COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/CLE/gen/01295

BETWEEN

HONG KONG ZHONG QING DEVELOPMENT COMPANY LIMITED

Plaintiff

-and-

(1)SQUADRON HOLDINGS SPV0164HK, LTD

First Defendant

(2) MR. D. SEAN NOTTAGE

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Christopher Jenkins with him Mr. Ra'Monne D. Gardiner of Lennox Paton for the Plaintiff
Mr. Michael R. Scott with him Mrs. Tracy A.A.A. Ferguson-Johnson for the Defendants

Hearing Date: 14 March 2017

Interlocutory applications – Preliminary applications - Application for ex parte injunction to be set aside – Whether Defendants had submitted to jurisdiction making setting aside application moot – Order of submission to jurisdiction not perfected – Transcript of proceedings available – Order not perfected may be varied –Re Barrell Enterprises [1972] 3 All ER 631 applied

Arbitration – Stay of legal proceedings – Step in proceedings – Whether filing a Defence and Counterclaim and asking Court to determine preliminary issue constitute "step in proceedings" - Whether Defendants have waived their right to arbitration - Section 9(3) of the Arbitration Act, 2009

Company – Company incorporated before arbitration proceedings commenced – Is arbitration void – Whether section 70 of the International Business Companies Act come to the aid of the Defendants – A way forward

On 10 August 2016 the Second Defendant, a promoter of the First Defendant (a Bahamian company) purported to commence arbitration proceedings against the Plaintiff by Notice of Arbitration dated 9 August 2016. The arbitration was brought under arbitration clauses in loan agreements relating to a loan provided to the Plaintiff by the Defendants in Hong Kong. The arbitration clause in the loan agreements provided for disputes to be referred to arbitration under the law of England and Wales through a BVI company referred to as "Arbitration Society of England & Wales Ltd" ("ASEWL"). On 16 August 2016 it was discovered in the context of separate proceedings in Hong Kong that the First Defendant company had not been incorporated. The First Defendant was subsequently incorporated and purported to pass board resolutions ratifying its prior actions of the company under section 70 of the International Business Companies Act ("the IBC Act").

Meanwhile, against the objections of the Plaintiff who disputed the bona fides of the arbitration clauses and the legitimacy and independence of ASEWL, ASEWL appointed an Arbitrator.

The Plaintiff commenced an action in the Bahamas by Writ filed on 6 September 2016 seeking, inter alia, declarations that the Second Defendant lacked the capacity to commence the arbitration on behalf of the First Defendant prior to its incorporation, challenging the arbitration clause in the loan agreements and the applicability of section 70 of the IBC Act. By summons brought on notice on 9 September 2016 the Plaintiff applied to the Bahamian Court for an injunction restraining the Defendants from taking any further action in the Arbitration proceedings. The application was heard on 'ex parte on notice' on 15 and 16 September 2016 and resulted in an injunction enjoining the parties from taking any further steps in the Arbitration.

On 4 October 2016 the Plaintiff filed its Statement of Claim. On 21 October 2016 the Defendants filed their Defence and a detailed Counterclaim. By Notice filed on 7 November 2016 the Defendants applied to set aside the Injunction.

The hearing of the 7 November 2017 Notice was set for 14 December 2016. What occurred and was determined at this hearing is disputed. The Plaintiff claims that the Defendants by their counsel conceded that they had waived the right to arbitrate, and that the injunction was continued, with the Judge ordering costs in the cause. The Defendants disputed that there was any such concession or determination. No order was perfected reflecting the directions given.

By summons filed on 2 February 2017 the Defendants again sought an order that the Injunction be set aside and further orders for the trial as preliminary issues of various issues relating to the adoptive resolutions made under section 70 of the IBC Act, and a stay for arbitration.

Following a hearing on 7 February 2017 which took place in the absence of the Plaintiff's lead counsel, a directions order was drafted by the Defendants' counsel and perfected by the Court purporting to set down the Defendants' application to set aside the injunction, the Defendants' applications for security for costs and fortification of the undertaking in damages, as well as trial of the preliminary issues identified in the summons of 2 February 2017.

In advance of the hearing, the Plaintiff raised preliminary issues. It was contended that the application to set aside the Injunction was moot in circumstances where (i) the Court and the Defendants' counsel had accepted at the hearing on 14 December 2016 that the Defendants had waived their right to arbitrate by filing a defence and counterclaim. (ii) In the alternative, by filing a substantive defence and counterclaim, and seeking the a preliminary trial of certain of the issues in the pleadings, the Defendants had waived their right to seek a stay for arbitration under section 9(3) of the Arbitration Act 2009; and (iii) the Arbitration was not defensible in

circumstances where it was clear as a matter of law that the Second Defendant could not commence arbitration proceedings on behalf of the First Defendant prior to the First Defendant's incorporation. The Plaintiff also sought orders striking out the provision in the Directions Order of 14 February 2017 that purported to set down preliminary issues for trial, or alternatively leave to appeal and a stay.

Held:

1) **The Defendant's application to set aside the Injunction of 16 September 2016 is dismissed with costs for the following reasons:**

    a. **Counsel for the Defendants conceded at the hearing on 14 December 2016 that the Defendants had by filing its Defence and Counterclaim taken a step to defend the substantive proceedings. As a result, the right to seek a stay for arbitration had been waived. The Court at the hearing on 14 December 2016 had given consequent case management directions and ordered 'costs in the cause'. Although the court has the jurisdiction to vary its own order prior to perfection, no exceptional circumstances arose subsequent to the hearing on 14 December 2016 which would warrant the Court altering the directions given at the hearing.** ***RTL v ALD and others [2015] 1 BHS J. No. 82*** **and** ***Re Barrell Enterprises and others [1972] 3 All ER 631 applied.***

    b. **Even if the matter had not already been determined at the hearing on 14 December 2016, it is clear that in filing its Defence and Counterclaim the Defendant and subsequently seeking trial of certain preliminary issues clearly waived its right to seek a stay for Arbitration under section 9(3) of the Arbitration Act 2009.** ***Kenneth Krys v New World Value Fund Limited Claim No. BVIHCM (COM) 2013/0026, Anzen Ltd v Herms One Ltd BVIHCMAP2014/0013, Vosko v Chase Manhattan Bank [1992] BHS J No. 168 Hunter v Crowch [1985] BHS J. No. 27,*** **and** ***Unwired Planet International Co Ltd and others [2015] EWHC 2097 applied.***

    c. **A company that does not exist cannot bring legal proceedings. Accordingly, the Second Defendant did not have the capacity to commence arbitration proceedings on behalf of the First Defendant prior to the First Defendant's incorporation, and the purported Arbitration proceedings are therefore a nullity.** ***Freeport Licencees and Property Owners Association v The Grand Bahama Port Authority Limited and others [2009] 3 BHS J. No. 125 C.A.*** **applied.**

    d. **Section 70 of the International Business Companies Act has no application to the commencement of legal proceedings prior to a company's incorporation.**

2) **Paragraph 4 of the Directions Order of 14 February 2017 should be set aside. The perfection of the Directions Order had taken place, in part, as a result of a breach of Practice Direction No. 4 of 1974 by counsel for the Defendants. In any event it would be premature to order trial of preliminary issues already the subject of separate and related proceedings commenced by the Defendants in the Bahamas before Senior Justice Stephen Isaacs, and the subject of related Court**

Proceedings involving the parties in Hong Kong until final determination of those proceedings.

JUDGMENT

Charles J:

[1] This matter is so contentious that there is even a dispute as to whether some of the applications listed below for hearing on 14 March 2017 were moot either having been heard and determined by the Court and/or conceded to by Learned Counsel for the Defendants, Mr. Scott at a prior hearing on 14 December 2016. The applications set for hearing on 14 March 2017 are as follows:

a. The Defendants' applications for the ex parte injunction on notice granted on 16 September 2016 to be set aside;

b. The Defendants' application for Security for Costs;

c. The Defendants' application for fortification of the undertaking in damages;

d. The Plaintiff's application to set aside paragraph 4 of the Order of 14 February 2017 providing for the trial of preliminary issues on 14 March 2017 ("the Disputed Directions Order");

e. The Plaintiff's application for leave to appeal the apparent decision of the Court (on 7 February 2017) to determine certain questions of mixed fact and law by way of a trial as preliminary issues; and

f. The Plaintiff's application for a stay of paragraph 4 of the Disputed Directions Order pending appeal.

[2] Before I attempt to address any of these issues, Learned Counsel for the Plaintiff Mr. Jenkins raised two preliminary objections namely: (1) whether the application to set aside the ex parte injunction on notice was moot and (2) whether the commencement of the arbitration proceedings before the First Defendant ("Squadron") was incorporated by the Second Defendant ("Mr. Nottage") is a nullity.

Whether the application to set aside the ex parte injunction on notice is moot?

[3] It is common ground that the current ex parte injunction on notice prevents the parties from taking further steps in furtherance of the purported arbitration before Israeli Arbitrator Adv Gilead Sher. The purported arbitration was commenced through and using the arbitration rules of a BVI Company named "Arbitration Society of England & Wales Ltd" by Mr. Nottage on behalf of Squadron prior to Squadron's incorporation in The Bahamas.

[4] However, what is tersely disputed is whether the application to set aside this injunction is moot. In other words, whether Squadron and Mr. Nottage (collectively "the Defendants") have already submitted to the jurisdiction at an earlier hearing on 14 December 2016. Learned Counsel Mr. Scott insisted that the application to set aside this injunction is not moot and ought to be heard. He submitted that, whilst the Defendants are in the jurisdiction, they have not submitted to the jurisdiction and they have not waived their right to arbitrate, as he alleges, is evident in their Counterclaim.

[5] On the other hand, learned Counsel for the Plaintiff ("HKZQ"), Mr. Jenkins asserted that on 14 December 2016, the Defendants submitted to the jurisdiction of the court, thereby waiving their right to arbitrate. In other words, the application to set aside the injunction is moot. HKZQ next asserted that the Defendants not only filed a Defence but also a detailed Counterclaim seeking damages in these proceedings. Mr. Jenkins argued that the Court even awarded costs to the Plaintiff; such costs to be costs in the cause.

[6] It is rather painstaking but sensible to look at various parts of the transcript of proceedings of 14 December 2016:

a. **Page 13 lines 20 - 32:**

"THE COURT: Why don't we hear the case?

MR. SCOTT: The entire case?

THE COURT: There is defence. All you have to do …. and a Counterclaim. Mr. Jenkins will have to ……

MR. SCOTT: I will love to have that section 70 issue determine. I will be more than happy to do that. Why don't we do that? Why don't we do that? Mr. Jenkins, put your money where your mouth is.

THE COURT: But you are submitting to the jurisdiction. Therefore if he is submitting to the jurisdiction, the matter goes to case management." (emphasis added)

b. Page 20 lines 6 – 26:

"THE COURT: Are you submitting to [sic] jurisdiction?

MR. SCOTT: That is what that counterclaim is; isn't it?

THE COURT: The fact that you have filed a defence and counterclaim.

MR. SCOTT: I filed a defence.

THE COURT: …means that you have submitted to the jurisdiction. If not, you would have filed a forum challenge before.

MR. SCOTT: That's correct.

THE COURT: Let me go to case management.

MR. JENKINS: As we offered in preparing for today, that is part of our case which we have been successful. We ask for cost of preparing for this.

THE COURT: He has said ---it will be cost in the cause.

MR. SCOTT: Yes, thank you." (Emphasis added)

c. Page 26 lines 6 – 26:

"MR. SCOTT: So, My lady, tell me, what are we going to do?

THE COURT: Case Management. We are going to go into trial. Have these parties ----

MR. SCOTT: I agree. But still, even if we go into trial, we still have a right of the Defendant here to security. And I know that you spoke of security.

THE COURT: Security for cost[s].

MR. SCOTT: Yes.

THE COURT: We can hear that. So you still will proceed with security for cost?

MR. SCOTT: Right. And if you are going to leave any sort of injunction in place, my clients are entitled to fortification. The other side have (sic) perhaps put up fortification in Hong Kong and we are entitled to fortification.

THE COURT: So, you are looking at those issues as well as security for cost?

MR. SCOTT: Right.

THE COURT: So, I need to give you another date."

d. **Page 28, lines 4 – 5:**

"THE COURT: So, you're issue now falls away – your preliminary issue. I want to be clear."

e. **Page 29, lines 9 – 17:**

"THE COURT: For the record, anything, any application needs to be withdrawn?

MR. SCOTT: Which application?

THE COURT: I just need to know what impending applications now.

MR. SCOTT: You have two applications.

THE COURT: Security for cost and fortification.

MR. SCOTT; That's it.

THE COURT: So, the injunction application is withdrawn?

MR. SCOTT: Well, it is not withdrawn. I am leaving it. There is no point to an injunction at this moment. The injunction was referred to arbitration but I need to confirm instructions which I am going to do in ten minutes downstairs. I am going to Café Matisse to have a chat with my clients."

