

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2021/0007

BETWEEN:

LUNAN PHARMACEUTICAL GROUP CORPORATION

Appellant/Defendant

and

[1] ZHAO LONG

[2] KUNLUN NEWCENTURY INVESTMENT HOLDINGS CO LTD

Respondents/Claimants

and

[1] ENDUSHANTUM INVESTMENTS CO. LTD

[2] JADE VALUE INVESTMENTS HOLDING CO. LTD

[3] ZHONGZHI INVESTMENT HOLDING CO. LTD

[4] HARON WEI

Respondents/Defendants

and

HENGDE CO (PTC) LTD

Respondent/Claimant (in BVIHC(COM) 2017/0125)

HEARD TOGETHER WITH:

BVIHCMAP2022/0029

BETWEEN:

LUNAN PHARMACEUTICAL GROUP CORPORATION

Appellant/Defendant

and

1. ZHAO LONG

2. KUNLUN NEWCENTURY INVESTMENT HOLDINGS CO. LTD

Respondents/Claimants

and

- (1) ENDUSHANTUM INVESTMENTS CO. LTD**
- (2) JADE VALUE INVESTMENTS HOLDING CO. LTD**
- (3) ZHONGZHI INVESTMENT HOLDING CO. LTD**
- (4) SHARON WEI**

Respondents/Defendants

and

HENGDE CO (PTC) LTD

Respondent/Claimant (in BVIHC(COM)2017/0125)

Before:

The Hon. Dame Janice Pereira
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Rubin, KC with Ms. Gráinne Hussey for Lunan Pharmaceutical Group Corporation
Mr. Tom Lowe, KC with him Mr. Christopher Bromilow for Endushantum Investments Co. Ltd.
Ms. Meenaa Azmayesh, Ms. Yegâne Güley, and Mr. John Crook for Zhao Long

2022: November 23;
2023: April 27.

Application for a stay of execution – Rules 26.1(2)(q), 62.19 & 62.20(1) of the Civil Procedure Rules 2000 – Rule 30(1) of the Court of Appeal Rules 1968 – The principles from C-Mobile Services Limited v Huawei Technologies Co. Ltd – Whether Lunan ought to be granted of a stay of execution of the Ancillary Judgment – Applications for an extension of time – Anti-suit injunction – Interim payment – Whether the reasons advanced by Lunan for its purported inability to comply with the anti-suit injunction and the interim payment order are satisfactory – Applications for unless orders – Parts 26 & 62 of the Civil Procedure Rules 2000 – Whether the case management powers in Part 26 that are given to the Court of Appeal can only be exercised in relation to an appeal of which the court is seised and not in relation to the proceedings below – Whether Lunan

should be debarred from prosecuting its appeal given its alleged contempt in failing to comply with orders made by the BVI Commercial Court

On 31st August 2021, Lunan Pharmaceutical Group Corporation ("Lunan") appealed a judgment of Jack J dated 20th July 2021 ("the Main Judgment"), which concerned competing claims arising in 2017 as to the entitlement to the shares in Endushantum Investments Co. Ltd ("Endushantum"), a Territory of the Virgin Islands ("BVI") company, and Endushantum's minority shareholdings in certain Peoples' Republic of China ("PRC") companies ("the PRC Shares"). Endushantum held the PRC Shares until 9th February 2021, when Lunan transferred them to two Hong Kong companies: Berpu Technology Co. Ltd ("Berpu") and Provision Investment Co. Ltd ("Provision") (collectively the "Hong Kong Companies"). This transfer was pursuant to a judgment of the People's Intermediate Court of Linyi City (the "Linyi Judgment") in April 2020. The Hong Kong Companies were incorporated on 5th January 2021 and are controlled by Zhang Guimin, who is Lunan's Chairman and the sole shareholder and director of the Hong Kong Companies. The Linyi Judgment and the transfer of the PRC Shares held by Endushantum to the Hong Kong Companies were only disclosed mere weeks before the trial was scheduled to commence before Jack J. The judge found this to be a deliberate breach of Lunan's disclosure obligations and a breach of undertakings given by Endushantum's lawyers in 2017 that they would not part with the 2017 PRC Shares. On 14th September 2021, Jack J ordered Lunan to make an interim payment of US\$2 million on account of Ms. Zhao Long ("Ms. Zhao")'s legal costs of the main claim (the "Interim Payment") on or before 8th October 2021. The deadline was subsequently extended until 1st February 2022. Lunan failed to meet that deadline, and on 4th February 2022, the court made a final order for the payment by 31st March 2022.

A second judgment which Lunan challenges (the "Ancillary Judgment") arose in the following way. Flowing from the judge's findings on the Main Judgment, on 14th September 2021, Endushantum sought and obtained leave to bring an ancillary claim against Lunan for knowing receipt, based on breach of fiduciary duty by Endushantum's director in transferring the PRC Shares to the Hong Kong Companies, which are acknowledged to be Lunan's nominees, and with the aim of procuring the transfer of the PRC Shares from the Hong Kong Companies to Endushantum. Jack J gave leave and ordered Lunan to file a defence (without being taken to submit to jurisdiction). The judge also suggested that Endushantum could seek summary judgment on the return date. An application for summary judgment was duly filed by Endushantum on 7th January 2022. For its part, Lunan filed a draft defence but also filed an application to set aside leave to issue and serve the ancillary claim, contesting the court's jurisdiction. Judgment on the ancillary claim was delivered on 17th March 2022. Jack J dismissed Lunan's jurisdiction application and granted summary judgment in favour of Endushantum, finding that Lunan was a knowing recipient of the PRC Shares and that it holds and exercises all rights it has in respect of the PRC Shares as trustee for Endushantum. Accordingly, on 17th and 31st March 2022 he made consequential orders requiring, *inter alia*, Lunan to cause or procure the PRC Shares held by the Hong Kong Companies to be re-conveyed to Endushantum and within 28 days thereafter take, and cause Shandong New Times Pharmaceutical Co. Ltd (sometimes referred to as Shandong New Age) ("Shandong NT") and Lunan New Times Biotech Co. Ltd ("Biotech"), two of the PRC companies, to take all steps necessary to record on appropriate registers and at appropriate regulatory bodies that the Lunan shares are held by Endushantum.

Meanwhile, certain developments on the litigation front in the PRC would subsequently lead to Jack J granting an anti-suit injunction order, which also forms the subject of an application to stay by Lunan. In August 2021, Ms. Zhao launched proceedings in the PRC to revoke or annul the Linyi Judgment. In January 2022, a group of Lunan shareholders filed a claim to recover dividends paid to Ms. Zhao from around 2017 which they claimed she had misappropriated (the 107 proceedings). They did so on the basis of the Linyi Judgment, which declared that the shares belonged to Lunan and not to her father. Meanwhile, Lunan also launched two sets of proceedings in the PRC. The first was against Shandong NT with Provision, Ms. Zhao and Endushantum named as third parties (the 108 proceedings) and the second against Biotech, with the same third parties named (the 109 proceedings). Proceedings 107, 108 and 109 will be referred to as “the new PRC proceedings”. The new PRC proceedings were scheduled for trial in August 2022 in the PRC. In an apparent attempt to forestall this, Endushantum sought and obtained an ex parte anti-suit injunction. Paragraph 3 of that order required Lunan to take active steps to stay the new PRC proceedings. On the return date on 23rd August 2022 a final order was made.

Before this Court are Lunan’s applications for a stay of execution of the Ancillary Judgment and an extension of time to comply with the Interim Payment order and the anti-suit injunction. These are met with cross-applications by Endushantum and Ms. Zhao for unless orders debarring Lunan from pursuing its appeals unless it complies with: (i) the orders for the re-conveyance of the PRC Shares to Endushantum, (ii) the anti-suit injunction order; and (iii) the Interim Payment order in favour of Ms. Zhao.

The issues for consideration may be summarised as: (i) whether Lunan ought to be granted a stay of execution of the Ancillary Judgment; (ii) whether the reasons advanced by Lunan for its purported inability to comply with the anti-suit injunction and the Interim Payment order are satisfactory; (iii) whether the case management powers in Part 26 that are given to the Court of Appeal can only be exercised in relation to an appeal of which the court is seised and not in relation to the proceedings below; (iv) whether Lunan should be debarred from prosecuting its appeals given its alleged contempt in failing to comply with orders made by the BVI Commercial Court.

Held: dismissing Lunan’s applications for a stay of execution and an extension of time, and making the orders set out at paragraph [90] of this judgment, that:

1. The court, on an application for a stay, is essentially engaged in performing a balancing exercise which requires it to consider a number of factors: (i) the court must take into account all the circumstances of the case; (ii) a stay is the exception rather than the general rule; (iii) a party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted; (iv) in exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered; and (v) the court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).

C-Mobile Services Limited v Huawei Technologies Co. Ltd
BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) followed.

2. Endushantum and Ms. Zhao have undertaken, through counsel, that were the shares to be re-conveyed, they would not exercise any voting rights in respect of the PRC Shares save to reverse any changes to the Articles of the PRC companies since 2001 and not to take or rely upon any arguments before the Court regarding a change of the *lex situs* of the PRC Shares as a result of the reconveyance. With such clear undertakings being placed on the record, the risks which had so excited Lunan would be considerably mitigated if not eliminated. In these circumstances, Lunan's position would not be prejudiced by a refusal of the stay application nor would the appeal be rendered nugatory in circumstances where the status quo is preserved. If Lunan prevails in its appeal, the position reverts to what it was prior to the Main Judgment. These factors weigh against the grant of a stay as these undertakings would serve to hold the ring sufficiently pending the determination of the appeal. Further, in circumstances where much of Lunan's challenge to the Ancillary Judgment centers on findings of fact by the trial judge, this is not a case where it can be said that it has been shown that there are strong grounds of appeal or a strong likelihood the appeal will succeed. On balance, the risk of prejudice is greater to Endushantum and Ms. Zhao should the stay be granted as the prospects of Lunan re-conveying the PRC Shares if it were unsuccessful on the appeal are not encouraging. Having regard to all of these circumstances, Lunan's application for a stay of execution pending appeal is dismissed.

C-Mobile Services Limited v Huawei Technologies Co. Ltd
BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) considered;
Page UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 considered.

3. The reasons advanced by Lunan for its purported inability to comply with the anti-suit injunction and the Interim Payment order are unsatisfactory. Furthermore, it seems ironic that while the PRC courts will not recognise the BVI judgment and court orders, this Court is being asked to defer to those proceedings by permitting Lunan to continue to disregard the orders of the BVI court so as not to impede its prospects in the PRC matters. This is a completely untenable expectation. The anti-suit injunction properly serves to hold the ring pending the determination of the appeal before this Court and nothing placed before this Court is persuasive that the time for compliance with it should be extended. Similarly, this Court is not persuaded that there is a proper basis on which the time for making the Interim Payment should be extended. Accordingly, both applications are dismissed.
4. There is no warrant for construing the rules as confining the jurisdiction to make unless orders to breaches of the rules or orders of the Court of Appeal itself. Such a construction would mean that although the Court of Appeal is alive to multiple, wilful breaches of orders of the court below, it would be powerless to impose conditions in relation to the prosecution of the appeal arising from those proceedings. That would seem to fundamentally undermine the overriding objective of the Civil Procedure Rules 2000. On a proper construction of the rules, the Court of Appeal has the jurisdiction and discretion to impose conditions for the prosecution of an appeal before it, in the face of an ongoing and wilful failure by an appellant to comply with consequential orders made in

the court below, whether or not there has been a formal finding of contempt by the court below.

Parts 1, 26 and 62 of the **Civil Procedure Rules 2000** applied; **Michael Baptiste v Yoland Bain-Joseph** Grenada HCVAP2006/026 (delivered 7th February 2008, unreported) considered; **Astro Exito Navegacion SA v Southland Enterprise Co Ltd and Nan Jong Iron and Steel Co. Ltd, The Messiniaki Tolmi** [1981] 2 Lloyd's Rep. 595 considered; **Hadkinson v Hadkinson** [1952] 2 All ER 567 considered.

5. While there is a general rule that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of that application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt. That exception is itself subject to qualifications including: (i) there may be cases where an appeal by a party in contempt against the very order, disobedience of which has placed him in contempt, can be shown to be, for one reason or another, an abuse of the process of the court; and (ii) cases where disobedience to the order impedes the course of justice. In such cases, the exception may be disapplied.
6. The current approach is not to take as a starting point the proposition that the court will not hear a party in contempt and then ask if the instant case falls within an exception to that general rule. It is to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so. The court is required to carefully consider the factual circumstances of the case to determine whether the interests of justice are best served by hearing or refusing to hear a party in contempt, and not merely refuse to hear him because he is in contempt; or entertain him because he is appealing the very order that has placed him in contempt. The peculiar circumstances of the case must be analysed to determine what the interests of justice dictate.

Astro Exito Navegacion SA v Southland Enterprise Co Ltd and Nan Jong Iron and Steel Co. Ltd, The Messiniaki Tolmi [1981] 2 Lloyd's Rep. 595 considered; **Hadkinson v Hadkinson** [1952] 2 All ER 567 considered; **Motorola Credit Corp v Uzan and others (No. 2)** [2004] 1 W.L.R. 113 considered; **X Ltd v Morgan-Grampian (Publishers) Ltd** [1991] 1 AC 1 considered; **Arab Monetary Fund v Hashim and others; Arab Monetary Fund v Bahiraluloom and others** [1997] Lexis Citation 2080 considered.

7. Lunan's breach of the ancillary claim order is deliberate, and the explanations proffered relate to its desire to not compromise its position in parallel legal proceedings in the PRC; and not because it is impossible to comply. Further, Lunan has no assets within the jurisdiction and has signalled that it does not intend to comply with the BVI court orders even if the appeal goes against it, while at the same time seeking to secure the advantage of being able to maintain their appeals. This constitutes an abuse of the process of the court and an impediment to justice as, assuming the respondents are successful on

appeal, it would be a pyrrhic victory only as there would be no means of enforcing the judgment, given that the shares are located in the PRC, where it has been said repeatedly in these proceedings, BVI court orders are not recognised. These particular circumstances, make this a case where it is appropriate to disapply the general exception.

JUDGMENT

- [1] **WARD JA:** Lunan Pharmaceutical Group Corporation (“Lunan”) is aggrieved by two judgments of Jack J. The first judgment dated 20th July 2021 (“the Main Judgment”), concerned competing claims arising in 2017 as to the entitlement to the shares in Endushantum Investments Co. Ltd (“Endushantum”), a Territory of the Virgin Islands (“BVI”) company, and Endushantum’s minority shareholdings in certain Peoples’ Republic of China (“PRC”) companies. Details of Endushantum’s interests in the PRC companies are that until 9th February 2021 it held 25.7 per cent of the shares in Lunan, 25 per cent of the shares in Shandong New Times Pharmaceutical Co. Ltd (sometimes referred to as Shandong New Age) (“Shandong NT”), which itself held 100 percent of the shares in Lunan Hope Pharmaceutical Co. Ltd (“Hope”) and Lunan Better Pharmaceutical Co. Ltd (“Better”), and 25 per cent of the shares in Lunan New Times Biotech Co Ltd (“Biotech”) (“the PRC Shares”). This was the shareholding until 9th February 2021, when Lunan transferred the PRC Shares to two Hong Kong companies: Berpu Technology Co. Ltd (“Berpu”) and Provision Investment Co. Ltd (“Provision”). These two companies will be referred to collectively as the “Hong Kong Companies”. This transfer was pursuant to a judgment of the People’s Intermediate Court of Linyi City (the “Linyi Judgment”) in April 2020 in proceedings instituted by Lunan against Endushantum on 5th December 2019. The Hong Kong Companies were incorporated on 5th January 2021 and are controlled by Zhang Guimin, who is Lunan’s Chairman and the sole shareholder and director of the Hong Kong Companies. The Linyi Judgment and the transfer of the PRC Shares held by Endushantum to the Hong Kong Companies were only disclosed mere weeks before the trial was scheduled to commence before Jack J. The judge found this to be a deliberate breach of Lunan’s disclosure obligations and a breach of undertakings given by Endushantum’s lawyers in 2017 that they would not part with the 2017 PRC Shares.

- [2] In short, the proceedings in the BVI Commercial Court were a contest about the ownership of Endushantum and ultimately about the beneficial ownership of the PRC Shares previously held by Endushantum before Lunan transferred them to the Hong Kong Companies. Jack J upheld the case of Ms. Zhao Long ("Ms. Zhao") that her father Zhao Zhiquan ("Zhao Snr") had paid for and was the ultimate beneficial owner of the PRC Shares and that he did not hold them as nominee or on behalf of Lunan. He held that Ms. Zhao had legal title to the original two shares in Endushantum by virtue of an executed transfer of title in her favour by her father just before he died in 2014 and was the beneficial owner of the Endushantum shares. He further held that she was entitled to have the shares transferred back to her, and that Endushantum is the beneficial owner of the PRC Shares. In so holding, the judge refused to recognise the Linyi Judgment, which he concluded was a 'clear case of a collusive judgment' because Endushantum conceded its liability knowing full well that there were arguable defences available to it.
- [3] On 31st August 2021, Lunan appealed the Main Judgment (BVIHCMAP2021/0007).
- [4] On 14th September 2021, Jack J ordered Lunan to make an interim payment of US\$2 million on account of Ms. Zhao's legal costs of the main claim (the "Interim Payment") on or before 8th October 2021. The deadline was subsequently extended until 1st February 2022. Lunan failed to meet that deadline, and on 4th February 2022, the court made a final order for the payment by 31st March 2022.
- [5] The second judgment which Lunan challenges (the "Ancillary Judgment") arose in the following way. Flowing from the judge's findings on the Main Judgment, on 14th September 2021, Endushantum sought and obtained leave to bring an ancillary claim against Lunan for knowing receipt, based on breach of fiduciary duty by Endushantum's director in transferring the PRC Shares to the Hong Kong Companies, which are acknowledged to be Lunan's nominees, and with the aim of procuring the transfer of the PRC Shares from the Hong Kong Companies to Endushantum. Jack J gave leave and ordered Lunan to file a

defence (without being taken to submit to jurisdiction). The judge also suggested that Endushantum could seek summary judgment on the return date. An application for summary judgment was duly filed by Endushantum on 7th January 2022.

[6] For its part, Lunan filed a draft defence but also filed an application to set aside leave to issue and serve the ancillary claim. Lunan contended: (a) that an ancillary claim could not be brought since the existing main claim was at an end; (b) there were no grounds for granting leave to serve Lunan outside of the jurisdiction in the PRC or for permitting alternative service on Appleby, or (3) that the Court should decline to hear the ancillary claim on grounds of *forum non conveniens* and *lis alibi pendens*. This was based on the currency of two sets of proceedings: first, proceedings in Hong Kong brought by Ms. Zhao against the Hong Kong Companies as Lunan's nominees, and in respect of which she had obtained an injunction on 6th August 2021 freezing the PRC Shares; secondly, proceedings brought by Ms. Zhao against Lunan in the Linyi Intermediate People's Court seeking to annul the Linyi Judgment. Both proceedings predated the ancillary claim.

[7] A rolled-up hearing was heard between 2nd and 4th February 2022. Judgment on the ancillary claim was delivered on 17th March 2022. Jack J dismissed Lunan's jurisdiction application and granted summary judgment in favour of Endushantum, finding that Lunan was a knowing recipient of the PRC Shares and holds and exercises all rights it has in respect of the PRC Shares as trustee for Endushantum. Accordingly, on 17th and 31st March 2022 he made consequential orders requiring, *inter alia*, Lunan to cause or procure the PRC Shares held by the Hong Kong Companies to be re-conveyed to Endushantum and within 28 days thereafter take, and cause Shandong NT and Biotech to take all steps necessary to record on appropriate registers and at appropriate regulatory bodies that the Lunan shares are held by Endushantum. Paragraph 9 of the transfer order provided for Lunan to procure the consent of the Hong Kong Companies to a variation of the Hong Kong freezing order by 1st April 2022, so that the PRC Shares could be transferred to Endushantum.

- [8] Meanwhile, certain developments on the litigation front in the PRC would subsequently lead to Jack J granting an anti-suit injunction order, which also forms the subject of an application to stay by Lunan. In summary, in August 2021, Ms. Zhao launched proceedings in the PRC to revoke or annul the Linyi Judgment. In January 2022, a group of Lunan shareholders, including Berpu, filed a claim to recover dividends paid to Ms. Zhao from around 2017 which they claimed she had misappropriated (the “107 proceedings” or “action 107”). They did so on the basis of the Linyi Judgment, which declared that the shares belonged to Lunan and not to her father. On 1st June 2022, three of those claimants (not including Berpu) obtained a Notice of Assistance, which in the BVI context would be analogous to a freezing order, against the assets of Ms. Zhao and others. The PRC court ordered Lunan to freeze dividends and other payables to Ms. Zhao in an amount of RMB 14,961,082.14. More will be said about the significance of this order when Lunan’s application for an extension of time to make the Interim Payment of US\$2 million dollars is discussed later in this judgment. Meanwhile, Lunan also launched two sets of proceedings in the PRC. The first was against Shandong NT with Provision, Ms. Zhao and Endushantum named as third parties (the “108 proceedings” or “action 108”) and the second against Biotech, with the same third parties named (the “109 proceedings” or “action 109”). Proceedings 107, 108 and 109 will be referred to in this judgment as “the new PRC proceedings”.
- [9] The new PRC proceedings were scheduled for trial in August 2022 in the PRC. In an apparent attempt to forestall this, Endushantum sought and obtained an ex parte anti-suit injunction. Paragraph 3 of that order required Lunan to take active steps to stay the new PRC proceedings. On the return date on 23rd August 2022, a final order was made
- [10] On 31st March 2022, Lunan filed a notice of application seeking leave to appeal the Ancillary Judgment and a stay of execution of the enforcement measures ordered by Jack J pursuant to the Ancillary Judgment. By order dated 31st May 2022, Thom JA granted Lunan leave to appeal the Ancillary Judgment (BVIHCMA2022/0029) but adjourned the application for a stay to a date to be fixed before the Full Court.

- [11] This prompted Endushantum and Zhao Long to file applications of their own (the Unless Order applications) on 30th May 2022, just as Lunan's leave and stay applications were being determined.
- [12] By amended notice of application filed on 22nd July 2022, and re-amended notice of application filed on 29th September 2022, Endushantum and Ms. Zhao pursue their respective Unless Order applications before this Court.
- [13] Endushantum seeks orders that Lunan's application to stay execution of the Ancillary Judgment be refused or, if not refused outright, to stay that application and the appeal unless and until Lunan causes the PRC Shares to be reconveyed to Endushantum within 4 weeks of the Court making such order, failing which the appeal should be struck out. Further, Endushantum seeks an order that if Lunan fails to comply with the anti-suit injunction granted by Jack J on 29th July 2022 within 4 weeks of this order being made, that the stay applications be struck out. The circumstances giving rise to the anti-suit injunction will be discussed later in this judgment.
- [14] Ms. Zhao seeks orders that (1) Lunan's appeals be stayed unless and until Lunan makes the Interim Payment; and (2) if Lunan fails to make the Interim Payment within 4 weeks of the order being granted, Lunan's appeals be struck out (the "Zhao application").
- [15] Having failed to meet the deadline for making the Interim Payment, Lunan applied on 20th October 2022, for orders that (1) time to make the Interim Payment be extended until 1st June 2023 (the "Extension of time application") and (2) the time for compliance with paragraph 3 of Jack J's order (the "anti-suit injunction") dated 29th July 2022 be extended until the determination of the appeal.
- [16] In summary, therefore, before the Court are Lunan's applications for a stay of execution of the Ancillary Judgment and an extension of time to comply with the Interim Payment order and the anti-suit injunction. These are met with cross-

applications by Endushantum and Ms. Zhao for unless orders debarring Lunan from pursuing its appeals unless it complies with: (i) the orders for the re-conveyance of the PRC Shares to Endushantum, (ii) the anti-suit injunction order; and (iii) the Interim Payment order in favour of Ms. Zhao.

**The parties' submissions on Lunan's stay of execution application
Lunan's submissions**

- [17] On behalf of Lunan, Mr. Stephen Rubin KC submitted that the status quo ante is that Lunan has controlled the shares since 2001 and its management has operated on this premise. It would be highly disruptive to Lunan's governance for Ms. Zhao to take control of the PRC Shares (representing 25.7% of its share capital) while an appeal was pending. Mr. Rubin submitted that it is counter-intuitive to transfer the PRC Shares which have been under Lunan's control for some twenty years to Endushantum while an appeal is pending. He contended that the court has to assess the risk of the shares being disposed of where they are. No such risk exists because when the Main Judgment was delivered, Ms. Zhao accepted undertakings by Lunan not to dispose of or diminish the value of the shares. That undertaking has not been breached. Secondly, Endushantum was fully protected by the current freezing order in Hong Kong which prohibits the Hong Kong Companies from transferring the PRC Shares. Endushantum would therefore suffer no prejudice by the grant of a stay. Mr. Rubin further submitted that, in any event, neither the Hong Kong Companies nor Lunan had shown any sign that they might try to transfer the PRC Shares. In contrast, if the PRC Shares were transferred pending the appeal, Endushantum, under Ms. Zhao's control, could dissipate or dispose of the PRC Shares, prejudicing Lunan if it were successful in its appeal.
- [18] Mr. Rubin further argued that if the PRC Shares were re-transferred to Endushantum, even pro tem, Endushantum might argue jurisdiction on the appeal or immediately thereafter on the basis that the property was now within the jurisdiction as per rule 7.3(6) of the **Civil Procedure Rules 2000** (the "CPR") or that, now that the chose in action had been moved to a BVI company, BVI law alone rather than PRC law applied to the issues in relation to knowing receipt and proprietary claims. Given that Lunan is challenging jurisdiction, it is said that

the stay would be necessary since without it, the appeal would be rendered nugatory.

- [19] Additionally, Mr. Rubin advanced the argument that the Linyi Judgment and the annulment proceedings constitute an obstacle to Lunan complying with the order to transfer the PRC Shares to Endushantum. In this regard, Lunan relies on the opinion of Ms. Xiaoqian Wang, a PRC lawyer, who opines that any application by Lunan to the PRC court for a stay of the new PRC proceedings in order to give effect to the BVI court, could be interpreted by the Linyi court as Lunan's acceptance that the Linyi Judgment could be revoked and be seen as Lunan recognizing the BVI judgment which the PRC courts have not recognised. This would prejudice Lunan's position in the annulment action in which they maintain that the Linyi Judgment was not collusive; an issue which is being tried again in the PRC and also an issue for determination in the BVI. Mr. Rubin urged the Court not to place Lunan in such a position for what would be a relatively short time pending the appeal.

Endushantum's submissions on the stay application

- [20] On behalf of Endushantum, Mr. Tom Lowe KC cited instances of Lunan's persistent disregard of court orders to ground his submission that in the event of an unsuccessful appeal, it was unlikely that Lunan would comply with the orders they now seek to stay. It was highlighted that Lunan had previously failed to meet its standard disclosure obligations and had failed to comply with specific disclosure orders following its failure to provide adequate standard disclosure. Further, Lunan breached the terms of the ancillary claim order, in that it failed to procure the consent of the Hong Kong Companies to the consent summons varying the Hong Kong injunction to allow the re-conveyance of the PRC Shares to Endushantum.
- [21] Since Zhang Guimin is both chairman of Lunan and sole shareholder and director of the Hong Kong Companies, Mr. Lowe invites the drawing of the inference that Zhang Guimin could have instructed himself to comply with the order but has refused to do so and the Hong Kong Companies are complicit in Lunan's breach by refusing to take the steps required by the ancillary claim order

to give effect to the transfer of the PRC Shares back to Endushantum. Lunan has failed to provide any reasonable or convincing explanation for its continued failure to obey orders in the Commercial Court proceedings, submitted Mr. Lowe. Thus, the risk is that Lunan will never return the shares and that Endushantum will be litigating about an empty shell, making resisting the appeal an expensive and pointless exercise.

[22] Mr. Lowe submitted further that the freezing order in Hong Kong does not really offer the level of protection suggested by Lunan because the shares are registered in the PRC and the director and shareholder of the company is in the PRC. Therefore, the Hong Kong freezing order doesn't prevent a change in the register in the PRC.

[23] As it relates to the annulment action, Mr. Lowe submitted that it was only necessary to pursue this because Lunan is insistent that the Linyi Judgment is valid and has transferred the shares to the Hong Kong Companies. It cannot therefore be said that Ms. Zhao has no risk and can rely on the PRC proceedings.

[24] Mr. Lowe disagreed with the contention that Lunan's actions 108 and 109 mirror the annulment proceedings as argued by Mr. Rubin. The difference, he submitted, is that Ms. Zhao is trying to uphold the BVI judgment while Lunan is doing its best to undermine it.

[25] It was further argued that Lunan's appeal lacked merit and faces very significant barriers in that it seeks to challenge a plethora of factual findings made by the judge. This he submitted was to invite the Court of Appeal, in effect, to rewrite large parts of the Ancillary Judgment without the benefit of seeing any of the witnesses at trial.

[26] Mr. Lowe further submitted that there would be serious prejudice to Endushantum and Ms. Zhao if the re-conveyance was deferred pending the outcome of the appeal. Endushantum dismissed the notion that it would be highly disruptive to Lunan's governance if Ms. Zhao were to take control of the

PRC Shares as fanciful. In any event, they argued, Ms. Zhao and Endushantum had both previously offered to give undertakings to the Commercial Court not to deal in the PRC Shares until all Lunan's appeals were exhausted. Mr. Lowe reiterated these undertakings before us and submitted that Lunan's stay application ought to be refused in order to right the misconduct that occurred before the trial

The applicable legal principles governing a stay of execution

[27] CPR 26.1(2)(q) confers power on the court to grant a stay of the whole or part of any proceedings generally or until a specified date or event. This power also resides with the Court of Appeal by virtue of CPR 62.20 (1) which vests in it the powers set out in CPR Part 26.

[28] Any discussion on an application for a stay of execution must commence with an acknowledgment that an appeal does not operate automatically as a stay of execution. CPR 62.19 provides that except so far as the court below or the court or a single judge of the court otherwise directs, an appeal does not operate as a stay of execution or of proceedings under the decision of the court below. Rule 30(1) of the **Court of Appeal Rules 1968**¹ is to similar effect. It provides:

“30.(1) An appeal shall not operate as a stay of execution or of proceedings under the judgment appealed from, except so far as the court below or the Court may order, and no intermediate act or proceedings shall be invalidated, except so far as the Court may direct.”

[29] A litigant should not be deprived of the fruits of their judgment pending appeal save in exceptional circumstances. Thus, an applicant for a stay must make a proper case for the grant of a stay since a stay is the exception rather than the rule. He does so by providing cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. The burden resting on an applicant for a stay, and the principles which ought to guide the court on such an application, are clearly stated in the judgment of this Court in **C-Mobile Services Limited v Huawei Technologies Co. Ltd**²:

“[30] The leading principles concerning applications for a stay pending appeal are identified by Mr. Justice Mostyn in the English case of **NB v**

¹ S.R.O 58 of 1968.

² BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported).

London Borough of Haringey. In particular Mostyn J at paragraph 7 cited and approved dicta of the Chief Judge of the High Court of Hong Kong, Ma J, in **Wenden Engineering Services Co Ltd. v Lee Shing UEY Construction Co Ltd** where five principles were identified as relevant to applications for stays pending appeal:

- (i) The Court must take into account all the circumstances of the case.
- (ii) A stay is the exception rather than the general rule
- (iii) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.
- (iv) In exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered.
- (v) The court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which will usually enable a stay to be granted)."

[30] What this passage highlights is that the court, on an application for a stay, is essentially engaged in performing a balancing exercise which requires it to consider a number of factors. Taking this approach, the following is clear. The highpoint of Lunan's argument seems to be that if a stay is not granted and the PRC Shares transferred pending the appeal, Endushantum - under Ms. Zhao's control - could dissipate or dispose of the shares, prejudicing Lunan if it were successful in its appeal. Secondly, it would be highly disruptive to Lunan's governance for Ms. Zhao to take control of the PRC Shares as those within Lunan would not know where they stood. Thirdly, that if the PRC Shares were transferred back to Endushantum, even pro tem, Endushantum might argue jurisdiction and assert that BVI law alone rather than PRC law applied to the issues in relation to knowing receipt and proprietary claims.

[31] To allay any such fears, Endushantum and Ms. Zhao have undertaken, through counsel, that were the shares to be re-conveyed they would not exercise any voting rights in respect of the PRC Shares save to reverse any changes to the Articles of the PRC companies since 2001 and not to take or rely upon any

arguments before the Court regarding a change of the *lex situs* of the PRC Shares as a result of the reconveyance

[32] With such clear undertakings being placed on the record, the risks which had so excited Lunan would be considerably mitigated if not eliminated. In these circumstances, Lunan's position would not be prejudiced by a refusal of the stay application nor would the appeal be rendered nugatory in circumstances where the status quo is preserved. If Lunan prevails in its appeal, the position reverts to what it was prior to the Main Judgment. These factors weigh against the grant of a stay as these undertakings would serve to hold the ring sufficiently pending the determination of the appeal. Further, in circumstances where much of Lunan's challenge to the Ancillary Judgment centers on findings of fact by the trial judge, this is not a case where it can be said that it has been shown that there are strong grounds of appeal or a strong likelihood the appeal will succeed. An uphill task confronts any appellant who seeks to dislodge a trial judge's findings of facts.³

[33] On balance, the risk of prejudice is greater to Endushantum and Ms. Zhao should the stay be granted as the prospects of Lunan re-conveying the PRC Shares if it were unsuccessful on the appeal are not encouraging.

[34] Having regard to all of these circumstances, I would dismiss Lunan's application for a stay of execution of the enforcement measures ordered by Jack J pursuant to the Ancillary Judgment pending appeal.

Lunan's applications for an extension of time

[35] Lunan seeks an extension of time until 1st June 2023 to make the Interim Payment ordered by Jack J on 14th September 2021 and 4th February 2022. They also seek an order that the time for compliance with paragraph 3 of the order of Jack J dated 29th July 2022 be extended until the determination of the appeal herein. This latter order refers to the anti-suit injunction.

³ See *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, paragraphs 114 – 115.

[36] As it relates to the anti-suit injunction, Mr. Rubin informed the Court that the current position is that Lunan hasn't taken any steps to further the PRC actions 108 or 109, nor has it applied for a stay in actions 108 or 109. It is not the claimant in action 107 and it has not procured the claimants in that action to withdraw the case. It is therefore not in compliance with paragraph 3 of the anti-suit injunction of 29th July 2022.

[37] Lunan, however, seeks to extend the time for compliance to beyond the hearing of the appeal because it is said Ms. Zhao has herself applied to suspend actions 107, 108 and 109. These applications have not yet been heard. Mr. Rubin argues that Ms. Zhao's action shows that she recognizes that the same issues arise on the revocation action and the new PRC proceedings. For that reason, it would be reasonable for this Court to extend time for compliance with the anti-suit injunction until after the appeal. Secondly, on the strength of Ms. Wang's expert opinion, Mr. Rubin submitted that Lunan cannot apply for a stay of the new PRC proceedings on the grounds of the anti-suit injunction which cannot be recognised and cannot have binding force in the PRC. In short, Lunan contends that there is no legal mechanism for Lunan to suspend the PRC proceedings and it is therefore not in a position to comply with the anti-suit injunction. Were the Court to refuse an extension it would, in effect, be asking Lunan to abandon its proceedings in the PRC while appeals to this Court and the PRC proceedings are pending, with the same arguments being run in both jurisdictions.

[38] As it relates to the application for an extension of time to make the Interim Payment, Mr. Rubin argued that the freezing order obtained in action 107 prevents Lunan from making the payment as the Interim Payment order is caught within the rubric 'other payables', which means anything that is required to be paid. In support of this argument, reliance is placed on the expert opinion of Ms. Wang on PRC law. Her conclusion on the issue whether the freezing order prohibits Lunan from making the Interim Payment to Ms. Zhao is that the freezing order has the effect of freezing all share interests and other payables to Ms. Zhao, and that Lunan's payment obligation to her in the sum of US\$2,000,000.00 falls within the scope of the term 'payables'. Ms. Wang further

opines that even if the PRC court were to recognize the BVI order, any payment would be into the PRC court on escrow and not directly to Ms. Zhao.

- [39] Mr. Rubin therefore submitted that Lunan would be in contempt of the PRC court if it paid out money to Ms. Zhao in breach of the freezing order. In these circumstances, Lunan may not properly be said to be in contempt of the BVI court order if it did not make the Interim Payment to Ms. Zhao. While Mr. Rubin accepted that Ms. Wang's opinion doesn't go as far as saying that Lunan cannot approach the PRC court for permission to make the payment, he contended that to do so would constitute an act of recognition of the BVI judgment and might compromise Lunan's position in the annulment action in the Linyi court.

Endushantum's response to the extension of time applications

- [40] In response to the extension of time applications, Mr. Lowe submitted that there is a risk to Ms. Zhao that Lunan can engineer a judgment in rem in the new PRC proceedings and then argue that Jack J's finding that the Linyi Judgment was collusive would no longer matter. For this reason, Ms. Zhao needs to have those proceedings stopped.
- [41] Mr. Lowe submitted that Lunan's expert does not say that there is any reason why Lunan can't sit on its hands or cause its subsidiaries to do the same in relation to PRC actions 107, 108 and 109. He cites the expert opinion of Mr. Vincent Mu to the effect that there is nothing preventing Lunan from withdrawing its cases or adjourning them. Thus, submitted Mr. Lowe, there is no proper evidence that Lunan cannot comply with the anti-suit injunction order. Mr. Lowe submitted that there is a risk that if the anti-suit injunction order is stayed, the PRC proceedings will be used to subvert the BVI process.
- [42] As it relates to the extension of time application in relation to the Interim Payment, in addressing the argument that the freezing order poses a legal impediment to Lunan's ability to make the Interim Payment, Mr. Lowe first drew the Court's attention to the identity of the applicants in those proceedings, noting that they are Lunan's witnesses at the trial and its employees. He highlighted that no explanation has been proffered as to how Lunan's employees came to

be applying for a freezing order. Mr. Lowe characterised them as stooges of Lunan, who had collaborated in designing this plan to cripple Ms. Zhao by hindering her ability to fund the litigation. He submitted that this purported impediment to payment was brought about by Lunan itself.

- [43] Moreover, Mr. Lowe took issue with Lunan's opinion that the Interim Payment was caught within the term 'other payables'. He relies on the expert opinion of Mr. Vincent Mu on PRC law that the freezing order should be confined to income that Ms. Zhao may gain from Lunan, if any, but that an Interim Payment is not income but matured debts. Thus, the freezing order does not prohibit Lunan from paying it.

Discussion on extension of time applications

- [44] The circumstances leading to the anti-suit injunction have been described earlier in this judgment. It was in response to new attempts initiated in the PRC by entities associated with Lunan, which might have the effect of thwarting the BVI judgments and court orders. Their timing seems not coincidental. It is worth remembering that Jack J gave the Main Judgment on 20th July 2021, followed by the consequential orders of 27th July 2021. Ms. Zhao filed an amended claim form and statement of claim to bring a new claim against Lunan to have the PRC Shares transferred to Endushantum (eventually withdrawn and replaced by Endushantum's ancillary claim). In August 2021 Ms. Zhao launched proceedings in the PRC to revoke the Linyi Judgment. The new 107 PRC proceedings were first instituted in January 2022 by Lunan's employees, followed by actions 108 and 109. It would be no mischaracterisation to say that these proceedings seem to all be at the behest of Lunan and are designed to challenge the findings and orders made by the BVI court.

- [45] Moreover, the reasons advanced by Lunan for its purported inability to comply with the anti-suit injunction and the Interim Payment order are unsatisfactory. The thrust of Lunan's expert opinion seems to be that the BVI judgments are not recognised and cannot be enforced in the PRC and so those courts will not accede to a stay of proceedings on the basis of the BVI anti-suit injunction nor recognise the Interim Payment order. While at this stage this Court is not in a

position to prefer one expert over the other in the absence of cross-examination and a full ventilation of their respective contentions, it does appear that on the face of Lunan's own expert evidence, there is nothing contained therein to suggest that Lunan cannot simply take no further steps to progress the matters or to seek permission from the PRC court to make the Interim Payment. Further, while Lunan has made it clear that it is not a party to the 107 PRC proceedings in which the PRC freezing order was sought, those initiating that action are Lunan employees, and the court has not been provided with any satisfactory explanation as to why Lunan cannot procure their cooperation in seeking approval of the payment by Lunan itself.

[46] The evidence before this Court establishes that Lunan initially sought extensions to make the Interim Payment, attributing the delay to various demands made by its PRC bank which had to be fulfilled before payment could be made. It was much later, and on the eve of the final payment deadline expiring, that a group of Lunan employees sought and obtained the freezing order which Lunan says prohibits it, effective 1st June 2022, from making the Interim Payment under PRC law. This situation would not have occurred had Lunan timeously complied with the Interim Payment order. The inference that this situation is contrived is hard to resist.

[47] While Mr. Rubin seems to recognize that the expert opinion doesn't go as far as saying that Lunan cannot simply take no further steps to progress the new PRC proceedings or to seek permission from the PRC court to make the Interim Payment, he offers the submission that for Lunan to adopt either of these postures might be to compromise its position in the current annulment action in the Linyi court, as it could imply recognition of the BVI judgments. Such an argument suggests that Lunan accords no priority to its duty to comply with the BVI court orders and is prepared to continue to deliberately flout them in order to enhance its prospects of success in the PRC proceedings. Tellingly, in answer to the Court during oral submissions, Mr. Rubin stated candidly that while Lunan hasn't taken any further steps in actions 108 and 109 since the anti-suit injunction order was made, and hasn't applied to stay those proceedings, if this Court did stay the anti-suit injunction, Lunan will be bound to take steps as

and when required to pursue actions 108 and 109 because it is engaged in litigation. The clear impression is received that Lunan seems to reserve unto itself the right to pursue those proceedings regardless of whatever decisions the BVI courts - including the Court of Appeal - might make.

- [48] While it is open to Lunan to determine its own litigation strategy, it must not expect this Court to partner with it in undermining and subverting the authority of the courts of the BVI. It seems ironic that while the PRC courts will not recognise the BVI judgment and court orders, this Court is being asked to defer to those proceedings by permitting Lunan to continue to disregard the orders of the BVI court so as not to impede its prospects in the PRC matters. This is a completely untenable expectation. The anti-suit injunction to my mind, properly serves to hold the ring pending the determination of the appeal before this Court and nothing placed before this Court persuades me that the time for compliance with it should be extended. Similarly, I am not persuaded that there is a proper basis on which the time for making the Interim Payment should be extended. Accordingly, I would dismiss both applications.

The Unless Order applications

- [49] I turn now to the applications of Endushantum and Ms. Zhao for unless orders. By these applications, Endushantum seeks orders that Lunan's application to stay execution of the Ancillary Judgment be refused. In my view they have prevailed in that regard. The remaining limb of its application is that Lunan's appeal be stayed unless Lunan causes the PRC Shares to be re-conveyed to Endushantum and complies with the anti-suit injunction granted by Jack J, and if within four weeks of such orders being made, Lunan fails to comply, the appeal should be struck out.
- [50] As stated above, Ms. Zhao additionally seeks orders that (1) Lunan's appeals be stayed unless and until Lunan makes the Interim Payment; and (2) if Lunan fails to make the Interim Payment within four weeks of the order being granted, Lunan's appeals be struck out.

The submissions

Endushantum and Ms. Zhao's submissions on the Unless Order applications

- [51] Mr. Lowe submitted that the court's power to make unless orders derive from three sources: section 30(1)(b) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**,⁴ ("the Supreme Court Act") read in conjunction with the CPR rule 62.20(1), rule 26.1(2)(w) and the court's inherent jurisdiction. Mr. Lowe contended that the effect of section 30(1)(b) and CPR rules 62.20(1) and 26.1(2)(w) when read together is that the Court of Appeal is empowered to stay the whole or part of any proceedings generally or until a specified date or event, and to take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective. He submitted that the power to make unless orders is an aspect of case management, without which, respect for the court would be fundamentally undermined.
- [52] In relation to the court's inherent jurisdiction to grant unless orders, Mr. Lowe argued that this jurisdiction vests the Court of Appeal with broad case management powers. In support of this proposition, Mr. Lowe cites the case of **Danone Asia PTE Ltd et al v Golden Dynasty Enterprise Limited et al**⁵ where, in commenting on rules 27(2), 62.15 and 62.16(4) and the jurisdiction and powers vested in the Court of Appeal by enactment, the Court of Appeal observed that when taken together, those provisions really do no more than codify to some extent and give broad recognition to the court's inherent jurisdiction which neither the Court of Appeal Rules nor the CPR have taken away or limited. Any limitation or removal of the court's jurisdiction could only be done by the use of the clearest and unequivocal of expressions in any statutory enactment.
- [53] Mr. Lowe further submitted that under its inherent jurisdiction, the Court of Appeal has power to impose unless orders specifically in respect of orders made by the Courts below and may decline to entertain an appeal in the face of wilful

⁴ Cap. 80, Laws of the Territory of the Virgin Islands.

⁵ Territory of the Virgin Islands HCVAP2009/002 (delivered 28th September 2009, unreported).

and contumacious failure to comply with an order of the lower court, and especially where it is made clear by the defaulting party that he will continue to defy the court's authority if the order should be affirmed on appeal. The English Court of Appeal decision in **X Ltd v Morgan-Grampian (Publishers) Ltd**⁶ is cited in support of this proposition.

[54] In like manner, submitted Mr. Lowe, the Court of Appeal has the power to require Lunan to comply with the orders made below for the Interim Payment, re-conveyance of the PRC Shares and the anti-suit injunction as a condition of being allowed to continue with its appeal, and may even make a permanent staying order in the absence of any evidence that Lunan cannot comply with the original order.

[55] While acknowledging that the Eastern Caribbean CPR contains no equivalent to the English Civil Procedure Rules 52.9(2), which requires there to be a 'compelling reason' to impose a condition on an appeal, Mr. Lowe submitted that even applying this standard, Endushantum and Miss Zhao would plainly meet that threshold. The following matters are relied upon as furnishing such compelling reasons:

- (i) Lunan has deliberately flouted the orders made by Jack J in relation to the Interim Payment of costs, the re-conveyance of the PRC Shares and the anti-suit injunction.
- (ii) Lunan has confirmed that it will not comply with BVI Court orders.
- (iii) Lunan's commencement of the new PRC proceedings to thwart the BVI action.
- (iv) Lunan has no assets in the jurisdiction and will go to any lengths to put its assets beyond the reach of normal enforcement processes.
- (vi) there is no prospect of enforcing the ancillary claim order in the PRC. At this stage, the only available avenue for Ms. Zhao and Endushantum is for the Court of Appeal to make an order to require

⁶ [1991] 1 AC 1.

Lunan to comply with the orders made in the Commercial Court for the Interim Payment, re-conveying of the PRC Shares and the anti-suit injunction as a condition of being allowed to continue with its appeals.

Lunan's submissions on the Unless Order applications

- [56] Mr. Rubin submitted that for all intents and purposes Endushantum and Ms. Zhao are really seeking a Hadkinson Order. Lunan challenges the Unless Order applications on both jurisdictional and substantive grounds.
- [57] On the jurisdiction point, Mr. Rubin submitted that section 30(1)(b) of the Supreme Court Act provides only for the Court of Appeal to have the powers, authority and jurisdiction of the High Court 'for the purposes of, and incidental to, the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon'. This provision does not confer any general power to make case management orders in respect of judgments or orders made by the lower courts. Rule 62.20(1), which vests the court with the case management powers provided for in Part 26, only applies in relation to an appeal to the Court of Appeal.
- [58] It is further said that the CPR contains no express provisions enabling the Court of Appeal to make 'unless orders' to enforce orders made at first instance or to strike out an appeal for breach of a first instance order. Mr. Rubin contended that the place to seek unless orders to enforce first instance orders is before the High Court.
- [59] It was further submitted that while CPR 26.3(1) permits the High Court to strike out a statement of case, that does not translate to a power in the Court of Appeal to make an unless order in relation to a first instance order since the expression statement of case in this context means a pleading; not a notice of appeal to the Court of Appeal.

[60] Mr. Rubin further argued that the English Judgments cited in support of the application are based entirely on the English Civil Procedure Rules, rule 52.9(1), which is predicated on the English procedural rule by which any appeal to the English Court of Appeal requires leave. That rule has no application to the present case as there is no equivalent provision in CPR 2000.

[61] The crux of Lunan's submission is that the proper basis on which the Unless Order applications should have been brought, if at all, is the Hadkinson jurisdiction. Mr. Rubin advanced the argument that this jurisdiction is discretionary and has draconian effect because it affects a litigant's right of access to the court. It is meant to be an order of last resort in substantive proceedings and is not 'a species of ... 'enforcement by the back door''. The applicants would have to satisfy the following conditions to obtain such an order: (a) the respondent is in contempt; (b) the contempt is deliberate and continuing; (c) as a result, there is an impediment to the course of justice; (d) there is no other realistic or effective remedy; and (e) the order is proportionate to the problem and goes no further than necessary to remedy it.

[62] Mr. Rubin submitted that on a proper application of the Hadkinson principles, such an application would be bound to fail. Lunan's argument may be summarised thus:

- (iv) No finding of contempt has or could be made in respect of either the interim costs order or the ancillary claim;
- (ii) in any event, a Hadkinson Order would only be available if there were no other realistic and effective remedy, which is not the present case since no efforts at enforcement have even been made;
- (iii) a Hadkinson Order would be contrary to principle by impairing Lunan's right to appeal the very judgment which gave rise to the orders which Endushantum and Ms. Zhao seek to enforce and a

violation of Lunan's rights to a fair trial under section 16(9) of the **Virgin Islands Constitution Order 2007**⁷ ("the Constitution") and Article 6 of the European Convention on Human Rights;

(iv) the appeal against the Summary Judgment Order is based, inter alia, upon an argument that the court has no jurisdiction over Lunan in relation to the ancillary claim. No Hadkinson Order can properly be made in such circumstances where the very jurisdiction of the court below is in issue.

[63] Mr. Rubin further submitted that the proper approach to be adopted by the court is as articulated by Lord Bingham in **Arab Monetary Fund v Hashim and others**⁸:

"From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders."

[64] It was further contended that a contemnor should not be prevented from advancing an appeal which seeks to set aside the very order in respect of which he is in contempt or an earlier order on which that order depends. The cases of **Astro Exito Navegacion SA v Southland Enterprise Co Ltd and Nan Jong Iron and Steel Co. Ltd, The Messiniaki Tolmi**⁹ and **Motorola Credit Corp v Uzan and others (No. 2)**¹⁰ were relied on in respect of this point. Furthermore, Lunan's right to a fair trial under section 16(9) of the Constitution and Article 6 of the European Convention on Human Rights should not be impeded.

[65] Replying specifically in its written submissions to Lunan's submissions on the Hadkinson jurisdiction, it was submitted on behalf of Endushantum and

⁷ S.I. No 1678 of 2007, Laws of the Territory of the Virgin Islands.

⁸ [1997] Lexis Citation 2080.

⁹ [1981] 2 Lloyd's Rep. 595 at 601–602.

¹⁰ [2004] 1 W.L.R. 113 at paragraph 51.

Ms. Zhao that the jurisdiction of lower courts to prevent a contemnor from appearing, known as the Hadkinson jurisdiction, does not extend to orders made on appeal when the appellant has already had his day in court. If the Court of Appeal grants an unless order, the Hadkinson jurisdiction has no application. Alternatively, all the elements of the Hadkinson jurisdiction are satisfied in this case. The basis for this assertion is said to be that Lunan is in contempt and no prior finding or application seeking such findings is required for the Court of Appeal to find the following: (i) there has been a breach of the ancillary claim order requiring Lunan to cause its privies, the Hong Kong Companies, to transfer the PRC Shares to Endushantum; (ii) the PRC Shares continue to be held by the Hong Kong Companies and no apparent attempt has been made by Lunan to instruct the Hong Kong Companies in compliance with the ancillary claim order; (iii) the ancillary claim order contained penal notices and therefore it follows from its breach of the ancillary claim order that Lunan is in contempt (iv) the ancillary claim order is capable of being complied with because Zhang Guimin is both Chairman of Lunan and the sole shareholder and director of the Hong Kong Companies, which are admittedly Lunan's privies. Zhang Guimin as Chairman of Lunan can instruct himself as a shareholder and director of the Hong Kong Companies to comply with the ancillary claim orders; (v) Lunan's breach is deliberate and continuing; (vi) no attempt has been made to vary or discharge the orders or to explain to the Commercial Court the failure to comply and such explanations as have been proffered are unsatisfactory and have only been made to the Court of Appeal; (vii) the failure to comply with the relevant orders is plainly an impediment to the course of justice as there are no prospects of Lunan returning the shares to the BVI.

- [66] It was submitted that these reasons make it plainly in the interest of justice to make unless orders sought.

Discussion

- [67] In simple terms, an unless order is an order that unless a party fulfils an obligation by a specified date or within a specified period, they will be penalised by a sanction imposed in that order. This can include striking out a party's case unless they comply with the order. This vital case management tool is available

to the Court of Appeal under the CPR. Starting with rule 62.14, this rule provides that Parts 25 to 27 of the CPR, in so far as they are relevant, also apply to the management of an appeal. Rule 62.20 provides that in relation to an appeal, the Court of Appeal has all the powers and duties of the High Court including the powers set out in Part 26.

[68] Part 26 expressly recognises and sanctions the use of unless orders where a party fails to comply with a rule or court order. Rule 26.4 provides:

“26.4 (1) If a party has failed to comply with any of these rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an ‘unless order’.

(2) Such an application may be made without notice but must be supported by evidence on affidavit which –

- (a) contains a certificate that the other party is in default;
- (b) identifies the rule or order which has not been complied with; and
- (c) states the nature of the breach.

...

(7) If the defaulting party fails to comply with the terms of any ‘unless order’ made by the court that party’s statement of case shall be struck out.”

[69] An unless order carries a specified sanction and may be made in circumstances where the rules themselves or a court order may not stipulate a sanction.

[70] Rule 26.3 (1) also gives the court the power to strike out a statement of case or part of a statement of case if there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings.

[71] However, the court also has power to impose a less draconian sanction. Under rule 26.1(2)(q), the court may stay the whole or part of any proceedings generally or until a specified date or event.

[72] Mr. Rubin argues that reference to ‘statement of case’ in Part 26 cannot mean a reference to a notice of appeal, as, by definition, it means claim form, statement of claim, defence, counterclaim, ancillary claim form or defence and

a reply. If this argument is correct it would lead to the conclusion that the Court of Appeal lacks the power to strike out a notice of appeal generally, or where it makes an unless order which is not complied with.

- [73] This argument cannot avail, considering the Court of Appeal's analysis of the meaning of statement of case in **Michael Baptiste v Yoland Bain-Joseph**.¹¹ The need to do so arose in the context of an application to strike out a notice of appeal. In determining that it had the jurisdiction to do so, the Court held that:

“[9]

...

Having regard to the definition of 'statement of case' under CPR 2.4, and the contents of a statement of case as prescribed by the relevant rules, the contents of the Notice of Appeal and Grounds of Appeal as prescribed by CPR 62.4, are obviously comparable to the statement of case for the purposes of CPR 26.3 (1)(a).”

- [74] The effect of this is that this Court has the power to strike out a notice of appeal under rule 26.3(1)(a) and under 26.4(7). The argument is made, however, that the case management powers in Part 26 that are given to the Court of Appeal can only be exercised in relation to an appeal of which the court is seised and not in relation to the proceedings below. Thus, it is argued that Endushantum and Ms. Zhao should have resorted to the High Court to procure an unless order, and it is further said that they have brought contempt proceedings below. This is an unattractive proposition.

- [75] Such an interpretation would mean that in managing an appeal, even where the court is aware that consequential orders flowing from the decision below are being wilfully flouted, it is nonetheless powerless to do anything about it and must proceed to entertain the appeal. This is even more egregious when it is considered that an appeal does not operate as a stay. There is no warrant for construing the rules as confining the jurisdiction to make unless orders to breaches of the rules or orders of the Court of Appeal itself. Such a construction would mean that although the Court of Appeal is alive to multiple, wilful breaches

¹¹ Grenada HCVAP2006/026 (delivered 7th February 2008, unreported).

of orders of the court below, it would be powerless to impose conditions in relation to the prosecution of the appeal arising from those proceedings. That would seem to fundamentally undermine the overriding objective of the CPR.

[76] The overriding objective of the rules is to deal with cases justly. Rule 1.2 enjoins the court when interpreting the rules, to do so in a manner which furthers the overriding objective. The rules must be interpreted in such a way as to further, rather than undermine, the overriding objective. Therefore, on a proper construction of the rules outlined above, the Court of Appeal has the jurisdiction and discretion to impose conditions for the prosecution of an appeal before it, in the face of an ongoing and wilful failure by an appellant to comply with consequential orders made in the court below, whether or not there has been a formal finding of contempt by the court below. While it would have been better practice to move the court below, the failure to do so does not preclude this Court from considering whether there has been wilful and contumacious conduct on the part of an appellant. This can be seen in the cases of **The Messiniaki Tolmi** and **Hadkinson v Hadkinson**¹² where the issue of contempt was first raised and entertained in the Court of Appeal.

[77] The only question is how is that discretion to be exercised in the particular circumstances of a given case. In other words, what principles guide the exercise of the discretion to make an unless order. To that question I now turn. I should add, that in the context of this case, whether one is speaking about an unless order or a so called Hadkinson Order, the issue is the same: whether Lunan should be debarred from prosecuting its appeal given its alleged contempt in failing to comply with orders made by the BVI Commercial Court.

[78] Undoubtedly, an unless order impacts a litigant's right of access to justice because it may well result in a party's case being struck out. Our rules do not specify any particular factors to which an applicant for an unless order, or a court faced with such an application, should focus the mind, except for the general injunction in rule 1 that the discretion must be exercised in furtherance of the

¹² [1952] 2 All ER 567.

overriding objective. It is permissible, therefore, to have regard to the principles culled from relevant case law treating with applications to debar an appellant from pursuing an appeal in circumstances where they stood in contempt of orders made in the court below.

[79] Mr. Rubin takes the point that where a party seeks to appeal against the very order, disobedience of which has placed him in contempt, this situation is a well-established exception to the general rule that a party in contempt in a proceeding should not be heard further in the same proceeding unless and until he had purged his contempt. Such is the case here he submitted. Reliance is placed on **The Messiniaki Tolmi** and **Motorola Credit Corp** among other cases.

[80] The principle is not in doubt. In **The Messiniaki Tolmi**, Brandon L.J. held:
“... I accept that, while the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of that application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt.”

[81] This exception was also recognised, and its rationale described, in **Motorola Credit Corp** in the following way:

“50 ... the proposition that the court will hear a person in contempt when the purpose of his application is to appeal against the order disobedience to which has put him in contempt, has merit not only of good sense; it seems to us necessary to satisfy considerations of fairness. Whether or not a party is in contempt of court by refusing to obey an order irregularly made, or one consequent upon and/or ancillary to an order so made, the circumstances will be rare indeed where it can be right to shut him out from arguing an appeal or application to appeal against that order made in due time.”

[82] In so far as the appeal against the Ancillary Judgment is concerned, it does appear that this is an appeal against the orders which places Lunan in contempt. However, I do not read either authority as saying that in all instances where the appeal seeks to challenge the very order that places the appellant in contempt

the appeal must be allowed to proceed, however egregious and contumelious the appellant's conduct.

- [83] Indeed, in the **The Messiniaki Tolmi** case, Brandon L.J. commented that the exception is itself subject to two qualifications. For present purposes the only relevant qualification is the first articulated by Brandon L.J.:

“The first qualification is that there may be cases where an appeal by a party in contempt against the very order, disobedience of which has placed him in contempt, can be shown to be, for one reason or another, an abuse of the process of the Court. In such a case the exception to the general rule discussed above would not apply.”

- [84] That there may be other exceptions was recognised by Lord Oliver in **X Ltd v. Morgan-Grampian (Publishers) Ltd**, cited in **Motorola Credit Corp**:

“One can, of course, envisage, as [Denning LJ] did in [Hadkinson v Hadkinson], circumstances in which the court would be unlikely to exercise its discretion in favour of hearing a contemnor - he instanced the case of an abuse of process or of disobedience to the order impeding the course of justice - but I would not be in favour of laying down any rules for the exercise of discretion, though it can do no harm to give examples which may serve as guidelines.”

- [85] The Court in **Motorola Credit Corp**, quoting Lord Denning in **Hadkinson v Hadkinson**, described the law and the nature of the Court's discretion thus:

“The starting point is that to refuse to hear a party, even a contemnor, is ‘a strong thing...only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance’.”

- [86] The current approach adopted by the court is as articulated by Lord Bingham in **Arab Monetary Fund v Hashim and others; Arab Monetary Fund v Bahiralulloom and others**:¹³

“From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing

¹³ [1997] Lexis Citation 2080.

a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders.”

- [87] These authorities seem to point to the requirement to carefully consider the factual circumstances of the case to determine whether the interests of justice are best served by hearing or refusing to hear a party in contempt, and not merely refuse to hear him because he is in contempt; or entertain him because he is appealing the very order that has placed him in contempt. The peculiar circumstances of the case must be analysed to determine what the interests of justice dictate.

Analysis and conclusions

- [88] Lunan is in contempt of the ancillary claim order, containing penal notices, requiring Lunan to cause the Hong Kong Companies, to transfer the PRC Shares to Endushantum. Lunan’s breach is deliberate, and the explanations proffered relate to its desire to not compromise its position in parallel legal proceedings in the PRC; and not because it is impossible to comply. Further, Lunan has no assets within the jurisdiction and has signalled that it does not intend to comply with the BVI court orders even if the appeal goes against it, while at the same time seeking to secure the advantage of being able to maintain their appeals. It seems to us that this constitutes an abuse of the process of the court and an impediment to justice as, assuming the respondents are successful on appeal, it would be a pyrrhic victory only as there would be no means of enforcing the judgment, given that the shares are located in the PRC, where it has been said repeatedly in these proceedings, BVI court orders are not recognised.
- [89] When these factors are combined with those we have explained when rejecting Lunan’s stay application and applications for extension of time, it is my view that these particular circumstances, make this a case where it is appropriate to disapply the general exception discussed at paragraphs [80] and [81] above. While it would be draconian to strike out Lunan’s appeals, I am convinced that the interests of justice require at the minimum that Lunan’s appeals be stayed in the first instance, while further time for compliance is given to Lunan.

Disposition

[90] For the reasons set out above I would make the following orders:

- (1) Lunan's applications for a stay of execution of the Ancillary Judgment and an extension of time to comply with the Interim Payment order and the anti-suit injunction are dismissed with costs to the respondents to be assessed by a judge of the Commercial Court if not agreed within 21 days.
- (2) Lunan's appeals, BVIHCMAP2021/0007 and BVIHCMAP2022/0029, are stayed unless and until, on or before 26th May 2023, Lunan complies: (i) with the ancillary claim order by causing the re-conveyance of the Endushantum shares to Endushantum; (ii) with the final anti-suit injunction order dated 23rd August 2022; and (iii) with the Interim Payment order in favour of Ms. Zhao.
- (3) Should Lunan fail to comply with the orders at paragraph (2) above, its appeals in BVIHCMAP2021/0007 and BVIHCMAP2022/0029 shall stand struck out without further order of the Court.
- (4) Lunan shall pay Endushantum's and Ms. Zhao's costs of the Unless Order applications, including the amended and re-amended applications, to be assessed by a judge of the Commercial Court if not agreed within 21 days.

I concur.
Dame Janice M. Pereira
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar