

**EASTERN CARIBBEAN SUPREME COURT  
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE  
(COMMERCIAL DIVISION)**

**CLAIM NO. BVIHC (COM) 2017/0151**

**BETWEEN:-**

**(1) ZHAO LONG  
(2) KUNLUN NEWCENTURY INVESTMENT HOLDINGS CO LTD**

**Claimants**

**-v-**

**(1) ENDUSHANTUM INVESTMENTS CO LTD  
(2) JADE VALUE INVESTMENTS HOLDING CO LTD  
(3) ZHONGZHI INVESTMENT HOLDING CO LTD  
(4) SHARON WEI  
(5) LUNAN PHARMACEUTICAL GROUP CORPORATION**

**Defendants**

**AND BY COUNTERCLAIM**

**BETWEEN:**

**LUNAN PHARMACEUTICAL GROUP CORPORATION**

**Claimant by Counterclaim**

**-v-**

**(1) ZHAO LONG  
(2) KUNLUN NEWCENTURY INVESTMENT HOLDINGS CO LTD  
(3) ENDUSHANTUM INVESTMENTS CO LTD  
(4) JADE VALUE INVESTMENTS HOLDING CO LTD  
(5) ZHONGZHI INVESTMENT HOLDING CO LTD  
(6) SHARON WEI**

**Defendants by Counterclaim**

**AND BY ANCILLARY CLAIM**

**BETWEEN:-**

**ENDUSHANTUM INVESTMENTS CO LTD**

**Ancillary Claimant**

**-v-**

**LUNAN PHARMACEUTICAL GROUP CORPORATION**

**Ancillary Defendant**

**CLAIM NO. BVIHC 2017/0125**

**BETWEEN:-**

**(1) HENGDE CO (PTC) LTD  
(2) ENDUSHANTUM INVESTMENTS CO LTD**

**Claimants**

**-v-**

**(1) ZHAO LONG  
(2) LUNAN PHARMACEUTICAL GROUP CORPORATION**

**Defendants**

**Determined on paper**

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2022 September 1

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### **JUDGMENT**

[1] **JACK, J [Ag.]**: By a document entitled “Recusal Application” dated 23<sup>rd</sup> August 2022 Lunan Pharmaceutical Group Corp (“Lunan”) invited me to recuse myself. The application is not made by a legal practitioner admitted in this Territory. Since this case is brought in the Commercial Division of the Court, that is a requirement: CPR 69B.4(4). Accordingly I cannot treat this as a formal application for my recusal. Nonetheless, a judge is under a duty to ensure that he does not adjudicate on matters where he should recuse himself. I shall therefore determine the matters raised by Lunan of my own motion.

[2] Because of the manner in which this application is brought by Lunan, there is no affidavit in support of it. Nor are any transcripts available to me of the hearings in which my rulings are criticised. This has limited the extent to which I can assess the validity of the complaints. I note, however, that Lunan has until recently been professionally represented by a well-known firm of BVI lawyers. Those lawyers have raised no concerns about my partiality and,

whilst still acting, made no application that I recuse myself. This itself casts doubt on whether there is any substance to Lunan's current complaints.

### The law on recusal

[3] I set out the law in relation to recusal in **Goldteam Group Ltd v Qin Hou and others**<sup>1</sup> as follows:

"[5] There was no dispute as to the relevant principles. Mr. Fay QC, who appeared for Mr. Qin [who sought recusal], relied on the summary of the law given by Freeman J in **Surrey Heath Borough Council v Robb**,<sup>2</sup> who said:

'19. It is of fundamental importance that judicial decisions should be made free from bias or partiality. It has long been recognised that justice must not only be done, it must also be seen to be done see **R v Sussex Justices, ex parte McCarthy**.<sup>3</sup>

20. The classic statement in respect of the legal test for apparent bias is not in dispute. It is taken from... the speech of Lord Hope in **Porter v Magill**,<sup>4</sup> whether:

"the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

21. As Lord Hope stated at [102-103], this was a minor modification from the test used in **re Medicaments and Related Class of Goods (No.2)**<sup>5</sup> per Lord Phillips MR at [85]:

'The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility... that the tribunal was biased.'

22. [Counsel for the defendants] helpfully drew attention to the judgment of Lord Hope in **Helow v Secretary of State for the Home Department**<sup>6</sup> setting out the characteristics of the notional fair-minded and informed observer as follows:

'2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and

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<sup>1</sup> BVIHC (COM) 2019/0180 (22<sup>nd</sup> October 2020).

<sup>2</sup> [2020] EWHC 1952 (QB).

<sup>3</sup> [1924] 1 KB 256.

<sup>4</sup> [2001] UKHL 67, [2002] 2 AC 357 at para [103].

<sup>5</sup> [2000] EWCA Civ 350, [2001] 1 WLR 700.

<sup>6</sup> [2008] UKHL 62, [2008] 1 WLR 2416.

fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in **Johnson v Johnson**.<sup>7</sup> Her approach must not be confused with that of the person who has brought the complaint. The “real possibility” test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

3. Then there is the attribute that the observer is ‘informed’. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political, or geographical context. She is fairminded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

23. In **Locabail (UK) Limited v Bayfield Properties Ltd**,<sup>8</sup> it was stated by Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C in a joint judgment at [25] that:

‘...By contrast, a real danger of bias might well be thought to arise if.... on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see **Vakauta v. Kelly**<sup>9</sup>); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal.

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<sup>7</sup> (2000) 201 CLR 488 at para 53

<sup>8</sup> [1999] EWCA Civ 3004. [2000] QB 451.

<sup>9</sup> (1989) 167 CLR 568.

We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be. Finally, [counsel for the claimant] drew to the attention of the Court a further passage in **Locabail**... to the following effect: Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”

[6] Mr. Baird, for Goldteam, took a neutral stance on the application, ‘because’, as he put it in his skeleton, ‘as a matter of principle, it is not for the parties to choose their own judge.’ He helpfully drew my attention to our Court of Appeal’s decision in **Riley v Attorney General**,<sup>10</sup> which cited the leading cases cited above. Our Court of Appeal laid particular weight on the English Court of Appeal decision in **Otkritie International Investment Management Ltd v Urumov**,<sup>11</sup> which held:

‘There must be substantial evidence of actual or apparent bias before the general rule can be satisfied. The issue of recusal is extremely fact sensitive and recusal ought not to be lightly done. Bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case in which a party has participated and been heard) unless it can be shown that he is likely to reach his decision by ‘reference to extraneous matters or predilections or preferences’. [B]ias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case.’

[7] He also drew my attention to **JSC BTA Bank v Ablyazov**,<sup>12</sup> where the first instance judge had held the defendant to be in contempt of a freezing order and to have lied while being cross-examined about his assets. The judge refused to recuse himself from subsequent involvement in the case. That decision was upheld by the Court of Appeal, which asked itself “whether there could be any difference between the judge who bears in mind his own findings and observations and another (second) judge who reads what the first judge has written, as he must be entitled to do”, and answered at paras [69]-[70]:

‘[U]nless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some

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<sup>10</sup> MNIHCVAP2020/0003 (determined 23<sup>rd</sup> June 2020). *Stuart A Lockhart v Valentina Nonini and others* ANUHCVP 20198/0004 (determined 14<sup>th</sup> October 2020) is to the same effect.

<sup>11</sup> [2014] EWCA Civ 1315 at paras [13] and [22].

<sup>12</sup> [2012] EWCA Civ 1551, [2013] 1 WLR 1845.

misjudgement which might set up a complaint of the appearance of bias, the fair-minded and informed observer is unlikely to think that the first judge is in any different position from the second judge — other than that he is more experienced in the litigation. In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not ‘pre-judging’ by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case... He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias.”

### Complaint 1

- [4] The first matter raised by Lunan is an alleged difference between my findings on Chinese law in my judgment of 20<sup>th</sup> July 2021<sup>13</sup> and in my judgment on the ancillary claim of 17<sup>th</sup> March 2022.<sup>14</sup> The two judgments must speak for themselves and I do not intend to put any gloss on them. Instead I propose merely to identify the differences between the issues in the two judgments, so as to show why the judgments reached the conclusion they did.
- [5] In my July 2021 judgment, I was considering a Chinese law claim by Lunan to trace a proprietary interest in the disputed shares. I held that Chinese law did not recognise a concept of a constructive trust (i.e. a trust imposed as a matter of law, as opposed to an express trust, which is created by the settlor’s intention). There was therefore no equitable interest which Lunan could trace. I therefore rejected Lunan’s tracing claim as not being well-founded in Chinese law.
- [6] In my March 2022 judgment, I was considering a trust claim in English and BVI law (which for these purposes are identical). It was urged on me that any claim to a beneficial interest in these disputed shares (which existed as a matter of English/BVI law) was lost because Chinese law would not recognise the beneficial interest. The two cases relied on were **Akers**

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<sup>13</sup> [2021] ECSCJ No 639.

<sup>14</sup> [2022] ECSCJ No 88.

**v Samba Financial Group**<sup>15</sup> and **Byers v Samba Financial Group**,<sup>16</sup> which concerned the same facts. There shares of five Saudi Arabian companies which were the subject of trust were transferred to a bank in Saudi Arabia. It was common ground that the transferee had acquired the legal interest in the shares. The question was whether the transferee was bound by its knowledge that the shares were the subject of a trust. In other words, did the transferee take free of the beneficial (or equitable) title to the shares. Saudi Arabian law did not recognise any title other than legal title. That, it was ultimately held in **Byers**, was fatal to the continued existence of any equitable title in the shares. The transferee therefore took free from any equitable title.

[7] In the current case, I held that Chinese law did recognise the existence of equitable title (albeit on narrower principles than in English or BVI law). Therefore in principle a transfer of the disputed shares did not destroy the equitable title recognised as existing in English/BVI law, since equitable title was capable of existing in Chinese law.

[8] That explains the difference in outcome. It has nothing to do with partiality to any of the parties, but merely a difference in the substantive law applying to each claim. If I have erred in my interpretation of the laws of the different legal systems, then Lunan's remedy is to appeal.

### **Complaint 2(i)**

[9] Complaint 2(i) is that in my July 2021 judgment I commented on certain actions of Lunan and its officers potentially amounting to criminal contempt and thereby "to the least, de facto encouraged, Zhao Long ["Ms. Zhao"] to bring criminal charges of contempt of courts against Lunan and Lunan officers. What I said was:

"The failure timeously to disclose the Linyi proceedings was a grievous interference with the proper administration of justice by this Court and I find that it was intended to be such. It shows in my judgment a complete absence of integrity on the part of Wang Jianping, his wife and those in the Guimin camp at Lunan. It may well be a criminal contempt of Court as well,<sup>17</sup> but I have not heard full argument on this."

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<sup>15</sup> [2017] UKSC 6, [2017] AC 424.

<sup>16</sup> [2021] EWHC 60 (Ch), affirmed by the Court of Appeal [2022] EWCA Civ 43 with summary at [79].

<sup>17</sup> See *Matthews & Malek on Disclosure* (5<sup>th</sup> Ed, 2016) at para 7.31ff.

- [10] This is no finding that a criminal contempt had occurred. Nor was it any encouragement for Ms. Zhao to issue an application to commit. The decision to issue an application for contempt was made solely by Ms. Zhao and her legal advisors. On 20<sup>th</sup> September 2021, I issued a judgment dismissing the application to commit for contempt with costs.<sup>18</sup> I fail to see how this shows I was acting partially or making an effort “to do Endushantum and Zhao Long legal teams’ jobs.” Since the application failed, I can hardly be said to doing the jobs of her lawyers.

### **Complaints 2(ii) and (iii)**

- [11] These complaints are that in March 2021 and March 2022 I raised issues about service. Without seeing the transcripts, I have no recollection of what occurred at these hearings. However, I can make these general comments. Service in the People’s Republic of China (“the PRC”) is always a matter which requires careful consideration. The PRC is a signatory to the **Hague Convention**,<sup>19</sup> but excludes both personal service in China and service direct between the Courts. In effect, the only permitted manner of service is via the diplomatic route, which is notoriously slow.
- [12] As a result there is usually a need to discuss the practicalities of foreign service. The Court has the advantage that it can, if necessary, make direct enquiries of the Foreign Process Unit at the Royal Courts of Justice and of the Senior Master, Queen’s Bench Division, in London, who are responsible for foreign service under the **Hague Convention** of BVI proceedings. (The BVI is a British Overseas Territory, hence the involvement of the Courts in London and of the Foreign, Commonwealth and Development Office.) There is nothing in the brief account given in Complaints 2(ii) and (iii) which suggests I was stepping into the dispute. It is an ordinary part of the Court’s case management powers and duties to ensure that litigation is conducted justly, including lowering costs and dealing with matters expeditiously: CPR 1.1(2)(b) and (d). Service issues can lead to extensive (and expensive)

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<sup>18</sup> [2021] ECSCJ No 690.

<sup>19</sup> Convention of 15th November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

interlocutory wrangling, if a proper basis for ensuring good service is not established at the earliest stage of any action: for an example, see **Re Durant International Corp (in liquidation); Hellard v Maluf**.<sup>20</sup>

- [13] In my judgment, no case has been established for me to recuse myself on these grounds.

#### **Complaint 2(iv)**

- [14] This alleges that in July 2022 on Endushantum’s *ex parte* application for an anti-suit injunction, I “took initiative to advise Endushantum and order (without Endushantum’s application)... adding additional parties as defendants (who never participated in the prior litigation) to [the] judgment previously issue[d].” This is not correct. The application for an anti-suit injunction was supported by Ms. Zhao’s thirteenth affirmation, made before the application was heard before me. At para 50, she names the additional parties which Endushantum seeks to have added to the proceedings as respondents to the anti-suit injunction and gives details of service. It is obvious that it was she and Endushantum who sought the addition of the parties. I merely adjudicated on that.

- [15] Because it is the long vacation and I am abroad and because the current proceedings predate electronic filing, I do not have access currently to the application, but I do to the affirmation in support. However, even if the application did not formally ask for the adding of additional parties, that would have been a venial omission which the Court could rectify under CPR 26.9. The intention to add the additional parties is clear from the affirmation.

#### **Additional arguments**

- [16] The recusal application sets out what it describes as “additional arguments”. These begin by submitting that the orders I made cannot properly be described as case-management orders. I disagree. Many of them can be.

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<sup>20</sup> [2021] ECSCJ No 672, appeal dismissed [2022] ECSCJ No 5 with leave to appeal to the Privy Council refused [2022] ECSCJ No 216, sub nom. *Maluf v Durant International Corp*.

[17] The point is made that the complaints raised need to be considered cumulatively. I agree. However, if there is (as here) no substance in the individual points made, there can be no cumulative effect.

[18] The application then says: "There is an inherent defect in the system putting the power to decide recusal into the hand of that same judge subject to [the] recusal application." I disagree. This is the way recusal applications are dealt with. It allows the judge to answer the points raised by the party seeking his or her recusal. If the application were dealt with by some other judge, then there would necessarily be speculation as to the true reasoning of the judge whose recusal is sought. In any event, the party seeking recusal can appeal, if the judge wrong refuses to recuse him or herself, so the applicant for recusal does have resort to a separate tribunal.

#### **Conclusion**

[19] For these reasons I refuse to recuse myself.

**Adrian Jack**  
Commercial Court Judge [Ag.]

**By the Court**

**Registrar**