[7] In my opinion, it is clear that learned Counsel Mr. Scott accepted that the Defendants had submitted to the jurisdiction and conceded that the issue of the injunction was moot. Having submitted to the jurisdiction on 14 December 2016, the Defendants have waived their right to arbitrate. As Mr. Jenkins correctly submitted, the Court even went so far as to award costs in the cause to HKZQ.

[8] For unexplained reasons, the Order made on 14 December 2016 had not been perfected by the time of the hearing on 7 February 2017. But the transcript of proceedings speaks for itself.

[9] It is not disputed that the Court has the discretion to vary an order it has made before perfection. However, that discretion is not unfettered. As a matter of principle, a judge retained control of a case to the extent of being able to reconsider the matter of his own motion or to hear further argument on a point which has been decided even after judgment had been handed down (but before it has been perfected). The Court has the power to permit pleadings to be amended, even if that involved a new argument being put forward, or further evidence being adduced at that stage: per Neuberger J in **Charlesworth v Relay Roads Ltd (in liquidation)** [1999] 4 All ER 397.

[10] However, once the Court has made and perfected an Order, only in exceptional circumstances that a judge should be invited to reverse a reasoned decision, since an appeal is the more appropriate course in such a situation: **Compagnie Noga D'Importation et D'exportation SA v Abacha (No. 2)** [2001] 3 All ER 513, following the approach adopted in **Re Barrell Enterprises and others** [1972] 3 All ER 631, CA (legal practitioners in England described the jurisdiction

to alter a judgment before it is perfected as 'the Barrell jurisdiction'). In **Re Barrell**, Russell LJ stated at p 636:

> "**When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought save in most exceptional circumstances to be able to assume that the judgment is a valid and effective one".**

[11] Thus, it is beyond question that the court's power to review and change its mind on a conclusion at any time before the order is drawn up is well established: **Stewart v Engel** [2000] 1 WLR 2268. Sir Christopher Slade stated at p. 2275:

> **"Since there must be some finality in litigation and litigants cannot be allowed unlimited bites at the cherry, it is not surprising that, according to the authorities, there are stringent limits to the exercise of the discretion conferred on the court by the Barrell jurisdiction."**

[12] In addition, in **Compagnie Noga D'Importation**, Rix LJ stated at paras 42 - 43:

> **"[42] Of course, the reference to exceptional circumstances is not a statutory definition and the ultimate interests involved, whether before or after the introduction of the CPR, are the interests of justice. On the one hand the court is concerned with finality, and the very proper consideration that too wide a discretion would open the floodgates to attempts to ask the court to reconsider its decision in a large number and variety of cases, rather than to take the course of appealing to a higher court. On the other hand, there is a proper concern that courts should not be held by their own decisions in a straitjacket pending the formality of drawing up the order. As Jenkins LJ said in *Re Harrison's Share [1955] 1 All ER 185 at p. 188*, *[1955] Ch 260 at 276*: 'Few judgments are reserved and it would be unfortunate if once the words of a judgment were pronounced there were no locus poenitentiae.'**
>
> **[43] Provided that the formula of 'exceptional circumstances' is not turned into a straitjacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another, the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary, or exceptional. An exceptional case does not have to be uniquely special. 'Strong reasons' is perhaps an acceptable alternative to 'exceptional circumstances'. It will necessarily be in an exceptional case that strong reasons are shown for reconsideration."** [Emphasis added]

[13] In **RTL v ALD and others** [2015] 1 BHS J No. 82, Winder J affirmed that the **Re Barrell** jurisdiction is the law of the Bahamas. He stated at para 37:

> **"The Bahamas however, has not as yet introduced any CPR changes and therefore I find the Barrell jurisdiction remains the state of our law. This position has been confirmed by Barnett CJ in the case of *Re: Petition of Henry Armbrister 2007/CLE/qui/01438 & 2008/CLE/qui/845*. I accept therefore that it is only in the most exceptional circumstances that I ought to revisit a decision made by me…"**

[14] I agree with Mr. Jenkins that, in the present case, no exceptional circumstances arose after 14 December 2016 which would warrant the Court altering its directions given on that day. While I agree with Mr. Scott that the Court was discussing with Counsel alternative methods of dispute resolution, it is plain from the transcript of proceedings that the Court was ready to give case management directions in preparation for trial having ruled that the Defendants had submitted to the jurisdiction of the court to which learned Counsel Mr. Scott conceded. I therefore find that the Defendants' application to set aside the injunction is moot and ought to be dismissed.

[15] Even if I am wrong to come to this conclusion, I shall carry on with the next point which, in my opinion, makes the case for HKZQ more persuasive.

Whether the right to seek a stay in favour of arbitration has been waived

[16] The Defendants asserted that (a) they have not taken the steps in the litigation contemplated by legal authorities and the matter should return to the pending arbitration and (b) even taking active steps in litigation does not preclude a party from challenging an improperly obtained *ex parte* injunction.

[17] HKZQ insisted that the proper course for the Defendants to take if they had wished to arbitrate was to seek a stay of the legal proceedings in favour of the arbitration. They did not do so. According to learned Counsel Mr. Jenkins, instead, the Defendants have taken steps in the proceedings waiving their right to arbitrate. They have filed a Defence and a Counterclaim and they are seeking an order for the trial of the preliminary issue of whether section 70 of the

International Business Companies Act, 2000 ("the IBC Act") allows a company incorporated under the Act to adopt a contract by way of a post incorporate Adoptive Resolutions, as contemplated by the section.

[18] Section 9(3) of the Bahamian Arbitration Act, 2009 ('the Act") provides as follows:

> **"9. Stay of legal proceedings**
>
> **(3). <u>An application may not be made by a person</u> before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or <u>after he has taken any step in those proceedings to answer the substantive claim</u>."** [Emphasis added]

[19] Section 9(3) of the Act is plain. It states that an application may be made in legal proceedings to stay those proceedings in favour of an arbitration clause. If not, a plaintiff may lose that right.

[20] Learned Counsel Mr. Scott submitted that section 9(3) is not worded in a way to preclude a defendant from seeking to discharge an *ex parte* injunction. According to him, section 9(3) does not trump all other law providing a party with a right to seek to discharge an injunction. The Defendants next submitted that HKZQ's reliance on section 9(3) is misguided and is an attempt to frustrate the contractually agreed exclusive dispute resolution mechanism - arbitration - which is universally favoured.

[21] Mr. Scott asserted that although it is true that, on 21 October 2016, the Defendants filed a Defence and a Counterclaim in these proceedings, they have not submitted to the jurisdiction. He submitted that the Defendants were obliged to take action so as to prevent HKZQ from attempting to make any application for default judgment. He argued that it is plainly obvious that this did not in any way constitute a waiver of any right to arbitrate.

[22] Mr. Scott further argued that the Defendants' initial focus was deployed in efforts to discharge the *ex parte* relief in breach of the practice of the court. To answer this argument, the injunction order was actually made **<u>on notice</u>** to Squadron

who was served on 9 September 2016, six days prior to the hearing on 15 September 2016. In addition to being served, Squadron's former attorney Nerissa Greene of Halsbury Chambers was also separately advised of the date of the hearing (as a courtesy) by learned Counsel Mr. Jenkins on 13 September 2016, at a hearing in related proceedings in which she acted for Squadron. Ms. Greene alleged that she was not instructed in relation to this particular matter. It is therefore questionable whether this was an *ex parte* hearing.

[23] Mr. Scott submitted that at paragraph 11 of the Defence, the Defendants stood firm on their rights to arbitration stating "*The Arbitration Proceedings are valid and binding. Indeed the Plaintiff itself attempted to rely on the arbitration clause." Mr. Scott continued that at* paragraph 18 of the Defence, the Defendants left no doubt about their right to arbitration, asserting that "*the Arbitration Proceedings correctly commenced*." Finally, the Defendants, in their prayer to the Counterclaim, at paragraph number 3, assert that "*the arbitration proceedings have been correctly instigated*."

[24] Mr. Scott next submitted that the Defendants' entire focus in these proceedings has been with respect to the discharge of the *ex parte* injunction which injunction precluded the continuation of pending arbitration proceedings. This, says Mr. Scott, pushes 'the envelope of credulity' for a party to assert that the foregoing acts or steps satisfies the legal standard of a willingness of a defendant to go along with a determination of the Court, so as to waive arbitration. He submitted that the Court initiated a dialogue as to whether the parties might be interested in having the Court resolve all outstanding issues. As the transcript of proceedings reflects, the Court inquired of Mr. Scott whether the injunction application is withdrawn. At that point, Mr. Scott said: "*Well, it is not withdrawn. I am leaving it. There is no point to an injunction at this moment. The injunction was referred to arbitration but I need to confirm instructions which I am going to do*…."

[25] No doubt, Mr. Scott appeared ambivalent as to what he was doing at that stage of the proceedings on 14 December 2016. However, this was after the Defendants had filed not only a Defence but a detailed Counterclaim.

[26] In passing, I observe that if a defendant wishes to prevent a plaintiff from obtaining judgment in default of defence, the defendant may file a defence; not a defence and counterclaim. A counterclaim is an opposing claim, as in this case, by the Defendants against HKZQ's claim. In the present case, the Defendants have counterclaimed against HKZQ for (i) Damages in the amount of HK$20,454,000.00 plus compound interest and (ii) loss profits in an amount not yet determined. In the alternative, the Defendants seek a Declaration that the Agreements are valid and binding and effective, enforceable in accordance with their terms and the arbitration proceedings have been correctly instigated and further and alternatively, a Declaration that the sum of HK$20,454,000.00 is held by HKZQ in trust for the benefit of the First Defendant. So, it is inaccurate to say that the Counterclaim only seeks arbitration. The substantive relief is for damages and loss profits.

[27] It is accepted that a defendant is entitled to a stay of the legal proceedings **unless** he took a step in the proceedings within the meaning of section 9(3) of the Act. The question of what constitutes "a step in the action or the proceedings" has been considered in a plethora of judicial authorities.

[28] Mr. Scott relied heavily on **Eagle Star Insurance Co Ltd v Yuval Insurance Co. Ltd** [1978] 1 Lloyd's Rep. 357; **Kuwait Airways Corporation v Iraq Airways Corporation** [1994] 1 Lloyd's Rep. 276 and **Patel v Patel** [2000] QB 551. In **Patel**, the plaintiff obtained judgment in default of defence in his action against the defendant for damages for breach of a building contract. The defendant applied to set aside that judgment and asked that he be given leave to defend the action and counterclaim and that consequential directions be given. Pursuant to section 9 of the Arbitration Act, the defendant applied for the action to be stayed on the ground that it concerned a matter which the parties had agreed to

refer to arbitration. The judge held that in doing so, he had taken a step in the proceedings to answer the substantive claim and was therefore precluded from seeking a stay pursuant to section 9(3) of the Act.

[29] On appeal, it was held that the defendant had not taken a step in the proceedings within the meaning of section 9 of the Act merely because, when applying to set aside the default judgment, he has asked for leave to defend the action and counterclaim, which he did not need, and for consequential directions to be given. Accordingly, the action was stayed in favour of arbitration.

[30] Lord Woolf MR, who gave the leading judgment, said at p 555G that the general approach under the old law was conveniently summarised in ***Mustill & Boyd, Commercial Arbitration***, 2nd edition (1989) p 472 where the learned editors said:

> **"The reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his right of stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court."** [Emphasis added]

[31] Applying Lord Wolff's approach, Mr. Scott submitted that the Defendants have not taken a step in these proceedings within the meaning of section 9(3) of the Act.

[32] In **Patel**, Lord Wolff held that the application to set aside the default judgment could not assist the plaintiff, because without such an application there was nothing to stay. The request for leave to defend the action and counterclaim was more challenging. Lord Wolff recognised the force in the plaintiff's argument that it was a clear indication that the defendant was going to defend the action and counterclaim. But the defendant did not need leave of the court to do so since he could have done so as of right if the default judgment was set aside. To hold that the defendant had taken a step in the proceedings by asking for something otiose would be inconsistent with the spirit of the 1996 Act. It seems reasonable

to infer that had the request for leave to defend the action and counterclaim not been otiose, then they would have constituted a step in the proceedings.

[33] In **Kenneth Krys et al v New World Value Fund Limited**, Claim No. BVIHCM (COM) 2013/0026 – judgment delivered on 19 April 2013, Bannister J found that by asking the Court for a hearing in order to obtain a relisting was "taking a step in the action" and a party is thus precluded by the terms of section 6(2) of the Arbitration Ordinance 1976 of the Virgin Islands from obtaining a stay. At para 23, he said:

> **"A step in an action, for these purposes, has been described as something which evinces an election to have the dispute resolved in Court and, correspondingly, a waiver of any right to have the dispute referred to arbitration –Eagle Star Insurance Co Ltd v Yuval Insurance Ltd [1978] 1 Lloyd's Report 357 at 361."**

[34] At paragraph 24, the learned judge said:

> **"<u>It seems to me that a party asking the Court to arrange a hearing at which it proposes to ask for the indulgence of an adjournment of a trial in order that it may be represented at the adjourned trial by Counsel of its choice takes a step in the action</u> from which the only possible inference is that it is not interested in invoking the arbitration agreement but instead wishes the matter to be heard by the Court at a time and in a manner most advantageous to its own perceived interests."**

[35] Mr. Jenkins quite correctly submitted that filing a defence and a counterclaim would each separately constitute a step in the proceedings to answer the substantive claim, even if the party purported to reserve the right to seek a stay. As such, unless the parties agree otherwise, they are now bound to resolve the dispute under the jurisdiction of the Bahamian Court. In that regard, he relied on a plethora of legal authorities. For instance, in **Vosko v Chase Manhattan Bank** [1992] BHS J No. 168, Campbell J.A. at para 61 said:

> **"Dicey and Morris (supra) at p 441 states that:**
>
> > **"a litigant who has voluntarily submitted himself to the jurisdiction of a court by appearing before it cannot afterwards dispute its jurisdiction. <u>Where such a litigant, though a defendant rather than a plaintiff, appears and pleads to the merits without contesting the jurisdiction</u>**

there is clearly a voluntary submission. The same is the case where he does indeed contest the jurisdiction but nevertheless proceeds further to plead to the merits."[Emphasis added]

[36] In another Bahamian case of **Hunter v Crowch** [1985] BHS J No. 27, Adams J. said at para 7:

> **"In the case of Re Dulles' Settlement 1951 Ch 842 at p 850 Denning LJ said in the Court of Appeal:**
>
> > **"I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction: see Tallack [12], per Lord Merrivale, P."**[Emphasis added]

[37] In **Unwired Planet International Ltd v Huawei Technologies Co. Ltd and others** [2015] EWHC 2097, Birss J had this to say at paras [62] to [64]:

> "[62**] As is clear from s 9(3) and (4), the Act creates a mandatory as opposed to a discretionary obligation on the court to grant a stay in respect of any claim that comes within the scope of an arbitration agreement so long as the application is made in appropriate circumstances. Those circumstances are that the stay is sought after acknowledgement of service but before the Applicant has taken a step to answer the substantive claim.**
>
> **[63] It is settled that s 9(3) …is not to be read in a way such that, for instance, only service of a defence or equivalent would potentially count as a step *"to answer the substantive claim"): Bilta (UK) Ltd v Nazir and others* [2010] Bus LR 1634, [2010] 2 Lloyd's Rep per Sales J (as he then was) at paras 27–28. Although the judge could see sound reasons for confining the sorts of steps contemplated by s 9(3) to things like serving a defence, he held that binding authority precluded that result.**

[64] Nevertheless not every step in proceedings is enough to satisfy s 9(3). The courts have applied what Floyd J (as he then was) described *"as a gloss to the plain words of the Act" (Nokia v HTC* [2012] EWHC 3199 (Pat) at 14). A relevant step in proceedings is one that *"impliedly affirms the correctness of the proceedings and the willingness of the Defendant to go along with a determination by the Courts of Law instead of arbitration": Eagle Star Insurance Co. Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 (CA). The quality of any step for the purposes of s 9 (3) '*has to be judged objectively in the light of the whole context known to both parties"*.

[65] Where a Defendant agrees directions for the conduct of proceedings, that agreement may be regarded for the purposes of s 9(3) as an unequivocal acceptance that the court is the correct forum for deciding all the issues which might foreseeably arise in the action: *Nokia v HTC* at paras 26 -27."

[38] In the BVI decision of **Anzen Ltd v Herms One Ltd** –BVIHCMAP2014/0013, Webster JA stated at para 17:

"The following *points emerge from the cases*:

….(3) If one of the parties by-passes the arbitration clause and files a claim in court (as in this case) the other party still has the option to invoke the arbitration clause, refer the matter to arbitration and apply for a stay of the court proceedings.

(4) If the counter party, having been sued, does not refer the matter to arbitration, or submits to the court's jurisdiction, the dispute will proceed under the court's jurisdiction"

[39] Mr. Jenkins asserted that the facts supporting the waiver of the right to seek a stay for Arbitration are now even stronger that they were when the Court made its order on 14 December 2016.

[40] In the present case, on 21 October 2016, the Defendants filed a Defence and Counterclaim. On 2 February 2017, they filed a Summons for an Order that certain issues related to the effect of section 70 of the IBC Act be tried as preliminary issues. On 7 February 2017, in the absence of lead Counsel Mr. Jenkins, the Defendants reiterated that there were four issues to be tried while Mr. Gardiner, an associate with Lennox Paton working on the file with Mr. Jenkins, maintained that there were only two issues – security for costs and fortification of the undertaking in damages. From the transcript of proceedings on

this day, it appeared that the Court was not properly prepared for this matter and so, the Order of 14 February 2017 was largely driven by learned Counsel Mr. Scott who repeatedly stated that the Defendants wish to go to arbitration.

[41] All things considered, the proper course for the Defendants to take if they had wished to arbitrate was to seek a stay of these proceedings in favour of arbitration. Instead, having filed a Defence and Counterclaim and have requested this Court to consider section 70 of the IBC Act, the Defendants have unequivocally represented that this action will be tried in this Court even though they speak of the arbitration whenever it is convenient to do so. It is scarcely conceivable that there could be a stronger case for waiver of the right to seek a stay for arbitration.

[42] For all of these reasons, it is very clear that the application to set aside the injunction remains moot. This point was accepted by Mr. Scott at the hearing on 14 December 2016.

[43] It cannot be gainsaid that the Court prefers arbitration instead of litigation especially when a trial lasting two weeks may not take place before 2019. According to Mr. Jenkins, as the Court expressed at the hearing on 7 February 2017, this does not of course mean that the dispute cannot be arbitrated if the parties so agree. He submitted that HKZQ is open to considering any reasonable proposals in this respect. If the Defendants were to propose Arbitration through a recognised body of Arbitrators, and could agree on a suitably qualified Arbitrator experienced in the law of England and Wales to act as Arbitrator, on the basis of established rules with limited rights of appeal on points of law, this would be something that HKZQ would be willing to consider.

Whether the arbitration is null and void as a matter of law

[44] Learned Counsel Mr. Jenkins submitted that the second preliminary issue which arises for determination is whether the arbitration proceedings commenced by

Mr. Nottage in Hong Kong are null and void since it was commenced before Squadron was incorporated in The Bahamas.

[45] It is not disputed that Mr. Nottage commenced arbitration proceedings in Hong Kong on 9 August 2016 before Squadron was incorporated on 17 August 2016. Mr. Nottage was one of the authorised promoters of Squadron.

[46] Mr. Scott submitted that in or around April/May 2016, Squadron entered into discussions with HKZQ in relation to a potential Loan Agreement between Squadron and HKZQ. Although Squadron had not yet been incorporated, at all material times, HKZQ and those that represented it were fully aware that the promoters of Squadron, were acting for and on behalf of Squadron and that it was Squadron that was the entity with which it would enter into a Loan Agreement.

[47] Mr. Scott next submitted that at all material times and throughout any and all pertinent pre-contractual negotiations Mr. Nottage had full authorisation to act for and on behalf of Squadron and was authorised to enter into the Loan Agreement on behalf of Squadron. He further submitted that during this time, Mr. Nottage was under the genuine impression that Squadron had been incorporated. The relevant documents had been completed and delivered to the Registry. However, due to an oversight and the fact that the Registry had recently converted to a new computerised system, the incorporation application for Squadron had not been correctly made and Squadron was not incorporated. Once the administrative error was discovered the correct application was made and Squadron was incorporated on 17 August 2017.

[48] Mr. Scott submitted that in late August 2016, after it had been properly incorporated, Squadron commenced legal proceedings in The Bahamas in relation to the Loan Agreement (2016/CLE/gen/59). According to him, these proceedings were commenced with the full knowledge and support of Squadron's Directors and Promoters. Those legal proceedings were set aside by an Order of

the Bahamian Court on 23 September 2016 due to alleged procedural errors and the substantive issues were not addressed. Mr. Scott indicated that there is no issue of res judicata and Squadron was at liberty to end those proceedings and commenced them again with the procedural errors corrected.

[49] All parties are agreed that at common law a company cannot be bound by any action taken on its behalf prior to its incorporation.

[50] Mr. Jenkins asserted that the arbitration commenced by Mr. Nottage is void is a matter of settled law, which to date that Defendants have been unable to answer - a company cannot commence legal proceedings prior to its incorporation. He cited the case of **Freeport Licensees and Property Owners Association v. The Grand Bahama Port Authority, Limited and others** [2009] 3 BHS J No. 125, C.A. At para 44, Osadebay JA said:

> **"The situation in this action was that the Appellant's legal capacity to bring the action in its name was being questioned. This action was not brought by the promoters in their personal capacity nor was it brought by some of them in a representative capacity. This action was brought in the name of the very entity which the promoters sought to incorporate as a legal entity under the Companies act, and for which a licence had not been granted by the Minister pursuant to section 14 of the Companies Act for its incorporation, nor was a certificate of incorporation issued by the Registrar General under section 16 of the Companies Act evidencing its incorporation.**

[51] Osadebay JA continued at paras 57 – 58:

> **"[57] This action was commenced about three weeks later by originating summons in the name of the appellant 'Freeport licensees and Property Owners Association'. However in the body of the Summons the appellant claimed that it was a non-profit Trust "incorporated under the provisions of the Companies Act, 1992". By virtue of Order 7 r(3) of the Rules of the Supreme Court it is the endorsement and not the title of the originating summons that determines the capacity in which one sues. Accordingly, as that claim was being made the respondents challenged the capacity of the appellant to bring the action.**
>
> **[58] And since no certificate of incorporation was issued one would think that that would be the end of the matter. <u>For the certificate of incorporation is the company's birth certificate and it is only from the date stated in that certificate that the company assumes full corporate status and has the</u>**

<u>requisite capacity to sue or be sued in its own name</u>. No facts that would alter the decision made by Adderley J have been put before this court and there would therefore not appear to be any factual basis for altering the judge's finding on the point."[Emphasis added]

[52] At paragraph 67, Osadebay JA continued:

"…Section 16(2) clearly provides that it is only from the date specified in the certificate of incorporation granted by the Registrar General that corporate status is conferred on a company incorporated under the Companies Act. <u>It is not simply a question of corporate status being conferred by operation of law or simply a question of submitting documents that are in order. The duly issued certificate of incorporation by the Registrar General is a necessary precondition</u>. There is therefore no basis for disturbing the finding that the company 'does not exist in law as a body corporate. It therefore has no capacity to sue or carry on an action'. It cannot be the plaintiff in this action. Capacity to sue is pivotal and in the circumstances the proceeding cannot be saved by resort to Order 2 rule 1 of the Rules of the Supreme Court (see Dubai Bank Ltd v Galadari and others The Times 23 Feb. 1990. [Emphasis added]

[53] **Dubai Bank Ltd v Galadari and Others (No. 4)**, The Times 23 February 1990 fortifies the Plaintiff's submissions that a company cannot be bound by any action taken on its behalf prior to its incorporation. Mr. Justice Morritt said at pp 3 – 4:

"The starting point for this inquiry must be the decision of the House of Lords in *Lazard Brothers v Midland Bank Ltd (1933) AC 289.* In that case a Russian bank which had been indebted to Lazards was dissolved by the law of the place of its incorporation. Lazards, unaware of that fact, obtained leave to serve the writ on the bank in Russia and obtained judgment in default of appearance. That judgment remaining unsatisfied Lazards sought to garnishee a debt due by Midland Bank Ltd to the Russian bank. <u>Midland argued that because the Russian bank did not exist the judgment was null and void and the garnishee proceedings must therefore fail.</u>

In his speech, with which the other members of the House of Lords concurred, Lord Wright at page 296 posed the question and answered it in these terms:

(2) Whether the order nisi should not be set aside on the ground that the judgment was a nullity, having been signed against a non-existent defendant since the Industrial Bank had ceased to exist as a juristic person before the date of the writ…

I shall deal with question (2), which is the most important and is decisive, since it is clear law, scarcely needing any express authority, <u>that a judgment must be set aside and declared a nullity by the Court in the exercise of its inherent jurisdiction if and as soon as it appears to the Court</u>

> **<u>that the person named as the judgment debtor was at all material times at the date of writ and subsequently non-existent</u>…"**[Emphasis added]

[54] At page 5, Mr. Justice Morritt continued:

> **"In my judgment the principle of *Lazard Bros v Midland Bank Ltd* has not been overridden by Order 2, rule 1, and there is no jurisdiction to join a person as a plaintiff to proceedings brought by a non-existent person…."**

[55] Mr. Jenkins submitted that the **Freeport Licensees** case from our Court of Appeal is binding authority that a company that does not exist cannot bring proceedings.

[56] In the present case, Mr. Nottage brought the arbitration proceedings not in his personal capacity nor did he bring it in any sort of representative capacity. Squadron was not incorporated when he commenced the arbitration proceedings in Hong Kong. To borrow the words of Osadebay JA, Squadron had no birth certificate.

[57] The act of simply submitting documents to the Registry and being under a genuine impression that Squadron was incorporated, as Mr. Nottage alleged, is not sufficient to discharge that burden that Squadron did not exist on the date that he commenced the arbitration proceedings. As the authorities suggest, a company only assumes full corporate status and has the requisite capacity to sue or be sued in its own name from the day of its 'birth'.

[58] Mr. Scott next submitted that once it was realised that the Loan Agreement had been entered into pre-incorporation, on 17 August 2016, Squadron passed an adoptive resolution (the "Adoptive Resolution") officially adopting the Loan Agreement and commenced legal proceedings in line with section 70 of the Act.

[59] Mr. Scott submitted that section 70 of the IBC Act provides a statutory avenue for adoption of said actions. He intimated that the intention behind section 70 is clear and precise and it is disappointing that HKZQ is attempting to pervert that

intention in order to assist it in escaping repaying the tens of millions of dollars it owes the Defendants.

[60] Learned Counsel Mr. Scott relied heavily on the BVI case of **Victor International Corporation v Spanish Town Development Company Limited** (Claim No. BVIHCV2007/0293) – Judgment of Hariprashad-Charles J delivered on 14 February 2008 [unreported]. Applying BVI law, I held that it is no longer the law that a contract entered into by an individual on behalf of a company before it is incorporated is a nullity. A company can adopt or ratify this contract within a specified time as provided for in the contract or within a reasonable time after it has been incorporated. The Second Agreement was signed by Mr. Johnson on 4 March 2007, on behalf of Victor BVI which was not incorporated until September 2007.

[61] **Victor International** turned on its own peculiar facts and circumstances and the applicable legal principles in that jurisdiction that a company can adopt or ratify this contract within a specified time as provided for in the contract or within a reasonable time after it has been incorporated. It is therefore distinguishable from the present case.

[62] As Mr. Jenkins corrected stated, the Court of Appeal decision in **Freeport Licensees** [supra] in which it was held that a company that does not exist cannot bring proceedings is binding on this Court.

[63] Attractive though the arguments of Mr. Scott are, section 70 of the IBC Act does not aid the Defendants as it has no application to legal proceedings which includes arbitration proceedings. This finding is supported by the expert reports of Messrs. Brian Moree QC and Richard Millet QC which was put forward on behalf of HKZQ in the Hong Kong proceedings. Both learned Queens Counsel accepted that there is no authority on the point in The Bahamas but they rely on the wording of the Act and the assertion that it refers to only "written contracts"

and not “purported contracts” or pre-contractual negotiations therefore Squadron could not pass an adoptive resolution.

[64] In respect of the non-application of section 70: the commencement of legal proceedings, the views of Messrs. Moree QC and Millet QC were consistent with the views of the Defendants’ own expert, Mr. Julian Malins QC. In his report, Mr. Malins stated: *“I agree that section 70 has no application to legal proceedings.*”

[65] It seems to me that all experts agree that section 70 has no application to legal proceedings. I agree. A company that does not exist cannot bring legal proceedings. It cannot be disputed that legal proceedings includes arbitration proceedings. In the premises, I find that Squadron did not exist at the date of the filing of the arbitration proceedings and therefore, the arbitration proceedings are a nullity.

[66] The upshot is that Squadron was not incorporated at the date of commencement of arbitration proceedings. In my considered opinion, the arbitration proceedings are null and void and I so find.

Breach of Practice Directions No. 4 of 1974 in relation to the Disputed Directions Order

[67] Learned Counsel Mr. Jenkins referred to the exhibits to the Affidavit of Ms. Chizelle Cargill filed on 17 February 2017 (“the Cargill Affidavit”), in the days following the hearing on 7 February 2017 when there were numerous emails exchanged between the parties concerning the wording of the disputed Directions Order filed on 14 February 2017.

[68] The chronology of events is well documented in the written submissions on behalf of HKZQ. It is not disputed. For brevity, I will merely adopt it. By an email dated 8 February 2017, Mrs. Ferguson-Johnson (“Mrs. Johnson”) wrote to Mr. Jenkins outlining her view as to the applications that would be heard by the Court at the hearing on 14 March 2017 (which included the hearing of the section 70 of the IBC Act application): see page 4 of the Cargill Affidavit. These did not initially

include the preliminary issues. Mrs. Johnson wrote back a second time indicating that the preliminary issues would also be heard.

[69] This did not correspond with the report of the hearing that Mr. Gardiner had provided to Mr. Jenkins. Mr. Jenkins therefore responded on the same day (8 February 2017) to the email stating as follows:

> **"It was our understanding that the Court indicated that it would deal with the question of <u>whether</u> there should be a trial of preliminary issues set out in your summons, not to actually determine the s. 70 related issues that your summons refers to. Can you please confirm that this accords with your understanding?"**
>
> (See page 4 of the exhibit to the Cargill Affidavit).

[70] Mrs. Johnson responded on 9 February 2017, at 9.40 am by stating *"as to the section 70 preliminary issue, Her ladyship directed that she will hear the preliminary issue on March 14*". The email enclosed a draft order (in the terms eventually made). Mrs. Johnson did not invite comments on the draft but indicated instead that her draft would be presented to the Court for perfection.

[71] By an email sent 10 minutes later at 9.50 on 9 February 2017, Mr. Jenkins informed Mrs. Johnson as follows:

> **"You should not under any circumstances present the order for signature, as it is not accurate and not agreed. I am in meetings this morning but will write fully with our views on your draft, which can then be presented with to her Ladyship. Please urgently confirm that you will await our written views on the draft."**

[72] Mr. Jenkins sent several follow-up emails to Mrs. Johnson requesting that the Order not be sent to the Court for perfection. Mrs. Johnson did not provide the confirmation requested but simply invited Lennox Paton to write directly to the Court with any comments: see pages 1-3 of the Cargill Affidavit.

[73] Mr. Jenkins and Mr. Gardiner drafted a revised draft order which in Mr. Gardiner's view set out the order actually made. In accordance with the practice direction, Mr. Jenkins emailed the same to Mr. Scott and Mrs. Johnson on 9

February 2017 at 3.06 pm, together with an explanation of the areas of disagreement and logic of the revised draft. Mr. Jenkins requested their comments thereon. Neither Mrs. Johnson nor Mr. Scott had the courtesy even to respond.

[74] Instead, Mrs. Johnson wrote directly to Mr. Grant (purporting to copy Lennox Paton), attaching her disputed draft and stating that the draft had already been provided to Lennox Paton (see page 41 of the Cargill Exhibit). There was no mention in the letter of the fact that a revised draft had been provided the previous day, nor that the form of the order was not agreed (let alone the basis for the disagreement which had been clearly ventilated in the emails). The inference in the letter was that the terms of the Order were not contentious. Most disturbingly, the letter to Mr. Grant purported to be copied to Lennox Paton, but was not in fact so copied. The first and only time Lennox Paton saw the letter was on Mr. Gardiner attending the Court on 15 February 2017 after receiving (that day) an email attaching the filed order. HKZQ regards this conduct as sharp practice.

[75] On 10 February 2017, Mr. Jenkins had drafted a letter to Mr. Grant (which was copied to the Defendants' counsel) outlining the Plaintiffs' objections to the Order and its reasons as to why in his submission the issues ought not be heard as preliminary issues: see page 10 of the exhibit to the Cargill Affidavit. The letter (and the copy) were not delivered until Monday 13 February 2017.

[76] I can safely say that I did not have sight of the contents Mr. Jenkins' letter prior to perfecting Mrs. Johnson's draft order.

[77] The above facts were communicated to the Court by emails from Mr. Jenkins, prompting Mr. Scott to write the letter exhibited at page 50 of the Cargill Affidavit, the contents of which speak for themselves.

[78] Practice Direction No.4 of 1974 provides as follows:

> **"I remind members of the Bar that before an Order or Judgment is presented to the appropriate Judge for his initials, prior to its being entered at the Registry of the Supreme Court, the form of the document should be agreed by all parties concerned. No one party has the right to settle the document in his sole discretion. <u>When the document is presented to the Judge for his initials, he should be entitled to assume that all parties have agreed its form.</u>**
>
> **<u>Of course, if the parties are unable to agree, the Judge himself will have to resolve the differences</u>"** [Emphasis added]

[79] I believe part of the breaches complained about by HKZQ may be attributable to the Court and I take full responsibility for not being more vigilant. That being said, I agree with Mr. Jenkins that:

1) Mrs. Johnson ought to have invited comments on her draft before sending the same to the Court;

2) Mrs. Johnson ought to have responded with comments to the revised draft emailed by Mr. Jenkins on 8 February 2017;

3) On presenting the Order to the Court for perfection, Ms. Ferguson ought to have

    i. Advised the Court that the form of the order was not agreed (as she was at that time aware);

    ii. Enclosed any rival draft or correspondence setting out the areas of disagreement; and

    iii. Actually copied Lennox Paton to the communication to Court (as opposed to merely professing to do so).

[80] I also agree with Mr. Jenkins that he should have been invited to make comments on the Order. This breach of protocol, compounded by the Court, is a reason why paragraph 4 of the Disputed Directions Order will be set aside.

Other issues

[81] Given the finding that paragraph 4 of the Disputed Directions Order is set aside, the Court will consider the remaining issues of security for costs and fortification of the cross-undertaking as to damages.

[82] The Court has deliberately abstained from forming any views on some of the other issues raised in the written submissions of both parties. That being said, should the Court direct a hearing of the Preliminary Issues sought by the Defendants? It seems not because they appear premature. The reasons for this position are as follows:

1) It would be inappropriate to direct trial of the preliminary issues when the identical issues are the subject of proceedings before Senior Justice Isaacs in the Bahamas, which remain live and have not been stayed.

2) The Hong Kong Court had previously ordered that the issues be tried in Hong Kong on the basis of expert evidence as to foreign law (as one would expect in such circumstances). Issues of foreign law are questions of fact, and are ordinarily determined on the basis of expert evidence of foreign law. See **Grupo Torras SA v Al Sabah** [1995] CLC 1025. Acting Justice Pang in a Judgment dated 24 November 2016 declined to hear and determine the issues of foreign law, instead adjourning the summons in which the issues arose. I understand that the decision of Justice Pang is the subject of the appeal process in Hong Kong with an application for leave to appeal which was filed on 8 December 2016 and;

3) Contrary to Mr. Scott's claims, there has however been no request from the Hong Kong Court for the assistance of the Bahamian Court: see paragraph 2 of the Summons of 2 February 2017.

[83] Before considering the question of whether these issues should be determined in this action CLE/gen/01295/2016, this Court opines that it ought to await:

(i) The determination of the Proceedings which are currently before Senior Justice Isaacs;

(ii) Determination of the appeal process commenced by the Summons of 8 December 2016 filed in the Hong Kong Court; and

(iii) A formal request from the Hong Kong Court for assistance, issued by the appropriate judicial body.

[84] I agree with Learned Counsel Mr. Jenkins that a trial by Preliminary Issues would in any event be inappropriate for the reasons set out in the letter to the Court of 10 February 2017, exhibited at page 10 – 36 of the Exhibit to the Cargill Affidavit. See also: **Warner Bros inc v Twentieth Century Fox Film Corp.** [1983] BHS J. No. 32.

Conclusion

[85] In all of the reasons stated above, my order will be as follows:

1) The Defendants' application that the Injunction granted on 16 September 2016 be set aside is dismissed with costs for the reasons set out above as the application is moot.

2) Paragraph (4) of the Disputed Directions Order is set aside;

3) It is inappropriate to hear the issue of whether the issues raised in paragraph 2 of the summons of 2 February 2017 ought to be tried separately until
    a) The Proceedings before Senior Justice Isaacs have been determined, withdrawn or dismissed and
    b) The appeal process in Hong Kong has been determined;

[86] The ex parte injunction which was granted on 16 September 2016 is still extant. Therefore I shall hear the parties on the issues of security for costs and

fortification of the cross-undertaking as to damages on a date convenient to the parties and the Court. The Defendants may apply to the Court for such date.

[87] HKZQ is the successful party in these proceedings. It claims costs on an indemnity basis. The parties are to submit arguments to the Court not later than 31 May 2017.

[88] Last but not least, the Court expresses its gratitude to all Counsel for their industry and patience in awaiting this judgment.

Dated this 4th day of May, A.D., 2017

Indra H. Charles
Justice