

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM No: BVIHC (COM) 2020/0055 and 0056

**IN THE MATTER OF SUMMER FAME LIMITED (IN LIQUIDATION) AND HAODE
INVESTMENT INC. (IN LIQUIDATION)**

AND IN THE MATTER OF THE INSOLVENCY ACT 2003

BETWEEN:

**RUSSELL GRANT CRUMPLER, JEFFREY STOWER AND PATRICK COWLEY
(in their capacity as joint liquidators of
Summer Fame Limited (in Liquidation) and Haode Investment Inc. (in Liquidation))**
Applicants

-and-

(1) HAODE INVESTMENT INC. (IN LIQUIDATION)

(2) SUMMER FAME LIMITED (IN LIQUIDATION)

Respondents

AND BETWEEN:

(1) GS WEALTH I, LP

(2) GUANGSHI HARVEST LIMITED

(3) HAODE INTERNATIONAL LIMITED

(4) SUMMER FAME INTERNATIONAL LIMITED

Applicants

-and-

**RUSSELL GRANT CRUMPLER, JEFFREY STOWER AND PATRICK COWLEY
(in their capacity as joint liquidators of
Haode Investment Inc. (in Liquidation) and Summer Fame Limited (in Liquidation))**
Respondents

Appearances:

Mr. David Allison QC, with him Mr. Stuart Rau of Maples and Calder for the
Liquidators

Mr. Richard Fisher QC, with him Mr. Andrew Willins of Appleby for GS Wealth I LP
Mr. Edward Davies QC, with him Mr. Grant Carroll and Ms. Sarah Latham of Ogier
for Golden Planet Holdings Limited
Mr. Richard Hacker QC, with him Mr. Timothy de Swardt of Kobre & Kim for Summer
Fame International Ltd and Haode International Limited
Mr. Stephen Atherton QC, with him Mr. Bhavesh Patel of Travers Thorp Alberga for
Camel Humps Limited
Guangshi Harvest Limited did not appear and were not represented
Harneys held a watching brief for Luckin Coffee Inc.
Campbells held a watching brief for the provisional liquidators of Luckin Coffee Inc.

2021: December 16 and 17
2022: January 17

JUDGMENT

[1] **JACK, J [Ag.]:** In this judgment I shall use the following shorthand:

ADS: American Depositary Share;
BarCap: Barclays Bank plc;
Camel Humps: Camel Humps Limited, the vehicle used by Centurium as
the purchaser under the Centurium SPA;
Centurium: Centurium Capital, a well-known Chinese investor in private
equity;
The Centurium SPA or SPA: the securities purchase agreement dated 14th
August 2021 between the Companies (acting by their liquidators)
on the one hand and Camel Humps on the other, the subject of the
liquidators' sanction application;
CGIIC: China Guangshi International Investment Co Ltd, an affiliate of
China Everbright;
The Companies: Haode and Summer Fame;
Mr. Cowley: Patrick Cowley, one of the liquidators of the Companies;
Golden Planet: Golden Planet Holdings Limited, one of the current creditors
of the Companies;
GS Wealth: GS Wealth I, LP, one of the current creditors of the Companies;
GHL: Guangshi Harvest Ltd, formerly one of the creditors of the Companies;
Haode: Haode Investment Inc. (in Liquidation), incorporated in this
Territory, one of the Companies, currently in liquidation;
Haode International: Haode International Limited, the legal owner of all the
shares in Haode;
Mr. Liu: Jian Liu, the former chief operating officer of Luckin;

Mr. Lu: Charles Zhengyao Lu, the former chairman of the board of Luckin;
Luckin: Luckin Coffee Inc., a Cayman company with ownership of a chain of coffee shops in the PRC;
Mayer: Mayer Investments Fund LP (in Official Liquidation), a Cayman limited partnership, which held shares in Luckin;
PRC: the People's Republic of China;
Primus: Primus Investments Fund LP (in Official Liquidation), a Cayman limited partnership currently in liquidation, which holds shares in Luckin;
Ms. Qian: Jenny Zhiya Qian, the former chief executive officer of Luckin;
Summer Fame: Summer Fame Limited (in Liquidation), incorporated in this Territory, one of the Companies, currently in liquidation;
Summer Fame International: Summer Fame International Limited, the legal owner of all the shares in Summer Fame.

[2] There were listed before me for hearing on 16th and 17th December 2021 two applications in the liquidations of the Companies:

- (a) an application dated 15th September 2021 by the liquidators of the Companies for sanction, pursuant to section 186(5) of the **Insolvency Act 2003**,¹ of the Centurium SPA; and
- (b) an application dated 11th October 2021 pursued by GS Wealth, a creditor of the Companies, and by Haode International and Summer Fame International for termination of the liquidations of Haode and Summer Fame.

[3] The first application sought an order that:

“The Court sanctions the decision of the joint liquidators to cause [Haode] and [Summer Fame] to enter into a securities purchase agreement between Haode, Summer Fame, [Primus] and [Camel Humps] made as of 14 August 2021...”

Primus is a Cayman limited partnership in respect of which a similar sanction application is pending in the Grand Court.

¹ No 5 of 2003, Laws of the Territory of the Virgin Islands.

- [4] After hearing this first application, I indicated that I would grant the sanction and that I would adjourn the case for me to give reasons. These are those reasons. The second application was adjourned without being heard.

The underlying facts

- [5] The main asset of Haode and Summer Fame is a large shareholding in Luckin, a Cayman company which controls a large café business in the PRC. The background is set out uncontroversially in Mr. Cowley's affidavit of 24th August 2021. Luckin commenced operations in October 2017 and by the end of 2019 operated one of the largest coffeehouse businesses in China, with over 4,500 outlets in 53 cities. Luckin focused on growth and had not achieved profitability, nor paid any dividends. The company floated on the NASDAQ stock market in May 2019.
- [6] On 2nd April 2020, Luckin made a public announcement that it had appointed a "Special Committee" which had engaged independent counsel and forensic accountants to conduct an internal investigation into an apparent fraud. Luckin's financial books and records showed approximately RMB2.2 billion (or US\$300 million) of fabricated transactions. The financial statements for 2019 could no longer be relied upon.
- [7] Subsequently on 12th May 2020, Luckin dismissed Ms. Qian, its chief executive officer, and Mr. Liu, its chief operating officer. They both resigned as directors of Luckin. On 1st July 2020, the Special Committee found that Luckin's net revenue in 2019 was inflated by approximately RMB2.12 billion. The fabrications were made by employees who reported to Ms. Qian and Mr. Liu. As a result of the investigation, the board requested the resignation of Mr. Lu, the chairman of the board. He was removed as a director at an extraordinary general meeting of shareholders held on 5th July 2020.
- [8] Haode and Summer Fame are holders of shares in Luckin. Haode was ultimately beneficially owned by Mr. Lu and his family through a trust structure. Summer Fame was ultimately beneficially owned by Ms. Qian and her family, again through a trust

structure. (Ms. Lu Nan, Mr. Lu's daughter, and Ms. Qian state that the family trusts in each case were "collapsed on or around 26 August 2021" and that since that date they have been the shareholders of Haode International and Summer Fame International respectively. Nothing turns on this.) The immediate legal owners of the shares in Haode and Summer Fame are respectively Haode International and Summer Fame International.

- [9] The announcement of the fraud resulted in Luckin's share price (technically the price of ADSs, as traded on the NASDAQ) crashing from US\$26 to US\$6.40 and later in May 2020 to a low of US\$1.39. (It had been over US\$50 in January 2020.) The drop in the share price caused Haode to default on a US\$533 million loan facility entered into on 10th September 2019 between Haode as borrower and Credit Suisse AG, Singapore Branch as agent for a consortium of banks consisting of latterly China Everbright, CICC, Morgan Stanley, BarCap and Goldman Sachs. Liability for the loan to Haode was assumed on a joint and several basis by Summer Fame and two Cayman limited partnerships, Primus and Mayer. Primus is wholly owned by Haode. Mayer is beneficially owned by Mr. Lu's sister.
- [10] The Credit Suisse loan was secured by various Luckin shares held by Haode, Summer Fame, Primus and Mayer. These were sold by Credit Suisse but, because of the collapse in the price of the shares, there was still a substantial deficit. On 16th June 2020, Credit Suisse obtained liquidation orders from the Grand Court in Cayman in respect of Primus and Mayer. On 9th July 2020 this Court appointed liquidators over Haode and Summer Fame. The orders appointing the liquidators gives them a power to sell or otherwise dispose of each company's property. Notwithstanding that power, it is always open to liquidators to seek the Court's sanction, particularly of momentous decisions. I shall return to the legal principles involved shortly.
- [11] On 15th July 2020, shortly after Mr. Lu's removal as chairman, Luckin applied to the Grand Court of the Cayman Islands for the appointment of joint provisional liquidators over itself on a "light touch" basis with a view to exploring the possibility

of restructuring Luckin's indebtedness. The appointment permitted the continued trading of Luckin shares and the registration of share transfers.

[12] After the sale of the pledged Luckin shares, the total owed under the loan facility administered by Credit Suisse was US\$359,478,668.68 with interest of about US\$90,000 accruing per day. In addition, Mr. Lu had lent just over a million dollars to Haode and Summer Fame to fund opposition to the liquidation applications. In the event that the termination applications in relation to Haode and Summer Fame succeed, Mr. Lu has agreed to waive his claims to repayment of these monies. In addition, class action proceedings were commenced in New York. No proof has been lodged in the liquidations by the class action plaintiffs and the cut-off period for lodging proofs has now passed. For present purposes, the only relevant debts now owed by Haode and Summer Fame are therefore the monies originally owed to Credit Suisse and the consortium banks.

[13] As to assets, Haode owns just over 208 million, Summer Fame just over 44 million and Primus just over 131 million shares in Luckin. In addition Haode and Primus have some other investments. The Luckin shares (until the events to which I shall come) together represented 18.9 per cent of the issued share capital but only 11.5 per cent of the voting rights. (This followed a reclassification of the shares in July 2020. They ceased to be Class B ordinary shares with a right to 56.6 per cent of the votes.)

[14] So far as concerns the liquidators' attempts to realise the value of the remaining shares, trading in the ADS's listed on the NASDAQ were suspended after the fraud was discovered. Trading continued on the Over-the-Counter market ("OTC"). In order for the liquidators to sell the shares on the OTC, they had first to be converted into ADS's. This could only be done through Bank of New York Mellon, but this bank was refusing to carry out such conversions until various regulatory requirements were satisfied. The amount of trading on the OTC was in any event small, on average 2.4 million ADS's per day, except for one day, 5th February 2021,

when 62 million ADS's were traded. That trade resulted in a 45 per cent slump in the price.

[15] The liquidators concluded, in my judgment reasonably, that the Haode and Summer Fame shares could not be sold publicly. They therefore investigated the possibility of a private sale. In July 2020, the liquidators appointed BarCap to test the market for the purchase of the shares. BarCap identified a large number of potentially interested parties. They held discussions with over twenty-six potential investors. The difficulty was that almost all buyers required some form of due diligence to be carried out. Without restated 2019 financial statements this was in practice impossible.

[16] The liquidators could not through the last quarter of 2020 and the first quarter of 2021 make progress in effecting a private sale, although they stayed in contact with Luckin. On 16th March 2021 Luckin announced it had entered a restructuring agreement with most of the US\$460 million note holders of Luckin. On 15th April 2021 Luckin made two public announcements. The first was that a new firm of accountants would be preparing the 2019 accounts. This was a concern to the liquidators, because it was unclear how long the new firm would need to produce the 2019 accounts. The second was that Centurium had invested US\$240 million in senior preferred shares in Luckin at a price of US\$0.8125 per share, the equivalent of US\$6.50 per ADS.

The lead-up to the Centurium SPA

[17] The liquidators' position in the first half of 2021 was that the public markets remained closed to them and a private sale to an unrelated party would not be possible due to the difficulty in providing any due diligence. The liquidators therefore explored with Centurium the possibility of a share sale to it. Centurium is a well-known private equity investment firm based in China. Prior to its 15th April purchase of further shares it owned over 144 million shares in Luckin. Centurium indicated that it did not have any substantial requirements for due diligence. Discussions continued on the basis that Centurium would have an exclusivity period and that a baseline of no

more than US\$6.50 per ADS would be an indicative price. Para 52 of Mr. Cowley's first affidavit gives, what in my judgment are, convincing reasons for pursuing this approach.

[18] On 30th June 2021 Luckin released its 2019 financial results. This caused the liquidators to reconsider their negotiations with Centurium. There were still significant risks associated with seeking a buyer other than Centurium. For example, the 2019 accounts had no less than 38 pages of "health warnings" about various financial uncertainties. The liquidators decided to continue exclusive negotiations with Centurium. On 30th June 2021 Centurium confirmed its intention to purchase at an indicative price of US\$6.25 per ADS. However, the liquidators were aware that the exclusivity provision did not prevent unsolicited approaches by would-be buyers. The liquidators also commenced discussions with the lenders. In fact only one non-solicited approach was made by the "first unsolicited bidder" (in fact Golden Planet) on 18th May 2021. This did not progress at the time.

[19] Among the lenders there was a divergence of views. In particular, China Everbright (which had purchased through GHL its interests in the loans in late 2020 and early 2021 from Credit Suisse AG and Haitong International Investment Solutions Limited) and CICC wanted to make 100 per cent recovery of their loans. They considered public sentiment in the PRC for Luckin was positive. US\$6.25 per ADS was, they thought, too low.

[20] On 21st July 2021 China Everbright informed the liquidators that they were negotiating with the other lenders to acquire all of the other debts. They were also negotiating with Mr. Lu to buy all the shares held by the companies. On 22nd July 2021 Centurium made a revised offer at US\$7.25 per ADS. This would completely pay off the lenders. On 24th July 2021 the first unsolicited bidder made an indicative offer of US\$7 to \$8 per ADS without any onerous due diligence. On 27th July 2021 there was a conference call with the lenders. Morgan Stanley, BarCap and Goldman Sachs (representing just under half of the loans) were content that the negotiations at US\$7.25 continue. China Everbright and CICC (representing just

over half) were not. The same day a second unsolicited bidder came forward to offer an indicative price of US\$7.50 to \$8.50 without onerous due diligence.

- [21] The liquidators decided that a three-way bidding process was the best course. Centurium and the first and second unsolicited bidders would be invited to submit their best offers by 6th August 2021. Non-disclosure agreements were made with the first and second unsolicited bidders. The bidders made offers of US\$8.50, \$8.00 and \$8.25 respectively. These were sufficient to discharge the whole of the indebtedness. However, China Everbright said that they opposed the sale because they, as Mr. Cowley records it, intended to “equitise the company”. On 11th August 2021, there was a meeting with China Everbright and a representative of the New World Group, a listed Hong Kong investment company, but Mr. Cowley’s impression was that the equitisation proposal was not fully developed.
- [22] On 12th August 2021 CGIIC, an affiliate of China Everbright, wrote to the lenders with copy to the liquidators. They proposed that CGIIC and another investor should purchase all the loans, leaving the companies solvent. The liquidations could then be terminated. CGIIC wanted a term to be inserted in any sale to a buyer allowing a “better offer” to take precedence. Subsequently, Mr. Cowley spoke to CICC, Morgan Stanley, BarCap and Goldman Sachs, all of whom rejected the CGIIC proposal and wanted the liquidators to continue with the sale process to one of the bidders.
- [23] The liquidators considered the three bids and various factors, such as counterparty debt risk. For the reasons set out in para 98 of Mr. Cowley’s first affidavit, they concluded that the Centurium offer was the best. I do not understand the choice of the Centurium offer instead of the other two bids to be challenged. Because of a possible tax issue, the liquidators were subsequently able to persuade Centurium to raise its offer price to US\$8.7631 per ADS.
- [24] On 13th August 2021 at 9.45pm, as the negotiations with Centurium were being finalized, Mr. Lu’s Hong Kong lawyers wrote to Latham & Watkins, the lenders’ Hong

Kong lawyers, (with copy to the liquidators) reiterating the CGIIC proposal and saying:

“[I]t would be irrational and unreasonable if the Liquidators are to conduct a fire sale of the Luckin shares owned by Haode, Primus and Summer Fame (as controlled by the liquidators now). Any such sale now will inevitably be conducted at prices much lower than the fair value of those shares, and if that is to happen we are instructed that our client will hold your clients (and the Liquidators) liable for any loss and damage that he may suffer.”

[25] The liquidators took the view that, having had very recent contact with four of the lenders opposed to the CGIIC proposals, and having regard to the lateness of the proposal, they should continue with the sale to Centurium. This resulted in the execution of the Centurium SPA on 14th August 2021 at a purchase price of US\$8.7631 per ADS. The effect of a sale at that price on that date was that the lenders would be paid in full (with accrued interest) and there would be approximately US\$80 million for distribution to Haode International and Summer Fame International, the shareholders. The \$80 million, however, stood to reduce at a rate of about \$90,000 per day in interest due to the lenders. Thus at the end of 2021 the amount available for distribution to the shareholders would have reduced to about \$66 million. (In fact, due to the increase in value of another asset, the amount available for shareholders turned out to be greater.)

[26] The purchaser under the Centurium SPA was Camel Humps. The terms of the Centurium SPA made the obtaining of the sanction of this Court a condition precedent to the sale agreement. It also required the liquidators to apply to this Court for such sanction. Pursuant to these requirements, the liquidators on 15th September 2021 did apply for sanction and this is the application which I am determining.

[27] The Centurium SPA originally provided for a long-stop date for completion of 31st December 2021. At the conclusion of argument on Friday 17th December 2021, I indicated the conclusion I had reached and said that, if that remained the long-stop

date, I would give my judgment orally on Monday 20th December, so that the aggrieved parties might be able to make such applications they wished to the Court of Appeal before the expiry of the long-stop. In the event, however, Mr. Allison QC, on behalf of the liquidators, indicated that the liquidators would exercise a provision in the Centurium SPA to extend the long-stop date to the end of June 2022. All counsel were in agreement that they would prefer a written judgment to be delivered in the New Year to an oral judgment. This is that judgment.

After the execution of the Centurium SPA

[28] After the execution of the Centurium SPA, discussions continued between the lenders. These are explained in the first affirmation of Wu Naijia, who explains the making of the debt restructuring support agreement (“DRSA”) as follows:

“14. Very shortly after Luckin Coffee published its annual report on 30 June 2021 GHL learned for the first time during the course of a telephone conversation with the Joint Liquidators on 2 July 2021 that the Joint Liquidators had entered into an exclusivity arrangement with Camel Humps, and that an offer had been made to acquire the Luckin Shares at \$6.25 per ADS. As Mr Cowley explains at para 62 of [his first affidavit], a further call took place on 5 July 2021 when GHL indicated that it took the view that this undervalued the Luckin Shares. The result was that the Joint Liquidators then sought to market the shares more widely.

15. In or around early August 2021, GHL became aware that the Joint Liquidators of the Companies were taking steps to sell the shares issued by Luckin Coffee (‘the Luckin Shares’).

16. On 10 August 2021, the Joint Liquidators convened a telephone conference with the Original Lenders and indicated that the Joint Liquidators had received three offers for the Luckin Shares. This telephone conference was attended by John Liu and David Zhang on behalf of GHL, who indicated that they opposed a sale of the Luckin Shares and proposed to seek to broker an arrangement with other lenders to ‘equitize’ the Companies [sic] debt. GHL then convened a meeting with the Joint Liquidators the following day to discuss in further detail the proposal with the Joint Liquidators prior to communicating it to the other Original Lenders.

17. That meeting was attended by Mr. Cowley on behalf of the Joint Liquidators, Mr. David Zhang, Mr. John Liu (who attended by telephone) Mr. Eddie Lau from the New World Group (a company that was considering a co-investment alongside the Applicant but which did not ultimately do so),

Mr. Baldwin Cheng and others (from White & Case, international counsel for the Joint Liquidators) and Mr. Raymond Oh and Mr. Jeremy Chase (from Sidley Austin international counsel for GHL, by telephone). At the meeting, the Joint Liquidators expressed their view that a sale of the Luckin Shares would be in the best interests of the Companies' creditors and shareholders.

18. I understand that GHL disagreed with this view, and indicated that an alternative finance proposal would be forthcoming, which would repay the Lenders at par. GHL sought to persuade the Joint Liquidators not to proceed with the sale of the Luckin Shares, until such time as an alternative proposal could be formulated, which would repay the Lenders at par. At that meeting GHL also indicated to the Joint Liquidators that the shareholders would be supportive of the proposal to be presented by GHL.

19. By that stage, it was clear that the Joint Liquidators were on the cusp of executing the Centurium SPA. GHL therefore sought to work tirelessly in order to broker an alternative proposal, which would redeem the Lenders at par and return the Companies to a position of solvency.

20. Between 12 August 2021 and 16 August 2021 GHL provided further details of the proposal. However, on 16 August 2021 the Joint Liquidators responded to indicate that having consulted with the Lenders on 10 August 2021, albeit prior to receipt of the alternative proposal, they had decided to enter into the Centurium SPA on 14 August 2021.

21. By 14 August 2021, GHL had invested considerable time and money in seeking to advance the Restructuring Proposal, but it was then at a formative stage, with the inter creditor arrangements then incomplete. Mr. Cowley explains in some detail between paras 46 to 100 of [his first affidavit] why he felt that he was ultimately left with little choice but to enter into the Centurium SPA on 14 August 2021 and why he considered it the best option open to the Companies at that time, supported (at least as at 12 August 2021) by a majority of the Companies' creditors. As is clear from the above, it was not an approach that was supported by GHL.

22. The reason for advocating the alternative restructuring proposal was that GHL felt strongly that the Centurium SPA considerably undervalued the Luckin Shares, the value of which was thought by GHL to be unduly depressed as a result of, among other things, several legal proceedings taken by Luckin Coffee's shareholders against Luckin Coffee in the United States Federal and State courts (the Class Actions). I understand that the Companies themselves were subsequently joined to one of those Class Actions as parties.

23. I understand that... GHL therefore continued to seek to broker an outcome which, with the approval of the Court, would bring about a better

return for the shareholders and which could see the Companies emerge from liquidation.

24. On 26 August 2021 Appleby (BVI) Limited ('Appleby'), on behalf of GHL, wrote to Maples and Calder ('Maples')... on behalf of the Joint Liquidators, to indicate that GHL had by then acquired a majority of the debts owed by the Companies under the terms of the Facility Agreement and that it was continuing to work towards putting proposals to the Joint Liquidators that would see a better return to the shareholders than that anticipated by the Centurium SPA. In a letter dated 2 September 2021, Maples responded on behalf of the Joint Liquidators, leaving the door open for further discussions and indicating that they appreciated that the position was developing, but asking that they be kept updated. By 14 September 2021 matters had developed to the extent that Appleby were then in a position to write to Maples again, confirming that [Golden Planet] had acquired the balance of the debt owed by the Companies under the Facility Agreement.

25. That letter foreshadowed a possible resolution of the Companies' difficulties which (if approved by the Court) would see the Companies emerge from liquidation.

26. On the same day, the Joint Liquidators received correspondence from Ogier on behalf of [Golden Planet] and from Kobre & Kim (BVI) LP on behalf of the registered shareholders of the Companies confirming that their clients joined GHL in opposing an order being made sanctioning the Centurium SPA. The result was that the Centurium SPA no longer had any creditor support, nor the support of the shareholders of the Companies. As a result, the Joint Liquidators then consented to the adjournment of their application for directions on the Sanction Application, which was then fixed for hearing on 15 September 2021.

27. By that stage, the DRSA was close to being finalised. The negotiation of the Restructuring Proposal and the redacted transaction documents necessary to consummate it, were extremely complex, involving multiple parties and large teams of lawyers at Sidley Austin and Appleby on behalf of GHL and Paul Weiss and Ogier on behalf of [Golden Planet], and Kobre & Kim on behalf of the Companies' shareholders and ultimate beneficial owners. Together with their deliverables and appendices, the redacted transaction documents run to over 1200 pages.

28. The result of these negotiations is that GHL (and GS Wealth) have been able to broker and finalise the terms of the Restructuring Proposal which (on my understanding of the creditor position in the Companies) is supported by all stakeholders with an economic interest in the liquidations of the Companies. Subject to the approval of the Court, rather than see the vast majority of the assets of the Companies sold and the Companies then

dissolved, the solution brokered would bring about the restructuring of the Companies' debt, an exchange of that debt for Class A ordinary shares in Luckin Coffee, and the emergence of the Companies from liquidation.

29. Those arrangements were ultimately finalised on Saturday, 18 September 2021. On Tuesday 21 September 2021 Appleby and Ogier wrote jointly to Maples once again to confirm that the DRSA to which I refer in more detail below had been executed, setting out its effect and seeking confirmation that the Joint Liquidators would keep the DRSA, once disclosed to them, confidential.

30. Following some further discussions, on Monday 27 September 2021 the Joint Liquidators provided that confirmation and the redacted DRSA was then provided to them the same day. Mr. Cowley then attended a call with representatives of [Golden Planet], GHL, GS Wealth and the shareholder constituents. The Joint Liquidators were able to confirm that, with the possible exception of the claimants in the Class Actions..., they were not anticipating any additional creditor claims being made in the liquidation, and that the Class Action Claimants had not themselves taken steps to submit a proof of debt claim form in the liquidation. The result is that the Restructuring Proposal addresses the needs of all relevant constituents. There was also an expectation that the Companies' assets (collectively) would be capable of meeting the Joint Liquidators' fees and expenses associated with the Liquidation.

31. During the course of the call on 28 September 2021, the Joint Liquidators emphasised that they had not yet had an opportunity to review the redacted DRSA in any detail or to take advice upon it and I do not wish to be unfair to the Joint Liquidators by seeking to summarise the discussions which took place in any further detail. Suffice it to say, the Joint Liquidators fairly recognised that the constituent bodies within the liquidations had changed very considerably since the Centurium SPA had been entered into and that the Joint Liquidators and the Companies were in a fundamentally different position, representatives for GS Wealth emphasised that if, after reviewing the terms of the redacted DRSA, the Joint Liquidators identified any concerns, or had any questions, then GS Wealth and [Golden Planet] would be pleased to seek to address them, indicated that they would consider the position further.

32. For current purposes, clauses 6.1(a)(iii) and 7.2(f) of the DRSA provide the basis for the debt for equity exchange. This exchange would occur at an exchange price, being [at a price] (subject to certain adjustments) ('Exchange Price') which is significantly higher than the sale price under the Centurium SPA,... resulting in substantially higher residual value being retained by the shareholders of the Companies.

33. If the sale to Camel Humps proceeds under the terms of the Centurium SPA, then the total consideration which the Companies will receive will be the sum of US\$419,999,772, of which there would be a surplus after payment of the creditors under the Facility Agreement, subject to accruing interest, in the amount of approximately \$51,249,516.02 (the Centurium Surplus). Conversely, had that price been struck at the sum... contemplated by the terms of the redacted DRSA, then Camel Humps would have paid a consideration of [significantly more].

34. More significantly, however, the Restructuring Proposal only provides for exchanging such number of shares in Luckin Coffee at the Exchange Price as is equal to the value of the outstanding debt. The residual value accruing to the shareholders consists of the Companies retaining some of the Luckin Shares, which allows the shareholders to benefit from further upside potential if the value of such shares increase... The 20 day volume weighted average price for the ADS for the period ending on 20 September 2021 was US\$15.56 per ADS or US\$1.945 per share.

35. If it is assumed (as I do at para 46 below) that the Companies would retain [a particular number of] ordinary shares, then those would be worth approximately [substantially more]. Conversely, I note that the Joint Liquidators proceed on the basis that the Centurium SPA would bring about a surplus available to the Companies' shareholders, approximately in the sum of the Centurium Surplus of [substantially less]. In other words, by comparison in terms of value, this is [much less than] the value of the ordinary shares retained under the Restructuring Proposal.

36. I would also draw the attention of the Court to Paragraph (B) of Clause 6A.1 of proposed amendments to the Facility Agreement set out on page 36 of the redacted DRSA [which] contemplates that, in the first instance, the exchange of the debt for Luckin Shares is mandatory with respect to the creditors (being GHL and [Golden Planet]). In other words, if the DRSA is able to proceed, the Companies have certainty that they can proceed with the debt for equity exchange.

37. A key part of the Restructuring Proposal is that:

- (i) applications will be made to: (x) terminate the liquidations of Haode and Summer Fame in BVI; and (y) permanently stay the liquidation of Primus in the Cayman Islands; and
- (ii) in the event that the Termination Application (and its Cayman equivalent) succeed, the Creditors shall convert their debt into equity at an exchange price [which is] higher... that the... sale price anticipated by the Centurium SPA.

38. I acknowledge, of course, that the value of the Luckin Shares can go up and down, and has been relatively volatile over the course of the last year.

However, the DRSA attributes a materially better price to the Luckin Coffee shares as compared to the Centurium SPA. Furthermore, it is supported by all stakeholders (creditors and shareholders) who plainly perceive there to be benefit in retaining their exposure to the value of the Luckin Shares through the Company. In my view, the Centurium SPA is clearly no longer the best option for the Companies and it is not regarded as such by its stakeholders, being the admitted creditors and shareholders as described above.”

- [29] There have since been two developments which potentially affect the DRSA. Firstly, on 14th October 2021, the board of Luckin approved a rights plan, or more colloquially, a poison pill. This would make it difficult for any form of hostile take-over to take place. Secondly, on 11th December 2021 an extraordinary general meeting of shareholders of Luckin approved amendments to the Articles of Luckin. The effect of these is summarized in Wu Naijia’s second affirmation in this way:

“30. The Announcement describes the proposed resolutions ‘as another step by the board and management to protect the company and its shareholders from certain Restricted Persons in connection with the previously disclosed fabricated transactions.’ That language appears to acknowledge that the Amendment Proposals are linked to the introduction of the Poison Pill. The reference to ‘fabricated transactions’ appears to be a reference to historical fraud allegations relating to transactions which were said to have been fabricated for the purposes of inflating the value of Luckin Coffee whilst Luckin Coffee was under the stewardship of Mr. Lu. The reference to ‘certain Restricted Persons’ appears to be intended to create the impression that the ‘certain Restricted Persons’ are somehow associated with that fraud.

31. That is categorically not the case in relation to GHL or GS Wealth. To the contrary, GS Wealth is an investment fund that was established to hold those assets which were aggregated by GHL, a subsidiary of a large PRC Investment Fund which has and had no connection with the management of Luckin Coffee or the alleged fraud. The investors in GS Wealth are all high net worth individuals and third party institutional investors, with none of GS Wealth, its general partner, its limited partners or their respective beneficial owners, being associated in any way with Mr. Lu, Jenny Qian, any other former management members of Luckin Coffee or their associates.”

[30] The validity of the poison pill or the amendments to the Articles is not an issue before me. The lenders and the shareholders in Haode and Summer Fame are all still keen to proceed with the DRSA. However, they acknowledge that the agreement may need to be “tweaked” to take these developments into account. Mr. Atherton QC, for Camel Humps, says, however, that this is fatal to the ending of the liquidation. In the event, however, I do not — or at least not at present — need to determine this point.

The principles on which the Court acts

[31] The principles on which the Court considers whether to grant sanction are conveniently set out in Mr. Fisher QC’s skeleton argument on behalf of GS Wealth:

“36. The application for sanction is made as an application for directions under section 186(5) [of the] **Insolvency Act 2003**. As observed in **McPherson’s Law of Company Liquidation**:²

‘The role of the section is to provide a procedure for a liquidator to obtain some guidance from the court in conducting a liquidation and so as to give protection against a claim for breach of duty. The provision is essentially concerned with action which is future at the time of the application being heard and it provides an administrative non-adversary proceeding.’

37. The Sanction Application is therefore in substance an application whereby the JLs seek protection against criticism going forwards for entering into the Centurium SPA. The Centurium SPA cannot be effective unless and until it is sanctioned, or blessed, by this Court. The question for this Court is whether, despite the wholesale opposition of the stakeholders, it should do so.

38. The correct approach to applications for sanction of commercial agreements was addressed at length in the ECCA decision of **Phoenix Group Foundation and others v Jackson and others**:³

(1) **Phoenix Group** was a case where, at the time that the application for sanction came before the Court, the JLs continued to be of the view that sanction of the agreement was in the best interests of the estate. The appeal proceeded on the basis that the case was a Category 2 Sanction Application in the sense used by Snowden J (as he then was) in the

² 5th Ed (looseleaf) at para 9-044.

³ [2020] ECSCJ No 373 (17th November 2020).

decision in **Re Nortel Networks UK Ltd**,⁴ i.e. a particularly momentous decision for the estate, rather than a case where there is doubt as to the existence of a power, or a trustee (or officeholder) abandons their decision mak[ing] power to the Court:⁵

‘Category 2 applications are in contradistinction to category one sanction applications. In category 1 sanction applications, the applicant-officeholder seeks the court’s decision as to whether they should take the particular course of action or enter into a particular compromise or settlement in the administration of liquidation of the company or companies under their control. Inherent in a category two application, is that the applicant officeholder has not surrendered to the court their power and discretion to decide whether to enter upon a particular course of action or into a particular agreement in the best interest of the estate of the company or companies over which they were appointed, and their creditors and contributories.’

(2) Using this distinction, category 1 cases are cases where the Court is asked to exercise its own discretion as to whether a particular step should be taken in administration of the estate. Category 2 cases involve a more limited review ‘but one which nevertheless must be exercised with great care and decided upon well-established principles’: at [42]. They involve cases where a decision has been made by officeholder that a particular transaction is in the best interests of the company and its creditors/other stakeholders, but that the momentous nature of the decision merits the ‘blessing’ of the decision by the Court (see **Phoenix Group** at [46]).

(3) In **Phoenix Group**, the ECCA cited at [49] and [50] with approval the following passage from the judgment of David Richards J in **In re MF Global (No. 5)**,⁶ quoting from **Lewin on Trusts** with approval:⁷

‘The court’s function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees’ powers is lawful and within the power and that it does not infringe the trustees’ duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval

⁴ [2016] EWHC 2769 (Ch), [2017] Bus LR 590.

⁵ See **Re Nortel** at [46] citing **Public Trustee v Cooper** [2001] WTLR 901 at pp 922-924, and **Phoenix** in the Court of Appeal at [42].

⁶ [2014] EWHC 2222 (Ch), [2014] Bus LR 1156 at [32].

⁷ 18th Ed (2008) at para 29-299.

merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise.'

(4) The ECCA summarised the relevant approach in their own words at [55] and [67]:

'Accordingly, the duty and burden rest with an administrator or liquidator seeking the sanction of the court, of his decision to embark upon a particularly momentous course of action in the administration or liquidation of the estate of a company over which he has been appointed, to put before the court all relevant material so as to enable the court to properly determine whether:

- (1) the exercise of the power was lawful;
- (2) the administrator or liquidator genuinely holds the view that the proposed course of action is in the best interest of the company, its creditors and contributories; and
- (3) that in coming to that decision he was acting rationally and without a conflict of interest.

...Finally, if the judge is left in any doubt, which must not [be] something speculative or wholly unsupported by the evidence, as to the propriety of the proposed course of action, then the judge must refuse the application. In coming to a determination on this aspect, where the judge has such a doubt, he is bound to withhold the court's approval and to dismiss the application.'

(5) Of relevance for current purposes was what was said by the ECCA in respect of the challenge on the basis of lack of positive support from creditors for the settlement agreement. At [263] and [264], the ECCA approved the liquidators' submissions that:

- (1) The Court's task is not to mechanically add up the voices on both sides of the dispute and give effect to the voice of the majority. Rather, it must apply the Sanction Test.

(2) Nor is a liquidator required to do the bidding of one faction of the (putative) creditor or shareholder body. He must act in what he believes to be in the interests of the insolvent estate as a whole: see e.g., **In re Longmeade Ltd (in liquidation)**.⁸

(3) As such, the question of whether or not a liquidator is acting rationally in deciding to settle claims against the wishes of certain (putative) stakeholders, requires an examination of the reasons given by those opposing for saying that the liquidators' views as to the commercial merits of the settlement are irrational.

(4) In the present case, the Judge carefully considered the objections made by the Appellants (and other opposing stakeholders) in the Decision and rejected them.”

[32] What Snowden J said in **Longmeade**, where there was unanimity amongst creditors and contributories, was this:

“The principles that I have outlined above presuppose a difference of opinion between the majority and minority of the members of the class. However, if *all* the persons having an interest in the insolvent company are fully informed and of the same view, then it seems to me that the liquidator would ordinarily be obliged to give effect to that view. That follows from the fact that liquidation is a statutory scheme under which the property of the company can... be realised and distributed for the benefit of those entitled under the [relevant insolvency act].⁹ The persons interested under the statutory scheme will be the unsecured creditors of the company, and, if there is a possibility of a surplus, the contributories. There is a clear analogy with the principle under which *all* of the beneficiaries of a trust can, if *sui juris* and together entitled to the whole beneficial interest, agree to put an end to the trust and direct the trustees to hand over the trust property (**Saunders v Vautier**¹⁰); or *all* of the members of a solvent company bind the company by their unanimous agreement in a matter which is intra vires and lawful (**Re Duomatic Ltd**¹¹).”

⁸ [2016] EWHC 356 (Ch), [2017] BCC 203 at [52]-[53] (Snowden J).

⁹ *Ayerst v C&K (Construction) Ltd* [1976] AC 167.

¹⁰ (1841) 4 Beav 115 (Lord Langdale MR), *affd* Cr & Ph 240 (Lord Cottenham LC).

¹¹ [1969] 2 Ch 365 at p 373.

Sanctioning the Centurium SPA

[33] I turn then to consider whether to sanction the Centurium SPA. I need to look at this as at 14th August 2021, when the liquidators entered the SPA, and as at 17th December 2021, when I announced the decision which I intended to make. (No one pushed for 15th September 2021, when the application for sanction was issued. The result would, however, be the same as at 14th August 2021. The DRSA, which amounts to the material change in circumstances, was only executed on 18th September 2021.)

[34] Section 186(5) of the 2003 Act provides:

“The liquidator of a company, whether or not appointed by the Court, may at any time apply to the Court for directions in relation to a particular matter arising in the liquidation.”

Sanction as at 17th December 2021

[35] As at 17th December 2021, all the lenders to and shareholders in Haode and Summer Fame were in agreement that sanction should be refused, so that the DRSA could take effect. Mr. Atherton QC’s objection on behalf of Camel Humps to this was as follows:

“19. ...a. Although it might be appropriate for the Court to have regard to the views of creditors on an application for sanction, it is not bound to do so. Accordingly, it is not bound to have regard to the views of creditors in relation to the Sanction Application.

b. Moreover, it is submitted that the creditors that oppose the Sanction Application appear to be motivated by interests other than their rights as creditors in the liquidations that are subject to this Court’s supervision. As a consequence, their views ought not to be given any weight.

c. Further, even if the Court considers that the views of the creditors are to be given due and proper consideration, the Court is by no means bound to act in accordance with the views expressed by the majority of creditors nor even if there is unanimity.

d. In deciding whether or not to sanction an arrangement or agreement to which a company in liquidation is or is to become a party, the Court must consider whether the interests of those, whether creditors or contributories, who have a real interest in the assets of a company in liquidation are likely to be best served:

- (i) by permitting the company to enter into the arrangement or agreement in question with all the terms that it contains; or
- (ii) by not permitting the company to enter into the relevant arrangement or agreement. It is not for the Court to speculate whether the terms of the proposed arrangement or agreement were the best that could have been obtained; or whether the proposed arrangement or agreement would have been better if it did not contain all the terms that it does contain.

e. Unless the Court is satisfied that, if the company was not permitted to enter into the arrangement or agreement on the terms which the liquidator has negotiated, there will then be better terms or some other arrangement or agreement on offer, the decision is between the proposed arrangement or agreement and no arrangement or agreement at all.

f. The Court will consider the wishes of creditors (and contributories — where appropriate), for the reason that creditors and contributories, are likely to be good judges of where their own best interests lie.

g. The Court will also take account of the views of the liquidators, who may, and normally will, be in the best position to take an informed and objective view. In this regard, Camel would say that the views of the liquidators at the time that they made the decision to enter into the Centurium SPA on 14 August 2021, is most relevant. Views expressed subsequently should not be given any weight, particularly when there are serious questions to be raised about the *bona fides* and/or standing of those expressing those views.

h. However, the Court must be satisfied that the creditors of the company in question are promoting a view based upon their status as such and are not doing so as the result of extraneous factors. If such extraneous factors are in play, then the views of the creditors should be discounted or not given effect to.

i. When considering the views of creditors, the Court will examine each creditor's objectives and other interests which may be influencing their views, in order to ascertain whether the preference being expressed by creditors is founded on their legitimate interests and status as a creditor or on some other basis or on the basis of some other different rights, interests or motives.

j. Creditors' views may also be discounted where they would be unaffected whichever way the decision of the Court goes.

k. Ultimately, the decision as to what is in the best interest of the creditors as a whole is one for the Court and not for the creditors to make i.e., whether or not to give its sanction to the arrangement or agreement that is put before the Court. As was said in a different, but related context, the Court must conduct its own, 'evaluation of the class interest' by considering, 'all the circumstances'.

20. Secondly, and in the alternative, it is submitted that given that the Joint Liquidators have exercised their discretion as liquidators, by already having executed the Centurium SPA, the claims of the creditors that are before the Court have now effectively been satisfied or sufficiently secured such that, the reality is, those creditors have ceased to have a tangible interest in or say in the manner in which the liquidations should be brought to a conclusion. All that remains to be done is for the Court to grant its sanction and the distributions (that will follow upon the performance of the Centurium SPA) to be made and the liquidations to be terminated pursuant to an order of the Court and such further attendant directions as the Court may provide. Thirdly, the sanction of the Centurium SPA will provide, in effect, an immediate in full return to all the creditors of Haode and Summer Fame and will result in a guaranteed and almost immediate return to shareholders. The rejection of the Centurium SPA and (in the alternative) the adoption of the DRSA, does not provide any such certainty of such a return whether to creditors or to shareholders. This Court should not countenance the creation of a situation where the rejection of the Centurium SPA may result in those that would otherwise be interested in sharing in the significant benefits of the Centurium SPA are deprived of those benefits and are at risk of receiving less than they would in the liquidations of Haode and Summer Fame."

[36] The thrust of Mr. Atherton QC's para 19 is directed at the position of creditors, as opposed to contributories. I agree with his points a, c, f and j. His points d, e and k, in my judgment, overstate the Court's function in a category 2 case. The Court is only supervising the decisions of the liquidators in a category 2 case. It is not itself the primary decision-maker. Points b, h and i go to the creditors' motives. I accept that issues of non-commercial motive can potentially create difficulties to the giving of sanction. These difficulties can be of both an abstract and a concrete nature. The Court would have to decide what the motives of a potentially diverse group of creditors were and whether these were in some way inappropriate. In the current

case, however, the creditors' motives are transparent: they think they will get a commercially better deal from a debt for equity swap than on a distribution by the liquidators on completion of the Centurium SPA. That in my judgment is a wholly unexceptional motivation for their wish that sanction of the SPA be refused. Point g concerns the date at which the sanctioning exercise needs to be considered and I shall deal with this separately.

[37] In fact, however, it is not necessary to examine the position of the creditors separately from those of the contributories. This is because the creditors and the shareholders are in complete agreement. They want the DRSA (subject to some minor tweaking) to proceed with the consequential ending of the liquidations.

[38] If the liquidators had not yet signed the Centurium SPA and were coming to Court for the first time on 17th December seeking category 2 sanction of it, then I would have no hesitation in refusing sanction of it. All of those with a commercial interest in Haode and Summer Fame are against the SPA. The liquidators would not yet have signed anything. There would not even be a moral obligation on the companies to obtain sanction. The Court in this situation would straightforwardly apply the **Longmeade** principle of unanimity.

[39] For completeness, I should add that Mr. Atherton QC argued that the involvement of Mr. Lu and Ms. Qian in the DRSA meant that there was a taint of impropriety, which would debar the Court from granting sanction. I do not agree. The involvement of Mr. Lu and Ms. Qian in the accounting irregularities at Luckin is not something explored in the evidence before me. In any event, however, their interest in the DRSA is as shareholders, not as previous office-holders in Luckin. Any participation in the accounting fraud by them is not in my judgment relevant to the propriety or otherwise of the DRSA.

Sanction as around 14th August 2021

[40] I turn then to the position as at 14th August 2021. Would the Court, if an application had been heard around that time (the 14th was in fact a Saturday), have sanctioned

the Centurium SPA? Mr. Fisher QC on behalf of GS Wealth submits No in his skeleton argument, on this basis:

“45. ...The reasons for the stakeholders opposing the Centurium SPA, and preferring the DRSA, reflect their perception that the Centurium SPA was and is a bad deal. Principally, that is because it sells the shares at a price that is seen as being a significant undervalue as compared to their actual value. The DRSA is therefore perceived by stakeholders as providing two principal advantages for creditors and shareholders as compared to the Centurium SPA:

- (1) a materially higher realisation price for the Shares than is offered by the Centurium SPA; and
- (2) retention of the Shares by the Lenders and the Shareholders.

The DRSA entitles the creditors to have their claims satisfied through a debt for equity exchange that they perceive as more advantageous than payment in cash. It entitles the shareholders to retain an indirect interest in the shares held by the SPVs. This is the commercial preference of both the creditors and shareholders and, in a case where there is unanimous support for the approach proposed, should be given effect.

46. In this regard, an observation is made in the JLs' evidence regarding the risk of fluctuating value of the Shares. However, the fact remains that, in the 20 day volume weighted average price for the ADS in the period ending 20.9.21, the price per ADS was some US\$15.56 per ADS. The current price per ADS is US\$11.88 (as of 13 December 2021). Even taking into account the risk of price fluctuating, against a background of ADS pricing which was as high as USD17.48 in September 2021, it is entirely unsurprising that the creditors and shareholder may prefer exposure to the risk of both price increases and decreases going forwards by holding the Shares. It is the Lenders and Shareholders who are ultimately the best commercial judges of what is in their own best interests in this regard.

47. ...[I]t is irrelevant that the JLs may have thought in August that the Centurium SPA was in the best interests of stakeholders. What matters is whether, based on all of the evidence now before the Court, sanction for entry into the Centurium SPA should be granted such that the outstanding contractual condition precedent is satisfied. That is to say, the assessment of whether sanction should be granted can only sensibly be conducted by reference to the circumstances currently existing and described in evidence before the Court, rather than on a blinkered basis limited to the matters which were considered by the JLs in August 2021.”

[41] I remind myself that in a category 2 case my function is one of review. As at 14th August 2021, the lenders were pretty evenly split as to the merits of the sale to Centurium/Camel Humps. The DRSA had not been finalized and the evidence of Mr. Cowley was that the debt for equity arrangement was not fully developed. The points in para 45 of Mr. Fisher QC's submissions are not in my judgment relevant as at 14th August. Para 46 is the heart of the attack on the 14th August SPA. However, as Mr. Cowley explains, the OTC price of the ADS's was an unreliable indicator of the price for anything other than small numbers of shares. The liquidators in my judgment carried out a careful exercise in testing the market for the substantial number of shares held by Haode and Summer Fame. They conducted an auction with serious bidders (including Golden Planet) and accepted the best price. Even once the auction had finished, they managed to squeeze another 26.31 cents per ADS from Centurium.

[42] In my judgment this was a classic case in which liquidators could properly conclude that "a bird in the hand is worth two in the bush". It was in my judgment well within the reasonable discretion of the liquidators to conclude on 14th August 2021 that the commercial certainty of the Centurium SPA was preferable to a DRSA, which as at 14th August was still inchoate (and indeed which took over a month to finalise). If 14th August 2021 is the relevant date for considering whether to grant sanction, then in my judgment it would be appropriate to do so.

Is August or December the relevant date for sanction?

[43] I turn then to the remaining question: should the Court look at the position in August or in December when determining sanction? On this point, there is a surprising dearth of authority. This appears to be because it rarely happens that liquidators change their mind.

[44] **Farnum Place LLC v Joanna Lau and another**¹² was a case arising out of the Madoff fraud. Fairfield Sentry had a claim in the liquidation of BLMIS, a Madoff

¹² [2012] ECSCJ No 345.

vehicle. The liquidators of Fairfield Sentry on 14th December 2010 agreed to sell its claim against BLMIS to Farnum at 32.125 cents on the dollar. That was, it was common ground, a good price at the time. The agreement, which was in writing (“the Trade Confirmation”), provided *inter alia* that the approval of the BVI court needed to be obtained for the agreement to be effective. Before the matter came before this Court, the liquidator of BLMIS had on 17th December 2010 reached an agreement with someone who had received payments from BLMIS. This resulted in a recovery of some \$7 billion by BLMIS. The value of claims in the liquidation of BLMIS shot up to around 70 cents on the dollar. In these changed circumstances, the liquidators of Fairfield Sentry decided not to apply to this Court for sanction of the agreement. Instead Farnum itself applied.

[45] The matter came before Bannister J, who held:

“49. As a matter of BVI insolvency law, the Liquidator did not require the approval of this Court in order to cause Sentry to enter into or complete performance of the Trade Confirmation. He appears to have decided to seek it (before he changed his mind) in order to protect himself from criticism for having entered into the agreement. Such a step is frequently taken by liquidators or trustees even though not strictly required where transactions, as here, are particularly significant. In such a case the Court will start with a predisposition to assume that a professional man, such as the Liquidator, even though wanting the comfort of Court approval, will not be asking it to approve a bargain with which he was not commercially satisfied as made. In such circumstances, the Court would ordinarily withhold approval only if it identified a feature of the sale overlooked by the Liquidator and which rendered the bargain defective as made or which it considered made completion of the transaction objectionable on policy grounds. No such considerations arise here. The approach should be no different merely because in the events which have happened it is Farnum which is obliged to seek approval of the Liquidator’s bargain.

50. On a factual basis, also, I have no doubt that this Court should approve the Trade Confirmation. It was negotiated at arm’s length by sophisticated parties with full awareness of the market and with the benefit of skilled professional advice. Subject to satisfaction of the conditions to which it is subject, it was obviously intended to be completed or consummated in short course. As a matter of BVI insolvency law,... the fact, if it is of any significance, that the market has risen since the transaction closed is irrelevant. All other considerations aside, it seems to me that it would be

unwise for the Court to refuse approval and thus destroy the bargain unless it had before it compelling evidence that the Liquidator is (not might be) in a position to engage with a purchaser presently willing to contract on terms no less advantageous than those of the Trade Confirmation and at a higher price. I have no such evidence.”

- [46] It can be seen that Bannister J gave two reasons for his grant of sanction. Firstly, the rise in the market was irrelevant as a matter of BVI insolvency law. Secondly, the liquidator did not have a buyer available then-and-there at the higher price: see footnotes 23 and 24 to his Judgment. The two grounds are not incompatible. The first ground says that post-agreement events are irrelevant; the second that, even if they were relevant, the Trade Confirmation should be sanctioned anyway. Thus, although it might be possible to read his judgment as saying post-agreement events can or should be taken into account, the better view in my judgment is that post-agreement events are irrelevant.
- [47] This accords with the purpose of the grant of sanction. The risk which a liquidator runs in making an agreement without the Court’s sanction is that the liquidator might have a personal liability if he or she has erred in their assessment of the commercial desirability of the agreement. The Court when deciding whether to grant sanction applies essentially the same test: is the liquidator acting within the reasonable bounds of a commercial decision-maker when he or she makes the agreement in question. This points strongly to the test being that applicable at the moment when the liquidator makes the agreement for which he or she seeks sanction.
- [48] The alternative construction gives the estate a put option: if the stock price drops, then the liquidators sell to the buyer under the sanctioned agreement; if the stock price rises, then the Court refuses to sanction the sale and the liquidator sells at the higher price. Mr. Fisher QC, Mr. Davies QC and Mr. Hacker QC all acknowledged this point on behalf of the objectors. Although they all had slightly different emphases, they all submitted that this was one of the *advantages* of their

construction of the decision date for any sanction. The Court was able to save the Companies from their bad bargain.

[49] A problem with allowing the Court to exercise hindsight in deciding whether or not to sanction an agreement is that the Court's decision becomes potentially aleatoric. In the current case, the DRSA was agreed on 18th September 2021. I accept that the DRSA is a better deal for the Companies than the 14th August Centurium SPA. However, this is largely happenstance. The share price of Luckin in 2020 and 2021 was extremely volatile. The price was up on 18th September and remained up on 17th December. Whether it crashes before I hand this judgment down is anyone's guess. If it did, then presumably the lenders and shareholders could perform a *volte face* and make a **Barrell** application for the grant of sanction.¹³ Indeed there is no reason why (if there were a subsequent change in the share price) the point could not be taken to the Court of Appeal relying on changes in the stock price to justify a **Ladd v Marshall** application to adduce fresh evidence.¹⁴

[50] All three leading counsel for the lenders and shareholders relied on **Chu v Lau**¹⁵ for the proposition that in company law cases the key date is always the date of the Court's determination. **Chu v Lau** was an application to wind up a company on the "just and equitable" ground. The Privy Council held that our Court of Appeal erred in treating the date on which the application for the appointment of liquidators was made as the critical date for the accrual of the cause of action for the winding up of the company. In modern litigation, the Privy Council held,¹⁶ the old rule in **Eshelby v Federated European Bank**¹⁷ was no longer good law. In deciding whether to wind up a company on "just and equitable" grounds, the Court had to decide the position as at the date of the trial, not as at the date the originating application was made.

¹³ See *Re Barrell Enterprises* [1973] 1 WLR 19. Such applications are now much easier to make in consequence of the UK Supreme Court decision in *Re L (Children)* (Preliminary Finding: Power to Reverse) [2013] UKSC 8, [2013] 1 WLR 634.

¹⁴ [1954] 1 WLR 1487.

¹⁵ [2020] UKPC 24, [2020] 1 WLR 4656.

¹⁶ At [40] to [41].

¹⁷ [1932] 1 KB 254 (KB Divisional Court).

- [51] In my judgment, **Chu v Lau** cannot be treated as an invariable rule. The particular circumstances of the application under consideration must be looked at. In the current case, the liquidators' application is that the "Court sanctions the decision of the joint liquidators to cause [the Companies to enter the Centurium SPA]." The wording of the application requires the Court, in my judgment, to look at — and only look at — the decision of the liquidators on 14th August.
- [52] Mr. Hacker QC submitted that Camel Humps had really only itself to blame for the terms of the SPA. It should have pushed for tougher terms of the contract. The question of the date on which sanction has to be considered is not, in my judgment, a matter which can be affected by drafting. It is a matter of law whether 14th August or 17th December is the date for deciding on sanction. A clause in the SPA which sought to impose a particular date would be an attempt to oust the jurisdiction of the Court and therefore ineffective as a matter of law. Now it may be that some minor adjustment might have been possible in the terms of the agreement (say, a requirement for the liquidators to seek sanction earlier than 15th September). However, the determination of the date on which this Court makes its assessment of whether to sanction the Centurium SPA is in my judgment outwith the power of the parties to alter.
- [53] Mr. Hacker QC also submitted that the Court really should not put any weight on Mr. Atherton QC's submissions. The only persons with standing to make submissions were the liquidators on the one hand and the lenders and shareholders on the other. This is a matter which was decided at an earlier case management hearing. The position before me was that the liquidators were contractually obliged to seek sanction. They could not withdraw their application of 15th September without incurring a substantial liability for breach of contract. The liquidators, however, took the view (and, as I have held above, rightly took the view) that the DRSA represented the wishes of all the Companies' creditors and contributories as being a better outcome for Haode and Summer Fame. It was wholly appropriate that the

party with skin in the game, Camel Humps, make representations. No appeal was brought against the case management decision to that effect.

- [54] The appropriate date for consideration of whether to grant sanction is in my judgment 14th August 2021. I therefore sanction the Centurium SPA.

A last word: the liquidators

- [55] I add a brief last word, because Mr. Atherton QC in the course of his submissions made a number of criticisms of the liquidators and their behaviour. In my judgment there was nothing in these criticisms. The liquidators have throughout behaved to the highest standards, seeking to realise the best outcome for all interested parties in the difficult circumstances of the discovery of misfeasance at Luckin. When the DRSA was agreed, they realized that the Centurium SPA did not represent the best outcome for Haode and Summer Fame. They put the facts fairly before the Court. I have held that their view on the August/December issue was wrong as a matter of law, but it was perfectly appropriate for the liquidators to put forward their view on this issue of law. They of course left the determination of the law to me. The liquidators are in my judgment to be commended for their approach to this matter.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar