IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 151 of 2017

BETWEEN:

[1] ZHAO LONG
[2] KUNLUN NEWCENTURY INVESTMENT HOLDINGS CO. LTD

Claimants

v

[1] ENDUSHANTUM INVESTMENTS CO., LTD
[2] JADE VALUE INVESTMENTS HOLDINGS CO., LTD
[3] ZHONGZHI INVESTMENT HOLDINGS CO., LTD
[4] SHARON WEI
[5] LUNAN PHARMACEUTICAL GROUP CORPORATION

Defendants

CLAIM NO.: BVIHC (COM) 0125 of 2017

[1] HENGDE CO (PTC) LTD
[2] ENDUSHANTUM INVESTMENTS CO., LTD

Claimants

v

[1] ZHAO LONG
[2] LUNAN PHARMACEUTICAL GROUP CORPORATION

Defendants

Appearances:

Mr. Tom Lowe Q.C. with him, Mr. Callum McNeil and Ms. Tamara Cameron for the First Claimant
Mr. John McCarroll with him, Mr. Jonathan Addo and Ms. Urmi Ahmed for the First and Second Defendants
Mr. Stephen Rubin Q.C. with him, Ms. Laure-Astrid Wigglesworth for the Fifth Defendant

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2019: April 2

ORAL JUDGMENT

[1] **GREEN QC, J [Ag.]:** This is a restored Case Management Conference ("**CMC**") in these two proceedings that essentially concern the same subject matter – the beneficial ownership of certain shares – and which have been ordered to be tried together. I will refer to Ms Zhao Long's proceedings as Case 151 and the fixed date claim form issued by Hengde Co (PTC) Ltd ("**Hengde**") as Case 125, by reference to their case numbers. I will explain the various parties shortly.

[2] The CMC was originally before me on 12 February 2019 when it was adjourned by consent and a number of directions were made by me. In fact the trial of these matters was due to be heard this week but that also was adjourned to be listed for the first available date after 1 July 2019 with a time estimate of 10 days. The parties are now agreed that that time estimate should be adjusted further to 13 days, given the involvement of translators and expert PRC law evidence. There will be a short break between the end of the evidence and the closing submissions to allow the parties to prepare written submissions.

[3] This judgment is concerned solely with an application by the Fifth Defendant in Case 151 and the Second Defendant in Case 125, Lunan Pharmaceutical Group Corporation ("**Lunan**") for permission to file an amended Defence and Counterclaim in Case 151.

[4] There is also an outstanding but maybe not contested application by the Claimant in Case 151, Ms Zhao Long, she is also the First Defendant in Case 125 for specific disclosure against Lunan. I will also possibly have to settle a list of questions for the PRC law experts

[5] Finally there may be some directions to be given in relation to the run up to trial.

Background

[6] I must first set out a simplified background as to the dispute and issues between the parties.

[7] Lunan is a successful pharmaceutical company in the PRC with over 120,000 employees and turnover in excess of US$1 billion. It was founded in 1987 by Mr Zhao Zhiquan ("**Mr Zhao Snr"**)**,** the father of Ms Zhao who died on 14 November 2014.

[8] A parcel of 21 million Lunan Shares are presently held by a BVI Company, the First Defendant in Case 151, Endushantum Investments Co Ltd ("**Endushantum"**). These are the so-called "Disputed Lunan Shares". Lunan, in its Counterclaim, claims that Endushantum holds the Disputed Lunan Shares "as nominee" for Lunan. In other words, Lunan says that it is the beneficial owner of 21 million of its own issued shares.

[9] The slightly odd situation in this case is that the Claimants, Ms Zhao and another BVI company, Kunlun Newcentury Investment Holdings Co Ltd ("**Kunlun BVI**") do not claim beneficial ownership of the Disputed Lunan Shares. Instead they claim beneficial ownership of the shares in Endushantum. They also claim that Endushantum beneficially owns the Disputed Lunan Shares. Hence, if the Claimants are right, they, or one or other of them, effectively own beneficially the Lunan Shares through their ownership of Endushantum. I should add that by its proposed amendments Lunan does seek to claim beneficial ownership by way of a constructive trust of the Endushantum shares, as well as the Disputed Lunan Shares.

[10] As I've said there is no dispute that the Lunan shares are now registered in the name of Endushantum. The Endushantum shares are presently registered as to 90% in the name of the Second Defendant, Jade Value Investments Holding co Ltd ("**Jade Value**") a BVI company incorporated on 5 June 2015, i.e. after Mr Zhao Snr's death. The other 10% is registered in the name of the Third Defendant, Zhongzhi Investment Holding Co Ltd ("**Zhongzhi**") which was also incorporated in the BVI on 5 June 2015.

[11] Jade Value is wholly owned by another BVI company Hengde, the Claimant in Case 125. Hengde is owned and controlled by Mr Wang Jianping ("Mr Wang") a senior partner at one of the largest PRC law firms, King Wood & Mallesons. He is the husband of the Fourth Defendant,

Ms Sharon Wei whose involvement will become clearer. I should say that Mr Wang and Ms Wei were very close friends of Mr Zhao Snr.

[12] Hengde is presently the trustee of the Banyan Tree Trust which was set up by Mr Wang on 20 November 2016. The trust assets, the share in Jade Value, was transferred to Hengde on 18 December 2016. The Banyan Tree Trust is a discretionary trust, the settlor of which is stated to be Ms Wei (she was the previous owner of Jade Value), the protector is Mr Wang and the beneficiaries are said to be Ms Zhao and Ms Wang Jiaoming who is Mr Wang's and Ms Wei's daughter (but who has disclaimed her interest in 2017). The proper law of the trust is the BVI. Ms Zhao says that she only became aware of the existence of the Banyan Tree Trust after February 2017 and that she did not consent to it or even know about it until after it had been executed. She claims that this was set up by Ms Wei in breach of the Zhao Trust and that she was dishonestly assisted in that by Jade Value and Zhongzhi. Zhongzhi which holds 10% of Endushantum was, according to Mr Wang, holding those shares as nominee for Lunan.

[13] So Ms Zhao seeks declarations that the Endushantum shares are beneficially owned by her and for the shares to be transferred to her together with all necessary accounts. She also seeks damages for breach of trust and dishonest assistance.

[14] How did the shares end up where they are now? There is no dispute that the Disputed Lunan Shares were before 2001 held by a US Company, Sitic America Inc ("Sitic"). It is also not disputed that on 2 April 2001, the Disputed Lunan Shares were purchased by Kunlun Properties Inc, ("Kunlun US") a US company owned by Mr Wang and Ms Wei. However the purchase was not paid for by Mr Wang and Ms Wei. That was because it was arranged by Mr Zhao Snr. At the heart of the dispute is the validity and effect of what has been called a Share Nominee Agreement or Share Entrustment Agreement dated 15 March 2001 whereby Kunlun US would purchase the Disputed Lunan Shares from Sitic for RMB 75.6m to be paid by or on behalf of Lunan and that Kunlun US would hold the Disputed Lunan Shares as nominee for Lunan.

[15] Lunan says that this was the arrangement that was entered into whereby Lunan could beneficially own its own issued shares and that its beneficial ownership persisted throughout the change in the legal ownership of the Disputed Lunan Shares to Endushantum and that all the dealings with the Endushantum shares are actually irrelevant to the ownership of the Disputed Lunan Shares.

[16] By contrast, Ms Zhao says that the Disputed Lunan Shares were bought by her father from Sitic by using his good friends' company Kunlun US and that, although the first instalment of RMB37.8m was paid by Lunan that this was a loan to Mr Zhao which he paid back to Lunan, and he paid the second instalment out of dividends earned on the Disputed Lunan and other shares. In her Reply and Defence to Counterclaim, Ms Zhao says that the Share Nominee Agreement, which she only heard about well after her father's death, is invalid and unenforceable under PRC law.

[17] There appear to have been three iterations of Transfer Agreements relating to the Disputed Lunan and Endushantum shares. By the Third such Transfer Agreement which was the only one carried through, Kunlun US was to transfer the Disputed Lunan Shares to Endushantum and Kunlun US was to transfer its shares in Endushantum to Kunlun BVI (it had originally been thought that this would be to Mr Zhao personally but he incorporated Kunlun BVI for this purpose). The transfer of the Disputed Lunan Shares to Endushantum was approved by the board of Lunan on 11 October 2006. Lunan says of course that this was on the basis that the shares were still held for it beneficially, but this is disputed by Ms Zhao.

[18] The Zhao Trust was set up on 19 July 2011. The settlor was Kunlun BVI and Ms Wei was the trustee. Kunlun BVI transferred the Endushantum shares to Ms Wei as trustee of the Zhao trust. Ms Zhao's case is that the effect of this is that both the Endushantum and Disputed Lunan Shares were ultimately beneficially owned by her father.

[19] On 9 November 2014, 5 days before Mr Zhao died, he caused Kunlun BVI to irrevocably authorise Ms Zhao to exercise all the rights and obligations of Kunlun BVI under the Zhao trust. In such capacity, Ms Zhao directed that the Endushantum shares should be transferred to her and Ms Wei prepared a transfer to such effect but she has since refused to sign it. Instead Mr

Wang and Ms Wei incorporated Jade Value and Zhongzhi and then set up the Banyan Tree Trust and Hengde and the Endushantum shares are now held as I have set out earlier. Mr Wang and Ms Wei say they did this to protect the shares while the dispute was being determined. That does not explain adequately why 10% were specifically set aside for Lunan's benefit, nor why their daughter should be a potential beneficiary of the Banyan Tree Trust.

[20] The first proceedings were actually Case 125 , a Fixed Date Claim Form issued by Hengde apparently as trustee seeking the directions of the Court as to what to do about the Endushantum and Lunan shares. Far from taking a neutral stance, Hengde, Mr Wang and Ms Wei were clearly siding with Lunan as they were claiming that the shares were all held on trust for Lunan. That was also their position in Case 151 but Hengde, Endushantum and Jade Value have now withdrawn from that position and are said to be adopting a neutral stance.

[21] So Ms Zhao claims the Endushantum shares; Lunan claims the Disputed Lunan Shares; and Hengde and Endushantum ask to be guided by the Court as to who they hold both sets of shares for.

The Application to Amend Lunan's Defence and Counterclaim.

[22] The core substantive amendments that Lunan seeks to make to its Defence and Counterclaim are of new allegations of breaches of fiduciary duties under both BVI and PRC law. The amended pleading refers to Articles of the PRC Corporation Law and the breaches thereof by Mr Zhao Snr leading to a number of conclusions. The first is that Mr Zhao Snr did not acquire beneficial title to the Disputed Lunan Shares when legal title was transferred to Endushantum. That has been Lunan's case throughout: that it was the beneficial owner of the Disputed Lunan Shares since the time of the Share Nominee Agreement and the transfer of legal title from Kunlun US to Endushantum did not change the beneficial interest. Further this is what is described in the authorities, dating back to Millett LJ's judgment in **Paragon Finance v Thackerar** as a class 1 pre-existing trust. So far so good.

[23] Lunan then goes on to make a series of allegations based also on these breaches of duty and knowledge thereof that not only the Disputed Lunan Shares are held on trust but also the Endushantum shares and possibly Kunlun BVI shares are held on constructive trust for Lunan. These allegations of constructive trust are in the Class 2 variety, being remedial, restitutionary type constructive trusts that arise on a breach of trust or as part of the impugned transaction. They engage limitation issues because they are not within s.19(1) of the Limitation Ordinance. Indeed, as Mr Tom Lowe QC for Ms Zhao and Kunlun BVI points out, they are not within s.19 at all in the light of the English Court of Appeal Judgment in **First Subsea Ltd v Balltec Ltd** [2018] Ch 25 in which it was said that "trust" and "trustee" must have the same meaning throughout the English equivalent, s.21 Limitation Act 1980. The end result is, and there is no dispute about this, there is a six year limitation period, equity applying by analogy to the constructive trust claims the period prescribed by s.19(2).

[24] As limitation issues arise in respect of the amendments, that brings into play CPR 20.2 which prescribes jurisdictional thresholds that a party applying has to get through before the Court even considers its discretion. CPR 20.2 applies where there is "*a change in a statement of case after the end of a relevant limitation period*". There is a three stage test that an applicant needs to satisfy – this is set out in **Ballinger v Mercer Ltd** [2014] 1 WLR 3597:

> "(i) Is it reasonably arguable that the proposed amendments are outside the applicable limitation period;
> (ii) if so, do they seek to add or substitute a new cause of action;
> (iii) if so, does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim."

[25] I can deal with (i) and (ii) relatively quickly as I do not consider that they are seriously disputed. Mr Stephen Rubin QC for Lunan has accepted that there is a reasonably arguable case that a 6 year limitation period applies to his constructive trust claims. He must be right about that. He says that he will be relying on s.25 which postpones the limitation period in the event of fraud so that time only starts to run from knowledge of the fraud, as in s.32 of the English Limitation Act.

[26] I should explain this further. There is an odd situation in this case because the normal problem of relation back of any amendments to the date of issue of the Claim Form, thus depriving a

defendant of a limitation defence, does not arise in this case. The breaches of duty relied upon happened in either 2006, when the Disputed Lunan Shares were transferred to Endushantum or 2010 when the Endushantum shares were transferred to Kunlun BVI. The proceedings were issued in 2017 so more than 6 years after both events. That means that relation back will not save the amendments from a limitation defence. If there was a party to take the limitation defence it would be able to do so, even if I give permission to amend. That is why the dramatic consequences that seems to influence the decisions on whether amendments should be allowed after a limitation period do not really apply to this case.

[27] I also wonder, although this was not argued before me, as to whether this comes within CPR 20.2 at all – after all CPR 20.2 is only there to ensure that relation back does not work unfairly on someone who is being deprived of a limitation defence. CPR 20.2 assumes that the original Statement of Case was issued within the limitation period so that the amended claim would also be deemed within the limitation period. In this case, the amendment is being made after the end of a relevant limitation period as stated in CPR 20.2 but it can still be defended on limitation grounds.

[28] In any event, I will consider the application as though it is within CPR 20.2. There is little doubt that there is a new claim in the amendments. Lunan seeks to add a claim of constructive trust and also for a declaration that Jade Value and Zhongzhi hold the Endushantum shares on constructive trust for Lunan. Mr Rubin QC suggested that Lunan was already claiming an order that Jade Value transfer its shares in Endushantum to Lunan's nominee but it is unclear upon what averments in the Counterclaim this relief was based. Clearly the constructive trust claims are new.

[29] The real battleground concerns whether this is within CPR20.2(2), that is: "only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings." This is a jurisdictional threshold on which there is no discretion. Lunan has to satisfy the Court on this before the Court will consider its discretion.

[30] I have been shown a very recent decision of the English Court of Appeal dated 14 March 2019 – **Samba Financial Group v Mark Byers and Hugh Dickson, Liquidators of Saad Investments Company Limited** [2019] EWCA Civ 416 – McCombe LJ, Sir Ernest Ryder and Floyd LJ**.** In that case the liquidators had applied to set aside transfers of Saad Investments Company Ltd's ("**SICL**") assets under s.127 English Insolvency Act. Shares worth $318m had been transferred to Samba Financial Group ("**Samba**") after the commencement of SICL's winding up in the Cayman Islands (because of another relation back doctrine) but there were problems with this claim in particular over jurisdiction and forum. It went all the way to the Supreme Court, where Lord Sumption decided the case on completely different grounds but basically held that the s.127 claim was bound to fail. It then returned to the High Court where the liquidators effectively withdrew that claim and pleaded constructive trust against Samba relying on 6 pages of new pleading as to Samba's knowledge and conduct. Birss J allowed the amendments. But the Court of Appeal overturned this and dismissed the new claim.

[31] The Court of Appeal considered the question of whether the Court can look beyond the pleadings to see if it is substantially the same facts as previously relied upon.

(a) McCombe LJ referred in paragraph 24 to s.35 of the English Limitation Act 1980 (which is not replicated in the BVI) and also to **Goode v Martin** which Mr Rubin QC relied upon. Clearly, the wording in s.35 of the English Act cannot be read into CPR 20.2 (as it had been into the English CPR in **Goode v Martin**). Therefore the broader test of the "*facts as are already in issue*" cannot be the test in the BVI.

(b) Even on that broader English test, the Court is ordinarily not prepared to look outside the pleadings to see if the facts are already in issue.

(c) In Paragraphs 28 to 30, McCombe LJ set out the debate as to whether or not it was permissible to determine whether facts were in issue by reference to facts known otherwise from the pleadings

(d) In Paragraph 41 McCombe LJ quoted from the judgment of Sales LJ (as he then was) in **Mastercard Inc v Deutsche Bahn** [2017] EWCA 272 which made clear that the judge has to analyse the pleadings and not just form a general impression. This approach was particularly important because of the harshness of the "relation back" principle. (I note that, as "relation back" will not apply in this case that strictness may not be so important.)

(e) Mc Combe LJ concluded as follows [paras 49-52]

> *49 In my judgment, with respect to the learned judge's careful judgment, he did not conduct any real evaluation of the new claim against the facts in issue in the old claim. No doubt he accepted a submission along the lines of that made by Mr Howard before us that no such evaluation was necessary. I disagree. As I think Sales LJ was saying in theMastercard case, it is necessary to make an evaluation of the new case as against the old case in order to ask the threshold question whether the new case arises out of the same or substantially the same facts as the old one. In this case, I do not find that the judge really asked the question how the extensive pleaded facts related to the bare assertion of good faith by Samba in the absence of any facts adduced by the respondents in contradiction of that assertion. The claim now made by the respondents is of an entirely different character from the claim they advanced previously.*
>
> *50 Having carefully considered the new pages of the pleading, I do not consider that the newly formulated claim arises out of the same or substantially the same facts as those already in issue in the old claim. Broadly similar allegations, implicitly made or understood will not do. In real terms, paraphrasing the words of Colman J in the BP v Aon case (supra) (which should not be read as a statute) I find that the new case puts Samba in the position of being obliged to investigate facts and obtain evidence well beyond the ambit of the facts that it could reasonably be assumed to have investigated for the purpose of defending the amended claim at the stage that it had reached before the amendment application. It may be that Samba will have to address those facts in the new 2017 action, but there is no reason to deprive it of the benefit of any accrued limitation period in the present action.*
>
> *51 So far I have not addressed Mr Onslow's submission that the application for permission to amend should have failed at the first hurdle in this case because the question arising under CPR r.17.4(2) has to be determined solely on the pleadings and on the pleadings the new facts do not appear at all.*
>
> *52 In my judgment, in the vast majority of cases what is "in issue" in an existing claim will usually be determined by examination of the pleadings alone. It will be the primary, and probably the only, source of material for deciding the question. In some cases, however, such as those considered above where, for example, there has been an extensive evidential battle on a summary judgment application or on a jurisdictional question, it may be possible to discern that facts are already in issue in a case prior to being crystallised in formal pleadings. Nonetheless, I consider that such cases will be rare. Certainly, I do not see that the "one line" assertions of good faith (which are not accepted by the other side) to which our attention was drawn, present sufficient material on which to find that wide ranging factual allegations of an absence of good faith are already in issue in the action.*

(f) Floyd LJ in para 55 was less inclined to look outside the pleadings.

[32] It seems to me that, even though Mr Lowe QC says that this case has quite close parallels to **Samba** in that it was seeking to make new allegations of constructive trust and knowledge, it was actually some distance away from this case. There was an abandonment of the original

claim and the new claim involved pages of amendments to introduce new allegations of knowledge. In our case, this is essentially a continuation of what has been Lunan's case throughout, namely that the Disputed Lunan Shares are held on trust for it, irrespective of who holds the legal title. What I do take from the **Samba** case is that I am essentially confined to the pleadings in determining whether substantially the same facts as pleaded are relied upon.

The Amended Defence and Counterclaim

[33] I am going to concentrate at this stage on the new claims. I will come back to deal with paragraphs 14 and 14D. I should say that Mr Lowe QC did not object to the new paras. 14A, B, C, D (first sentence) and E. I should also say that Mr John McCarroll SC appearing on behalf of Endushantum, Jade Value and Hengde does not oppose any of the amendments.

Paras 14 F to 14J of the proposed amended Defence and Counterclaim

[34] Mr Rubin QC says that these paragraphs do not contain a new claim; they are just a different legal way of getting there. Mr Lowe QC however says it quite clearly is a new claim – what Lunan now relies upon is a breach of fiduciary duty (the self-dealing rule) and misappropriation of company funds to found its claim at 14J that *"The transactions upon which the Claimant relies as summarised above were thus ineffective in law to pass any beneficial title in the Lunan Shares to Zhao Snr. or to any person through him"*. Mr Lowe QC says this is a new claim to constructive trust, rather than a continuation of the trust established in 2001 by the Share Nominee Agreement.

[35] Perhaps more importantly for these purposes is whether the amendments rely on substantially the same facts. Mr Lowe QC had a rather nuanced argument about this that originally Lunan was relying on Mr Zhao Snr's good intentions to honour the 2001 agreement and, as I understand the argument, that he had that same intention in all the later transfers and setting up of trusts. What Lunan now seeks to argue by contrast is that Mr Zhao Snr had a bad or naughty intention to misappropriate Lunan's assets and the two are fundamentally different and inconsistent.

[36] I have to say that I think that overlooks the reality of the core issue between the parties, which is, and seemingly always has been on the pleadings, who actually paid for the Disputed Lunan Shares? Did Mr Zhao Snr borrow the money from Lunan and then repay Lunan through dividends earned on the shares; or was it always Lunan that paid for the shares as Mr Zhao Snr knew and he has subsequently sought to wrest the Disputed Lunan Shares away from Lunan? What Lunan is seeking to do by these amendments is to respond to Ms Zhao's plea that her father paid for the shares by saying that if that was so it was a breach of his duties as chairman and director of Lunan to borrow from Lunan and to misappropriate the dividends that should have been paid by and to Lunan. Even though I do find para. 14J difficult to follow, I think that what it is saying is that because the payments were in breach of his fiduciary duties, those transactions – i.e. the loan and dividends – were ineffective and it is still as though there was no actual payment made by Mr Zhao Snr for the shares. Therefore it is the same as Lunan's original case, it's just that the payments relied on by Ms Zhao are dealt with by pleading that they are ineffective and the case remains as it was. I do not think this is either a new claim or based on different facts, even if I might have pleaded it somewhat differently.

Paragraphs 14K to 14L of the proposed amended Defence and Counterclaim.

[37] These paragraphs do contain new claims as is accepted by Mr Rubin QC. They are predicated on the basis that Ms Zhao succeeds in proving that the beneficial interest in the Disputed Lunan Shares transferred from Lunan to Endushantum, I assume. Again it is not clearly pleaded. I should also point out that Ms Zhao says that Lunan never had a beneficial interest in the Disputed Lunan Shares, and that they were always held for the ultimate benefit of her father. But this amended pleading deals with Ms Zhao's alternative case in her Reply that Lunan had assigned its beneficial interest either on the payment of the second instalment by Mr Zhao Snr or on the transfer to Endushantum which was approved by the Board of Lunan in full knowledge of the circumstances on 11 October 2006.

[38] I do find these paragraphs difficult to follow. Mr Rubin QC says it's very straightforward. Everyone knows that this is a binary case and the shares were either beneficially owned by Lunan or by or on behalf of Mr Zhao Snr. It is obviously part of Lunan's case that Mr Zhao Snr misappropriated its shares.

[39] Looking more closely at paragraph 14K(2) it pleads the knowledge of Mr Zhao Snr, Kunlun US, Kunlun BVI, Ms Wei and Mr Wang. Then in para 14L the knowledge of just Kunlun BVI, Mr Zhao Snr and Ms Wei is referred to. Having said that, it does not seem to me that what they are said to have knowledge of raises any real new facts. That alleged knowledge includes: that Kunlun US and Endushantum were to hold the shares for Lunan and it did not intend to transfer beneficial ownership; or that Mr Zhao Snr had not paid for the shares. These are all underlying facts that are inherent to the claims already being made by Lunan and I do not believe that they require any further investigation than would have been made to date in these proceedings (I leave to one side for the moment the disclosure difficulties).

[40] Para 14L contains an unexplained plea of breaches of fiduciary duty under BVI law. That plea will need to be explained. Quite how it leads to a constructive trust of both the Disputed Lunan Shares and the Endushantum shares is a bit of a mystery, but that confusion over which shares Lunan is talking about: its shares; Endushantum's shares; or Kunlun BVI's shares, pervades the existing case and is something that I hope will be made clearer well before trial.

[41] Paras. 16A and B and 25 are said to follow from the pleas of constructive trust and tracing but are just as confused over which shares are being talked about. Para 16A refers to the Zhao Trust into which the Endushantum shares were transferred, that is transferred to Ms Wei as trustee. That transfer did not affect the Disputed Lunan Shares or their beneficial ownership. I ask rhetorically - what "beneficial ownership over the assets transferred into the trusts" did Lunan have? I do not know what transfer of the Zhao Trust is being talked about. Para 16B – I do not understand why Lunan seeks to trace into the Zhao Trust – is it claiming to be a beneficiary of the Zhao Trust? And para 25A, I assume the reference to the Zhao Trust in the last line should be the "to Banyan Tree Trust", but again is Lunan really seeking to trace into that trust? It's all becoming very far removed from its main case that it beneficially owns the Disputed Lunan Shares and has done throughout. I suppose it wants to be sure that it has covered all the legal bases for its core claim that the Disputed Lunan Shares are held ultimately for its benefit and whether that is through ownership of the Endushantum shares or any higher company in the structure, it does not much mind, so long as its ultimate ownership of the

Disputed Lunan Shares is recognised. As such these paras 16A and B and 25 are just legal consequences and not new facts.

[42] Mr Lowe QC says that his client would like to be able to investigate these allegations of knowledge and in particular to explore what Lunan knew about all of this. But that is what Ms Zhao has been trying to do based on the existing pleadings and of course has not been helped by the difficulties around the Lunan majority directors being excluded from the company's premises. That is an issue Ms Zhao faces anyway. She has made allegations of Lunan's knowledge of the transfers – see eg para 10 of the Reply.

[43] I am therefore satisfied that there are no real new facts being alleged in support of the amended claim and while I would prefer the pleading to be clarified and particularised better, I consider that it gets past the jurisdictional threshold in CPR 20.2.

[44] In the exercise of my discretion I am going to allow these amendments to be made. It is important that the parties' real cases are before the Court and there is still plenty of time to deal with and respond to these amendments. I do not believe that Ms Zhao is prejudiced by these going in. In saying that, I have been strongly influenced by the unusual situation in this case that there is no prejudicial effect on the defendants to the counterclaim by "relation back" because the date of issue was after the expiry of the limitation period. Therefore limitation can still be run as a defence.

[45] This however runs into a potential problem as to who can run that defence. The relief that Lunan seeks is directed at Endushantum, Jade Value and Zhongzhi. They have not opposed the amendments being made and are now taking a neutral stance in these proceedings. Clearly it would be better if they maintain their neutral stance but it would also be highly unfortunate if a limitation defence that was otherwise available to defendants to Lunan's claims was not able to be run by any party.

[46] Mr Lowe QC suggested that his client should be able to run and argue limitation either by agreement of the other parties that she should be able to do so or she may have to apply in Case 125 for permission to run limitation derivatively on behalf of Endushantum. I think all I can

say in this judgment is that I very much hope that a way can be found to enable limitation to be available as a substantive defence to Lunan's counterclaim and it would be very unfair if it were not.

Paragraphs 14 and 14D of the porposed Amended Defence and Counterclaim.

[47] Finally, I return to paras. 14 and 14D. Mr Rubin QC accepted that the addition to the last sentence of para 14 goes nowhere and is confused as to time. That is disallowed.

[48] As to the new second sentence of para 14, I simply do not understand what it is saying or where it leads. If Lunan is trying to say that Kunlun BVI was incorporated on behalf of Lunan and that its shares were held beneficially by Lunan then why does it not say that? There is no claim in relation to the Kunlun BVI shares by Lunan and so I do not see the point of this plea. I am not going to allow it.

[49] Para 14D pleads that the payments under the Second and Third Transfer Agreements were never paid or intended to be paid. There is then out of the blue a plea that "*such provisions were a sham and any receipts for such payments were false*". Mr Rubin QC could not explain what "the provisions" were and there are no particulars whatsoever as to sham, dishonesty, fraud – all of which are inherent in the nature of sham. Furthermore, the alleged shammers have to be both parties to the transactions but these are not identified. But perhaps fatally it seems to me, is the fact that this is dealing with the Second and Third Transfer Agreements. The Third Transfer Agreement is pleaded in para. 18 of the Statement of Claim. In para 13 of this Defence, para 18 is admitted. How can Lunan admit para 18 and then claim the Third Transfer Agreement is a sham? The Second Transfer Agreement is para 16 of the Statement of Claim and this is not admitted in para 12. The plea does not go anywhere anyway, and I do not think I should allow a serious allegation of sham to be made at this stage in a wholly unparticularised form and seemingly inconsistent with Lunan's existing case. I am not going to allow the second sentence of para 14D.

[50] I think that deals with all the amendments. Just to clarify, I am not allowing amendments to para. 14 and 14D 2nd sentence. But I'm allowing the rest and I hope that some thought can be given to clarifying some of the more confusing of those amendments,

[51] We can now turn to the other issues before me.

Honourable Justice Michael Green, QC [AG]

Commercial Court Judge

By the Court

Registrar