities known as the XiO Group.

6. The Third Defendant Athene (Xiang) Li ("**Ms Li**") is a citizen of the PRC. She is the Chairwoman and Partner of XiO Group which has a place of business in Hong Kong and in England. Mr. Xie avers that Ms. Li was at all material times a financial advisor to him. This is denied by XiO GP and Ms. Li.

7. The Fourth Defendant, Dorsey Ventures Limited ("**Dorsey**") is a Cayman Islands exempted limited company whose registered office is at the offices of Offshore Incorporations (Cayman) Limited, PO Box 31110, Grand Pavilion, Hibiscus Way, 802 West Bay Road, Grand Cayman, KY1-1205, Cayman Islands.

8. I shall refer to the Plaintiffs collectively as "**the Plaintiffs**" and, when reference is made collectively to XiO GP and Ms. Li as "**the First and Third Defendants**", or "**these Defendants**", as the context requires.

The Applications

9. There are two applications before me. The first is the *inter partes* hearing of the Plaintiffs' application for the continuation of the interim injunctions first applied for by them and granted by me *ex parte* (on notice) on 9 February 2017 (as continued on 14 and 28 February 2017). The Defendants seek a discharge of the injunctions or alternatively a variation of them.

10. In the event that the injunctions are not discharged, the Defendants seek fortification of the Plaintiffs' undertaking as to damages. This is the second application, although there is not an actual summons seeking this relief.

11. There was also before me a summons on behalf of XiO GP which dealt with certain confidentiality issues. That application was dealt with at the outset and nothing further needs to be said about it in this judgment.

The Interim Injunctions Granted on 9 February 2017

12. On 9 February 2017, on the Plaintiffs' application by way of summons dated 7 February 2017 and on the Plaintiffs' oral application, I granted respectively, on the Plaintiffs' giving the usual undertaking as to damages, the injunctions set out at paragraphs 1 and 2 below:

> *"1. The First Defendant ("**XiO GP**") be restrained until 4:00 p.m. on 14 February 2017 from doing, whether by itself or its directors, officers, servants or agents or otherwise howsoever, any of the following acts or things: taking any steps to enforce certain purported "call notices" dated 24 January 2017 that have been issued by XiO GP on 25 January 2017 to the Fourth Defendant ("**Dorsey**") including, without limitation, any steps to resolve or declare that Dorsey's limited partnership interest in XiO Fund 1 LP be diminished, forfeited or otherwise negatively affected.*
>
> *2. The Third Defendant ("**Li**") be restrained until 4:00 p.m. on 14 February 2017 from doing, whether by herself or by her servants, agents or otherwise howsoever any of the following acts or things:*
>
> *(a) taking any steps that would have the effect of impairing or restructuring or dissipating all or part of the assets of Dorsey;*
>
> *(b) transferring, dealing with or encumbering, or voting in respect of, any and/or all the shares in Li's name in Dorsey; and*
>
> *(c) taking any steps or actions on behalf of Dorsey, or holding herself out as representing the interests of Dorsey."*

13. These injunctions were continued on 14 and 28 February 2017, and on 28 February 2017 I ordered that they continue upon the same terms as originally granted until further order of the Court.

14. At the close of the hearing, since it was accepted on all sides that there needed to be variations, I made certain orders as to variation, some of which were agreed, and some of which I had to rule upon.

15. The injunction as varied, included provisions restraining XiO GP whether by itself or its directors, officers, servants or agents or otherwise until further order, from resolving under clause 6.3(a)(iv) of the Amended and Restated Limited Partnership dated 6 August 2014 or clause 6.3(a)(iv) of the Amended and Restated Limited Partnership Agreement dated 25 July 2015 (together the "**LPAs**"), that Dorsey's Interests (as defined in clause 1.1 of the LPAs) have been forfeited.

16. It also included provisions restraining Ms. Li until further order, in the general terms set out in paragraph 12 above, but varied to say that that order does not prevent Ms. Li, by herself or by her servants or agents or otherwise, from taking any action in her capacity as a director of XiO GP or as a director and/or officer and/or authorised signatory and/or authorised representative of any entity owned directly or indirectly by XiO Fund I LP ("**the Entities**") which is in the ordinary course of business of XiO GP and the Entities, save for divesting Project Camping and Project Laguna. For the avoidance of doubt, a definition was also given of what is included under "ordinary course of business".

17. Numerous affidavits have been filed on behalf of the Plaintiffs and XiO GP as well as Ms. Li. Defences have been filed on behalf of XiO GP and Dorsey. I, on 31 March 2017, at the request of Mr. Atherton QC who appears for XiO GP as well as for Mr. Pacini, and Miss Leahy, who appears for Ms. Li, granted leave for the Defences of Ms. Li and Mr. Pacini to be filed 14 days after delivery of my judgment in respect of these applications.

The Nature of the Case and Instant Applications

18. I consider this case a complex one and I have not found these applications easy to determine. In fact, I apologise to the parties and Counsel for the fact that it has taken me longer than I originally anticipated, to arrive at my decision. I thank them for their patience. There have been many points raised and argued. I thank Counsel for the thoroughness of their preparation which has been of great assistance to the Court.

The Plaintiffs' Claim

19. This application by the Plaintiffs relates to a claim concerning Dorsey and the XiO Fund I LP (**"the XiO Fund"**) of which Dorsey is the sole limited partner. The detailed factual background to this application from the Plaintiffs' point of view and the claim are set out in the Statement of Claim. However, I gratefully adopt the summary contained in paragraphs 7 to 12 (inclusive) of the *"Plaintiffs' Supplementary Written Submissions for Inter Partes Hearing on 28 March 2017 for Continuation of Injunctive relief"*.

20. In 2014, Mr. Xie approached Ms. Li and asked her to establish an offshore investment structure for him. Mr. Xie made it clear, he asserts, that it was important to him that he would have management powers over the investment fund and would have a right of veto over any investments.

21. In the months that followed, the XiO Fund was established in the Cayman Islands. XiO GP is the General Partner of the XiO Fund. Ms. Li and Mr. Pacini are the controllers of the XiO Fund and the entities within it.

22. The sole Limited Partner of the XiO Fund is Dorsey. Dorsey is 100% legally owned by Ms. Li. However, under the terms of an Entrustment Agreement which the Plaintiffs say was executed by Ms. Li on or around 24 August 2014 and by Mr. Xie on 29 August 2014, all of those shares in Dorsey are held by Ms. Li on a bare trust for the benefit of Mr. Xie. It is the Plaintiffs' case that the Entrustment Agreement was proposed to Mr. Xie by Ms. Li. Ms. Li provided the first draft of the Entrustment Agreement, negotiated its terms with Mr. Xie's representatives, and then attended the offices of one of Mr. Xie's

companies to sign the final Entrustment Agreement. It is asserted that for a substantial period after signing the Entrustment Agreement, Ms. Li acted consistently with its terms.

23. The only two investors that have contributed to Dorsey are Fortune and Shengshi. The Plaintiffs say that both of these entities are wholly owned and controlled by Mr. Xie. On 30 September 2014, Shengshi paid Dorsey US$20 million. On 7 October 2014, Fortune paid Dorsey US$60 million, of which US$10 million was returned by Dorsey in November 2014 as being surplus to requirements. The Plaintiffs say that these transactions were entered into as, and understood to be, equity contributions. However, subsequently, at the request of Ms. Li, they were documented as loan transactions.

24. According to the Plaintiffs, the intention was initially that entities controlled by Mr. Xie, including Fortune and Shengshi, would invest in the XiO Fund through contributions to Dorsey. However, a change in the regulations covering offshore investment from the PRC meant that this structure was no longer possible. A second fund, the Shanghai Li Hong Investment Centre Limited Partnership ("**Shanghai Li Hong**") was established, under the control of Ms. Li and Mr. Pacini, in Shanghai, for the purposes of allowing investment into offshore portfolio companies.

25. Shanghai Li Hong has three Limited Partners: Shanghai Zhong Heng Zhi Trading Co., Ltd ("**Onshore LP1**"); Jiangyin Liqin Yecheng Investment Co. ("**Onshore LP2**"); and Jiangyin Haoxin Xiangsheng Investment Co. (Limited Partnership) ("**Onshore LP3**"). It is the Plaintiffs' case that Onshore LP1 is beneficially owned by Mr. Xie, and all three limited partners are controlled by Mr. Xie.

26. The objective of Shanghai Li Hong was to invest directly into targets identified by the XiO Fund. In 2015 Shanghai Li Hong contributed approximately US$797.5 million to acquire two target businesses identified by the XiO Fund, to be held jointly by the XiO Fund and Shanghai Li Hong. These businesses were Project Camping and Project Laguna. Share Subscription Agreements for each investment were entered into between Shanghai Li Hong, the XiO Fund and the relevant target company, under which Shanghai

Li Hong's investment was recognized and commitments were given for shares to be issued by the target entities to Shanghai Li Hong.

27. According to the Plaintiffs, however, following Shanghai Li Hong's investment in Project Camping and Project Laguna, Ms. Li and Mr. Pacini ceased to cooperate with Mr. Xie and his representatives and Ms. Li and Mr. Pacini failed to provide information regarding the activities of the funds. In addition, they failed to ensure that shares were issued to Shanghai Li Hong in accordance with the Share Subscription Agreements, despite repeated requests from Mr. Xie. The Plaintiffs aver that Ms. Li and Mr. Pacini stopped responding to correspondence asking for updates on the funds' activities.

28. At the end of 2016, Mr. Xie wrote to Ms. Li and Mr. Pacini asking for information on the status of the investments in Project Camping and Project Laguna, and set a deadline of 20 January 2017 for a reply. No information was provided by Ms. Li or Mr. Pacini. The Plaintiffs assert that instead, apparently in response, on 4, 5 and 7 January 2017, XiO GP issued three capital calls to Dorsey for a total amount of US$65 million and the general partner of Shanghai Li Hong (under the control of Ms. Li and Mr. Pacini) issued three capital calls for a total of US$65 million from the Limited Partners of Shanghai Li Hong.

29. Following receipt of these capital calls:

29.1 On 18 January 2017, Mr. Xie wrote to Ms. Li to exercise his rights under the Entrustment Agreement, requiring her to transfer the shares in Dorsey to his nominee.

29.2 On 20 January 2017, the Hong Kong office of Debevoise & Plimpton LLP, Mr. Xie's Hong Kong solicitors, wrote to XiO GP, Ms. Li and Mr. Pacini seeking confirmation that the XiO Fund would not seek to enforce the capital calls against Dorsey, nor treat Dorsey as being in default as a result of non-payment.

30. The Defendants failed to comply with these requests. The Plaintiffs claim that moreover, there were statements made which were surprising and deeply worrying to Mr. Xie. As an example, the Plaintiffs refer to the statement first made, they say, on 24 January 2017 in a letter from Ms. Li's lawyers stating that she did not consider herself bound by the Entrustment Agreement. Further, shortly before the Court granted the injunctions on 9 February 2017, Ms. Li resigned her position as sole director of Dorsey, to be replaced by two directors appointed by her, Mr. Chow and Mr. Griffin of FTI Consulting. The capital calls were withdrawn by XiO GP on 24 January 2017, only to be replaced with new capital calls on that date, in the same amount of US$ 65 million.

31. On 3 February 2017, the Plaintiffs then commenced proceedings in this Court against the Defendants for breach of fiduciary duty, dishonest assistance and unlawful means conspiracy, and on 9 February 2017, brought the applications for the injunctions that were granted in the terms set out at paragraph 12 above.

32. In addition, on 7 February 2017, Mr. Xie filed a stop notice in relation to the shares in Dorsey, thereby in effect preventing any dealing in those shares and the payment of any dividends in respect of those shares - see Order 50, Rule 12 of the Grand Court Rules ("**the GCR**"). The stop notice was served on Dorsey and provided to Ms. Li's Cayman Islands Attorneys on 8 February 2017.

The Defendants' Position

Dorsey

33. Dorsey has filed a Defence to the claim. In essence, Dorsey denies that it conspired with the other Defendants to defraud the Plaintiffs and to conceal such fraud. It indicates that it has undertaken very little activity of any kind, and none of the actions it has undertaken could form part of the alleged conspiracy or have dishonestly assisted any alleged breach by Ms. Li or Mr. Pacini of their fiduciary obligations. Dorsey has indicated in particular, that it has not had any role in the management of the XiO Fund, nor any role in the

management or funding of Project Camping, Project Laguna or any other asset of the XiO Fund, or had any dealings with Shanghai Li Hong.

XiO GP

34. XiO GP, in its Defence, made a detailed response to the Plaintiffs' claims. However, paragraph 10 of its Defence also summarised the essence of its Defence. At paragraphs 9 and 10, it is pleaded as follows:

> *"9. .....for the avoidance of doubt, it is denied that Ms. Li was a financial advisor to Mr. Xie.*
>
> ***Summary of the GP's Defence***
>
> *10. The GP's Defence to the Plaintiffs' claims is set out in detail below. Without prejudice to the detailed rehearsal of its case, the GP's response to the claims made against it may be summarised as follows:*
>
> *a) Mr. Xie's true relation to the XiO Group was as an introducer of investors. To the best of the GP's knowledge, Mr. Xie has not directly invested any of his own capital into any of Project Camping, Project Laguna or the Fund. Contrary to the Plaintiffs' case, the XiO Group was not established at his request, nor was it intended to be and never has been a private equity fund for Mr. Xie's offshore investments.*
> *b) The causes of action relied upon by the Plaintiffs fail for the following principal reasons:*
> *(i) The GP did not breach any fiduciary duties owed by it to Dorsey (as alleged in paragraph 79) because the capital calls sent to Dorsey on 4, 5, 7 and 24 January 2017 in accordance with the Amended Offshore LPA (defined in paragraph 23(c) below) were sent in good faith and for a proper purpose, as set out in paragraphs 88-97 below.*

(ii) *Even taking the Plaintiffs' case on conspiracy (as set out in paragraphs 81-85) at its highest, there is no completed cause of action because: (A) no damage has yet been sustained; and (B) no damage will be sustained because the GP, Mr. Pacini and Ms. Li have not sought, do not intend to and will not forfeit Dorsey's interest in the Fund.*

(iii) *The claim for dishonest assistance (as set out in paragraph 86) fails because: (A) the underlying breaches relied on are not made out; and (B) neither Mr. Pacini, Ms. Li nor the GP had any relevant knowledge or took any steps to assist in the alleged breaches.*

(iv) *The causes of action referred to in sub-paragraphs (i) and (iii) above cannot apply to Fortune and Shengshi because it is not alleged (nor could it be) that the GP (or any of the Defendants) owed fiduciary duties to Fortune or Shengshi.*

c) *In any event, each of the Plaintiffs' claims are barred by the rule precluding the recovery of reflective loss."*
(My emphasis)

Interlocutory Injunctions - The Plaintiffs' Position

35. The Plaintiffs rely upon the classic case on interlocutory injunctions; ***American Cyanamid v Ethicon Ltd*** [1975] A.C. 396. At page 407 H to 408 B to H, Lord Diplock said in an oft-quoted passage:

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial...*
>
> ...
>
> *...the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award*

of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."

36. The Plaintiffs submit that there are serious issues to be tried. At paragraph 65 of their written submissions for the *ex parte* hearing, they submitted that, as regards the corporate Plaintiffs, the assessment of damages would be inherently speculative. As regards Mr. Xie, they say that his loss would involve a retrospective assessment of the performance of the XiO Fund either with no limited partner at all to replace Dorsey or with a new limited partner admitted in substitution of Dorsey with different means or investment objectives

to Dorsey and would be highly speculative and subject to many variables which could not be sensibly addressed at trial, or at all.

37. The Plaintiffs also say that conversely, damages would be an adequate remedy for XiO GP because the Plaintiffs would be jointly and severally liable under the cross-undertaking, and Mr. Xie's interests through Shanghai Li Hong are substantially greater than his interests in Dorsey and he would be able to pay any award of damages.

38. As regards the balance of convenience, they say that in this case that strongly favours preserving the status quo.

The 1st and 3rd Defendants' Position

39. The 1st and 3rd Defendants have stated that they are prepared to accept (for the purposes of this hearing only) that there is a serious issue to be tried in respect of the key factual bases for each of the claims, i.e. Mr. Xie's assertion that (i) he is the beneficial owner of Dorsey; and (ii) Ms. Li owed Mr. Xie fiduciary duties (in addition to any duties she owed to XiO GP and Dorsey (qua director)). They say that, in fact, these issues are already in dispute between the parties in other proceedings in other jurisdictions and will be resolved in those proceedings. In particular, Mr. Xie's assertions are premised on the alleged (Entrustment) Agreement between him and Ms. Li which is already the subject of Hong Kong arbitration proceedings commenced by Mr. Xie against Ms. Li under the Hong Kong arbitration clause contained in the (alleged) Entrustment Agreement itself. Ms. Li disputes the validity of the (alleged) Entrustment Agreement on the ground that it is a fabrication and further disputes that she owes any fiduciary duties to Mr. Xie thereunder or at all.

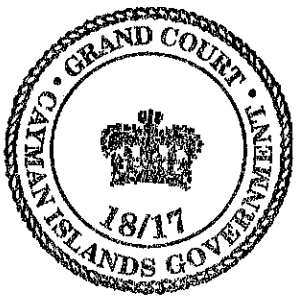
40. The 1st and 3rd Defendants put the matter this way regarding the law:

> *"31 …before granting an injunction the Court must be satisfied that (i) the applicant for the injunction has an underlying legal or*

equitable right to be enforced or protected; and (ii) the Court has jurisdiction to make the order sought (" Stage 1").

32. *Only if so satisfied, will the Court go on to decide whether it is fair and equitable to grant an interlocutory injunction ("Stage 2"). The appropriate test to be applied at this (second) stage depends on whether the decision on the interlocutory summons will effectively dispose of the claim. Stage 2 itself divides into two parts, hereafter Stage 2A and 2B.*

33. *As regards Stage 2A, the question to be posed by the Court is: will the grant of an interlocutory injunction, in effect dispose of the underlying claim? If the answer to that question is in the affirmative, "it is, in general, an injustice to grant one at an interlocutory stage if this effectively precludes a defendant from having his rights determined in a full trial" -* ***Cayne v Global Natural resources Limited*** *[1984] 1 All E.R. 225 per May LJ at p.238f....*



If the question to be posed at Stage 2A is answered in the negative, then the Court must move on to Stage 2B, which comprises the three part "test" set out in American Cyanamid."

Stage 1 – Jurisdiction

41. These Defendants say that the Ms. Li Injunction restrains Ms. Li from dealing with the shares and assets of Dorsey or holding herself out as representing the interests of Dorsey. It is in precisely the same terms as the injunction granted against Ms. Li in Hong Kong on 8 February 2017. The Hong Kong injunction was granted in aid of arbitration proceedings commenced by Mr. Xie in Hong Kong for declarations that Ms. Li holds shares in Dorsey on trust for Mr. Xie under the terms of the (alleged) Entrustment Agreement and for damages for breach of that Agreement. The submission is that the

stated purpose of the Hong Kong injunction was to protect Mr. Xie's alleged rights under the Entrustment Agreement pending the determination of the Arbitration Proceedings.

42. At paragraphs 39 and 40 of the 1st and 3rd Defendants' Outline Submissions, prepared for the hearing in March, these Defendants stated as follows:

> *"39. The principal object of the Cayman proceedings is to prevent enforcement of the capital calls, not to enforce Mr. Xie's rights under the (alleged) Entrustment Agreement, and the primary relief sought is therefore a perpetual injunction in the form of the GP Injunction. Such of the Claims that do not touch upon the rights and liabilities arising out of or relating to the (alleged) Entrustment Agreement, even if established, would not entitle Mr. Xie to the relief sought in the Hong Kong arbitration, viz., an order that Athene transfer her shares in Dorsey to Mr. Xie. Insofar as any part of the Claims do relate to the rights and liabilities arising out of or relating to the (alleged) Entrustment Agreement, these cannot be pursued in this Court as they are the subject matter of arbitration proceedings in Hong Kong. Put another way, only the Hong Kong arbitral tribunal can grant relief in respect of Mr. Xie's alleged rights under the (alleged) Entrustment Agreement.*
>
> *40. Furthermore, the Plaintiffs have made no claim in these proceedings (or indeed in Hong Kong) for a final injunction in the form of the Athene Injunction, no doubt having recognised that any such claim would be misconceived. It would essentially amount to an attempt to procure the Court (whether here or in Hong Kong) to do that which it has no jurisdiction to do, namely, to remove a director from office. Removal of a director, is of course a matter for the shareholders in accordance with the internal governance rules of the company."*

43. These Defendants therefore submit that the Court's only (conceivable) jurisdiction to grant the Ms. Li injunction was under section 43 of the ***Arbitration Law 2012.*** However, Leading Counsel points out that the Plaintiffs' oral application was, however, not moved on that basis, and further, submits that the circumstances for the operation of section 43 did not exist in the instant case.

44. It was therefore submitted that on this basis alone, the Ms. Li injunction should be discharged.

45. During the Plaintiffs' Reply submissions, the Court was handed an Amended Statement of Claim which introduced into the prayer a claim for a final injunction in the form of the Ms. Li Injunction. It is these Defendants' submission that even if the new claim was sustainable, which they say it is not, it is too late. At the time when the Court granted the Ms. Li Injunction at the *ex parte* hearing, it is submitted that there was no basis for the grant of that injunction in these proceedings. That difficulty cannot be overcome retrospectively by this late amendment made almost two months after the *ex parte* hearing itself.

46. These Defendants in any event maintain that the claim for a final injunction is not sustainable for a number of reasons, including that any prayer for relief must obviously have a pleaded basis.

Stage 2A - The *Cayne* Principle

47. These Defendants indicate that they accept that the ***Cayne*** principle only applies to cases where it is very clear that the grant or refusal of an interim injunction will have the effect of putting an end to the claim. They say that this is such a case. It is the 1st and 3rd Defendants' position that the continuation of the Injunctions until trial will have the practical effect of putting an end to the action for the reasons set out in paragraphs 115-123 of Mr. Pacini's 2nd affidavit and in his 3rd affidavit. In short, they maintain that the XiO GP is likely to become insolvent within three to six months if the Injunctions remain in place. This will not only result in losses for the XiO GP and, to the extent he has any

interest in Dorsey or the Onshore LP, Mr. Xie, it will cause loss to the third party investors to the XiO Fund, the employees of the XiO GP and potentially also for the creditors of the trading companies ultimately held under the XiO Fund.

48. For these reasons, these Defendants say, the Plaintiffs must show more than a serious issue to be tried; they must show an overwhelming case on the merits. It was submitted that they cannot make such a showing because of the factual disputes (in particular: (i) as to whether Mr. Xie is the beneficial owner of Dorsey; and (ii) as to whether, even if he is, he is owed fiduciary duties by Ms. Li) and because of (amongst other matters) the rule against reflective loss ("**RL Rule**").

49. These Defendants argued that, as regards the corporate Plaintiffs' conspiracy claim, damages would plainly be an adequate remedy. They submit that the corporate Plaintiffs are (contingent) creditors of Dorsey in the sum of US$70 million, with no interest being repayable on their loans.

50. Thus, the argument continues, that the maximum damages which the corporate Plaintiffs would be entitled to are: (i) known; and (ii) no more than US$70 million. It was argued that it has not been suggested, nor could it properly be suggested, that the Defendants to the conspiracy claim (which include XiO GP) would not be able to satisfy a US$70 million judgment debt.

51. As regards Mr. Xie's claims, they say firstly, the argument put forward on Mr. Xie's behalf, proceeds on the wrong assumption that the XiO GP will, if it is allowed to enforce the capital calls, take steps to forfeit Dorsey's rights in the XiO Fund. They say that is not so – see paragraphs 88-91 of Mr. Pacini's 2nd affidavit and further, that Dorsey as a limited partner that made initial capital contributions, which were themselves funded by loans from the corporate plaintiffs, does not have any real entitlement beyond that initial sum of US$70 million.

52. It was also submitted that if Mr. Xie establishes at trial that his rights have been wrongfully forfeited, he will be entitled to the value of that forfeited interest which is quite capable of assessment.

53. It was also submitted that Mr. Xie's assertion that it is doubtful that XiO GP would have sufficient assets to meet any award in his favour wrongly assumes that any award would be substantial, and also rests entirely on speculation. At paragraph 70 of their main submissions, the 1st and 3rd Third Defendants argue as follows:

> "*70* ...[As to speculation] *it is equally likely that the Fund prospers or maintains its present value. Thus there is no sufficient basis for the Court to conclude that damages would not be an adequate remedy. Indeed, if this type of assertion was a sufficient basis, there would be almost no case at all in which damages were an adequate remedy. The true position is that the only current identifiable risk to the fortunes of the GP is the Injunctions themselves."*

54. These Defendants go on to submit that the continuation of the injunctions will cause substantial loss which is difficult to precisely estimate. They also submit that it is doubtful how any award of damages would be enforced against Mr. Xie in the PRC. Reference was made to the affidavit of Mr. Huang (to which the Plaintiffs filed counter-evidence), where it was Mr. Huang's opinion that it was unlikely that a Cayman judgment would be enforced by the Courts of the PRC.

55. As regards the balance of convenience, it was submitted that this favours the discharge of the injunctions.

Allegations of a Failure to Provide Full and Frank Disclosure at the *Ex parte* Hearing

56. The 1st and 3rd Defendants' Counsel made a number of submissions under this head. In particular, at paragraph 74 of their main submissions, they say that there were the following main examples:

(1) The failure to draw the Court's attention to the jurisdictional issues in relation to the grant of the Athene Injunction;

(2) The failure to address the Court on the direct impact of the 8 February Stop Notice, Athene's undertaking not to deal with the shares in Dorsey and the appointment of the Independent Directors on the application for the Athene Injunction - which is the respect in which that undertaking had real relevance. ...the undertaking was in fact only referred to by the Plaintiffs in the context of the GP Injunction;

(3) The failure to draw the Court's attention to the fact that the Athene Injunction does not contain the usual ordinary course of business or payment of debts as and when they fall due qualifications/exemptions, or give any reason why it was appropriate for such qualifications/ exemptions not to be included within the terms of the Injunctions;

(4) The failure to draw the Court's attention to the ambiguity in, and width of, the Injunctions or their potential impact on the day to day management of the XiO Group...

(5) The failure to draw to the Court's attention to the RL Rule and its application to Claims;

(6) The failure to draw the Court's attention to the proper test to be applied in relation to adequacy of damages in the context of the Corporate Plaintiffs' conspiracy claim;

(7) The failure to draw the Court's attention to the matters set out above as to why damages would be an adequate remedy in respect of Mr. Xie's claims;

(8) The failure to draw the Court's attention to the GP's concerns in relation to Mr. Xie's conduct, including the Cease and Desist Letters referenced in paragraph 99 of Joseph Two;

(9) The failure to put before the Court the proper particulars of the Plaintiffs' financial worth or to draw the Court's attention to the other matters set out in paragraph 72 above (all of which would have (at

least) raised serious doubts as to the likely worth of the cross-undertaking)."

57. In response, Lord Goldsmith, Leading Counsel on behalf of the Plaintiffs, submitted that there had been no material non-disclosure.

Reflective Loss

58. In relation to the RL Rule, which became a large focus of the arguments on all sides, Mr. Atherton QC referred to the House of Lords' decision in ***Johnson v Gore Wood & Co (No. 1)*** [2002] 2 A.C.1 at page 35. Reference was also made to the decision of Foster J (Actg.) (as he then was) in ***Renova Resources Private Equity Limited v Gilbertson*** [2009 CILR 268]. At page 35 E-G, of ***Johnson v Gore Wood***, Lord Bingham stated as follows:

> *"Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss."*

59. At paragraph 54 of the 1st and 3rd Defendants' Written Submissions, it is argued as follows:

> *"54. It is now well established that:*
>
> *(1) A loss claimed by a shareholder which is merely reflective of a loss suffered by the company - i.e. a loss which would be made good if the company had enforced in full its rights against the defendant wrongdoer - is not recoverable by the shareholder,*

save in a case where, by reason of the wrong done to it, the company is unable to pursue its claim against the wrongdoer;

(2) Where there is no reasonable doubt that that is the case, the court can properly act, in advance of trial, to strike out the offending heads of claim. This will be so where "the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets".

(3) The irrecoverable loss (being merely reflective of the company's loss) is not confined to the individual claimant's loss of dividends on his shares or diminution in the value of his shareholding in the company but extends to, "all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds" and also "to other payments which the company would have made if it had had the necessary funds even if the plaintiff would have received them qua employee and not qua shareholder". It is therefore irrelevant that the shareholder is claiming in his capacity as a creditor of the company rather than in his capacity as shareholder;

(4) The principle is not rooted simply in the avoidance of double recovery in fact; it extends to heads of loss which the company could have claimed but has chosen not to;

(5) Provided the loss claimed by the shareholder is merely reflective of the company's loss and provided the defendant wrongdoer owed duties both to the company and to the shareholder, it is irrelevant that (i) the duties so owed may be different in content or (ii) that the shareholder is the beneficial rather than the legal owner of shares in the company."

60. These Defendants say that Mr. Xie's claim in brief is that the value of his shareholding in Dorsey has been/will be damaged as a result of the capital calls which Ms. Li and Mr. Pacini caused XiO GP to issue in alleged breach of their duties to Mr. Xie and Dorsey. As such, they assert that Mr. Xie's claim, whether put as breach of duty, dishonest assistance or conspiracy manifestly falls foul of the RL Rule. They referred to the authorities where claims that offend the RL rule have been struck out at various stages. Whilst there is no summons before me seeking to strike out, Mr Atherton QC boldly sought to have the Court strike out the Plaintiff's claims in the event that the Court agreed that there was no serious issue to be tried as a result of the RL Rule.

61. These Defendants also contend that the RL Rule also plainly applies to the conspiracy claims by the corporate Plaintiffs. Their complaint in brief, say Counsel, is that by reason of the capital calls, Dorsey may not be able to repay their debts. This (potential) loss only arises through the depletion of the assets of Dorsey (in the event of forfeiture of its interest in the XiO Fund). They submit that only Dorsey can sue in respect of that (potential) loss. To put their point another way, they say that if the potential loss occurred, Dorsey's assets could be replenished by claims by Dorsey and the corporate Plaintiffs' loss would be made good; they would then be able to recover their debts from Dorsey.

62. It was also submitted that it is no answer to say that the corporate Plaintiffs are claiming in their capacity as creditors of Dorsey not shareholders. These Defendants submit that there is clear English Court of Appeal authority to the effect that the RL Rule applies to prevent creditors who are also shareholders from bringing a claim against a wrongdoer. Reference was made to the decision of ***Gardner v Parker*** [2004] 2 BCLC 554, where, at paragraphs [67-74] Neuberger LJ (as he then was) held that a claim by a shareholder *qua* creditor in respect of a loan that it had made to the company was barred by the RL Rule, adding that "*it [was] hard to see any logical or commercial reason*" why the rule should not also apply to a pure creditor.

63. Reference was also made to two decisions of Flaux J in ***Fortress Value v Blue Skye*** [2013] EWHC 14 (Comm) and ***Erste Group Bank AG v ISC "VMZ Red October"*** [2013] EWHC 2926.

64. In ***Fortress*** Flaux J, at paragraph 79, held that it was at least arguable that the RL Rule does not extend beyond shareholders of the company, to pure creditors (i.e. a creditor who is not also a shareholder). In the ***Erste Group*** case, Flaux J, at paragraphs [96] and [99], rejected an argument that the RL Rule is a "*killer blow*" in relation to claims by creditors of a company. He stated as follows:

> *"96. The other alleged "killer blow" on which RT and RT Capital rely is the assertion that Erste's claim is for reflective loss, in other words that its claim is for the diminution in the value of the borrower's assets, which is said on analysis to be the borrower's claim not Erste's.*
>
> .....
>
> *99. In my judgment, on the basis of these submissions, Erste has a sufficiently arguable case for present purposes that its claims are not ones for reflective loss. In any event, even if the claims were for reflective loss, it is also arguable that the rule against reflective loss does not apply to creditors of a company: see [79] of my judgment in* ***Fortress Value Recovery Fund 1 LLC v Blue Skye Special Opportunities Fund LP*** *[2013] EWHC 14 (Comm) 973. Like the applicable law point, this point about reflective loss is not a killer blow in favour of the defendants in relation to a serious issue to be tried".*

65. The 1st and 3rd Defendants say that the reasoning of Flaux J has no applicability in the instant case since the corporate Plaintiffs are not third party creditors. They also submit that Flaux J's decisions give insufficient weight to the *obiter dicta* of Neuberger LJ in ***Gardner v Parker*** (and the line of authority upon which that *obiter dicta* is based) and should not be followed by the Grand Court in any event.

66. Reference was also made, by both Mr. Atherton QC and Ms. Leahy to the decision of the English Court of Appeal in ***Kazakhstan Kagazy plc and others v Arip*** [2014] EWCA Civ 381. This case concerned an appeal and cross-appeal in relation to freezing injunctive relief granted by the Judge at first instance. The Court of Appeal dismissed the appeal, and the cross-appeal. They rejected the argument that the reflective loss rule did not apply because the case fell within the exception in ***Giles v Rhind*** [2003] Ch 618.

The Plaintiffs' Response Regarding the RL Rule

67. In response to the submissions of Mr. Atherton QC regarding the RL Rule, the Plaintiffs relied upon the case of ***Giles v Rhind*** [2003] Ch 618, and the exception therein contained. In essence, the exception relied upon by the Plaintiffs is that Dorsey was under "*wrong-doer control*", Ms. Li being the legal owner of the shares in Dorsey. The Plaintiffs have also claimed that another reason that the ***Giles v Rhind*** exception applies is that Dorsey has no money to bring the claims and so will be left without any remedy at all. The Plaintiffs have further argued that the RL Rule and the principles involved therein do not apply to a claim for an injunction, as opposed to a claim for damages.

68. I was referred to the Headnote in ***Giles v Rhind*** and to a number of paragraphs of the judgment, including 34, 35, 52 and 69. The holdings by the Court of Appeal, are set out in the Headnote as follows:

> *"Held, allowing the appeal, that, although in general a shareholder could not recover damages from a wrongdoer for a loss which was reflective of loss suffered by the company in circumstances where the company itself could have recovered in respect of that loss but had chosen not to do so, since the loss to the shareholder in such a case was caused by the decision of the company not to pursue its remedy and not by the wrongdoer's fault, there were no reasons of principle or policy to prevent a shareholder from recovering damages where the wrong done to the company had made it impossible for it to pursue its own remedy against the wrongdoer; that,*

since the claimant had established that a contract containing covenants in his favour the object of which was to protect his investment in, his loan to and his remuneration from the company and a breach of those covenants by the defendant of a kind that led to serious damage to his investment, irrecoverability of his loan and discontinuance of his remuneration, since the devastating effect of that breach was not only foreseeable but intended and since the company had not settled its claim but had been forced to abandon it by reason of impecuniosity attributable to the wrong which had been done to it, the claimant was entitled to pursue his claim against the defendant; and that, accordingly, the case would be referred back to the High Court to assess the damages payable by the defendant to the claimant..."

69. At paragraphs 34 and 35, Waller LJ discusses the issues as follows:

"34. One situation which is not addressed [In ***Johnson v Gore Wood***] *is the situation in which the wrongdoer by the breach of duty owed to the shareholder has actually disabled the company from pursuing such cause of action as the company had. It seems hardly right that the wrongdoer who is in breach of contract to a shareholder can answer the shareholder by saying, "The Company had a cause of action which it is true I prevented it from bringing, but that fact alone means that I the wrongdoer do not have to pay anybody.*

35. In my view there are two aspects of the case which Mr. Giles seeks to bring which point to Mr. Giles being entitled to pursue his claim for the loss of his investment. First, as it seems to me, part of that loss is not reflective at all. It is a personal loss which would have been suffered at least in some measure even if the company had pursued its claim for damages. Second, even in relation to that part of the claim for diminution which could be said to be reflective of the company's loss, since, if the company had no

cause of action to recover that loss the shareholder could bring a claim, the same should be true of a situation in which the wrongdoer has disabled the company from pursuing that cause of action. I accept that on the language of Lord Millett's speech there are difficulties with this second proposition, but I am doubtful whether he intended to go so far as his literal words would take him. Furthermore it seems to me that on Lord Bingham of Cornhill's speech supported by the others, it would not be right to conclude that the second proposition is unarguable."

70. In their reply to the oral submissions on behalf of the 1st and 3rd Defendants, the Plaintiffs raised the argument that it is impossible for Dorsey to bring the reflective loss claims because Clause 20 of the Amended LPA bars any claims that Dorsey may have against the GP and Ms. Li for breach of fiduciary duty in relation to the alleged loss. Clause 20 of the Amended Offshore LPA is headed **"**INDEMNIFICATION**"**, and Clause 20.1(a) provides as follows:

> " *None of the General Partner, the Manager, any of their respective Affiliates and any of their respective officers, directors, employees, agents or delegates (each an "Indemnified Person") will have any liability for any loss incurred by the Partnership or the Limited Partner howsoever arising in connection with the provision of services by it under this Agreement and will be indemnified and held harmless by the Partnership out of the Assets or against any and all Claims that may accrue or be incurred or in which an indemnified Party becomes involved, arising out of or relating to this Agreement or activities undertaken in connection with the Partnership."*

71. The Plaintiffs also advanced other arguments. Lord Goldsmith QC submitted that, in addition to the alleged loss, the Plaintiffs' losses also include their own legal and investigatory costs associated with bringing these proceedings and that these other losses are not reflective of any losses Dorsey has or may suffer. The Plaintiffs rely upon the

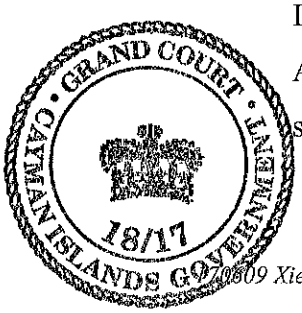
case of ***R + V Versicherung AG v Risk Insurance & Reinsurance Solutions SA (No. 3)*** [2006] EWHC 42 (Comm) at [77]. That case is authority for the proposition that the cost of wasted staff time spent on the investigation and/or mitigation of an actionable tort is recoverable if staff have been significantly diverted from their usual activities.

72. In reply, the Plaintiffs also contended that they were claiming interim injunctive relief and at this stage, are not asking for damages. Further, that their claims were properly characterised as claims for *quia timet* relief and that the RL rule does not bar a claim for injunctive relief of that nature because it is concerned to bar claims for losses and damages, so as to prevent double recovery, and does not bar the underlying causes of action themselves.

73. In relation to the points made about the injunctive relief against Ms. Li, Lord Goldsmith QC argued that whilst there is some similarity between the wording of the injunction granted by the Hong Kong Court in support of the Hong Kong arbitration, and the injunction which I have been asked to extend, the injunction sought in the Cayman proceedings is not at all in support of the Hong Kong arbitration. It is sought, Leading Counsel submitted, to preserve the status quo and to prevent further damage to the interests of Mr. Xie through breach of fiduciary duty, unlawful conspiracy, and dishonest assistance. Further, the dispute in Cayman is wider and involves different parties. It was submitted that the fact that there may be some overlap between the relief sought in both sets of proceedings is not a question that goes to jurisdiction.

Supplemental Submissions

74. Mr. Atherton QC on behalf of the First Defendant, and Ms. Leahy on behalf of the Third Defendant, indicated that they wished to be able to respond by way of written submissions after the hearing to what they considered new points raised by the Plaintiffs' Leading Counsel during his Reply. These Supplemental Submissions were filed on 6 April 2017, and the Plaintiffs were permitted to make a brief three page response to those submissions, which was filed on 12 April 2017.



Supplemental Submissions on behalf of the 1st and 3rd Defendants

75. These Defendants submit that it is neither a necessary nor a sufficient condition for there to be wrongdoer control, in order to bring the case within the ***Giles v Rhind*** exception. Reference was again made to ***Kazakhstan,*** per Longmore LJ at [31] to [34], for the proposition that the exception is in truth "*very limited*" and only applies in circumstances where "*the wrong done to the company had made it impossible for the company to pursue its own remedy against the wrongdoer*". It was thus submitted that the test is one of "*impossibility*" brought about by the actions of the wrong-doer himself.

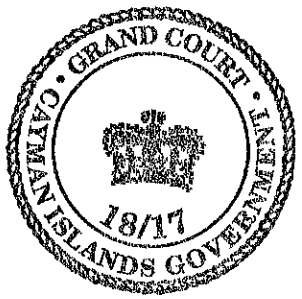
76. At the time of these submissions there were still in place independent directors. It was submitted that in any event, there were now in place independent directors who are on notice of Mr. Xie's claim to be the beneficial owner of Dorsey. Thus, it was further submitted, there is not even wrong-doer control on the facts. Learned Counsel asked the Court to note that (paragraph 3 (3) of the Supplemental Submissions):

> "*(i) there is no evidence before the Court that Mr. Xie has requested the Independent Directors to cause Dorsey to advance the (alleged) claims he is seeking to advance on Dorsey's behalf; and*
>
> *(ii) there is no pleaded case, or evidence that Athene has or will seek to exert any influence over the Independent Directors in this regard (and nor could she in any event.*"

77. As regards the Plaintiffs' submission that Dorsey has no money to bring the claims, it was submitted by these Defendants that this plainly does not satisfy the "*impossibility*" test. Firstly, they say, it has not been suggested in the pleadings or in the evidence (and not could it have been in any event) that Dorsey's lack of liquid funds is attributable to the 1st and 3rd Defendants' alleged wrong-doing. Thus, the argument continues, it cannot be said that it is impossible for Dorsey to bring its claim by reason of impecuniosity attributable to the wrong alleged to have been done to it. Secondly, and in any event, the submission was then made that if Dorsey's alleged claims are meritorious, there is

nothing to stop the independent directors from seeking litigation funding from Mr. Xie or another third-party funder.

78. It was further submitted that the only reason that Dorsey's alleged claims will not be brought is if the independent directors determine that it is not in the interests of Dorsey to do so. It was contended that the facts here are therefore analogous to the facts in ***Johnson v Gore Wood & Co (No 1)*** [2002] A.C.1, where the company was in liquidation and at page 66D, the House of Lords held that :



> *"...if the company chooses not to exercise its remedy, the loss to the shareholder is caused by the company's decision not to pursue its remedy and not by the defendant's wrongdoing...Shareholders (and creditors) who are aggrieved by the liquidator's proposals are not without a remedy; they can have recourse to the Companies Court, or sue the liquidator for negligence."*

79. These Defendants submit that, in short, if Mr. Xie is indeed the beneficial owner of Dorsey, and is aggrieved at the failure of the independent directors to pursue a remedy; Mr. Xie could procure (and, if necessary, fund) Dorsey to pursue its alleged claims; or procure it to pursue potential claims it might have against the independent directors for any loss alleged to have arisen from the failure of the independent directors to pursue Dorsey's (alleged) claims.

80. In relation to the claim about other losses, these Defendants argue that that the claims for the other losses stand or fall with the claims for the alleged loss. In other words, if the claims are subject to the RL Rule, there can be no possible basis upon which the gratuitous incurring of costs by the Plaintiffs in investigating claims that they have no right to bring can be sought to be recovered from the 1st and 3rd Defendants. In any event, the Defendants say these other losses by themselves provide no proper basis for continuing the injunctions and in any event, damages would be an adequate remedy.

81. In relation to the Plaintiffs' argument that their claims were properly characterised as claims for *quia timet* relief, at paragraph 8 of their Supplemental Submissions, the 1st and 3rd Defendants say that this contention is wholly misconceived.

82. In the course of conducting research after the hearing, the 1st and 3rd Defendants' Attorneys-at-Law came across one case in which the Court has considered the question whether the RL Rule bars a claim for a final injunction. This is the unreported decision of Birss J in ***Peak Hotel and Resorts Ltd. v Tarek Investments Ltd*** [2015] EWHC 3048 (Ch). The case involved an application to strike out part of a claim on the basis that it was barred by the RL Rule. The Court struck out certain of the claims for damages on the basis that they were barred by the RL Rule, but refused to strike out the claim for a mandatory final injunction that sought relief in the form of an order that misappropriated assets be returned to the company (as opposed to the claimant shareholders). These Defendants say that the judgment was wrong in principle, reached per incuriam, and in any event is distinguishable. The Plaintiffs on the other hand, in their Response to the Supplemental Submissions, say that the decision in ***Peak*** is consistent with the rationale for the reflective loss rule, and is not per incuriam at all.

The Hearing on the 23 May 2017

83. At the request, and on the application of the Plaintiffs, I conducted a further hearing on 23 May 2017. This hearing was to deal with the fact that the independent directors had resigned and the Plaintiffs wished to reopen their case, and to adduce further evidence, in light of the fact that notices of resignation had been received from Messrs. Chow and Griffin on or about 2 May 2017, with effect from 12 May 2017.

84. As it turns out, although these directors have resigned, there is a discussion ensuing between the parties in relation to the appointment of replacement independent directors. This followed the comments and encouragement from Justice Chan of the High Court of the Hong Kong SAR on 17 May 2017 on the inter partes hearing of the Mr Xie's application for an interim injunction against Ms Li in Hong Kong. Mr. Xie has also made an application against Ms. Li to the Hong Kong Court for the appointment of interim

receivers over all of the shares in Dorsey (of course currently registered in Ms. Li's name).

85. On 23 May 2017, I granted the Plaintiffs leave to adduce into evidence, the Sixth and Seventh Affidavits of Rachel Baxendale and exhibits, as well as granting leave to Ms. Li to introduce into evidence her Second Affirmation and exhibit.

86. In my judgment, the Plaintiffs were plainly correct to seek to have these developments regarding the directors brought to the attention of the Court. At the end of the day, to some extent, the 1st and 3rd Defendants are also correct that, there could have been scope for some agreement between the parties as to appointing new independent directors, as indeed I understand the parties are or were discussing up to the time when they appeared before me on 23 May 2017.

87. In my judgment, the appropriate order to make on the application is that costs should be costs in the cause.

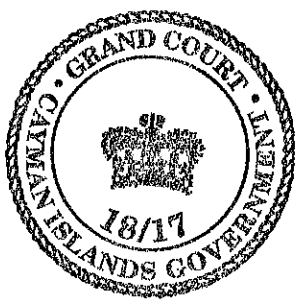
DISCUSSION AND ANALYSIS

88. As regards the issue of non-disclosure, I accept Lord Goldsmith QC's submission that, with the exception of the reflective loss point, there is no substance to the submissions about non-disclosure. As recognized in the decision of Smellie CJ, in ***Cable and Wireless v Information and Communications Technology Authority*** [2007 CILR 273] , the duty of the applicant on an *ex parte* hearing, includes the duty to disclose relevant law as well as relevant facts. However, I accept the Plaintiffs' submission that this failure to disclose is not of the order that the injunctions previously granted merited discharge, as a punitive measure. I am bolstered in that view by the fact that, as pointed out by Lord Goldsmith QC, I had set an early return date to protect the situation, ie. 14 February 2017, and the Defendants chose not to attend Court or be represented on that date.

Indeed, I have already said that I consider this a complex case, including the issues to do with reflective loss. In complex cases, there is greater scope for arguments being raised

about non-disclosure, and the Court has to keep a sense of proportion in considering such matters. In that regard, I found paragraphs [36] and [49] of the ***Kazakhstan*** decision apt, notwithstanding that in that case the discussion was directed in particular to freezing orders. Longmore LJ there stated as follows:

> *"[36] As long ago as 1990 Sir Nicholas Browne-Wilkinson V-C asked this court for guidance about the right approach to be taken to the inevitably lengthy hearings which were then growing in relation to non-disclosure in respect of freezing and search and seizure orders, see* ***Tate Access Inc v Boswell*** *[1991] Ch 512, 533H-534D, [1990] 3 All E.R. 303, [1991] 2 WLR, 304. I am not aware that this court has ever answered that cri-de-coeur and we did not receive any argument which would enable us to do so authoritatively in the present case. The judge adopted the approach of Toulson J (as he then was) in* ***Crown Resources AG v Vinogradsky*** *(15 June 2001) for cases of any magnitude and complexity and I am content to do the same:*
>
> > *"issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself (pages 4-5 of the transcript).*
> > *Secondly, where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a sense of proportion. The overriding objectives apply here as in any matter in which the court is asked to exercise its discretion (page 6).*
> > *I would add that the more complex the case, the more fertile the ground for raising arguments about non-disclosure and the more*



> *important it is, in my view, that the judge should not lose sight of the wood for the trees (page 7).*
> *In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion (page 22)."*
>
> ....
>
> *[49] The judge has a wide discretion in relation to matters of non-disclosure, particularly if he himself made the initial freezing order. His decision in this case is well within the margin of discretion allowed to him and I would not interfere with it."*

90. In my view the appropriate way in which to exercise my discretion, drawing sensible limits, and maintaining a sense of proportion, is not to discharge the injunctions on the ground of a failure in the duty of full and frank disclosure.

WHETHER *CAYNE* CONSIDERATIONS APPLY

91. At page 238b-g of ***Cayne***, May LJ discusses the relevant considerations as follows:

> *"At this juncture I quote another short passage from the speech of Lord Diplock in the **NWL** case [1979] 3 All E.R. 614 at 625..., where he said:*
>
> > *"when properly understood, there is in my view nothing in the decision of this House **in American Cyanamid v Ethicon Ltd** to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. **American Cyanamid v Ethicon Ltd**, which enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious issue to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial."*

With those considerations in mind, I do not think in cases such as the present, whatever the strengths on either side, where the decision on an interlocutory application for an injunction will effectively dispose of the claim, the court can legitimately, nor is it bound, to apply the Cyanamid guidelines, which, as I have already said, I think are based on the proposition that there will be a proper trial at a later stage when the rights of the parties will be determined.

It may well be that it is the same ultimate consideration which the court has in mind, namely the question whether it is likely to do an injustice. Where a plaintiff brings an action for an injunction, I think that it is, in general, an injustice to grant one at an interlocutory stage if this effectively precludes a defendant from the opportunity of having his rights determined in a full trial. There may be cases where the plaintiff's evidence is so strong that to refuse an injunction and to allow the case to go to trial would be an unnecessary waste of time and expense and indeed do an overwhelming injustice to the plaintiff. But those cases, would, in my judgment, be exceptional.

In general, as I say, where a plaintiff brings an action and in it seeks an interlocutory injunction on the basis that the defendant has breached the former's rights, then justice requires that the defendant should be entitled to dispute the plaintiff's claim at a trial, and if the grant of the injunction would preclude this then it should not be granted on an interlocutory basis."

92. In ***Allfiled UK Limited v Eltis et al*** [2015] EWHC 1300 (Ch), referred to by Mr. Atherton QC and Ms. Leahy, Hillyard J, at paragraphs [72] and [74] discusses matters in this way:

*"72. Thus, for example, in **Cayne v Global Natural resources plc** [1984] 1 All E.R. 225, the Court of Appeal declined to grant an injunction which would once and for all have enabled the*

> *applicants to remove the existing board of a company and put themselves in their place, and thereby effectively foreclose the need for any further pursuit of any proceedings brought by the applicants to wrest away control of the company. In such a context the court concluded that the risk of doing injustice was such that the gateway to relief should be whether the applicants had established an overwhelming case.*
>
> *Is this an exception to the usual rule that it suffices to show a serious issue to be tried?*
>
> 74. *The first question to be addressed is, therefore, whether the gateway in this case should be taken to be that of establishing a serious question to be tried, or an "overwhelming" case."*

93. I now turn to examine the contents of paragraph 123 of Mr. Pacini's 2nd affidavit to see what exactly is the basis upon which these Defendants say that to continue the injunctions until trial will have the practical effect of ending the action.

94. At paragraph 123 Mr. Pacini states as follows:

> *"123. Operating expenses are currently met by XiO Cayman from the following sources: the initial US $70 million cash injection in Dorsey, which includes US$20 million for annual management fees, establishment fees, with the balance having done to deal costs, plus fees accrued from previous deals. These resources are finite. A realistic estimate, from my discussions internally and a review of XiO Cayman's financials, is that unless the GP can replace the US$65 million in outstanding capital in order to maintain the current ongoing operations of XiO Group, whilst also prudently holding in reserve funds for legal proceedings, the GP will cease to operate in the normal course within the month and will likely become insolvent within 3 to 6 months."*

95. In his 3rd affidavit, Mr. Pacini refers to certain alleged potential losses arising from the injunction against Ms. Li (paragraphs 9-13) and the inability to carry out certain deals (paragraphs 14-16) and the alleged risk of insolvency of Project Camping, the latter seemingly a risk because Ms. Li's involvement would be required in the process of restructuring of the relevant loan facility. One of the potential losses alleged was the risk of an inability to carry out a merger with a large asset management company.

96. However, as it turns out on Friday 2 June 2017, the Court was informed that there had been new developments and that the Hong Kong Court had entered a Consent Order between Mr. Xie, Ms. Li, and XiO GP as proposed Intervenor in the Hong Kong proceedings, which will operate to vary the Hong Kong injunction currently in place against Ms. Li. This is to allow the merger referred to in Mr. Pacini's affidavit to be pursued. This Court was asked to enter a Consent Order similarly varying the injunction granted by the Grand Court against Ms. Li.

97. In my judgment, there is no sufficiently concrete or substantiated basis given in these affidavits upon which I can conclude that the continuation of the injunctions until trial will have the practical effect of ending the action. I accept Lord Goldsmith QC's submission that the matters set out in Mr. Pacini's second affidavit, in particular, in support of these aspects of the matter are vague and imprecise and amount to bare statements, unsupported by documents or details or independent assessment of what the expenses and losses are. In addition, I am not satisfied that the risk of potential losses feared by Mr. Pacini are sufficiently likely to lead to the conclusion contended for by Mr. Atherton QC and Ms. Leahy, i.e. that they would have the practical effect of bringing the action to an end.

98. In addition, XiO GP's evidence as to its ability to pay damages should they be found liable at trial also inclines me to the view that there is insufficient evidence, on balance to conclude that granting an injunction at this interlocutory stage would effectively preclude XiO GP from having its rights determined in a full trial.

99. I appreciate that in the decision of the Privy Council in ***NCB v. Olint*** [2009] 1 WLR1405, at paragraph 21, Lord Hoffman warned that a box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction (he was however there speaking in particular about mandatory as opposed to prohibitory injunctions). At paragraph 17, the learned Law Lord stated that the basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or to the other.

100. In any event, in my view, the evidence is not such as to take this case outside of the operation of the usual ***American Cyanamid*** guidelines.

101. The issues therefore are properly to be considered along the guidelines laid down in ***American Cyanamid*** (as discussed in ***NCB v Olint)*** and boil down to the following:

a. Is there a serious issue to be tried; do the Plaintiffs have a real prospect of succeeding in their claim for permanent injunctions at the trial?

b. If there is a serious issue to be tried, will the Plaintiffs be adequately compensated by damages for the loss they would have sustained as a result of the Defendants continuing to do that which it was sought to be enjoined, and are the Defendants in a position to pay the damages?

c. If damages would not provide an adequate remedy for the Plaintiffs, if the Defendants were to succeed at trial, would they be adequately compensated under the Plaintiffs' undertaking as to damages? I bear in mind, that as Lord Hoffman said at paragraph 17 of ***NCB v Olint*** :

"In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy."

d. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of the balance of convenience arises.

e. Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

f. The Court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

The Injunction Against Ms. Li - Whether The Court Had Jurisdiction To Grant

102. In relation to the Ms. Li Injunction, I accept Lord Goldsmith QC's submission in reply that whilst there may be a similarity between the wording of the injunction that was granted by the Hong Kong Court, and the injunction that the Plaintiffs are asking me to order here, the injunction sought here is not in support of the Hong Kong arbitration. I also accept that the dispute with Ms. Li here is wider and involves different parties. It involves three parties whereas the Hong Kong proceedings involve one. It involves alleged causes of action for breach of fiduciary duty, dishonest assistance and conspiracy.

103. Whilst it is true that at the time when the *ex parte* injunction was granted, there was no claim for a permanent injunction against Ms. Li in the Statement of Claim, I do not accept that the point is unarguable, particularly now that the Statement of Claim has been amended.

104. However, Counsel for the 1st and 3rd Defendants is correct that any prayer for relief must have a pleaded basis.

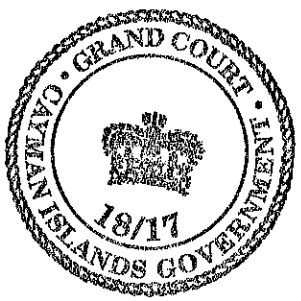
105. The pleaded causes of action relate to the alleged breaches of fiduciary duty, good faith, conspiracy and dishonest assistance. Part of the pleaded case is that Mr. Xie is the sole beneficial owner of the shares in Dorsey and the Plaintiffs do place reliance on the Entrustment Agreement. These are in my judgment, important aspects underlying the Plaintiffs' case regarding breaches of duty.

106. In my judgment, in so far as the claims herein are underpinned by Mr. Xie's claim to beneficial ownership of the shares in Dorsey, and his reliance upon the Entrustment Agreement which is the subject of arbitration in Hong Kong, this Court has jurisdiction to

grant an injunction restraining Ms. Li from transferring or dealing with the shares in Dorsey. A Stop Notice was filed on behalf of Mr. Xie.

107. Whilst a Stop Notice has been filed on behalf of Mr. Xie, as set out in the written submissions of Mr. McKie QC on behalf of the Plaintiffs, handed up in Court in March 2017, a Stop Notice is similar to a caveat. It is limited in nature, it is not an injunction, and it enables the person with the benefit of the Stop Notice to have an opportunity to apply to the Court to obtain an injunction in the usual way or to obtain a prohibition order under GCR O. 50, rule 15.

108. At the hearing on 23 May 2017, Mr. Goodman, who appeared for Ms. Li, referred me to a very useful decision of the Grand Court, albeit in support of a different point, ie that the Plaintiffs ought to have applied to the Grand Court and not the Hong Kong Court for the appointment of interim receivers over the shares in Dorsey. It is the decision of Harre CJ in ***160088 Canada Incorporated et al v Socoa International Limited*** [1998 CILR 256]. The learned Chief Justice, at page 261 held as follows:



> *"The rule of private international law is that shares are deemed to be situated in the country where they can be effectively dealt with between the shareholder and the company. There is only one place where issues regarding the perfecting of title to shares by rectification of the register can be dealt with and that is before the Grand Court of the Cayman Islands, under s. 45 of the Cayman Companies Law."*

109. In my judgment, whatever may be the case with regard to injunctions granted in Hong Kong, this Court plainly had jurisdiction to make the orders restraining Ms. Li from acting as specified in relation to the shares and to Dorsey.

WHETHER SERIOUS ISSUE TO BE TRIED

110. In my view, the 1st and 3rd Defendants' Counsel correctly, and appropriately, conceded (albeit, as they made clear, for the purposes of this hearing only), that there are serious

issues to be tried in relation to the factual basis of the claims; for example, Mr. Xie's assertion that he is the beneficial owner of Dorsey, and whether Ms. Li owed Mr. Xie fiduciary duties. It is my view that there is also a serious issue of whether the capital calls, the subject of the injunction against XiO GP, have been issued in good faith. The Plaintiffs maintain that they are "*bogus*" and were issued in retribution for Mr. Xie's written request of 30 December 2016. XiO GP maintains that they were issued for proper purposes, and in good faith.

111. It has been argued that the RL Rule point is in the nature of a "*knock-out point*". I have struggled with this point somewhat. However, on balance, I am of the view that the question of whether the Plaintiffs' claim for a permanent injunction takes it outside the RL Rule's operation, and, whether the Plaintiffs' claim falls within the type of "*wrongdoer*" exception discussed in ***Giles v Rhind*** raise serious issues to be tried, that claim appears to have real prospects of success. In relation to ***Giles v Rhind*** there was some force in these Defendants' arguments that the issue is whether the wrong done to the company has made it impossible for the company to pursue its remedy against the wrongdoer, over and above the question whether Dorsey is under wrongdoer control. There is also the issue of whether it can properly be said that Dorsey is under wrong-doer control. This would be particularly so if new independent directors are appointed in relation to Dorsey. However, here the Plaintiffs, in the evidence and skeleton arguments submitted for the hearing on 23 May say that even if independent directors are appointed, that still leaves concerns as to whether Dorsey would truly be able to investigate and pursue claims, based upon the circumstances of the case, as well as the circumstances in which the FTI directors resigned.

112. In relation to the further evidence admitted on 23 May 2017, I accept the 1st and 3rd Defendants' point that arguably, the Plaintiffs' attorneys did seek to have the independent directors request information prior to their resignation, that these Defendants say did not fit comfortably with their role. However, the email of 9 May 2017 from Mr. Griffin in response to Mr. Goodman, Attorney-at-Law for Ms. Li's request for clarification as to the

reason for the resignation, does to some extent arguably support the Plaintiffs' position. It reads as follows:-

> *"...Having reflected on the information provided during the call on 2 May 2017 and the information provided previously by your client and the General Partner, the Directors did not consider we had been given full, consistent and/or timely information in relation to the affairs of Dorsey, despite our requests and having reviewed the evidence filed in the ongoing proceedings..."*

113. For whatever relevance it may have in relation to this point, it has also to be remembered that the Plaintiffs have sued Dorsey itself as being involved in the alleged conspiracy.

114. The Plaintiffs' arguments with regards to an injunction claim and *quia timet* injunctions needing to be treated differently than a claim for loss and damages gain some support from the ***Peak Hotel*** case, which the 1st and 3rd Defendants, through the commendable industry and candour of Counsel, brought to the attention of the Court and to the Plaintiffs. I am of the view (although I appreciate that the facts were not identical and the decision is not binding on this Court) that it is something that I consider worthy of putting into the equation in the Plaintiffs' favour. Ms. Leahy quite rightly made the point that the ***Kazakhstan*** case did concern a freezing injunction. However, the freezing injunction appears to have been granted in respect of a money claim that was being made and thus does not take away from the arguability of the Plaintiffs' point.

115. For completeness, I state that I do not consider the point advanced by the Plaintiffs, that Clause 20 of the Amended LPAs bars any claims against XiO GP or Ms. Li that Dorsey may have, to have any real prospect of success.

116. It is a close call, but overall, I am of the view that there are serious issues to be tried on the RL Rule point, in the circumstances of this case.

WHETHER DAMAGES AN ADEQUATE REMEDY AND WHETHER DEFENDANTS WOULD BE IN A POSITION TO PAY

117. I now turn to a consideration of the question of whether damages are an adequate remedy for the Plaintiffs. As made clear in ***American Cyanamid***, if damages in the measure awarded at common law would be an adequate remedy, and the defendant would be in a position to pay them, then however strong a plaintiff's case appears to be, no injunction should normally be granted.

The XiO GP Injunction

118. If the injunction restraining the XiO GP from taking any steps to enforce the capital calls is discharged, or not continued until trial, and the Plaintiffs emerge successful at trial, what are the potential losses that the Plaintiffs may suffer?

119. If Dorsey does not pay the sums required, the issue would then arise whether, if, contrary to XiO GP's stated position that it does not intend to forfeit Dorsey's interest in the XiO Fund, it proceeded to do so, would damages be an adequate remedy? Under the LPAs the validity of which Mr. Xie denies, if Dorsey fails to pay pursuant to the capital call notices, XiO GP is able to issue default notices and, if Dorsey is unable or unwilling to pay in the cure period set out in the default notices, Dorsey will be designated a "*Defaulting Limited Partner*". If Dorsey is designated a Defaulting Limited Partner, XiO GP will then have a discretion to forfeit Dorsey's interest in the XiO Fund under Clause 6.3 of the Amended Offshore LPA. In my judgment, in that instance, damages would not be an adequate remedy because it would go to the root of Dorsey's investment interests and would not compensate for the losses Mr. Xie would sustain as a result of his claim to beneficial proprietary interest, or ownership interest of the shares in Dorsey and his claim that the XiO Fund was established in order to pursue his investment strategies.

XiO GP has stated, it has no desire to or intention to forfeit Dorsey's interest, but would seek out other investors, co-investment from alternative parties to fund the ongoing obligations of the XiO Fund. In my judgment, even if this is truly the position, this action

on behalf of the XiO GP also would suggest that damages would not be an adequate remedy, given that Dorsey is presently the sole limited partner in the XiO Fund at this time.

The Injunction against Ms. Li

121. Additionally, these Defendants' evidence discloses that they have been contemplating alternative financing of transactions for the XiO Fund. I accept the Plaintiffs' submission that any transaction which is funded through raising debt finance against the XiO Fund's assets increases the number of creditors of the XiO Fund and potentially reduces the ability of the Plaintiffs to recover against Dorsey or the XiO Fund in the future.

122. All told, therefore, I am of the view that damages would not provide an adequate remedy in the event that XiO GP is not enjoined from taking steps to enforce the capital calls. Further, that damages do not provide an adequate remedy in the event that the injunction as against Ms. Li is not continued.

123. I have gone on to consider whether damages would be an adequate remedy for XiO GP in the event that the injunctions were to be continued but XiO GP were to succeed at trial. In my view, given the evidence as to the need for the funding in order to meet the ongoing obligations of the XiO Fund, and the alleged potential losses, damages would not provide an adequate remedy for XiO GP, the general partner in this to date considerably successful fund.

Balance of Convenience

124. It would appear that the XiO Fund has to-date been operating extremely successfully. On the one hand, whilst I do not think that sufficient information was put before the Court to say that if the capital calls are not met, the case should be considered on the ***Cayne*** principles, I do see how not having the capital calls complied with, if for a legitimate purpose, could be detrimental to XiO GP. XiO GP has pleaded in paragraph 97 of its Defence, and given evidence that capital calls are the normal mechanism by which

private equity funds obtain funding for its investments. It is also the case, as candidly stated by the Plaintiffs' leading Counsel, that Mr. Xie has no interest in seeing the XiO Fund fail. It is a fund in which he claims he has a substantial stake and he wants it to succeed.

125. However on the other hand, the Plaintiffs are challenging the terms of the alleged Amended Offshore LPA and they say that it was part of the initial agreement that Mr. Xie would have management powers over the investment funds and that capital calls were not to be made without prior consultation with him. Indeed, Mr. Pacini has admitted in affidavit evidence that Mr. Xie was given prior information in the past, although he says it was only out of courtesy.

126. Further, the Capital Call Notices of 24 January 2017 claim to have been issued for management fees, investments in existing portfolio companies and reimbursements. In paragraph 87 of Mr. Pacini's second affidavit, he states (which is not stated in the Capital Call Notice itself) that the US$40 million is for a contribution towards invested capital in Project Camping. Project Camping is of course one of the Projects in respect of which Mr. Xie claims that substantial sums of money have been invested by Shanghai Li Hong, and in respect of which he complains that he has not been able to obtain information requested.

127. I am of the view that this question is a difficult one and that matters may be evenly poised. On the one hand, the Plaintiffs are saying that there have been breaches of duty, including that the capital calls have been made for a bogus purpose. They contest the validity of the Amended LPA. The background factual matrix to the Plaintiffs' case is also that, in relation to Shanghai Li Hong, although investments of nearly US$800 million have been contributed by Shanghai Li Hong to the Project entities, Project Camping and Project Laguna identified by the XiO Fund, and Share Subscription Agreements were entered into whereby shares in the project companies were to be issued to Shanghai Li Hong, Ms. Li and Mr. Pacini, failed to ensure that those shares were issued. The claim is also that Mr. Xie has not been provided with information to which

he is entitled. The Shanghai Li Hong onshore fund structure is the subject of separate proceedings in the PRC, but there are important connecting issues between those proceedings and these. XiO GP, on the other hand, has said that if the Call Notices are not met, there will be serious detriment to the ability of the XiO Fund to meet its operating and ongoing expenses.

128. Where things appear to be evenly poised, it is a counsel of prudence to preserve the status quo. In my judgment, the status quo would be the position at the time when the claim was issued, i.e. that XiO GP and Ms. Li were not in a position to take steps to forfeit Dorsey's interests in the XiO Fund.

129. As regards the injunction against Ms. Li, it seems plain to me that the balance of convenience and the status quo favour that injunction, as varied, remaining in place until trial. The arbitration proceedings in relation to the Entrustment Agreement are underway in Hong Kong, and Dorsey is a Cayman Islands Exempted Limited Company.

130. In my judgment, having regard to all of the relevant circumstances, the course which is likely to cause the least irremediable harm to one party or another, is to continue both injunctions against Ms. Li and against XiO GP, as varied, until trial.

FORTIFICATION

131. These Defendants had made it clear that, in the event that the Court were minded to maintain the injunctions, they seek fortification in relation to the Plaintiffs' undertaking as to damages. Whether fortification is appropriate, and if so, for how much, is a matter for the discretion of the Court - *Gee on Commercial Injunctions* 6th Edition, [11 - 027]. If a limit is to be placed on an undertaking or guarantee, for example, by a bank, the limit is usually fixed by reference to what losses might be suffered by reason of the order, by the party or parties covered by the undertaking.

132. It is relevant whether the applicants are resident within the jurisdiction, and whether there are assets within the territorial jurisdiction of the court which would readily be available to satisfy any liability under the undertaking.

133. In this case, none of the Plaintiffs are resident within the jurisdiction. There is no evidence of any assets within the jurisdiction that could be readily available. The shares in Dorsey in respect of which Mr. Xie asserts a beneficial interest, will not suffice for these purposes as his ownership and interest are issues in dispute.

134. In my judgment, fortification is appropriate. XiO GP and Ms. Li have shown a sufficient level of risk of loss to require fortification. However, the question of the limit is to some extent influenced by the fact that there have been substantial variations to the injunctions to allow for matters in the ordinary course of business. In addition, some of the feared losses are less of an issue. For example, the Consent Order has permitted the merger to be pursued.

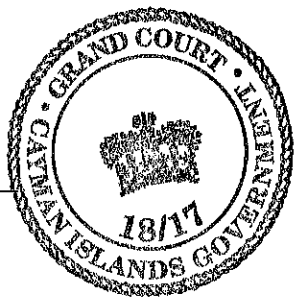
135. The difficulty is in deciding what would be an intelligent estimate of the likely amount of the loss - ***Harley Street Capital v Tchigirinski*** [2005] EWHC 2471(Ch), paragraph 17.

136. At the hearing, had I been minded to decide to grant fortification in the interim until I made this decision, Mr. Atherton QC had indicated that XiO GP and Ms. Li would be prepared to accept for the interim period a figure of US$2 million in fortification. I believe this is the amount that was ordered in respect of the Hong Kong injunction against Ms. Li.

137. In my view, the Plaintiffs, having succeeded in maintaining the injunctions until trial, the appropriate to order fortification by way of bank guarantee in the sum of US$2 million in respect of the injunction against Ms. Li, and in the sum of US$5 million in respect of the injunction against XiO GP.

138. In my judgment, the appropriate order is that costs of the Plaintiffs' summons are to be costs in the cause. If the parties disagree, they may make written submissions as to costs, within 7 days of the date of delivery of this decision.

139. I will therefore invite the parties to submit formal orders that accord with my Judgment.



THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT