

**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

Appearances:

Mr. Tom Lowe QC, with him Mr. Christopher Bromilow of Forbes Hare for Endushantum Investments Co Ltd

Mr. Oliver Clifton, Ms. Meenaa Azmayesh and Ms. Yegâne Güley of Walkers BVI in a watching brief for Ms. Zhao

Mr. Stephen Rubin QC, with him Ms Laure-Astrid Wigglesworth of Appleby (BVI) Ltd for Lunan Pharmaceutical Group Corporation

2022 February 2, 3 and 4
 March 17

JUDGMENT

[1] **JACK, J [Ag.]**: I heard the trial in this matter over thirteen days in March of 2021. I gave judgment on 20th July 2021.¹ This judgment should be read in conjunction with that substantive judgment. I shall use the same shorthand for the various protagonists as I used in it.

[2] This judgment deals with three issues. Firstly, on 14th September 2021 I gave Endushantum leave to issue an ancillary claim under CPR 18.4(2) against Lunan. In accordance with CPR

¹ [2021] ECSCJ No 639.

18.5(2), I directed that the ancillary claim be served on Lunan's legal representatives, Appleby. That application was determined *ex parte*. This is the return date on the application. Lunan challenges both Endushantum's ability to bring its ancillary claim against Lunan and the order for service on Appleby. Lunan by application of 20th October 2021 also applies to set aside the grant of leave to bring an ancillary claim and the order in respect of service. This challenge is now made on three bases. (a) The existing action is at an end, so it is too late to bring an ancillary claim. (b) This Court has no jurisdiction under CPR 7.3 to try the causes of action in the ancillary claim and should in any event decline to do so on *forum conveniens* and *lis alibi pendens* grounds. (c) Lunan has not been validly served with the ancillary claim.

[3] Secondly, by application dated 7th January 2022 Endushantum seeks summary judgment on the ancillary claim against Lunan.

[4] Thirdly, Lunan sought an extension of time to the end of March 2022 for payment of the interim costs order which I made as long ago as 14th September 2021 in the sum of US\$2 million. I had already by order of 2nd December 2021 extended time for payment to 1st February 2022. In the event the parties agreed that I should make a final order giving Lunan until the end of March 2022 to make the payment with interest. It is noticeable that, although Lunan asserted that its bank in China was putting up difficulties with making a foreign payment, it produced no documentary evidence from the bank to that effect.

Further facts

[5] In order to deal with these issues, it is necessary to set out some facts beyond those in the July judgment. It will be recalled that latterly Endushantum held 25.7 per cent of the shares of Lunan, 25 per cent of the shares in Shandong NT (which in turn held 100 per cent of the shares in Hope and Better) and 25 per cent of the shares in Biotech. (I shall call these shares in Lunan, Shandong NT and Biotech "the PRC shares".) On 5th February 2021 the Lunan shares and on 9th February 2021 the Shandong NT and Biotech shares were transferred to Berpu and Provision.

- [6] On 5th December 2019, Lunan issued proceedings against Endushantum before the Intermediate People's Court of Linyi City. That Court gave judgment on 3rd April 2020. The operative part of the judgment is in these terms:

“the litigation request by the plaintiff for recognizing release of the relationship of entrusted shareholding between both parties shall be established, it [the release] is recognised by our court...”

The Linyi Court did not make any order that Endushantum transfer the shares to Lunan or to Lunan's order. Instead the judgment consists of, what we would procedurally call, a declaration.

- [7] Following the judgment, there was a Court-supervised “mediation” between Lunan (with Zhang Guimin as its legal representative) and Endushantum (with Mrs. Wei as its legal representative). This resulted in a written “enforcement agreement”, signed on 9th January 2021 by Zhang Guiman and on 18th January 2021 by Mrs. Wei. So far as material it reads (in not very good translation) as follows:

“In respect of the case of application for enforcement made by Lunan... the applicant for enforcement according to (2019) Lu 13 Min Chu No.773 the Civil Judgment against Endushantum... the person subject to enforcement, both parties under mediation hosted by Linyi Intermediate People's Court have reached the following enforcement of settlement agreements:

1. The person subject to enforcement undertakes that before 1 May 2021, 21 million shares of equity interest that it held in Lunan... the applicant for enforcement shall be made transfer in the names of Berpu... and/or Provision... as designated by the applicant; of which Berpu shall be transferred 12.8288 million shares, Provision shall be transferred 8.1712 million shares. If such equity interests are unable to register and make transfer in the names of the above companies, the person subject to enforcement consents that as per the instruction of the applicant, the above equity interests shall be made transfer in the names of other companies as further instructed by the applicant.

2. [A similar provision in respect of the Shandong NT and Biotech shares.]

3. The person subject to enforcement authorizes Qiaofeng Du... as an agent being entrusted for administering all of the relevant procedures in the course of the transfer of equity interest...

4. Within thirty (30) days upon signing of this agreement, the applicant for enforcement consents to pay the person subject to enforcement the disbursement and management fees during the period of equity interest being held by entrust in a total of RMB323,200.00.

5. The enforcement fee of this case and the acceptance fee of the original case shall be assumed by the applicant.

6. This agreement for settlement is an agreement for enforcement of settlement reached on the basis of the principle of voluntary of both parties and under the host of Linyi Intermediate People's Court, and shall become effective since the date of signing or seal affixed by both parties on the agreement."

[8] On 22nd January 2021, the Linyi Intermediate People's Court made what is described as an "enforcement ruling". (Lunan plead it as the "termination judgment".) This provided:

"In the enforcement proceeding in relation to the dispute over the entrustment contract between Lunan... and the party subject to enforcement, British Virgin Islands Endushantum..., the Civil Judgment ([2019] Lu 13 Min Chu No.773) rendered by the Linyi Intermediate People's Court has come into force, and the enforcement proceeding has been carried out by this Court on January 11, 2021. Through mediation, the Applicant, Lunan... and the party subject to enforcement, BVI Endushantum entered into the settlement agreement on enforcement of the judgment. When the settlement agreement is being performed, the Applicant for enforcement submitted to this Court in written form to withdraw its application for enforcement.

NOW, THEREFORE, in accordance with Items (1) and (6) of the Civil Procedure Law of the People's Republic of China, the rules are as follows:

Terminate the enforcement proceeding of (2021) Lu 13, Zhi No. 64.

This ruling shall take effect immediately upon service."

[9] It will be recalled that the Linyi judgment and the fact of the transfer of the PRC shares held by Endushantum to Berpu and Provision were only disclosed shortly before the trial held before me in March 2021. No explanation was given for the late disclosure of that judgment or the documents submitted to the Linyi court in that case. Nor has any apology been forthcoming for what was on any view a serious breach of Lunan's and Endushantum's disclosure obligations. It was also a gross breach of undertakings given in correspondence

by Endushantum's lawyers in 2017 whereby Endushantum promised not to part with the PRC shares. The late disclosure of the Linyi judgment and the breach of the 2017 undertakings, however, was not the end of their deliberate non-disclosures. At the time of the trial, neither Lunan nor Endushantum (which at that time was still under the control of Mrs. Wei) had disclosed the enforcement agreement or the enforcement ruling. These documents were only disclosed under cover of a letter from Appleby of 30th August 2021. Again this appears to be a deliberate and flagrant breach of the disclosure obligations of Lunan and those then having control of Endushantum. Again no explanation or apology has been forthcoming.

Procedural issues

- [10] The April 2020 judgment in the Linyi proceedings and the share transfers were disclosed only shortly before the trial was due to commence before me. This led to timetabling difficulties. In particular, Ms. Zhao (assuming she won on the merits) would want an order that the shares transferred by Endushantum to Berpu and Provision be transferred back to Endushantum. Until she won at trial this could only have been done by Ms. Zhao bringing derivative proceedings in the name of Endushantum. The procedure for bringing derivative proceedings was begun, but once Ms. Zhao succeeded at trial, such a claim could be brought only by Endushantum itself. This is what she has now done *via* the ancillary claim brought in the name of Endushantum.
- [11] The trial had been listed for thirteen days, but this was somewhat misleading. Various of the witnesses were giving evidence from the Far East. Due to the twelve hour time difference, on several days the Court sat at 8am and had to finish before lunch. There was not enough time to deal with the questions of law and fact which arose from the transfer of the PRC shares from Endushantum to Berpu and Provision.
- [12] There were discussions about the way forward, starting on day 11.² This was followed by an application dated 26th March 2021 by Ms. Zhao to amend her pleadings to seek re-conveyance of the shares transferred by Endushantum and to serve Berpu and Provision

² Transcript pp 62 to 75.

under CPR 42.12, so that they would be bound by the BVI judgment. The following are particularly relied on by Mr. Lowe QC to show that it was always anticipated that there would be further steps taken in the action after the judgment following the March trial was delivered. On day 12, there was the following exchange:³

“THE COURT: I mean, because of the way in which this point about the Lunan shares and whether they need to be returned by the Hong Kong companies developed, I would have thought it’s sensible for that all to be done once you’ve seen my draft judgment on the other aspects of the case.

MR. LOWE: Yes, My Lord, absolutely. I wasn’t intending to argue them, just to give Your Lordship the references.

THE COURT: Thank you. Mr. Rubin, are you reasonably content with that approach? It doesn’t seem to me that it causes you any prejudice by effectively hiving that off to a hearing in May sometime.

MR. RUBIN: No. I mean, as the order against the Hong Kong companies, can I reserve our position until May on whether that’s a matter that you should or should not grant?”

On day 13, there were further discussions:⁴

“MR. RUBIN: The rest of my submissions on this were really prepared to meet the amendment application and which, from the Claimant, which is to, for an order that the shares be transferred back to Endushantum. And as I understand the position, I’m sure this is right, but I’m just confirming, this is why I’m not going into it now. That’s something which is going to be looked at entirely after judgment.

THE COURT: Yes, I think that’s a sensible course rather than deal with things on an hypothetical basis.”

The ancillary claim

[13] Mr. Rubin QC takes the following points in respect of the bringing of the ancillary claim. I have put them in a different order:

- (a) The Court has delivered its July judgment. That is a final judgment. The Court is now *functus officio*. It is too late to permit the bringing of an ancillary claim.

³ Transcript, day 12, pp 7 to 8.

⁴ Transcript, day 13, p 90.

- (b) An ancillary claim is in any event inappropriate. The cause of action in the ancillary claim is quite different and is unconnected with the issues determined in the main action.
- (c) There are moreover two actions already commenced by, or at the instigation of, Ms. Zhao prior to Endushantum commencing the ancillary claim: firstly a claim commenced on 3rd August 2021 in Hong Kong against Berpu and Provision in respect of the shares, where a proprietary injunction has been obtained and secondly a claim commenced on 9th August 2021 in the Linyi Intermediate People's Court to set aside the original Linyi judgment. The ancillary claim should be stayed on grounds of *lis alibi pendens*.
- (d) Further, although Endushantum could have applied to amend its defence to Lunan's counterclaim and added its own counterclaim, it has not done so. An ancillary claim is a separate action and should not be permitted.
- (e) There is in any event no gateway for service of the ancillary claim.
- (f) Service of the ancillary claim form on Appleby was bad. Appleby were not authorised to accept service of the ancillary claim on Lunan's behalf.

[14] By agreement, (e), the question of gateway, was stood over to be argued if it became material.

(a) *Functus officio*

[15] So far as (a) is concerned, Mr. Rubin QC did not cite any authority on what constituted a final resolution of a claim, so as to render the Court *functus officio*. In my judgment, a Court is not *functus* until it has dealt with all outstanding matters and has made a final order: **Ocean Conversion (BVI) Ltd v Attorney-General of the Virgin Islands**.⁵ In the current case, as shown from the extracts from the transcripts above, it was clear that the July judgment was not going to determine everything. As often happens in modern litigation, there were various issues, including the well-flagged possibility of an ancillary claim being made, which were hived off from the trial for consideration after the July judgment was delivered. As a minimum, it seems to me a party who says that the Court is *functus* must show an order

⁵ [2009] ECSCJ No 204 (Bannister J) at [3]. Appeals against that judgment were subsequently dismissed but without touching on this point: [2012] ECSCJ No 97, [2012] ECSCJ No 226.

which is said finally to resolve the matter in respect of which the Court is said to be *functus*: see **Re VGM Holdings Ltd.**⁶ Mr. Rubin was unable to do so. Accordingly, in my judgment I was not, when I permitted the ancillary claim to be brought, and am not now *functus officio*.

(b) Different cause of action

- [16] As to (b), Mr. Rubin QC's submissions on this have an unreality to them. As I said in the opening words of my July judgment: "This action concerns the ultimate beneficial ownership of 25.7 per cent of the shares in a large pharmaceutical business carried on in Linyi City in the Shandong Province of the People's Republic of China..." What the trial was really about was who was the ultimate beneficial owner of the PRC shares, which are worth upwards of US\$100 million. Those shares were held, until the transfers to Berpu and Provision, by Endushantum. Endushantum was not a trading company; it merely held the PRC shares. No one was interested in Endushantum as an empty shell. The case was always about the PRC shares. The reason the issues which are now the subject of the ancillary claim were not ventilated at trial was because Endushantum had given the 2017 undertakings. Those were not undertakings given to the Court, but they were key elements of the factual matrix against which the trial took place. It is solely because of the late disclosure of the transfers of the shares to Berpu and Provision that the matters now raised by the ancillary claim were not tried in March 2021. The remainder of Mr. Rubin's submissions on (b) I consider under (c) and (d).

(c) *Forum conveniens* and *lis alibi pendens*

- [17] As to (c), Mr. Rubin QC takes the point that an ancillary claim should not be permitted where there is litigation already brought in other jurisdictions. I agree that this *can* be a relevant consideration in considering where the appropriate *forum conveniens* might be. In the current case, there are two foreign actions, which he says are relevant. Firstly, Ms. Zhao and Endushantum on 3rd August 2021 brought proceedings in Hong Kong against Berpu and Provision, as Lunan's nominees, seeking proprietary remedies in respect of the PRC shares. They obtained an injunction freezing the PRC shares. Secondly, on 9th August 2021 Ms. Zhao commenced proceedings in the Linyi Intermediate People's Court to overturn

⁶ [1941] 3 All ER 417.

the 3rd April 2020 judgment. Both these actions predate the bringing of the ancillary claim in this Court.

- [18] Lord Diplock giving the only substantive speech in the House of Lords in **The Abidin Daver** held:⁷

“Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it.

Quite apart from the additional inconvenience and expense, if the two actions are allowed to proceed concurrently in the two jurisdictions the courts of the two countries may reach conflicting decisions...”

- [19] In the current case, it is important to note two matters. Firstly, the parties are different. In the new Linyi action, it is Ms. Zhao suing Lunan. Endushantum is not suing Lunan in this new action; it is a passive defendant. In the Hong Kong proceedings, the defendants are Berpu and Provision; Lunan is not a party. Secondly, the relief which is sought is relief which can only be obtained in those Courts. Only the Linyi court can set aside its judgment of 3rd April 2020. Only the Hong Kong court can give *effective* interim relief freezing the PRC shares and ensuring (assuming Ms. Zhao wins her claim) that the shares are retransferred to Endushantum.

- [20] This is not a case where Ms. Zhao and Endushantum are seeking the same relief in the sets of foreign proceedings as they seek in this action. Moreover, if Endushantum recovers judgment against Lunan in this Court, either on the summary judgment application or after a

⁷ [1984] AC 398 at pp 411-412.

trial of the ancillary claim, and Lunan are ordered to transfer the PRC shares back to Endushantum, then that will be an end of the Hong Kong proceedings. (This assumes of course that Lunan complies with the orders of this Court and is subject to the point discussed below about the enforceability of the nominee agreements.) The subject matter of the Linyi proceedings is setting aside the declaration pursuant to which the legal title to the PRC shares was transferred to Lunan's nominees, Berpu and Provision. The ancillary claim seeks relief consequential to determinations as to the beneficial ownership of the PRC shares. There is thus no risk of inconsistent judgments.

[21] In my judgment, this Court is the natural forum for determination as to whether Mrs. Wei acted in breach of her duties as the sole director of Endushantum in transferring the shares to Berpu and Provision and whether Lunan are bound to ensure the return the PRC shares conveyed in breach of Mrs. Wei's duties to Endushantum. Endushantum is a BVI company. Mrs. Wei's duties as a director are subject to BVI law. Lunan issued its own counterclaim. By so doing Lunan was voluntarily making itself a party to this BVI litigation concerning Endushantum and through Endushantum the ultimate beneficial ownership of the PRC shares.

[22] Mr. Rubin QC submits that the ancillary claim "is about the validity of a transaction in China governed by PRC law following a PRC court judgment. It turns on whether, despite the Linyi City Judgment, the enforcement ruling and court-mediated agreement with Endushantum that followed that judgment, this court can conclude that the transfer to the Hong Kong Companies was unlawful under a combination of BVI and PRC law." I disagree. I have already determined in my July judgment that the Linyi judgment was collusive. Mr. Rubin makes a point on the *lex situs* of the PRC shares, which I shall consider in determining the summary judgment application, but the central issue in the ancillary claim is not in my judgment as characterised by Mr. Rubin.

[23] The new Linyi proceedings and the Hong Kong action are not in my judgment on the facts of this case a bar to the bringing of the ancillary claim under the doctrine of *lis alibi pendens*. The BVI remain the *forum conveniens*.

(d) Ancillary claim as a separate action: the Court's discretion

- [24] Mr. Rubin QC submits that an ancillary claim is a separate claim to the action in which it is brought, therefore all the requirements of gateways etc for bringing a separate action need to be fulfilled. The position in my judgment is more complicated than that. CPR 18.2(1) provides: "An ancillary claim is to be treated as if it were a claim for the purposes of these Rules except as provided by this rule." However, the definition of "ancillary claim" needs to be considered. CPR 18.1(1) says it "is any claim other than a claim by a claimant against a defendant or a claim for set off contained in a defence and includes a... (c) counterclaim by a defendant against the claimant or against the claimant and some other person."
- [25] Mr. Rubin accepted in argument that it would have been possible for Endushantum to have applied to amend its defence to Lunan's ancillary claim against it to add a counterclaim. His objection is to having the counterclaim as a separate ancillary claim. This is an argument without substance in my judgment. A counterclaim is a species of ancillary claim. Indeed statistically it is probably the most common type of ancillary claim. The fact that there is a separate piece of paper called an ancillary claim instead a combined document entitled "defence to counterclaim and counterclaim to the counterclaim" is neither here nor there. What matters is that procedurally Endushantum could bring a claim against Lunan to have the PRC shares restored to it. Even if there were merit to Mr. Rubin's argument that Endushantum should have proceeded by amending its defence to add a counterclaim to the counterclaim (and there is not), this would be a case for the Court to exercise its powers under CPR 26.9 to correct the error. Had it been necessary to do so, I would have done so.
- [26] The rules on counterclaims brought against a defendant are somewhat different to those in relation to ancillary claims in general. Firstly, if a counterclaim is brought against a claimant by a defendant, the claimant in principle can make a counterclaim to the counterclaim as of right: **MV Normar (Owners) v British Transport Docks Board (The Normar)**, which shows that this has been the position since the nineteenth century.⁸ Thus Endushantum could serve a counterclaim to the claim brought by Lunan in the existing actions. The protection

⁸ [1968] P 362 (Cairns J).

against abusive use of counterclaims (and ancillary claims) lies in the Court's discretionary power to control their procedural use: **Ernst & Young v Butte Mining plc (No 2)**.⁹

[27] The discretionary power in the old English RSC Order 15 rule 5(2), discussed in **Butte Mining**, is carried over into our CPR 18.10. CPR 18.10 provides:

- “(1) This rule applies when the court is considering whether to —
 - (a) dismiss an ancillary claim;
 - (b) permit an ancillary claim to be made; or
 - (c) require the ancillary claim to be dealt with separately from the claim.
 - Rules 26.1(d) and (e) deal with the court's power to decide the order in which issues are to be tried or to order that part of the proceedings be dealt with separately.
- (2) The court must have regard to all the circumstances of the case including —
 - (a) the connection between the ancillary claim and the claim;
 - (b) whether the ancillary claimant is seeking substantially the same remedy which some other party is claiming from the ancillary claimant;
 - (c) whether the ancillary claimant wants the court to decide any question connected with the subject matter of the proceedings —
 - (i) not only between the existing parties but also between existing parties and the proposed ancillary claim defendant; or
 - (ii) to which the proposed ancillary defendant is already a party but also in some further capacity; and
 - (d) whether the facts in the ancillary claim are substantially the same, or closely connected with, the facts in the claim.”

[28] Applying the criteria in CPR 18.10(2), in my judgment there is a close connection between the counterclaim made by Lunan against Endushantum and the ancillary claim now brought by Endushantum against Lunan, so (a) is satisfied. As will be seen when I consider the summary judgment application, there is a close connection between the facts I considered in my July judgment and those involved with the ancillary claim. The effect of the Linyi judgment was an important issue in my July judgment. The working out of the consequences of my findings in relation to the Linyi judgment is intimately connected with (i) the claim brought by Ms. Zhao, (ii) the counterclaim brought by Lunan and (iii) the ancillary claim now brought by Endushantum against Lunan. The additional facts relevant to the summary

⁹ [1997] 1 WLR 1485 at p 1493 (Lightman J).

judgment application are closely connected with the original facts as found by me after the trial, so (d) is satisfied. (b) and (c) are case management considerations which strongly support having all matters between the parties resolved.

- [29] Taking an overall view of the considerations in CPR 18.10(2), in my judgment it is appropriate to permit the ancillary claim to be made under CPR 18.10(1)(b). For the reasons I have given in the section of this judgment titled “procedural issues”, the ancillary claim has of necessity had to be brought and determined after the main trial. This is permissible under CPR 18.10(1)(c). The delay is caused by Lunan’s own breaches of its disclosure obligations. It should not be rewarded for its breaches of those obligations. I refuse to dismiss the ancillary claim under CPR 18.10(1)(a).

(f) Service of the ancillary claim

- [30] By CPR 18.5(2) the Court must give directions for service of the ancillary claim. Since Lunan was already a party to the action, it had an address for service within the jurisdiction: CPR 3.11. Service at its legal practitioners was therefore entirely appropriate: CPR 3.11(1) and (2)(a) and 6.3. There was no need for Endushantum to obtain permission to serve outside the jurisdiction. Service within the jurisdiction at Appleby’s offices was sufficient and indeed mandatory. Under CPR 18.2(5) an ancillary defendant who is already a party does not need to file an acknowledgement of service. Thus there was no need for Lunan to file an acknowledgement of service.
- [31] As Oliver LJ said in **Republic of Liberia v Gulf Oceanic Inc**:¹⁰ “[B]y becoming a litigant within the jurisdiction, a plaintiff submits himself to the incidents of such litigation including liability to a counterclaim.” Accordingly, by voluntarily submitting to the jurisdiction of this Court in the main action, Lunan was in my judgment submitting to the risk that another party might raise a counterclaim: **AK Investment CJSC v Kyrgyz Mobil Tel Ltd**,¹¹ **Derby & Co v Larsson**,¹² and **Glencore International AG v Exter Shipping Ltd**.¹³

¹⁰ [1985] 1 Lloyd’s Rep 539.

¹¹ [2011] UKPC 7, [2012] 1 WLR 1804, on appeal from the Isle of Man.

¹² [1976] 1 WLR 202.

¹³ [2002] EWCA Civ 524, [2002] 2 All ER (Comm) 1. Sometimes cited as **Glencore International AG v Metro Trading International Inc** (No 3).

[32] The fact that Lunan voluntarily submitted to the jurisdiction is why Mr. Rubin QC's reference to para [37] of my decision in **ABC Grandeservus Ltd v Emmerson International Corp**¹⁴ is in my judgment misplaced. In that case, I drew the distinction made in the cases cited in the previous paragraph between a defendant who had involuntarily been brought into the jurisdiction through one of the gateways and a party who had voluntarily submitted to the jurisdiction. This can be seen from the surrounding parts of the judgment which Mr. Rubin did not cite:

"[33] Mr. Doctor [counsel for the defendant to the ancillary claim, ABC] submitted that the additional relief sought against ABC and the amendments to the pleadings were such as to add a new claim to the action. Therefore, he submitted that the Emmerson had to find a gateway in rule 7.3 to allow the claim to be brought against, and then served on, ABC in Cyprus.

[34] Mr. Weekes [counsel for the claimant by ancillary claim, Emmerson], by contrast, submitted that once ABC was a party to the action only the ordinary rules as to amending to add new claims applied. There was no need to serve outside the jurisdiction. Service on Campbells, he submitted, was perfectly legitimate.

[35] In my judgment, the position in law lies somewhat between these two extremes. As to Mr. Doctor's submissions, 'new claim' can have two meanings. The expression can refer to issuing a claim form in a fresh action. Such a claim form can only be served outside the jurisdiction if the Claimant can satisfy one of the gateways. However, a new claim can also refer to adding a new cause of action in an existing action. This is the terminology used by the CPR in rule 20.2(2) which provides:

'The Court may allow an amendment the effect of which will be to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as a claim in respect to which the party wishing to change the statement of case has already claimed a remedy in the proceedings.'

[36] Where an amendment to add a new cause of action in an existing action is permitted, service must, in my judgment, be on the attorney on record: see CPR rule 6.3.

[37] On the other hand, Mr. Weekes' submission does not properly recognize the special position of parties domiciled abroad who are only before the Court as a result of Court permitting a claim to be served outside the jurisdiction under, what used to

¹⁴ [2019] ECSCJ No 206. An appeal was allowed on other grounds, but without casting doubt on this point: [2021] ECSCJ No 321, sub. nom. Emmerson International Corp v ABC Grandeservus Ltd.

be called, the Court's extraordinary jurisdiction. Take the case of a defendant against whom the claimant wants to bring claims in contract and in tort. When the claimant applies to serve outside the jurisdiction, suppose the Court allows service of the contract claim but refuses to allow the tortious claim to be served abroad. It would be absurd if the defendant, once he had acknowledged service to answer the contract claim and submitted to the jurisdiction of the Court for that purpose, could then face an application by a claimant to add the tortious claim on the ordinary domestic principles applicable to the amendment of claims.

[38] In my judgment when considering whether to allow an amendment to add a fresh cause of action against a foreign defendant who only appears because of service out of the jurisdiction, the Court should consider whether the fresh cause of action passes through one of the gateways. However, once the new claim does pass the gateway, it can be served at the defendant's address for service within the jurisdiction."

- [33] Accordingly, in my judgment there was good service of the ancillary claim on Lunan at Appleby's offices in Road Town. Lunan voluntarily submitted to the jurisdiction, including the possible incidence of an ancillary claim being brought.

Conclusions in relation to the ancillary claim

- [34] Leave to issue the ancillary claim by Endushantum against Lunan was properly granted. There has been good service of the ancillary claim on Lunan. There are no grounds on which to set aside the ancillary claim. It was not necessary for Endushantum to establish a gateway for service of the ancillary claim outside the jurisdiction. Point (e) therefore drops away.

Summary judgment

- [35] I turn then to the summary judgment application. The test to be applied is explained in the judgment of George-Creque JA (now Pereira CJ) in **St Lucia Motor & General Insurance Co Ltd v Peterson Modeste**:¹⁵

"CPR 15.2 says in essence that the court may give summary judgment on the claim or on a particular issue if it considers that (a) a claimant has no real prospect of succeeding on a claim, or (b) a defendant has no real prospect of defending the claim or the issue...

¹⁵ [2010] ECSCJ No 8 at [21]f.

The principle... may be stated thus: Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in **Swain v Hillman**¹⁶ is that the claim or the defence has no 'real' (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case then it is open to the court to enter summary judgment."

The basis of the application for summary judgment

- [36] There are three bases on which to consider Endushantum's case on knowing receipt as justifying summary judgment and one special defence raised by Lunan relating to the *lex situs* of the PRC shares.
- [37] Endushantum's case is this. Firstly, Zhang Guimin knew the truth that the Endushantum and PRC shares were held on the trusts of the Zhao Trust.
- [38] Secondly, from at least 2018 onwards, Lunan knew from the pleadings and evidence in this litigation (including the 2017/0125 action) that there was at least an *arguable* case that Endushantum and the PRC shares held by Endushantum were held on the trusts of the Zhao Trust. In those circumstances, Lunan knew that Mrs. Wei could not properly, as the sole director of Endushantum, enter into the collusive Linyi litigation. "[I]f a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded."¹⁷ Given the (on any view) arguable case that Endushantum owed duties to Ms. Zhao under the Zhao Trust, it was a breach of Mrs. Wei's duties to Endushantum to enter the collusive litigation. Lunan had actual

¹⁶ [1999] EWCA Civ 3053, [2001] 1 All ER 91.

¹⁷ *Guardian Trust and Executors Co of New Zealand Ltd v Public Trustee of New Zealand* [1942] AC 115 (Privy Council) at p 127, cited in *Lane v Cullens Solicitors* [2011] EWCA Civ 547, [2012] QB 693.

knowledge of *these* facts and therefore had actual knowledge of Mrs. Wei's breach of trust. Lunan had this knowledge on 5th December 2019, when it commenced the Linyi proceedings, on 3rd April 2020 when the Linyi Court delivered its judgment, in January 2021 when Lunan entered the enforcement agreement with Endushantum, on 22nd January 2021 when the Linyi Court gave its enforcement ruling and in February 2021 when the PRC shares were transferred to Berpu and Provision.

[39] Thirdly, Lunan, Berpu and Provision all knew all the facts when they received notification of my judgment of 20th July 2021. They were not purchasers for value without notice. Thus at latest by that date, all the elements of a knowing receipt claim were established.

[40] Lunan's special defence is that the Linyi judgment, as a determination of a court of the *lex situs* of the PRC shares, means that Berpu and Provision received the PRC shares free from any equitable interest of Endushantum or Ms. Zhao. It is convenient to deal with this special defence first.

Knowing receipt and the *lex situs*

[41] A claim for knowing receipt can potentially apply where assets are held in a jurisdiction which does not recognise the concept of a trust. In **Akers v Samba Financial Group**,¹⁸ a Mr. Al-Sanea held shares on the terms of a Cayman trust for a company, SICL. The shares were all in banks incorporated in Saudi Arabia. After SICL went into insolvent liquidation, Al-Sanea transferred the shares to Samba, in purported settlement of various debts which Al-Sanea owed Samba. Saudi law does not recognise the concept of a trust. The UK Supreme Court held unanimously at [34]:

“that in the eyes of English law, a trust may be created, exist and be enforceable in respect of assets located in a jurisdiction, the law of which does not recognise trusts in any form.”

¹⁸ [2017] UKSC 6, [2017] AC 424.

[42] However, this is not the last word on the subject. In **Byers v Samba Financial Group**,¹⁹ a related case subsequent to the UK Supreme Court decision, Fancourt J and the Court of Appeal on appeal from him held there needed to be some equitable title surviving in the foreign jurisdiction. Saudi law did not recognise any such title, which was fatal to the survival of the claim. (Distantly analogous concepts in the Islamic law applied in Saudi Arabia were held by Fancourt J and by the Court of Appeal on appeal to be too far removed from the common law to be relevant.) This meant that no claim for knowing receipt could lie. In the absence of a surviving equitable interest, the recipient of the legal title to the Saudi shares could not be liable for knowing receipt.

[43] In the current case, we know that Chinese law does know a concept of a trust: see para [213] of my July judgment. Indeed, Lunan in para 22(3) of its draft defence pleads: “If (which is denied) Lunan holds the PRC Shares at all, it cannot be as a trustee under PRC law as there is no written trust agreement and none of the steps required for the establishment of a trust under PRC law have been satisfied.”

[44] Now, if Chinese law knows the concept of a trust, it must also provide a remedy in cases where a trustee wrongfully parts with the trust property. English law of course provides the remedy of knowing receipt (and also dishonest assistance). The question thus arises whether Chinese law can also be presumed to offer the same relief as would be available in England or the BVI.

[45] The traditional view is that expressed in **Dicey, Morris & Collins on the Conflict of Laws**,²⁰ which states:

“RULE 25—(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.

(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.”

¹⁹ [2021] EWHC 60 (Ch), affirmed by the Court of Appeal [2022] EWCA Civ 43 with summary at [79].

²⁰ 15th Ed (2012), at 9R-001.

[46] This now requires modification in the light of the UK Supreme Court decision in **FS Cairo (Nile Plaza) LLC v Brownlie**,²¹ where Lord Leggatt introduced the concept of a “presumption of similarity” in preference to the old default rule that English law applied until provisions of another law were pleaded and proved. He held (this part of his judgment being agreed by all the law lords):

“143. Because the application of the presumption of similarity is fact-specific, it is impossible to state any hard and fast rules as to when it may properly be employed. In light of the authorities..., however, the following observations may be made.

144. First, ...as a matter of broad generalisation the presumption is more likely to be appropriate where the applicable foreign law is another common law system rather than a system based on Roman law. There are, however, ‘great and broad’ principles of law which are likely to impose an obligation in all developed legal systems.

145. Second, also as a matter of broad generalisation, the presumption is less likely to be appropriate where the relevant domestic law is contained in a statute, but this depends on the nature of the statute and, more specifically, the relevant statutory provision. There is a difference between a statute which codifies general principles and one which introduces a local scheme of regulation. The fact that the events in question are not actually within the scope of the domestic statute, for example because it does not have extraterritorial effect, is not a bar to relying on the presumption — as the question is not whether the domestic statute itself applies but whether it is reasonable to presume, unless and until the contrary is shown, that the foreign system of law contains a materially similar rule. That may depend upon the particular aspect of the statutory rule on which a party is seeking to rely...

146. Third, it is in the nature of the test that its application may often be uncertain so that it is difficult to predict whether a judge will consider that the presumption can be relied on in a particular case. I do not think this problematic, however, given that reliance on the presumption is always a matter of choice. It is always open to the party who is asserting a claim or defence based on foreign law to adduce direct evidence of the content of the relevant foreign law rather than take the risk of relying on the presumption. Equally, it is always open to the other party to adduce such evidence showing that the foreign law is materially different from the corresponding English law rather than take the risk that the presumption will be applied.

147. Fourth, the procedural context in which the presumption is relied on matters. Self-evidently, there is more scope for relying on the presumption of similarity at an early stage of proceedings when all that a party needs to show in order to be allowed to pursue a claim or defence is that it has a real prospect of success. By contrast,

²¹ [2021] UKSC 45, [2021] 3 WLR 1011.

to rely solely on the presumption to seek to prove a case based on foreign law at trial may be a much more precarious course.”

[47] In my judgment the current case is one where I can properly apply the presumption. As I have noted, since Chinese law recognises the concept of a trust, it must also have a remedy for breach of trust. The essence of a trust is that it gives the beneficiary a proprietary interest in the subject matter of the trust. It follows that there must be at least some proprietary remedy if trust assets are transferred to third parties. In the absence of any pleading, still less any expert evidence, to the contrary, in my judgment it is safe to assume that a remedy very similar to that of knowing receipt given by English and BVI law exists in Chinese law.

[48] It follows in my judgment that Lunan can in principle be guilty of knowing receipt in respect of the PRC shares. This is not a case like **Samba** where the *lex situs* does not recognise the existence of trusts.

Judgment *in rem*

[49] Mr. Rubin QC says that, even if China does recognise trusts, on the facts of the current case this is not conclusive. Lunan's case on this is pleaded as follows:

“17. ...The transfer of the PRC Shares was valid and binding under both PRC and BVI law. Without prejudice to the generality of that contention:

- (1) The transfers were made in accord and satisfaction and/or pursuant to the Enforcement Process of the Linyi City Judgment.
- (2) If consideration were required (which is denied), there was good consideration under the Enforcement Agreement and/or by virtue of the Enforcement of the Linyi City Judgment and/or as Lunan had paid for the PRC Shares.
- (3) The Enforcement Agreement remains a valid, subsisting and binding agreement on both parties.
- (4) The rights to the intangible property in the PRC Shares are governed by PRC law. Under PRC law the PRC Shares were property to which Lunan was entitled as aforementioned and now belong to Berpu and Provision. Endushantum has no right to claim to these shares whether under BVI or PRC law.
- (5) Endushantum was anyway holding the PRC Shares as Lunan's nominee or trustee.

...

22. ... (3) If (which is denied) Lunan holds the PRC Shares at all, it cannot be as a trustee under PRC law as there is no written trust agreement and none of the steps required for the establishment of a trust under PRC law have been satisfied.

(4) If a constructive trust under BVI law is being alleged (which is denied), no such claim is sustainable as the transfers were properly authorised by Endushantum, there was no breach of fiduciary duty and the PRC Shares were never trust property.”

[50] The *lex situs* of the PRC shares is the PRC. That much is common ground: **Dicey**.²² Mr. Rubin goes on to submit²³ “that the issue of whether Endushantum has a valid proprietary claim to the PRC shares is governed by PRC law. Under PRC law there is a valid judgment subsisting and binding on the parties... [T]his means that for all purposes Endushantum has no claim whether to the property or to unjust enrichment remedies.”

[51] Now Lunan’s expert evidence for the assertions in the last two sentences is defective in that it does not meet the requirements of CPR 32.13 and 32.14. It is given by Lunan’s lawyer in China, Yang Wantao, who is hardly independent. However, Lunan did not have enough time to obtain proper expert evidence in the time since the issue of the summary judgment application on 7th January 2022. Had it been necessary I would have given directions for proper expert evidence to be filed.

[52] What Yang Wantao says is in my judgment on its face credible. However, it is important to note the extremely limited matters to which he deposes. He says that an unjust enrichment claim in PRC law under Article 985 of the Civil Code requires that there be no legal basis for the transfer. “The fact that a foreign court has refused to recognise a PRC judgment does not affect the validity of that judgment, nor the validity of any settlement agreement approved by the PRC court thereunder, as a matter of PRC law,” he says. There was no need for consideration for the transfer to Berpu and Provision; the Linyi judgment and the enforcement agreement provided a sufficient legal basis for the transfers of the PRC shares. I am prepared to accept this for summary judgment purposes.

²² At 22-044. (The exceptions at 22-045 are irrelevant.)

²³ Skeleton for 2nd to 4th February 2022 at [64].

[53] This, however, leaves the question of whether the knowing receipt claim, which is a personal claim, survives. Mr. Rubin says it does not. Mr. Lowe QC says that the Linyi Court judgment is not a judgment *in rem*, so it is not conclusive as to claims in equity against Lunan and its nominees. Yang Wantao gives no evidence about the PRC approach to a knowing receipt claim.

[54] **Dicey** at paras 14-110f (omitting most footnotes) says:

“[I]f the person entitled under a foreign judgment *in rem* vesting in him the title to some movable thing brings an action for wrongful interference in England against a person who denies that title, he is in reality relying on his title rather than the source of it — the judgment. He is, in other words, relying on the foreign judgment *qua* an assignment rather than *qua* a judgment. So also is the purchaser of a ship sold by foreign judicial sale who sets up the foreign judgment by way of defence to the original owner’s proceedings for wrongful interference. All that is involved is, at most, recognition of the foreign judgment, and, at that, recognition *qua* an assignment. As Lord Blackburn put it [in **Castrique v Imrie**]:²⁴

‘In the case of **Cammell v Sewell**²⁵ a more general principle was laid down, viz. that “if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.” This, we think, as a general rule is correct, though no doubt it may be open to exceptions and qualifications; and it may very well be said that the rule commonly expressed by English lawyers, that a judgment *in rem* is binding everywhere, is in truth but a branch of that more general principle.’

The degree of recognition to be accorded to such a judgment, therefore, falls to be determined not so much by the rules governing the recognition of foreign judgments as by the rules governing the validity of assignments of property. The distinction is important because while a foreign judgment is in general impeachable for fraud, the validity of an assignment of property depends almost entirely upon the *lex situs*; though it is conceivable that recognition of a foreign judgment *qua* an assignment may be refused on grounds of public policy.”

[55] In my judgment (applying the **Peterson Modeste** test), the Linyi Court judgment did not itself affect any assignment of the PRC shares. The assignment was pursuant to the enforcement agreement between the parties. Accordingly, I find that there was no judgment *in rem* which

²⁴ (1870) LR 4 HL 414 at p 429.

²⁵ (1860) 5 H & N 728 at p 746.

could bar the personal knowing receipt claim made by Endushantum against Lunan. Thus, liability for knowing receipt potentially exists.

Bona fide purchaser for value without notice

[56] I will start by considering the law as to whether Lunan, Berpu or Provision can be considered as *bona fide* purchasers for value without notice. (There is no need to distinguish between them: **Lewin on Trusts**.²⁶)

[57] A purchaser for value need not pay the full value for the asset transferred: **Midland Bank Trust Co Ltd v Green**.²⁷ However, in the current case, no consideration was paid for the PRC shares under the enforcement agreement. The only monies agreed to be paid were in respect of the custodial charges of Endushantum. Further there is no evidence that even those modest charges were paid, which is a requirement of the doctrine: **Lewin on Trusts**.²⁸

[58] I shall deal with the question of knowledge below, but there is a more general question as to whether Zhang Guimin acted in good faith. As Lord Wilberforce said in **Midland Bank v Green**, giving the only substantive speech in the House of Lords:²⁹

“[I]t would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or that when notice came to be regulated by statute, the requirement of good faith became obsolete. Equity still retained its interest in and power over the purchaser's conscience. The classic judgment of James LJ in **Pilcher v Rawlins**³⁰ is clear authority that it did: good faith there is stated as a separate test which may have to be passed even though absence of notice is proved. And there are references in cases subsequent to 1882 which confirm the proposition that honesty or bona fides remained something which might be inquired into (see **Berwick & Co v Price**,³¹ **Taylor v London and County Banking Co**,³² **Oliver v Hinton**³³).

²⁶ 20th Ed (2000) at para 44-122.

²⁷ [1980] AC 513.

²⁸ At para 44-122, citing *Storey v Windsor* (1743) 2 Atk 630.

²⁹ At p 538.

³⁰ (1872) LR 7 Ch App 259 at p 269.

³¹ [1905] 1 Ch 632 at p 639.

³² [1901] 2 Ch. 231 at p 256.

³³ [1899] 2 Ch. 264 at p 273.

Endushantum's case on knowing receipt

- [59] I turn then to the facts on which Endushantum rely. In para [45] of my July judgment, I set out the terms of the Zhao Trust. The Trust provided:

“III. The Trust Property entrusted to the Trustee is Endushantum Investments Co Ltd and property under its name listed as follows [details of the shares in Lunan, Shandong NT, Hope, Better and Biotech are then given].”

- [60] The Zhao Trust was pleaded in para 1 of Ms. Zhao's statement of claim in the 2017/0151 action. Lunan became the fifth defendant to the action in 2018 and thereafter had knowledge that Ms. Zhao and Kunlun BVI asserted the existence of the Zhao Trust. By its defence and counterclaim (in various amended versions), Lunan asserted that it was the beneficial owner of the PRC shares. In its prayer to its counterclaim, it sought a declaration to that effect and an order for transfer of the PRC shares to its nominee. In para 2 of its defence, Lunan did not admit the Zhao Trust and denied that Endushantum or the PRC shares were held on such trust.

Previous determinations of fact

- [61] I turn first to the proper approach for me to take to my previous assessment of facts at trial. Here, I gave a substantive judgment in July which made various findings in respect of disputed facts. There is an issue between the parties as to how those findings stand to be applied in relation to the current application.
- [62] Mr. Rubin QC submitted that the only facts determined in the July judgment which were binding on me on the summary judgment were those in relation to which there was an issue estoppel under the technical rules of the common law which apply to estoppel *per rem judicatam*. Originally he drew from this the inference that the Court in deciding the summary judgment application was, save to that limited extent, starting with a *tabula rasa*. The facts which I found as to Zhang Guimin's knowledge of the Zhao Trust, for example, should be ignored. Zhang Guimin did not give evidence at the March trial. He could, however, (as Mr. Rubin rightly points out) give evidence at the trial of the ancillary claim. The Court, after the trial of the ancillary claim, might reach a different view as to his knowledge and state of mind.

Thus, the Court in determining the summary judgment application must, Mr. Rubin submitted, bear in mind that the evidence it would hear at the second trial might be quite different to that on the basis of which I made my findings of fact in my July judgment. Indeed at one point in oral argument he seemed to hint that it was slightly unfortunate that it was I who was hearing the summary judgment application, since I would have to clear my mind of the impression various witnesses made on me during the March trial. In post-hearing submissions, he, as I shall explain, somewhat drew back from this submission.

- [63] There are thus two matters for determination: firstly what, if any, estoppels arise out of my July judgment and secondly, what approach I should take to my findings at trial when I consider Endushantum's application for summary judgment.

Estoppel *per rem judicatam*; issue estoppel

- [64] I shall consider first estoppel *per rem judicatam*. Lord Sumption in **Virgin Atlantic Airways v Zodiac Seats UK Ltd** said:³⁴

“*Res judicata* is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is ‘cause of action estoppel’. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages.³⁵ Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant’s sole right as being a right upon the judgment... Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties.³⁶ ‘Issue estoppel’ was the expression devised to describe this principle by Higgins J in **Hoysted v Federal Commissioner of Taxation**³⁷ and adopted by Diplock LJ in **Thoday v Thoday**.³⁸ Fifth, there is the principle first formulated by Wigram V-C in **Henderson v**

³⁴ [2013] UKSC 49, [2014] 1 AC 160 at [17].

³⁵ *Conquer v Boot* [1928] 2 KB 336.

³⁶ *Duchess of Kingston's Case* (1776) 20 St Tr 355.

³⁷ (1921) 29 CLR 537 at p 561.”

³⁸ [1964] P 181 at pp 197-198.

Henderson,³⁹ which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.”

[65] The elements of an issue estoppel were stated by Dixon J in **Blair v Curran**,⁴⁰ a decision of the High Court of Australia,⁴¹ as follows:

“A judicial determination directly involving an issue of fact or of law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion... the distinction between *res judicata* and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is ... necessarily decided by the prior judgment, decree or order.

Nothing but what is legally indispensable to the conclusion is thus finally... precluded. In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right... Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negated. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order... the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

In the phraseology of Lord Shaw ‘a fact fundamental to the decision arrived at’ in the former proceedings and ‘the legal quality of the fact’ must be taken as finally and conclusively established. But matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more

³⁹ (1843) 3 Hare 100 at p 115.

⁴⁰ (1939) 62 CLR 464 at pp 531-533.

⁴¹ *Spens v Inland Revenue Commissioners* [1970] 1 WLR 1173 (Megarry J) is to the same effect in England.

than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation.

The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision or judgment, decree, or order or necessarily involved in it as its legal justification or foundation from matters which even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgment, decree or order.”

[66] **Spencer Bower & Handley on Res Judicata** comments on this as follows:⁴²

“Two matters emerge from this statement which merit further mention. The first is the importance of the formal order of the court. An issue estoppel is limited to ‘a state of fact or law which is necessarily decided by the prior judgment, decree or order’. The second is that the issue estoppel created by a dismissal is limited to ‘the actual ground upon which the existence of the right was negated’.”

[67] Of significance, however, are the observations of the learned editors of **Phipson on Evidence**.⁴³

“The lines between the traditional *res judicata* estoppels, the wider (or extended) doctrine, and these related forms of abuse of process are often indistinct, and, in practice, it is not always necessary to identify with any clarity which doctrine is being invoked. It is common to find cases being argued, and almost as often decided, on the basis that if one doctrine does not apply then another certainly should. Indeed because well-established forms of abuse of process will in many situations prevent relitigation even where the conditions for invoking a traditional *res judicata* estoppel are not satisfied it is difficult to deny that some of the old learning about the technical conditions is fast becoming redundant.”

[68] Mr. Lowe QC submitted at para [106] of his skeleton that the following matters were the subject of an issue estoppel:

⁴² 5th Ed (2019) at para 8-02.

⁴³ 20th Ed (2021) at para 40-03

“(a) ...[I]ssues about the knowledge, motive and honesty of Lunan and [Mrs.] Wei in the Linyi proceedings were fundamental to the claim for recognition.
(b) The issue of [Mrs.] Wei’s knowledge and honesty in relation to the Linyi proceedings and the Banyan transaction was fundamental to the claim made by Ms. Zhao.
(c) [Mrs.] Wei’s knowledge of the ultimate ownership of the PRC shares was fundamental to the breach of trust claim against her.
(d) The knowledge of Ms. Zhao’s rights was the reason why the dishonest collusive judgment was obtained and was therefore a fundamental issue.”

[69] Mr. Rubin QC in his skeleton at paras [94] and [96] claimed the following as a matter determined by issue estoppel:

“The Hong Kong Companies hold the PRC Shares under nominee agreements for Lunan. In relation to the PRC Shares such nominee agreements have been held already [in the July judgment] to be invalid as a matter of PRC law. So the Hong Kong Companies hold those shares beneficially... [E]ven if Endushantum were entitled to summary judgment it would not be entitled to an order that Lunan procure the transfer of the PRC Shares as Lunan has no power to enforce that under an unlawful nominee agreement.”

[70] In the current case, the substantive parts of the order which I made on 27th July 2021 following the handing down of the July judgment comprised: firstly a declaration that Ms. Zhao was the sole legal and beneficial owner of the Endushantum shares; secondly a direction that the register of members of Endushantum be rectified to reflect the declaration; thirdly an order for an account against Jade Value, Zhongzhi, Mrs. Wei and Hengde (but not against Lunan); and fourthly an order dismissing Lunan’s claim for recognition of the Linyi Court judgment.

[71] This fourth element results in a cause of action estoppel (Lord Sumption’s case 1) to the effect that the Linyi Court judgment is not enforceable. It also in my judgment results in an issue estoppel (Lord Sumption’s case 4) to the effect that the Linyi Court judgment was obtained by collusion between Endushantum and Lunan. That finding of collusion was, as Dixon J formulated it, “a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself.” The non-enforceability of the Linyi

judgment was based solely on the existence of collusion. That conclusion could be and is being appealed.

[72] However, a finding of collusion in pursuing litigation does not *necessarily* indicate dishonesty in relation to the underlying claims which are the subject matter of the litigation. It is possible, at least as a matter of logic, for the parties to the litigation to have a belief that the claims in respect of which the collusive judgment is given were valid. As a matter of fact, of course, it may be unlikely that the parties did have such a belief. Why litigate collusively if there is a genuine claim, which can be litigated non-collusively? However, the theoretical possibility is sufficient in my judgment to mean there can be no “necessity” in the **Blair v Curran** sense.

[73] As to the other three substantive matters decided, the determinations themselves obviously give rise to a cause of action estoppel. However, determining what findings of fact were “necessary” to those determinations is more difficult. This is because the case advanced at trial by Ms. Zhao and Kunlun BVI was put in three separate ways: (i) the burden of proof, (ii) the facts as to entrustment of the shares and (iii) the issues of Chinese law. Lunan lost on all three. In order to satisfy the “necessity” test in establishing an issue estoppel in relation to a discrete matter, there must be a fact which was necessary and formed part of the groundwork of each of three ways in which the case was put. A fact only relevant to one basis is not capable of giving rise to an issue estoppel. The reason is that the party losing on that issue would not be capable of appealing against that finding on its own. “[I]f he could not have appealed from it (because it did not affect the order made) then it is only an incidental matter, not essential to the decision, and he is not bound.”⁴⁴

[74] In my judgment, a finding as to Mrs. Wei’s knowledge of the ultimate beneficial ownership of the PRC shares was not “necessary” (in the technical sense) to my holding that Endushantum’s shares were held for the benefit of Ms. Zhao. Accordingly Mr. Lowe’s (c) does not give rise to an issue estoppel. It follows from this and my reasoning in the previous two paragraphs that (a), (b) and (d) do not give rise to the claimed issue estoppels either.

⁴⁴ Penn-Texas Corporation v Murat Anstalt (No 2) [1964] 2 QB 647 (Lord Denning MR) at p 660. See most recently Neurim Pharmaceuticals (1991) Ltd v Generics (UK) Ltd (t/a Viatris) [2022] EWHC 109 (Pat) (Meade J) at [150].

[75] Turning to Mr. Rubin's claim of issue estoppel, I remind myself of what I said in my July judgment about the share entrustment agreement of 15th March 2001:

"[180] Article 149 of the **Company Law 1993** provides:

'A company may not purchase its own shares, except in the case of share cancellation for the purpose of reducing the company's capital, or in the case of merger with another company holding shares of the company. Upon repurchase of its shares pursuant to the previous paragraph, the company shall cancel such shares within 10 days, and carry out amendment registration in accordance with the relevant national statutes or administrative regulations, and shall make a public announcement. The company may not accept its own shares as the collateral under a security arrangement.'

It was replaced in similar terms by article 142 of the **Company Law 2005**.

...
[198] In my judgment, the share entrustment agreement was unlawful, because it breached article 149 of the **Company Law 1999**."

[76] That holding cannot in my judgment be applied to the nominee arrangements under which Zhang Guimin holds the shares in Berpu and Provision as nominee for Lunan. Firstly, in the passage cited I was not making a general *ex cathedra* statement that all share entrustment agreements in favour of a company of its own shares are void in PRC law. That would have been absurd. I only had expert evidence on the validity of the 2001 share entrustment agreement and could not possibly speak generally about this area of Chinese law. The circumstances of each entrustment would need to have been examined. Secondly, I was making a determination under the 1993 Law. Although I noted that the same provision applied under the 2005 law, that finding was not necessary to my determination in para [198], accordingly no issue estoppel can arise. Even if (which is not the case) my observation on the 2005 law was binding under the doctrine of issue estoppel, there is no evidence that that remained the relevant law in February 2021 when the nominee arrangement was made in respect of the PRC shares held by Berpu and Provision.

[77] Thirdly (and most importantly, since it goes to the substantive merits), Article 149 and its successors are concerned with capital retention by companies. The issue between the experts at trial was whether the prohibition on companies buying their own shares could be circumvented by placing the shares in the hands of a nominee. I held it could not be. The

current acquisition of the PRC shares by Berpu and Provision was in effect a gift from Endushantum. No money was paid for the shares themselves. There can be no objection to a company acquiring its own shares without paying for them: no share capital is lost to the company.

- [78] Although this is to jump ahead, this issue on the summary judgment application can be determined now. There is no dispute that there were nominee arrangements between Lunan on the one hand and Berpu and Provision on the other whereby Zhang Guimin held the shares in Berpu and Provision as nominee for Lunan. There is (apart from the passage in my July judgment already cited) no evidence of Chinese law suggesting any legal difficulty in such a nominee arrangement. Yang Wantao does not suggest any such problem. In these circumstances I find that the nominee agreements in respect of the PRCs share were not and are not prohibited by PRC law. To suggest otherwise is fanciful.

Conclusion as to issue estoppel

- [79] Accordingly, in my judgment there are no issue estoppels on which either side can rely. The sole exception is my finding that Linyi judgment was collusive.

Approach to the evidence at trial and to the findings in the July judgment

- [80] I turn then to the approach I should take, when considering the application for summary judgment on the ancillary claim, to the evidence given at trial and the findings I made in my July judgment. As I have noted, Mr. Rubin QC's initial submission, as expanded in oral argument, was that under the rule in **Hollington v F. Hewthorn and Co Ltd**⁴⁵ I should take no notice of my earlier view of witnesses when considering the summary judgment. There is no doubt that in separate proceedings between different parties or between one party to the current proceedings and a stranger, the determination of the Court in one action is not admissible in the other. As Christopher Clarke LJ held in **Rogers v Hoyle**,⁴⁶

"39. ...The trial judge must decide the case for himself on the evidence that he receives and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and

⁴⁵ [1943] KB 587.

⁴⁶ [2014] EWCA Civ 257, [2015] QB 265. See also *Calyon v Michailaidis* [2009] UKPC 34, 2007-09 Gib LR 321.

however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is therefore, as a matter of law, irrelevant and not one to which he ought to have regard.”

[81] In the current case, I have held above that the ancillary claim is part of the action in which I gave the July judgment. It is not a separate action. It is between the same parties. In these circumstances, the rule in **Hollington v Hewthorne** does not in my judgment apply. In modern litigation it frequently happens that issues in cases are determined in stages. Sometimes a preliminary issue is ordered to be tried. Sometimes the trial of liability and quantum is split. In such cases, the evidence and findings in the earlier proceedings are admissible in the subsequent stages of the proceedings.

[82] On the last day of submissions on the current applications, Peel J, sitting in the Family Court in England, handed down judgment in **Bailey v Bailey**.⁴⁷ The judgment was published the following week and I invited counsel to make written submissions, which they did. The case concerned an application to commit the husband (“H”) for contempt for breaching various orders made in divorce proceedings. The husband challenged the admissibility of the judgment given by His Honour Judge Gibbons in the substantive divorce proceedings. Peel J held:

“In my judgment, the submission on behalf of H that the judgment in the financial remedy proceedings is not admissible in the subsequent committal proceedings before me is not well founded:

i) It is, it has to be said, a startling notion that the very judgment which gives rise to the order from which springs a committal application cannot be admitted in evidence. How else is a court to make sense of the order which has been made?

ii) Logically, on H’s case, no judgment in a final hearing conducted according to the civil standard of proof can ever be referred to within subsequent committal proceedings. Thus, in a family context, a judge hearing a contempt application would not be permitted to take account of, or refer to, or in any way rely upon, findings made at a substantive trial of financial remedy, or public law, or private law

⁴⁷ [2022] EWFC 5.

proceedings, or indeed any other part of the family jurisdiction. Further, H's submission that 'findings of fact by earlier tribunals are inadmissible in subsequent civil proceedings because they constitute opinion evidence' means that it would never be open to the court to be referred to the prior judgment upon a subsequent enforcement application of whatever nature. Moreover, following the logic through, a substantive judgment including findings as to, for example, periodical payments, could not be before the court upon a variation application under section 31 of the **Matrimonial Causes Act 1973** (as amended).⁴⁸ All of this seems to me to be extremely doubtful.

iii) Counsel for H were not able to point me to a single authority where a substantive judgment was ruled inadmissible in a subsequent committal application made in respect of the order springing from that very same judgment, whether in family proceedings or elsewhere in the civil jurisdiction. My personal experience (and I believe reflected in published judgments on committal in the Family Court or Family Division) is entirely to the contrary...

iv) The rule can be encapsulated in one sentence. Goddard LJ said at pp 596-597 of **Hollington v Hewthorn** that '[a] judgment obtained by A against B ought not to be evidence against C'. It concerns different parties to different proceedings. As His Honour Judge Matthews said in **Crypto**⁴⁹ it concerns admissibility 'between different parties'. And **Phipson**⁵⁰ describes the rule as applicable to issues between strangers, or between a party and a stranger.

v) So far as I can tell, and consistent with these propositions, the rule in **Hollington v Hewthorn** has been applied to exclude previous judgments only in cases of separate, distinct proceedings and/or involving different parties. Even then, as both **Hoyle v Rogers** and **JSC BTA Bank v Ablyazov**⁵¹ demonstrate, the earlier decision may be admitted (or, perhaps more accurately, not excluded) if fairness so requires. The decision in **Hollington v Hewthorn** itself prevented a criminal conviction for careless driving being admitted in civil proceedings brought by those injured in the collision. These were two, separate sets of proceedings, with different parties...

vi) By contrast, the committal applications before me are part of the same set of proceedings, namely enforcement referable to the financial remedy claims, and they are between the same parties.

vii) I conclude that **Hollington v Hewthorn** is *not* authority for the proposition that the judgment in earlier proceedings between the same parties cannot be admitted in evidence for the purpose of a contempt application arising out of the earlier judgment, and order made thereon.

⁴⁸ 1973 c. 18.

⁴⁹ *Crypto Open Patent Alliance v Wright* [2021] EWHC 3440 (Ch).

⁵⁰ *Phipson on Evidence* (20th Ed, 2021) at 43-77.

⁵¹ [2017] EWHC 2906 (Comm).

viii) The foundation of the rule is the fairness of the subsequent trial.

ix) Evidence presented in the earlier proceedings, and the contents of the judgment from the earlier proceedings, are, in my judgment, admissible in subsequent committal proceedings flowing from the earlier proceedings, and between the same parties.

x) The weight to be attached to the earlier proceedings, and judgment, will be a matter for the judge conducting the committal proceedings.

xi) None of the above derogates from long established principle that the applicant must prove the alleged contempt of court to the criminal standard.

I therefore propose to take into account the judgment of [His Honour Judge] Gibbons to the extent that fairness requires, whilst at all times bearing in mind, at the risk of repetition, that the onus of proof lies on W, and the criminal standard of proof is applicable.”

[83] I respectfully agree. The evidence at trial in March and the findings in my judgment in July are in my judgment admissible.

[84] This does not, however, end the matter. I need to consider what approach I should take when the weighing those matters. It is convenient to take first the straightforward situation of a split trial. Suppose the judge on the initial leg of the trial takes a favourable view of one witness and an unfavourable view of another witness. On the second leg, the judge (whether or not he or she is the same as on the first leg) is not bound to take the same view. To determine otherwise would in my judgment be a significant error of law. The fact that a witness lies on one matter does not mean as a matter of law that they are lying on a different matter. A witness who lies on the first leg is not necessarily lying on the second leg or *vice versa*. However, when assessing credibility and whether the witness is also lying on the other matter, the judge is entitled to take into account the witness's lies at the earlier hearing.

[85] Likewise in relation to the findings after the earlier hearing, unless the strict rules governing estoppels *per rem judicatam* apply, the judge is obliged to keep the earlier findings under review. If fresh evidence is adduced on an issue decided earlier, the judge must assess the new evidence. Nonetheless, the judge's starting point will as a matter of common sense be

the earlier finding. The party seeking to overturn the earlier finding will need to justify that overturning. The judge can legitimately ask why the fresh evidence — now said to be important — was not adduced at the earlier hearing. There may be good reasons for that failure; the fresh evidence may be convincing; a completely different view of the case may be appropriate. As with all determinations of fact, the judge has to take an holistic view of all relevant matters and determine the questions of fact accordingly.

[86] In determining issues of fact, the final question for determination will be different in different types of cases. In a criminal case tried by judge alone, the judge will have to determine whether the prosecution has proved the case beyond reasonable doubt, so that the Court is sure of the defendant's guilt. In a civil case, the judge has to determine the facts on the balance of probabilities. On a summary judgment application, the judge has to decide whether the defendant has a realistic, as opposed to a fanciful, prospect of success. In each case, however, a judge has always to stand back and take an overall view of the evidence and other relevant matters.

[87] This has an impact on the correct approach to evidence in a summary judgment application. In most such applications, the Court will have heard no live evidence. The applications are usually made at a very much earlier stage in the proceedings than in the current case, sometimes even before a defence has been served. The only evidence before the Court will usually be by affidavits. Evidence is often hearsay, given on the basis of information and belief, due to the urgency of serving evidence in opposition to the application. There is a low threshold to be crossed by a defendant to a summary judgment application. However, the Court on such an application still evaluates the evidence adduced by each side. It is perfectly open to the Court to reject evidence which is far-fetched or unbelievable and to grant summary judgment.

[88] Where, as here, the Court has heard live evidence and make determinations, the formal position remains the same. However, the Court when determining whether the respondent has a realistic prospect of success has more materials available to it. The Court will not adopt a "sterile approach", in Pereira CJ's words, when evaluating the evidence of fact. Thus, for example, where the Court has heard oral testimony, the Court is (if it is appropriate)

entitled to attach less weight to hearsay evidence adduced in opposition to the summary judgment application. If a party is seeking to overturn a finding which the Court has already made, the Court may expect a more detailed case as to why the party has a realistic prospect of overturning the Court's earlier findings. If a witness, on whom reliance is now placed, did not give evidence earlier, the Court can perfectly properly consider the reason for this. None of these observations comprise rules of law; they are merely matters of common sense. They only show how, in a case such as the present, the Court, when it decides whether a realistic prospect of defending the case is demonstrated, puts more elements into the mix than in the more common-or-garden summary judgment application, where no oral evidence has been given. The Court does not take a blinkered approach.

The evidence in answer to the summary judgment application

[89] In answer to the summary judgment application Lunan has filed an affirmation of Yang Wantao and a witness statement of Tun Wing Jonathan Lee. Yang Wantao's evidence of Chinese law I discussed above. Mr. Lee is Appleby's legal manager in their Hong Kong office. Almost all his evidence is based on information knowledge and belief derived from what Zhang Guimin had told him.

[90] Mr. Lee draws attention to a statement dated 18th February 2021 made by Zhang Guimin, which was included in the supplemental disclosure given by Lunan. He says that he has had discussions with Zhang Guimin, but gives no details of when these discussions took place or why he (Mr. Lee) was giving this evidence rather than Zhang Guimin himself. He then says:

"7. In relation to the allegations made in the Ancillary Claim, Mr. Zhang has told me that Lunan commenced the Linyi proceedings in September 2019 in the belief that it was advancing an honest and genuine claim. Mr. Zhang did not believe or suspect that Ms. Sharon Wei was acting otherwise than honestly or that she was (as is alleged by the Ancillary Claimant) breaching any duties to Endushantum.

8. Mr. Zhang has confirmed that he was not involved in Endushantum's decision-making process in its response to Lunan's Linyi claim, and Lunan's management and legal team also had no such rôle (at least in so far as he is aware).

9. I note that [Wang Buqiang in his witness statement for trial] stated that after Mr. Zhang became the Chairman of Lunan, in around 2014 or 2015, Wang Buqiang told

Mr. Zhang about the disputed Shares. I have asked Mr. Zhang about this and his recollection is that Wang Buqiang only mentioned it briefly at that time to raise the issue.

10. Mr. Zhang has told me that the investigations that Mr. Zhang carried out in 2017 confirmed his understanding that Lunan was entitled to the Luan Shares (including in particular the discovery of the share nominee agreement entered into between Lunan and Kunlun US).

[91] This all amounts to little more than bald assertion. Mr. Zhang says that Lunan “was advancing an honest and genuine claim” in Linyi. Yet, Lunan had been litigating in substance the same issue since 2018 in this Territory. Lunan knew full well that Ms. Zhao was making a case to ownership of Endushantum and the PRC shares. Why did Mr. Zhang then think it was “honest and genuine” to issue proceedings in Linyi behind Ms. Zhao’s back? If any credence is to be attached to what he says about this, then he needs to give some explanation of this.

[92] Further, he does not address the lamentable disclosure failings on Lunan’s part. He was, at least latterly, in ultimate control of the litigation on Lunan’s part. There seems to have been a deliberate decision on Lunan’s part not to comply timeously with its disclosure obligations. Zhang Guimin gives no explanation. That in my judgment affects Zhang Guimin’s credibility.

[93] He says that neither he nor any members of management were “involved in Endushantum’s decision-making”, but gives no background information whatsoever about how the litigation was conducted on each side. What, for example, did he understand about Wang Jianping’s rôle? Why were Appleby not consulted? There must have been internal discussion at Lunan about whether to bring proceedings in Linyi, when litigation was afoot in this Territory. Again, however, there is a complete blank. I made detailed findings about the collusive nature of the Linyi proceedings. If Lunan was going to persuade me to draw different inferences from those findings, it behooved it to provide detailed evidence as to why I erred.

[94] Mr. Lee says that Zhang Guimin told him that “in around 2014 or 2015, Wang Buqiang told Mr. Zhang about the disputed Shares.” Well, what did Wang Buqiang tell him? The impression given is that this was a mere trivial comment on Wang Buqiang’s part, but this in

my judgment is not believable. The PRC shares were either owned beneficially by Ms. Zhao or by Lunan itself. Zhang Guimin simply *must* have been interested in that question. It was potentially critical to the control of the company.

- [95] Zhang Guimin says that in 2017 he carried out investigations into the PRC shares and made “discovery of the share nominee agreement entered into between Lunan and Kunlun US”. He does not comment on my finding of fact at para [73] of my July judgment that:

“On 27th February 2017, Ms. Zhao gave an instruction to Lunan stating that she was the only legitimate owner of Endushantum and Endushantum’s property. She said: ‘I hereby entrust my mother to manage the dividend collection on my behalf. I no longer empower Sharon Wei to do so.’ Zhang Guimin sent this to the Finance Department with the instruction: ‘Please handle accordingly.’”

The discovery of the share entrustment agreement (if it were, contrary to what I have held, material) would surely have led him to countermand this direction to the Finance Department. Yet he says nothing about this at all.

- [96] Nor does he give any account of what advice he received in relation to the 2001 share entrustment agreement or what discussions there were about it (and between whom). As will be readily apparent from my July judgment, the legal effect in Chinese law of the share entrustment agreement is anything but straightforward. It is not credible that Zhang Guimin, unaided, would be able to reach a conclusion as to the ultimate beneficial ownership of those shares. Zhang Guimin fails to put forward any coherent narrative of how his knowledge of Ms. Zhao’s claim to the PRC shares developed.

- [97] These substantive points on their own mean in my judgment that little weight can be attached to Mr. Lee’s affidavit. There is, however, the further point that Zhang Guimin has clearly decided not to give direct evidence himself. I can take judicial notice that blight of Covid is thankfully largely eradicated in the People’s Republic, so there would have been no difficulty his making an affidavit or affirmation before a notary. Even if I were not entitled to do so, there is no evidence of any difficulties in so doing. It is true that there was only a short period between the service of the summary judgment application and the hearing before me, but

Mr. Rubin QC made no application for an adjournment, so that he might put better evidence in.

[98] One point in considering the weight to be attached to hearsay evidence is that the maker of the hearsay statement cannot be cross-examined. Another is that, if the maker of the statement gives evidence by affidavit or affirmation, then the conscience of the maker is bound by the averment of the truth of that to which the maker has deposed. Yet another is that someone who lies on affidavit or affirmation is liable to prosecution for perjury. There is of course little likelihood that a deponent in China will be subject to prosecution for perjury in this Territory. However, the position may be different in China itself. It is possible that someone who lies in an affidavit or affirmation made in China faces a non-negligible prospect of prosecution for perjury in the People's Republic. In any event, as I have noted, no explanation for the failure to give evidence directly has been forthcoming.

[99] Taking all these points together, I can attach virtually no weight to Zhang Guimin's evidence as given *via* Mr. Lee.

The law of knowing receipt

[100] The law on knowing receipt of trust assets and how it differs from dishonestly assisting a breach of trust is conveniently summarised by Fancourt J in **Byers v Samba Financial Group**,⁵² on the trial of a separate but related claim following the UK Supreme Court decision in **Akers v Samba Financial Group**:

“109. Dishonest assistance is truly fault-based — the equity arises from the dishonesty of the defendant in assisting a trustee to commit a breach of trust — but knowing receipt unconnected with dishonesty is different, at least at the moment of receipt. The recipient is not liable in such a claim for wrongly agreeing to receive the property. Although Lord Sumption referred to the receipt as being ‘wrongful’ from the outset, that is in the sense that the transfer is a breach of trust and the recipient has no authority under the trust to receive the property. The principal duty of a knowing recipient is to deal with the property once received *as if* he were a trustee of it and to restore it to the trust, as Lord Sumption explained. It is unconscionable for him to do otherwise.

⁵² [2021] EWHC 60 (Ch), affirmed by the Court of Appeal [2022] EWCA Civ 43 with summary at [79].

110. The knowing recipient's liability depends on his knowledge that the property he receives is trust property and is to be dealt with in that way. His receipt is not wrongful in the sense that he has acted dishonestly or culpably (unless he has also dishonestly assisted in the breach of trust), but his liability to deal with the property as if he were a trustee arises at the moment of receipt because of his knowledge that the property is trust property. If the transferee then deals with the property otherwise than as a trustee should (whether by failing to restore it to the trust or by dealing with it as his own) he is at fault and will be liable for the consequences. In those circumstances, a personal claim against the transferee can properly be said to be fault-based, but the reason for liability is that the transferee has knowingly dealt with (or retained) property that belongs to the trust inconsistently with his duty. If the property is not trust property, there cannot be liability of that kind.

111. In my judgment, the issue of principle — whether a knowing receipt claim that does not allege dishonesty requires the claimant to have a continuing proprietary base for it — is decided (in this court at least) by Millett J in the **Macmillan v Bishopsgate** case,⁵³ which decision was approved by the Court of Appeal in that case. The claimant must be able to assert that the defendant received his property and was obliged to deal with it as if he were a trustee of it. As Millett J said in terms, that is a matter of the English law of knowing receipt, not a matter of English conflict of laws. If the recipient was from the outset entitled to deal with the property as his own, the claim cannot succeed.

[101] The elements of a knowing receipt claim which a claimant has to prove are set out in **Lewin on Trusts**,⁵⁴ as follows:

- “(1) There is property subject to a trust.
- (2) The property is transferred.
- (3) The transfer is in breach of trust.
- (4) The property (or its traceable proceeds) is received by the defendant.
- (5) The receipt is for the defendant's own benefit.
- (6) The defendant receives the property with knowledge that the property is trust property and has been transferred in breach of trust, or if not a *bona fide* purchaser of a legal estate without notice, retains the property, or deals with it inconsistently with the trust, after such knowledge.”

⁵³ *Macmillan Inc v Bishopsgate Investment Trust plc* (N.3) [1995] 1 WLR 978 (Millett J) and [1996] 1 WLR 978 (CA).

⁵⁴ 20th Ed (2020) at para 42-023, citing *El Ajou v Dollar Land Holdings Plc* [1994] 1 All E.R. 685 at p 700, where Hoffmann LJ specified three requirements. The three requirements were adopted in *Akindele* (see next footnote). Lewin notes that the six requirements (which the learned authors created by dividing some of Hoffmann LJ's three) were approved in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2010] EWHC 1653 (Ch) (Lewison J) at [48]; in *Lavarello v Jyske Bank (Gibraltar) Ltd*, unreported, May 17, 2017 (Jack J) at [15] (appeal allowed on other grounds, unreported, 15th January 2018); and in *First National Trustco (UK) Ltd v Page* (Joanna Smith QC) [2019] EWHC 1187 (Ch) at [280].

[102] Dealing with these elements in turn. As to (1), there can be no dispute now as between Ms. Zhao, Endushantum and Lunan that the shares in Endushantum were held on the trusts of the Zhao Trust. That is what I determined in my July judgment. Lunan's draft defence to the ancillary claim at para 3 admits the existence of the Zhao Trust and that Endushantum was held on the terms of that trust. The draft defence pleads in para 17(5) that "Endushantum was... holding the PRC Shares as Lunan's nominee or trustee." No particulars are given of this averment. In the light of my July judgment, this is an obviously bad plea. It does not meet the **Peterson Modeste** threshold.

[103] (2) is established both on the facts and by admission in the draft defence.

[104] As to (3), para 18 of the ancillary statement of claim avers that the transfer of the PRC shares was a breach of trust on the part of Mrs. Wei. The draft defence denies that Mrs. Wei acted in breach of trust and says:

"20. [Mrs.] Wei and (through her and Wang Jianping) Endushantum believed that Lunan as principal was entitled to the PRC Shares. She and Endushantum accordingly acted properly and honestly at all material times in recognising that entitlement. It would have been dishonest of her for Endushantum to have advanced before the Linyi City Court any case other than the one that they did, and wrong for them not to have transferred the shares.

21. Lunan at all times has believed that it was entitled to the PRC Shares and that the Linyi City Judgment and the Enforcement are valid, subsisting and properly obtained. It has not received any trust property or knowingly received any property to which it is not entitled."

Again this is obviously bad. What I said in [38] above in relation to Lunan applies *a fortiori* to Mrs. Wei. In the absence of any, or any convincing, evidence to the contrary, I conclude that the purpose of engaging in the collusive Linyi litigation was because of her awareness of the wrongfulness of her actions. These averments do not reach the **Peterson Modeste** threshold.

[105] As to (4) and (5), there is no doubt that the PRC shares were transferred to Berpu and Provision. Para 8 of Lunan's draft defence pleads that "Berpu and Provision were

incorporated for Zhang Guimin to hold the PRC Shares as nominee for Lunan under a contract governed by PRC law.” However, para 24 of the draft defence pleads that “Endushantum is estopped *per rem judicatam* by [my July judgment] from contending that Lunan as principal under a nominee agreement governed by PRC law has rights to enforce against Berpu and Provision a transfer of shares in Lunan itself to Endushantum.” I have already rejected this assertion of an estoppel. It does not reach the **Peterson Modeste** standard.

[106] Mr. Rubin QC raises an issue as to whether on the facts and as a matter of PRC law the transfers of the PRC shares to Berpu and Provision amount to a transfer to Lunan or for the benefit of Lunan. This is another way of putting his similar submission on issue estoppel and I reject it for the same reason. The nominee agreements in favour of Lunan are binding as between the parties to them. Lunan can direct the transfer of the PRC shares back to Endushantum. I so find, applying the **Peterson Modeste** standard.

[107] As regards the last element (6), the English Court of Appeal in **Bank of Credit and Commerce (International) Ltd v Akindele** held:⁵⁵

“All that is necessary is that the recipient’s state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt... [J]ust as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt.”

[108] Zhang Guimin knew of the proceedings in this Territory. It is fanciful to suppose that he was unaware that Ms. Zhao had an arguable case to ownership of Endushantum and the PRC shares. If Lunan’s claim to the PRC shares did not succeed, the transfer of the PRC shares to Berpu and Provision was liable to have been made by Mrs. Wei in breach of her obligations to Endushantum and Ms. Zhao. In my judgment, I can be satisfied to the summary judgment standard that he knew these facts. His knowledge stands to be imputed to Berpu and Provision. In those circumstances, the acquisition of the PRC shares by Berpu and Provision was not in good faith. Zhang Guimin’s state of knowledge in February 2021

⁵⁵ [2000] EWCA Civ 502, [2001] Ch 437 at [69] to [70].

was such as to make it unconscionable for him, Lunan, Berpu and Provision to deny the claims of Endushantum and Ms. Zhao.

- [109] Moreover, even if (contrary to my findings) Zhang Guimin's knowledge in February 2021 was insufficient to fix him and the three companies with knowledge, when he saw the July 2021 judgment, he, Lunan and the two Hong Kong companies were certainly fixed with full knowledge of the facts. Since none were purchasers for value without notice, that acquisition of knowledge in July 2021 was sufficient to bind their conscience.

Conclusion on the knowing receipt claim

- [110] I am satisfied to the **Peterson Modeste** standard that the six elements of a knowing receipt claim are made out. I find that the ancillary claim is well-founded. There are no good reasons for not granting summary judgment and I do so.

Dishonest assistance

- [111] I should add that Ms. Zhao and Endushantum may also have a viable claim for dishonest assistance with a breach of trust. However, this is not pleaded at present in the ancillary claim. I shall therefore not consider it further.

Stay of execution

- [112] I turn then to the question of a stay of execution pending appeal. At this point, I have to say I have doubts as to whether Zhang Guimin will honour any order of this Court. So far Lunan has demonstrated what Moses LJ memorably described⁵⁶ as a "jemenfichiste attitude" to its obligations to this Court, for example in relation to its disclosure obligations. However, it would be wrong not to give Zhang Guimin the opportunity to show that he will obey orders of this Court.

- [113] What I therefore propose, subject to the parties' submissions, is this:

- (a) The parties should agree by the time of the handing down of this judgment a draft consent order in the Hong Kong proceedings, providing for the execution of share transfer forms in respect of the PRC shares to Endushantum. The order in the

⁵⁶ In *Whitehead Mann Ltd v Cheverny Consulting Ltd* [2006] EWCA Civ 1303 at [99].

Hong Kong proceedings should attach drafts of the share transfer forms which will stand to be executed on behalf of Berpu and Provision. Terms will need to be included for the relaxation of the current freezing order to permit the transfer of the PRC shares to Endushantum.

- (b) Ms. Zhao and Endushantum should give an undertaking to this Court to hold the PRC shares to the order of this Court pending the final determination of the appeal currently pending to the Court of Appeal (including any further appeal to the Privy Council).
- (c) If Lunan wants additional protection in respect of that undertaking, then I would be willing to hear a submission that, pending final determination of the appeal, (i) Lunan should be entitled to appoint a director to the board of Endushantum and (ii) the Articles of Endushantum should be changed, to permit a transfer of any shares held by Endushantum only with the unanimous approval of the board.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar