IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 82 OF 2020 (IKJ)

BETWEEN:

(1) LINDEN CAPITAL LP
(2) AM ASIA STRATEGIES MASTER FUND LP
(3) AURIGIN MASTER FUND LIMITED
(4) MHD VERTCO LTD.
(5) DKP VERTCO LTD.
(6) DKIP VERTCO LTD.
(7) DKIL VERTCO LTD.
(8) DCIG CAPITAL MASTER FUND LP
(9) LONG CORRIDOR ALPHA OPPORTUNITIES MASTER FUND
(10) LMA SPC FOR AND ON BEHALF OF ITS SEGREGATED PORTFOLIO, MAP 246 SEGREGATED PORTFOLIO
(11) MYRIAD OPPORTUNITIES MASTER FUND LIMITED
(12) OASIS INVESTMENTS II MASTER FUND LIMITED
(13) VERITION MULTI-STRATEGY MASTER FUND LIMITED

Plaintiffs

-AND-

LUCKIN COFFEE INC

Defendant

IN CHAMBERS-VIA ZOOM

Appearances:

Mr Stephen Houseman QC of counsel and Mr Denis Olarou of Carey Olsen for the Plaintiffs

Mr Alex Potts QC and Mr Erik Bodden of Conyers Dill & Pearman for the Defendant

Before: **The Hon. Justice Kawaley**

Heard: **25 May 2020**

Draft Ruling Circulated: **1 June 2020**

Ruling Delivered: **4 June 2020**

[REDACTED VERSION]

HEADNOTE

Ex parte Worldwide Freezing Order-assets of defendant-extended definition-holding company required to make ancillary disclosure of assets of subsidiaries-legality of disclosure order-whether disclosure obligations should be suspended pending application to discharge ex parte injunction

RULING

Introductory

1. On May 8, 2020 I granted an ex parte Worldwide Freezing Order ("WFO") in favour of the Plaintiffs against the Defendant. This was not "until further order", as was the effect of the draft Order initially submitted with the application and what in my experience is the more common form. Instead, the "*Duration of Order*" was defined as follows:

> "26. *This Order will remain in force up to and including the granting of any further Order following the hearing on the Return Date, unless before then it is varied or discharged by a further Order of the Court. The application in which this Order is made shall come back to the Court for further hearing on the Return Date.*"

2. The Plaintiff's substantive claim is for damages for fraudulent misrepresentation in relation

to the true financial position of the Defendant prior to a bond issue which the Plaintiffs subscribed to in January 2020. Considerable reliance is placed on the fact that on or about April 2, 2020, the Defendant issued a Press Release announcing an internal investigation into certain improprieties including the falsification of transactions in the last quarter of 2019 to the value of RMB 2.2 billion.

3. By a Summons dated May 15, 2020, the Defendant sought an Order, so far as material for present purposes:

> "2. *That the time for compliance with paragraphs 8 (a), 8 (b) and 8 (c) of the Order be extended until after the conclusion of the inter partes hearing of the return date;*
>
> *3. That any disagreements between the Plaintiffs and the Defendant as to the interpretation, effect and scope of paragraphs 2, 5, 6, 7(a)(i), 7(a)(ii), 8(b), and 8(c) of the ex parte Order be resolved at the inter partes hearing on 25 May 2020.*
>
> *4. Any such remaining disclosure obligations of the Defendant (if any) be stayed pending the conclusion of the Disclosure Hearing.*"

4. On May 19, 2020, I adjourned the Plaintiffs' *inter partes* Summons seeking a continuation of the WFO until trial, which had been fixed for an initial return date of May 25, 2020, to a date to be fixed. The directions ordered included the following:

> "*2. By 5 pm on 20 May 2020:*
>
> *(a) Pursuant to paragraph 8(a) of the WFO, the Defendant do file and serve on the Plaintiffs a Witness Statement from a director or other responsible officer of the Defendant confirming the information provided on behalf of the Defendant pursuant to paragraph 7 of the WFO in the letters from Conyers Dill & Pearman to Carey Olsen dated 15 and 19 May 2020 ('**Disclosure Letters**');and*
>
> *(b) Pursuant to paragraphs 8(b) and 8(c) of the WFO, the Defendant do provide to the Plaintiffs copies of the Defendant's own bank statements evidencing the transfers and bank balances (as the case may be) referred to in the Disclosure Letters.*

*3. Any and all disputes about whether, upon compliance with paragraph 2 above, the Defendant continues to owe any further disclosure obligations pursuant to paragraphs 7 and 8 of the WFO shall be determined at the hearing to be listed for 10.00am on 25 May 2020 ('**Disclosure Hearing**').*"

5. The Defendant filed Affirmations from its Chief Financial Officer ("CFO") Mr Reinout Schakel which had not for logistical reasons yet been notarised ("Schakel 1" and "Schakel 2"). Schakel 1 simply exhibited the Disclosure Letters. Schakel 2 sought to buttress the legal arguments about the scope of the WFO with factual support. It was not asserted that compliance with the ancillary discovery obligations in relation to the Defendant's direct and indirect subsidiaries would be burdensome or oppressive.

6. The Plaintiffs filed the Third Affidavit of Andrew Berdon which sought, *inter alia*, to buttress the Plaintiff's case for the ancillary disclosure obligations with fresh evidence not originally before the Court, including assertions as to the legal position under British Virgin Islands law, Chinese law and Hong Kong law.

The issues raised by the Defendant

7. The Defendant's Skeleton Argument described the issues the Court was required to decide as follows:

> "*8.1 What is the proper interpretation and scope of the ancillary disclosure orders against the Defendant under paragraphs 7 and 8 of the ex parte Injunction Order, pending the Return Date hearing, taking into account:*
>
> *8.1.1 the 'strict construction' principle;*
>
> *8.1.2 the 'enforcement principle';*
>
> *8.1.3 the separate legal personality of the Defendant (a publicly listed Cayman Islands holding company) and the separate legal personalities of all other corporate entities in its corporate group (none of which are Cayman Islands companies, being a variety of entities in the BVI, Hong Kong and the PRC); and*

8.1.4 the absence of any proprietary claims by the Plaintiffs against the Defendant.

8.2 In particular:

8.2.1 Is the Defendant obliged to give disclosure of documents or information relating to assets that are, as at 8 May 2020 or 12 May 2020, legally and beneficially owned (and controlled) not by the Defendant but by sixteen legally separate corporate entities incorporated in the BVI, Hong Kong, and the PRC (none of whom are named Respondents to the ex parte Injunction Order, nor Defendants in these proceedings)? The Defendant's position is that the Defendant is not obliged to do so: the Plaintiffs appear, however, to disagree.

8.3 Is the Defendant obliged to give disclosure of 'the current location of the Bond Proceeds' or 'all bank statements evidencing the current location of the Bond Proceeds' (whether as at 8 May 2020 or 12 May 2020), in circumstances where:

8.3.1 As a matter of law, there is no specific asset owned by the Defendant that can properly be described as 'the Bond Proceeds' (whether as imprecisely defined at paragraph 2 of the ex parte Injunction Order as 'the proceeds of the ... Convertible Senior Bonds ... including any indirect or equivalent proceeds', or at all);

8.3.2 It is, as a result, legally impossible for the Defendant to identify 'the current location of the Bond Proceeds' or to give disclosure of 'all bank statements evidencing the current location of the Bond Proceeds' (even if, which is denied, the Defendant was the legal or beneficial owner of any relevant bank accounts or cash assets); and/or

8.3.3 The Plaintiffs have not asserted, and do not have, any proprietary claim (or tracing remedies) with respect to the monies received by the Defendant, or paid by the Defendant to separate legal entities, between January 2020 and April 2020 (whether in exchange for long-term loan repayment obligations or otherwise). It is clear on the authorities that it is normally only when a proprietary freezing order is sought (which is not this case) that such a proprietary order may be coupled with an ancillary disclosure order requiring information to be provided by the defendant as to what has happened to the assets claimed to be beneficially owned by the plaintiff; and

8.3.4 Despite the Plaintiffs' assertions as to the alleged risk of dissipation

by the Defendant of the Defendant's own assets (which the Defendant intends to address more fully in its evidence and submissions at the inter partes Return Date hearing), it is obvious (and should have been obvious at the ex parte hearing) that, for the purposes of any ancillary disclosure order:

> *8.3.4.1 the Defendant has only used its own money in the ordinary and proper course of its business, and in the manner that it had already disclosed to the Plaintiffs that it would be doing in its Final Offering Memorandum (FOM) (exhibited to the Plaintiffs' own evidence, at Exhibit AB 1, relevant extracts of which have been set out for convenience in the Defendant's affirmation evidence, in Schakel 2); and*
>
> *8.3.4.2 the Defendant's assets do not include the assets of any of its direct or indirect subsidiaries, since they are not assets that are legally or beneficially owned, or controlled by, the Defendant. This is a matter of law, and there is no evidence from which it is possible for the Plaintiffs to ask the Court to draw any inferences to the contrary.*

8.4 If (contrary and without prejudice to the Defendant's primary position on the issues at paragraphs 8.1, 8.2, and 8.3 above), the ancillary disclosure orders under paragraphs 7 and 8 are to be interpreted as broadly as the Plaintiffs appear to contend, should such broad disclosure orders properly have been made by the Court on an ex parte basis, or should they now be varied, set aside, stayed, extended, or discharged (as the Defendant submits), or should they be maintained (as the Plaintiffs appear to submit), pending the inter partes Return Date hearing, taking into account the various matters referred to above and below?"

8. This dense thicket of issues can be trimmed down into the following headline questions:

   (a) whether the WFO can properly be read as applying to specific assets (the Bond Proceeds) in the absence of a proprietary claim and/or in light of the disclosure already provided by the Defendant, whether further disclosure be dispensed with altogether or pending the Return Date;

   (b) whether the WFO ought properly to have adopted the extended definition of assets;

(c) whether the WFO can properly be read as requiring the Defendant to provide disclosure about the assets of the Defendant's direct and indirect subsidiaries and/or whether this disclosure should be dispensed with altogether or pending the Return Date.

9. These issues must be approached by the Court keeping very much in mind that although the WFO permitted the Defendant to apply before the Return Date to, in effect, seek the summary discharge of the WFO (or parts of it), the Defendant elected not to do so. Mr Potts QC was surely right to submit that at the Return date the Plaintiff will bear the burden of satisfying the Court that the WFO should be continued. Clearly, no formal application to discharge need be made on the Return Date when the WFO will expire unless continued, according its plain terms. The Defendant's Summons has squarely raised the question of whether the ancillary disclosure obligations should be suspended pending the Return Date at which I assume for present purposes that the Defendant will contend that the WFO should not be continued, even if it was initially validly made. The arguments pursued by the Defendants at the hearing were, as I understood it, limited to seeking to suspend the exceptional obligation to produce information about the assets of the Defendant's subsidiaries. This requires the Court to consider whether justice requires that the controversial disclosure obligations should be suspended until the Court substantively determines whether the WFO should be continued or not.

10. To the extent that the Defendant pursued the application to the Court to suspend the outstanding ancillary disclosure obligations in relation to the Defendant's own assets as defined by the WFO, for the avoidance of doubt that application is summarily refused.

Relevant provisions of the WFO

11. The primary freezing provisions in the WFO were the following:

> "*1. Until further Order of the Court, the Defendant must not remove from the Cayman Islands or in any way dispose of or deal with or diminish the value of any of its assets whether they are in or outside the Cayman Islands, whether in the Defendant's own name or not, whether the Defendant is interested in them legally or otherwise, and whether solely or jointly owned, up to the value of US$160,701,850.*"

12. The identification of the following particular assets, the "Bond Proceeds", was controversial:

"2. *The prohibition in paragraph 1 above includes, in particular, the proceeds of the 0.75% Convertible Senior Bonds due 2025 convertible into American Depositary Shares of the Defendant, which the Defendant issued in January 2020, including any indirect or equivalent proceeds (the "**Bond Proceeds**").*"

13. The effect of the following "extended definition" of assets was legally challenged:

"*5. Paragraph 1 above shall apply to:*

(a) All of the Defendant's assets which the Defendant has the power, directly or indirectly, to dispose of or deal with as if it were the Defendant's own, whether or not the assets are in the Defendant's own name, whether the Defendant is interested in them legally or otherwise, and whether they are solely or jointly owned. The Defendant is to be regarded as having the power, directly or indirectly, to dispose of or deal with an asset as if it were the Defendant's own if, inter alia, a third party holds or controls the asset in accordance with the Defendant's direct or indirect instructions; and

(b) *The Defendant's directly-owned shareholdings, partnership interests and/or investments in other companies and entities (as well as any control it might be entitled to exercise over any variable interest entities in the People's Republic of China) and all rights, powers and interests that such shareholdings, partnership interests and/or investments (as well as rights of control) may afford it in respect of any and all of the assets (including but not limited to shareholdings) of the Defendant's indirectly-owned subsidiaries and variable interest entities.*"

14. The combined effect of paragraphs 1 and 5 was particularised in the next paragraph of the WFO:

"6. *The Defendant must not exercise any of its rights or powers as a direct or indirect shareholder of shares, partnership interests and/or investments in other companies and entities (as well as any control it might be entitled to exercise over any variable interest entities in the People's Republic of China) for the purpose of achieving any of the matters prohibited by paragraph 1 above.*"

15. The controversial disclosure obligations were primarily set out in the following provisions of the WFO:

"7. *Within three business days of service of this Order, the Defendant must:*

(a) Inform the Plaintiffs' attorneys in writing of:

(i) The current location of the Bond Proceeds (including contact details of any person having legal custody or control of the Bond Proceeds,

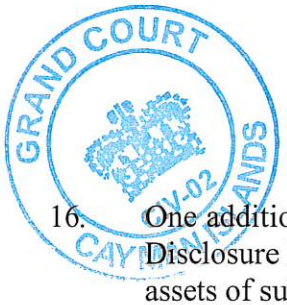
(ii) The value, location (including contact details of any person having legal custody or control of the assets), and details of all of the Defendant's assets located in the Cayman Islands above the value of US$10,000 and worldwide above the value of US$1 million (for these purposes 'asset' has the meaning given to it cumulatively by paragraphs 1 and 5 above)…

8. Within five business days of service of this Order, the Defendant must:

(a)Confirm the information in paragraph 7 above in an affidavit by a director of the Defendant served on the Plaintiff's attorneys;

(b)Provide the Plaintiffs' attorneys with copies of all bank statements evidencing the current location of the Bond Proceeds, which must show the statement of the bank accounts as at the date of this Order; and

(c)Provide the Plaintiffs' attorneys with bank account details and current balances of all bank accounts in the name or



held on behalf of the Defendant or its directly or indirectly controlled subsidiaries and group companies listed in Schedule 3 to this Order."

16. One additional safeguard for the Plaintiffs, which was alluded to in passing by me at the Disclosure Hearing, was the following provision (which does not, of course, extend to the assets of subsidiaries):

> "9. *The Defendant must preserve and must not dispose or part with possession of any documents in the Defendant's possession, power or control which evidence the existence, location or value of the Defendant's assets within the scope of paragraphs 7 and 8 above.*

Findings: the WFO and whether it was legally intelligible to purport to freeze particular assets (the Bond Proceeds) in the absence of the Plaintiffs asserting a proprietary claim

17 Prior to the ex parte hearing on May 8, 2020 which ended with the making of the WFO, I invited the Plaintiff's counsel to address, *inter alia*, the following query:

> "Paragraph 2: applies restraint in paragraph 1 to the "*Bond Proceeds*". Paragraph 7(a)(i) requires the provision and preservation of information about the "*Bond Proceeds*". **Clarify whether a proprietary claim is asserted in relation to the Bond Proceeds and if not on what basis the draft Order seeks to freeze a specific fund.**"

18. Mr. Houseman QC in oral submissions on May 8, 2020 satisfied me that there was no objection in principle to identifying specific assets in a freezing order. The Plaintiffs' case was that the Defendant's CFO, Mr. Schakel, had told several deponents over the telephone in April 2020 that the Bond Proceeds were mostly being kept "offshore", meaning outside Mainland China ("PRC"). The Plaintiffs were concerned that there was a risk of these monies being moved into PRC otherwise than in the ordinary course of business, reducing the sums available to meet any judgment they might obtain against the Defendant. At the hearing of the present application, Mr. Houseman QC referred to the somewhat dated and basic standard Cayman Islands Mareva Injunction Form. Paragraph 1(1) of Form No.65 explicitly contemplates the identification of particular assets.

19. Paragraph 2 of the WFO presupposed that the Bond Proceeds constituted an identifiable fund based on the information available to the Plaintiffs on May 8, 2020. The scope and legal efficacy of paragraph 2 of the WFO cannot be undermined with reference to disclosure provided by the Defendant since then, absent an application to set aside. Such evidence is of course potentially relevant to whether, and if so to what extent, further disclosure is required in the comparatively short period before the Return Date. I did not understand the Defendant's counsel to be pursuing any, or any direct, attack on paragraph 2 of the WFO at the Disclosure Hearing. This limb of the WFO was sufficiently clear to enable the Defendant to give the disclosure it contended it was not obliged to give through the Disclosure Letters. The purport of the disclosure was that the Bond Proceeds did not constitute a segregated fund, that the funds had been commingled with other assets upon receipt and had thereafter been transferred.

20. It is against this background, supported by Schakel 1, that the Defendant submitted in relation to paragraph 7 (a) (i) of the WFO:

> "*...8.3.2 It is, as a result, legally impossible for the Defendant to identify 'the current location of the Bond Proceeds' or to give disclosure of 'all bank statements evidencing the current location of the Bond Proceeds' (even if, which is denied, the Defendant was the legal or beneficial owner of any relevant bank accounts or cash assets); and/or*
>
> *8.3.3 The Plaintiffs have not asserted, and do not have, any proprietary claim (or tracing remedies) with respect to the monies received by the Defendant, or paid by the Defendant to separate legal entities, between January 2020 and April 2020 (whether in exchange for long-term loan repayment obligations or otherwise). It is clear on the authorities that it is normally only when a proprietary freezing order is sought (which is not this case) that such a proprietary order may be coupled with an ancillary disclosure order requiring information to be provided by the defendant as to what has happened to the assets claimed to be beneficially owned by the plaintiff...*"

21. Mr Potts QC relied in support of the latter proposition on the May 20, 2020 decision in *CPOD SA-v- De Holanda Jr et al* [2020] EWHC 1247 (Ch) where Michael Green QC (sitting as a Deputy High Court Judge) opined as follows:

> "*51...So far as I can tell from the authorities, it is normally only when a proprietary freezing order is sought that it may be coupled with an ancillary disclosure order*

requiring information to be provided by the defendants as to what has happened to the assets claimed to be beneficially owned by the claimant."

22. It was submitted that at the very least the disclosure obligations should be suspended until the Plaintiffs' *inter partes* Summons for a continuation of the WFO had been heard. Understandably, Mr Houseman QC had no convincing answer to these legal submissions. He did, however, have what initially appeared to me to be mere rhetorical flourishes, which like a footballer performing fancy step-overs, entertained without threatening his opponent's goal. In the Plaintiffs' Skeleton Argument, it was argued:

> "*5. As was submitted in the Plaintiffs' Skeleton Argument for the 19 May 2020 hearing, the Defendant's Summons is an attempt to inhibit the effective operation of the WFO. It should not be indulged. To do so would be to risk creating a Fraudsters' Charter by emasculating the Court's important interlocutory powers in favour of a 'self-certification' procedure at freezing injunction return date hearings. The Defendant's approach would rob the Court of its powers to police and enforce its own interim injunctive remedies. At the return date hearing, the Court would be deprived of an opportunity to scrutinise or evaluate the Defendant's protestations about the use of its assets (including the Bond Proceeds) in the absence of full financial disclosure...*"

23. In fairness this submission was intentionally broad, attacking both limbs of the Defendant's disclosure challenge. But to my mind it was the high point of the Plaintiffs' attempt to justify requiring further disclosure to be given about the Bond Proceeds in light of the evidence tending to show that no such asset legally exists. Or, as Mr Potts QC put it at the May 19, 2020 hearing, the concept in law (as opposed to in equity) has "*no ontological basis*". But on reflection, and while I reject the suggestion that acceding to the Defendant's present application would "*risk creating a Fraudsters' Charter*", the fact that the Company admits that it has been implicated in fraudulent conduct is an important consideration. It must inform how the Court assesses the risk that dissipation may have already occurred, the risk of future non-compliance with the WFO and the need for proportionate policing protections.

24. However the 'fraud factor' was not responsive to the solid legal objection to seeking further disclosure about the Bond Proceeds which had already been dispersed, as it were, to the four winds. If the Bond Proceeds were understood to exist in laymen's terms, Mr Potts QC rightly argued that in legal terms this was gibberish (absent engaging equitable relief). There is also a more practical alternative argument to this elegant legal objection, which I adverted to in the course of argument. There is a temporal non-alignment between looking

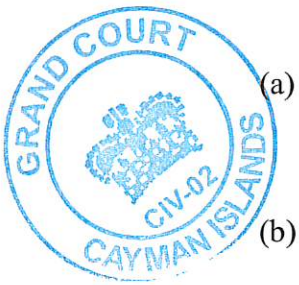
back at what happened to assets received before the WFO was granted under the guise of "policing" the Order granted on May 8, 2020. A proprietary claimant is entitled to require the Court to look back at events before the Order was made, because equitable relief 'bites' on antecedent transactions and property representing the proceeds of the misappropriated property. A proprietary freezing injunction is designed to not just freeze what the defendant currently owns, but is aimed to support a claim designed to restore to the claimant what is rightfully his. The Plaintiffs presently only seek damages in aid of a personal claim. The correct approach to the narrow question of whether to require a defendant to comply with disclosure obligations before an application to set aside a freezing order is heard is described in '*Gee on Commercial Injunctions*', 6th edition, at paragraph 6-06 as follows:

> "*In a case which is otherwise suitable for worldwide Mareva relief together with a disclosure order, it is not normally right to decline to grant the relief pending resolution of a challenge to the jurisdiction, because of the risk of rendering the relief useless.*"

25. Near the end of the hearing, however, Mr Houseman QC referred the Court to the broader and more flexible principles the Plaintiff relied upon in seeking the disclosure obligations initially at the ex parte hearing, found in '*Gee on Commercial Injunctions*', 6th edition, paragraph 23-003:

> "*An order can be made if the purpose is to identify and preserve assets of the defendant which might otherwise be dissipated notwithstanding the injunction.*"

26. These principles, which I understood to be deployed in support of the attempt to compel disclosure of assets embraced by the extended definition of assets, does not assist the Plaintiffs as regards the Bond Proceeds limb of the case at all. In particular, it does not purport to address how the Court balances the competing interests of the applicant seeking interim protection and the respondent seeking interim protection pending a hearing that might result in the freezing order being discharged. Here the Court is concerned with balancing the scales of justice in the interregnum between the *ex parte* hearing when the WFO was made and the *inter partes* hearing when it may not be renewed. I find that the Defendant should not be required to make any further disclosure about the Bond Proceeds pending the Return Date because:



(a) the connection between the information sought and the assets frozen by the Order, based on the material presently before the Court, is legally tenuous and/or unintelligible and incapable of being fairly complied with; and

(b) (further and in any event) declining to order further disclosure at this stage will not render the WFO nugatory, having regard to the disclosure already given.

Findings: should the Defendant be required to disclose the assets of its direct and indirect subsidiaries?

Overview

27. In my judgment no serious issue arises as to the intended scope or construction of the WFO as regards the obligation to disclose information about the assets of the Defendant's subsidiaries. In reality, the Defendant invited the Court to find that either there was no valid legal basis for the obligation or that the Court in its discretion should not require the Defendant to comply with it until the Return Date hearing has concluded.

28. Before considering the respective arguments, it is helpful to revisit the relevant provisions of the WFO and consider how they interact. Firstly, the frozen assets include assets which are in reality its assets irrespective of the legal basis on which they are formally held. Secondly, the dealings which are restricted include dealings through the instrumentality of the Defendant's direct shareholdings and any related powers conferred over subsidiary companies' assets. Reading paragraph 5 of the WFO in a straightforward way, there is no attempt to blur the lines of demarcation between the Defendant's assets and those of its legally distinct subsidiaries. The extended definition of assets only captures assets held by subsidiaries which in reality belong to the Defendant, formal appearances to the contrary notwithstanding. The disclosure obligations, on the other hand, cast a broader net. At first blush this seems anomalous; but it requires little analysis to identify the practical rationale for seeking such relief if it is legally available. A holding company's asset value is usually a reflection of the underlying value of its subsidiaries. The most obvious way in which the risk of dissipation will be realised will typically be indirectly, with the holding company causing or permitting a dissipation of its subsidiaries' assets, otherwise than in the ordinary course of business.

29. In this case the Defendant has disclosed that its main assets are a receivable from its indirect subsidiary, Luckin Coffee (Hong Kong) Limited ("Luckin HK"), and its shareholding in its direct subsidiary, Luckin Coffee Investment Inc. ("Luckin BVI"). So, in this commercial context, disclosure obligations aimed at policing a freezing injunction granted against a

holding company would, *prima facie,* have little teeth if the assets of subsidiaries were in principle shielded completely from view by the veil of separate corporate personality.

Was it legally permissible to extend the scope of the WFO's disclosure obligations to the assets of the Defendant's subsidiaries?

30. Mr Potts QC, in a series of typically persuasive submissions, contended that any such pragmatic considerations must give way to more elevated but fundamental considerations of legal principle. Firstly, he addressed through the Defendant's Skeleton Argument the impact of the doctrine of separate legal personality:

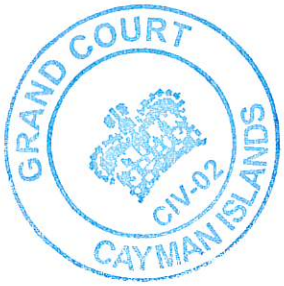
"21. Given the fact, and law, of separate corporate personality, it would take an exceptional set of circumstances (and strong supporting evidence at the ex parte stage) for a Court to 'pierce the corporate veil' in the context of an application fora Mareva injunction and ancillary disclosure orders. This is clearly not such a case (and the Plaintiffs did not attempt to suggest that it was, at the ex parte hearing on 8 May 2020)."

31. He then referred to various English authorities directly addressing the question of ancillary disclosure orders. Firstly:

> *"22.1 the English High Court decision in Linsen International Ltd & Ors v Humpuss Sea Transport PTE Ltd & Anor [2010] EWHC 303 (Comm), in which Christopher Clarke J held, at paragraphs 124 to 126, as follows:*
>
> > *'125. I do not regard it as incumbent on a company ordered to give information as to its assets for the purposes of a Freezing Order to give details of the assets of its subsidiaries since they are not its assets - even though the value of the subsidiary's assets will help to determine the value of the parent's holding in the subsidiary. By the same token a subsidiary does not give information as to its assets by its parent producing a consolidated balance sheet."*

32. Secondly, reliance was placed on *FM Capital Partners Ltd v Marino* [2018] EWHC 2889 (Comm) (at paragraphs 32 to 40, paragraphs 51 to 53, and paragraph 56), to which he referred in oral argument. Thirdly, reliance was placed on *Lakatamia Shipping Co Ltd v Su*

[2014] EWCA Civ 636 (at paragraphs 30, 51). Particular reliance in the latter regard was placed on the following *dicta* of Sir Bernard Rix LJ (as he then was):



> *"42...if a claimant wishes to freeze company assets of a non-defendant, he must either be prepared to make a sufficient case that the company concerned is just the money-box of the defendant and holds assets to which the defendant is beneficially entitled, and/or it has to make that company a defendant itself under the Chabra jurisdiction. Where a defendant's alleged liability is not merely that in the ordinary way of a party liable in debt or damages but is said to arise out of the misappropriation of funds or some such dishonesty, as in the Ablyazov litigation, it will often be possible to request the court to make orders in wider terms and/or to make the defendant's corporate creatures defendants themselves. But in the more ordinary case, even where a freezing order is justified under its standard rationale, that does not extend to freezing the assets of other parties or corporate non-defendants."*

33. This passage, it is obvious, is not concerned with the ancillary disclosure aspects of a freezing injunction at all. So it is only obviously relevant to the extent that it is legally essential that the scope of the disclosure obligations match that of the freezing order. The same observation, with one qualification, applies to the fourth case relied upon:

> *"22.4 the English High Court decision in Group Seven Ltd v Allied Investment Corpn Ltd [2013] EWHC 1509 (Ch), in which Hildyard J spoke at paragraphs 80 to 82 of the need for 'strong evidence' that 'the respondent has or is likely to have assets in a non-trading body corporate which he wholly owns and controls, which do not have any active business, and which are in truth no more than pockets or wallets of that respondent... as has often been emphasised, a freezing order is, even in its standard form, a substantial invasion of a respondent's usual rights, to be made only to seek to ensure that the effective enforcement of orders of the court is not deliberately thwarted. Obviously, any extension in its application to legally separate third parties, which may be affected in ways that cannot necessarily or comprehensively be envisaged, can only be justified in exceptional circumstances"*

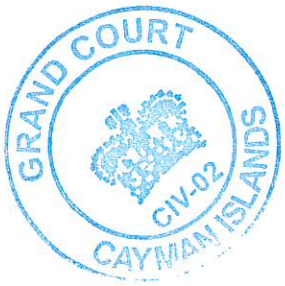
34. The qualification I would make to generally doubting the relevance of this passage is as follows. To the extent that the ancillary disclosure obligations are merely the 'tail' to the freezing order 'dog', the same policy cautionary concerns about extending the freezing order to third parties potentially apply to disclosure orders as well. The Defendant's

counsel then advanced the following central submissions in relation to alleged evidential deficiencies in the Plaintiffs' case which had considerable merit:

> *"25. For the avoidance of doubt, the Plaintiffs' current arguments derive no support from the United Kingdom Supreme Court's decision in JSC Bank v Ablyazov[2015] 1 WLR 4754 (or from Gee at 23-016 or JSC v Pugachev [2016] EWHC 248). There is simply no evidence properly before the Court (and there was none at the ex parte hearing on 8 May 2020) that might enable the Court to form the view that the corporate structure of the group of companies of which the Defendant is a part (which has been fully disclosed in the FOM) is a 'sham', or that the Defendant, in its capacity as a shareholder of a BVI company, exercises legal or factual control over the assets owned by the BVI company, the Hong Kong companies or (most importantly) the PRC companies or the PRC VIE, for ancillary asset disclosure purposes."*

35. Unperturbed by my indication that his opponent was ahead at half-time, Mr Houseman QC sought to pull back the deficit with persuasive submissions of his own. The Plaintiffs' Skeleton Argument advanced the following arguments in support of the legal basis for the "extended definition" of assets incorporated in the WFO at paragraph 5:

> *"74. The Defendant's argument against paragraphs 8(b) and 8(c) (and the scope of paragraph 7(a) (ii) beyond the Defendant itself) is that the 'extended definition' of 'assets' in the second sentence of paragraph 5(a) of the WFO is not appropriate and/or in any event, on the facts of this case, does not require the Defendant to give any financial disclosure in relation to its subsidiaries. This is incorrect.*
>
> *75. The so-called 'extended definition' was considered by the English Supreme Court in JSC BTA Bank v Ablyazov. The meaning is well understood and summarised in Gee: 'The fact that assets belong legally and beneficially to a company does not answer whether the extended wording applies. If through a defendant's legal control over a company he is able to use the company's assets as if they were his own then it is considered that the extended wording applies.'*
>
> *76. As Gee explains, the more restrictive interpretations in Lakatamia and in Group Seven Ltd v Allied Investment Corp should be regarded as overruled.*
>
> *77. As stated by Lord Clarke JSC in Ablyazov: '... the whole point of the extended definition of 'assets' is to catch rights which would not otherwise have been caught*



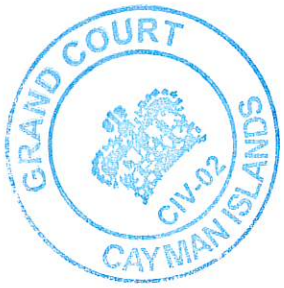
and, in particular, the 'defendants' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own'. And further: 'The whole focus of the second and third sentences of the paragraph is the defendant's power to deal with the lender's assets as if they were his own. It follows that the focus of the second sentence of paragraph 5 is not on assets which the defendant owns (whether legally or beneficially) but on assets which he does not own but which he has power to dispose of or deal with as if he did."

36. This submission, it seems to me, does not fully engage with the Defendant's main objection. Although the propriety of adopting the extended definition was questioned in passing, in part because the issue was not expressly addressed at the ex parte hearing, the Defendant's main objection was to producing information about non-party subsidiaries. Since the extended definition point is an important point of practice not seemingly addressed in local case law, I will consider the point nonetheless. The critical issue in dispute initially appeared to me to be what factual findings were required to justify deploying the "extended definition". This issue was not directly addressed in any of the English cases, so far as I could discern. In fact on a proper analysis no evidential test need be met if an applicant for injunctive relief wants to deploy the extended definition. Justification for invoking the extended definition will perhaps often only arise in the context of enforcing the freezing order or seeking ancillary relief. This emerges from the most relevant cases to which counsel referred. In *FM Capital Partners Ltd v Marino* [2018] EWHC 2889 (Comm), Peter MacDonald Eggers QC (sitting as a Deputy High Court Judge) helpfully reviewed the English case law in the context of explaining why he had refused to discharge a post-judgment worldwide freezing order, paragraph 5 of which resembled paragraph 5(a) of the WFO in general terms. The central complaint made by the applicant seeking to discharge the order in that case was that the order ought not to apply to the assets of his companies. The judge described the pre-*Ablyazov* position as follows:

> "*32. In my judgment, the decisions of Hildyard, J in Group Seven Ltd v Allied Investment Corpn Ltd and of the Court of Appeal in Lakatamia Shipping Co Ltd v Su established that:*
>
> *(1) The extended definition of assets in the standard form of freezing order does not, by itself, render the freezing order applicable to the assets of a third party, including a company wholly owned and controlled by the respondent.*
>
> *(2) In order that the extended definition should apply to a particular asset, that asset must be one to which the respondent is beneficially entitled or in which the respondent is beneficially interested.*

(3) *When the respondent, in his or her capacity as a director or shareholder of a company, exercises control to dispose of or deal with a company's asset, the respondent is acting as an organ or agent of the company, not as an individual in his or her own right. While the conduct or knowledge of an individual may be attributed to a company for a variety of reasons, the reverse is not true, that is the conduct or knowledge of a company is not to be attributed to the individual director or shareholder.*

(4) *Nevertheless, where the respondent exercises control over the assets of a company in which he or she is the only or principal shareholder, that conduct may have the effect of diminishing the value of the respondent's shareholding in the company, and as that shareholding is an asset which is captured by the freezing order, such conduct may be enjoined by the freezing order. This is very unlikely to be the case where the respondent is exercising such control in the ordinary course of business of the company. Nevertheless, such a consideration would justify the imposition of a notice requirement in the freezing order on the part of the respondent in respect of such a company's assets.*



(5) *There may be occasions where the freezing order could be expressed by the Court to apply to the assets of a company wholly owned or controlled by the respondent, where that company is not a defendant to the substantive litigation, but that jurisdiction is to be exercised only exceptionally, for example, where in truth the company's assets are the respondent's assets (as Hildyard, J suggested in respect of non-trading companies which have no active business and 'which are in truth no more than pockets or wallets of that respondent').*"

37. Deputy Judge Eggers then summarised the post-*Ablyazov* legal position as follows:

"*51. Accordingly, I do not consider that the Supreme Court's decision in JSC BTA Bank v Ablyazov overrules the ratio of the Court of Appeal's earlier decision in Lakatamia Shipping Co Ltd v Su. Nevertheless, the question arises whether there is an inconsistency between the two decisions. Having regard to the principles I extracted from the Court of Appeal's decision, as summarised in paragraph 32 above, I do consider that there is an inconsistency between the first two of the principles summarised and the Supreme Court's decision in that:*

(1) Lord Clarke held (at para. 46, 48-49) that the extended definition of assets in the standard form of freezing order captured assets which are not owned legally or beneficially by the respondent, but over which the respondent has control and has the power to dispose of or deal with as if he or she did. In other words, the extended definition expands the ordinary meaning of 'assets'.

(2) This holding is at odds with the Court of Appeal's decision (at para. 30, 41-42, 47-51) that the extended definition of a defendant's assets was not intended to include the assets of another person, even if controlled by the respondent.

52. Therefore, the extended definition does apply to assets over which the respondent has control but which the respondent does not legally or beneficially own. Insofar as the Court of Appeal in Lakatamia Shipping Co Ltd v Su held otherwise, that decision cannot stand given the decision of the Supreme Court in JSC BTA Bank v Ablyazov."

38. Mr Potts QC embraced the example given by Hildyard J in *Group Seven Ltd v Allied Investment Corpn Ltd.* Assets of wholly owned companies of a defendant not before the Court could only be frozen if they were "*in truth no more than pockets or wallets of that respondent*". But that is not what paragraph 5(a) purports to do. In fact *FM Capital Partners Ltd,* carefully read, suggests two different tests altogether for two different categories of restraint:

(a) a "control" test which triggers the application of an extended definition of assets (using a form of wording which is standard in the English Commercial Court) to include assets controlled by the defendant; and

(b) an exceptional, veil-piercing, test applicable to an order designed to freeze assets of non-party companies owned by a defendant, which assets fall outside of a standard and extended definition of assets of the defendant.

39. The effect of deploying the extended definition of assets necessarily means that no freezing of third party assets occurs at all. That is the legal function of extending the definition of the defendant's assets. It is only if assets not falling within the extended definition and belonging to third party companies owned by the defendant are frozen, that what may be described as piercing the corporate veil occurs. The distinction between these two

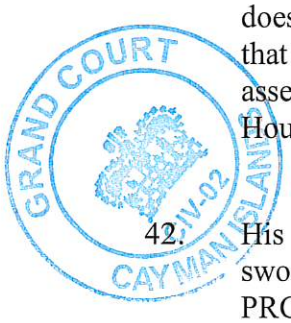
categories is reflected in the separate treatment accorded them in sub-paragraphs (4) and (5) in Peter MacDonald Eggers QC's judgment in *FM Capital Partners Ltd v Marino* [2018] EWHC 2889 (Comm). It is also clear from the judgments of the English Court of Appeal in *Lakatamia.* For instance, Tomlinson LJ in *Lakatamia Shipping Company Limited -v-Su* [2014] EWCA Civ 636 (at paragraph 29) cited with apparent approval the analysis of Hildyard J in *Group Seven Limited v Allied Investment Corporation Limited* [2013] EWHC 1509 (Ch); [2014] 1 WLR 735. This analysis clearly distinguishes two scenarios:

> "*(5) Since the Hadkinson case, words to extend the meaning of 'his assets'* ha*ve been introduced into the standard CPR form: these are the words in paragraph 6 of the standard CPR form and paragraph 9 of the Freezing Order. Those words extend the meaning of 'his assets' to cover assets which are not in the legal ownership of the defendant but in respect of which the defendant 'retains the power to direct how the assets should be dealt with': per Patten LJ in JSC BTA Bank v Solodchenko and others [2011] 1 WLR 888 898, paragraph 26, per Patten LJ....*
>
> *(9) As to piercing or lifting the corporate veil: ownership and control of a company are not themselves sufficient to provide justification for that course, even when no unconnected third party is involved and it might be perceived that the interests of justice would be served by it: see VTB Capital plc v Nutritek International Corp [2012] EWCA Civ 808 at paragraph 78. It is always necessary to show impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing: see the VTB Capital plc case, para 78.*"

40. In my judgment there can be no objection in principle to restraining the Defendant from disposing of, otherwise than in the ordinary course of business, its own assets broadly defined. Nor do any difficulties of construction arise. The Defendant should have little difficulty in identifying what assets, if any, fall within the extended definition, assuming the corporate structure is not a sham and that it is the exception rather than the rule that it treats assets legally owned by its subsidiaries as if they were its own. For my part, the English standard extended definition of assets should be regarded as uncontroversial in this jurisdiction as well[1].

[1] Nothing in my view turns on the difference between the fuller English wording "*interested in them legally, beneficially or otherwise*" and the abbreviated "*interested in them legally or otherwise*" found in paragraph 5(1) of the WFO.

41. In my judgment, there is no need as regards the principle of granting the WFO on terms which embody the extended definition of assets set out in paragraph 5(a) to demonstrate that such extended category of assets exist. If they do not exist, the extended definition does not 'bite' and the Defendant suffers no discernible prejudice. I reject any suggestion that adopting the extended definition was legally flawed in the absence of proof that such assets existed. It ought to ordinarily suffice to show that such assets might exist. Mr Houseman QC posited two tests of control nonetheless, one legal and one evidential.



42. His "first route to goal" was based on demonstrating, through the Third Berdon Affidavit sworn in reply to Schakel 2, that under British Virgin Islands law, Hong Kong law and PRC law, the Defendant had the ability to exercise considerable control over its direct and indirect subsidiaries. This provoked howls of protest from Mr Potts QC. Clearly, a New York lawyer engaged by the Plaintiffs is not competent to give expert evidence as to foreign law. All that the deponent did, however, was to explain the legal control he believed existed for the purposes of an interlocutory application based on what he had been "*informed by counsel in the various jurisdictions*". The complaints about the timing of the production of this evidence were justified, though. Mr Houseman QC's "second route to goal" was positive evidence that the Defendant exercises and has publicly admitted that it exercises "effective control" over the Group. In addition, based on discovery provided to date, that on at least one occasion the Defendant appears to have wired money for its own benefit into an account in the name of another company. To the extent that any evidential basis for applying the extended definition is required, the ex parte application was made without addressing these issues at all (as Mr Potts QC was keen to point out). Nevertheless, I find that the minimum threshold has been met. But this does not mean without more that the disputed disclosure requirements are legally required. The mere fact that the Defendant can (as I accept) produce the financial records of its subsidiaries does not mean that it should. More fundamentally still, the applicability of the extended definition of assets was not contended to justify freezing all of the assets of the subsidiaries so as to trigger an almost automatic right to matching ancillary disclosure relief. That definition preserves rather than extinguishes the boundaries between the Defendant's assets and those of its controlled subsidiaries.

43. The key question on the present application therefore, properly understood, is whether there is a sufficiently cogent case for, not just restraining the dissipation of the Defendant's assets broadly defined, but also imposing ancillary disclosure obligations which extend beyond the Defendant's own assets to include the following terms of paragraph 8 of the WFO (emphasis added):

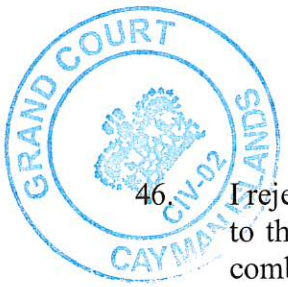
> "*(c) Provide the Plaintiffs' attorneys with bank account details and current balances of all bank accounts in the name or held on behalf of the Defendant or its*

directly or indirectly controlled subsidiaries and group companies listed in Schedule 3 to this Order."

44. The most obvious reason why information about the assets of the subsidiaries would be relevant to policing the restraint imposed by the WFO on dissipating the Defendant's own assets was the following. The Defendant's main asset was a receivable from its indirect subsidiary, Luckin HK, so that reducing the value of any of the underlying assets would indirectly diminish the value of the Defendant's shareholding in its wholly owned direct subsidiary, Luckin BVI. In this indirect sense, being able to monitor significant disposals of the subsidiaries' assets would enable the Defendant's compliance with the freezing of its own assets to be policed. At the ex parte hearing, as Mr Potts QC again was keen to point out, the implications of this limb of the disclosure obligations were not expressly addressed. Far less were any submissions made on the more tenuous issue of whether disclosure of the subsidiaries' assets was required because some of those assets were or might not be the subsidiaries' assets at all, but might fall within the extended definition of assets under paragraph 5(a) of the WFO.

45. Is what I meekly accepted at the ex parte hearing as an obvious generic basis for requiring disclosure of the subsidiaries' assets truly uncontroversial, or is it an exceptional form of disclosure order? Mr Houseman QC's route to goal was in reality a circuitous one which brought him within clear sight of goal without putting the figurative football into the back of the net. Rather than positing a straightforward answer, supported by authority, to the question of when it was appropriate for financial information about third party subsidiaries to be disclosed in aid of freezing orders, the Plaintiff's Skeleton Argument advanced the following beguiling submissions:

> "*82. Given this self-proclaimed 'effective control' by the Defendant over its subsidiaries (the existence of which is corroborated by evidence of relevant foreign law), the extended definition applies and the scope of the disclosure orders at paragraphs 7(a)(ii), 8(b) and 8(c) is appropriate in the present case. This is especially so given that this Defendant appears to have already channelled over US$800 million, including the funds it raised by means of its fraudulent misrepresentations, through its network of subsidiaries.*
>
> *83. As Carey's letter of 14 May 2020 confirmed, disclosure under those paragraphs is not sought from the subsidiaries (i.e., non-parties). It is sought from the Defendant to the extent that, whether de jure or de facto, the Defendant has access to the relevant documents. Whether or not the Defendant properly complies with this important disclosure obligation will fall to be tested another day. The key point*



for present purposes is that the obligation is clear in scope and effect, such that the Defendant knows what it must do ahead of the return date hearing of the WFO."

46. I reject for present purposes the submission that disclosure of financial information relating to the Defendant's subsidiaries' assets can, without more, be justified by reference to a combination of the facts that (a) the extended definition of assets is appropriate for the freezing order, and (b) the Defendant has effective control over the subsidiaries' financial information. These generic facts, which would apply to potentially many similar cases, do not by themselves support an entitlement to disclosure of the controlled subsidiaries' assets in a way that makes no real distinction between those assets and the Defendant's own assets. The alternative submissions require more careful scrutiny:

> "*87. As such, at least the Defendant's BVI and Hong Kong subsidiaries are nothing more than the Defendant's own pockets or moneyboxes. In an extraordinary case such as this, where the Defendant is accused of a massive fraud, it would be entirely appropriate to include at least the Defendant's BVI and Hong Kong subsidiaries' documents within the scope of the disclosure orders even if the 'extended definition' language was held to be inappropriate.*
>
> *88. The second (and independent) basis is that this is a case where dissipation of the assets owned by the Defendant's subsidiaries will, inevitably, lead to the diminution in value of the Defendant's own assets in the form of its shareholding in Luckin BVI (the value of which in turn depends on the value of the assets of the Hong Kong subsidiaries, and so on down to the PRC operating companies).*"

47. The "*pockets or money boxes*" point is another new point and is a quite exceptional basis for justifying an unusually broad disclosure order. For present purposes, and subject to reconsidering the point on the Return Date, I do not accept that the Plaintiffs have come close to justifying disclosure of third party financial information on the basis that it is, in effect, appropriate to lift, or pierce, the corporate veil. If the Plaintiffs could make good this point, they would logically have sought to freeze the assets of the subsidiaries as well.

48. On the other hand, the second alternative point, that dissipation of the subsidiaries' assets will diminish the value of the Defendant's shareholding in Luckin BVI, reflects the tacit basis upon which the expanded disclosure provisions of the WFO were in fact ordered. However, circularity is again at play. The argument assumes that which it purports to establish. The mere fact that the dissipation of the subsidiaries' assets will diminish the value of the Plaintiff's main asset makes dealings with those assets relevant to the efficacy

of the freezing limbs of the WFO. It does not follow that disclosure of such information is necessarily appropriate as a matter of legal principle and/or practical need. The best authority the Plaintiffs could deploy in this regard provided no direct support for ordering disclosure at all:

> "*89. In Lakatamia, although the English Court of Appeal criticised Burton J's first instance reasoning on whether assets of the defendant's subsidiaries fell within the definition of 'assets' in the injunctive provisions of the freezing order, the Court of Appeal ended up upholding Burton J's order imposing notification requirements with respect to any disposal of the subsidiaries' assets on a different basis. The basis was that, in circumstances where the dissipation of the subsidiaries' assets could have diminished the value of the defendant's own assets, the assets of the subsidiaries are 'covered' by the freezing order even though they are not the same as the assets of the defendant actually frozen by it.*"

49. In my judgment there can be little room for doubt that, in appropriate circumstances, the Court has jurisdictional competence to order a party in the position of the Defendant to produce documents about the assets of its subsidiaries to police the freezing portions of a freezing injunction. However, whether it is appropriate to make such an intrusive order, as opposed to imposing, for instance, the less intrusive notification requirements ordered by Burton J and approved by the Court of Appeal in *Lakatamia Shipping Company Limited -v-Su* [2014] EWCA Civ 636, is a more nuanced question. The "*orthodox position*" as regards to the interaction between the indirectly relevant assets of a defendant's third party companies was described by Tomlinson LJ in *Lakatamia* as follows:

> "*31. There is therefore no basis upon which it can be asserted that the language of paragraph 6 of the standard form freezing order, whether with or without the Commercial Court words, is either intended to have the effect or does have the effect of bringing within the definition of a defendant's assets the assets of a company which he controls, and such assets are not 'directly affected' by such an order. It can no doubt be both surprising and unsettling to be reminded of these first principles. For the reasons I have already given however the assets of such a company will ordinarily be indirectly affected by the Order because of the effect of disposition upon the value of the defendant's assets consisting in his direct or indirect shareholding in the relevant company. The orthodox position is explained by Gloster J in JSC VTB Bank v Skurikhin [2012] EWHC 3116 (Comm) at paragraph 35:-*

'As I indicated during the course of the hearing, I am not prepared to order the provision of the further disclosure sought from Perchwell, namely the nature and value of the assets held by its wholly-owned subsidiaries, Cegasa, Promanda and Tunnelson. The injunction made against Perchwell restrained it from disposing of its assets whether it was interested in them "legally, beneficially or otherwise" including any asset "which it has the power, directly or indirectly, to dispose of or deal with as if it were its own." The injunction also provided that Perchwell was to be regarded as having such power "if a third party holds or controls the asset in accordance with its direct or indirect instructions'. But the assets caught by the injunction were Perchwell's legal ownership of the shares in the three subsidiaries, not the underlying assets of those subsidiaries themselves. There was no evidence before me providing any justification for me to disregard the separate corporate legal personalities of the underlying subsidiaries, namely Cegasa, Promanda and Tunnelson, or to suggest that their assets were held or controlled in accordance with Perchwell's "direct or indirect instructions". On the contrary, the evidence showed that the shares in the subsidiaries were held pursuant to the nominee agreement to the account of Shawnee. Moreover there was no evidence to suggest that the three companies were not genuine holding or commercial companies in their own right. For example Tunnelson had been the holding company of the SAHO group companies since March 2009. In my judgment, to have made such an order would not only have extended beyond the legitimate jurisdictional ambit of this court's powers as articulated in Uden, supra, but would have also disregarded the principle enshrined in Salomon v A Salomon & Co Ltd [1897] AC 22.'"

50. The quoted observations of Gloster J (as she then was) reveal that ordering the production of information about the assets of subsidiaries is an exceptional course. That an applicant for an ancillary disclosure order is not ordinarily entitled to information about third party assets finds further support in the following observations of Christopher Clarke J (as he then was) in *Linsen International Ltd & Ors -v- Humpuss Sea Transport PTE Ltd & Anor* [2010] EWHC 303 (Comm) upon which Mr Potts QC relied:

> "*124. The purpose of requiring information as to the assets of a company subject to a freezing order is to determine what assets are caught by it and to monitor compliance. Consolidated accounts by definition present all the assets and*

liabilities of a group of companies as if the group was a single entity. They will not, therefore, identify the individual assets of the parent (e.g. property and bank accounts which it owns or its shareholdings), or of any particular subsidiary or the value of those individual assets, although the total value of the assets of a group in the consolidated accounts will indicate the total book value of the assets of the companies owned by the parent...

126. Mr Howard submitted that it was necessary for a company such as HIT to provide accounts of its subsidiaries, and of its sub-subsidiaries in order to value its assets. I think that this goes too far. Prima facie the Owners are not entitled to the accounts of companies which are not defendants. In those circumstances I do not propose to order the defendants to produce financial statements of Silverstone, Cometco, Humolco or HTK." [Emphasis added]

51. The important principle to be extracted from this persuasive authority is that (a) the general rule is that information about the value of subsidiaries' assets will not be provided, but (b) such disclosure may be ordered in appropriate exceptional cases. A careful balancing act must be carried out to assess whether there is specific evidence which displaces the starting assumption that ancillary disclosure will not be ordered about the assets of indirectly relevant non-party subsidiaries, which is also implied by the quoted passage of Gloster J in *JSC VTB Bank v Skurikhin* [2012] EWHC 3116 (Comm) at paragraph 35. The need for such a careful assessment was not canvassed before me at the ex parte hearing. The threshold required to justify displacing this starting assumption against ancillary disclosure seems to me to be logically lower than the threshold which is required to justify treating the assets of subsidiaries as not their own assets at all. One exercise involves weighing factors for and against including a legally permissible ancillary provision in a freezing order. The other entails dis-applying a fundamental substantive law rule, the doctrine of separate corporate personality.

52. In light of the Third Berdon Affidavit, and the disclosure given by the Defendant thus far, the Plaintiffs' case on risk of dissipation appears to me to have strengthened to a material extent since the WFO was actually made. The Plaintiffs' case, supported by presently uncontradicted sworn[2] evidence from three apparently unconnected deponents, is as follows. In early April 2020 Mr Schakel (the Defendant's CFO) in three separate conversations represented that the Bond Proceeds were "*mostly*" still "*offshore*". These conversations are said to have occurred shortly after the Defendant announced an internal investigation into the suspected fraudulent misstatement of its accounts for the fourth quarter of 2019. Two further deponents say that in subsequent days Mr Schakel avoided

[2] Sworn versions of the Affidavits relied on by the Plaintiffs in this respect and generally were filed after the ex parte hearing on May 8, 2020 but on or before the May 25, 2020 hearing.

speaking to them. It is common ground that the Defendant's attorneys Davis Polk & Wardell by email dated April 11, 2020 to Kasowitz Benson & Torres LLP (New York attorneys for certain Plaintiffs) notified the Plaintiffs' attorneys that the "*proceeds from the Notes (as defined in your April 5, 2020 letter) offering were distributed in the ordinary course of business to the Company's subsidiaries to support is operations in accordance with the 'Use of Proceeds' section of the Offering Memorandum*". This was after the Plaintiffs say these discussions and attempted discussions with the CFO occurred.

53. Schakel 2, filed (understandably) in unsworn form on May 22, 2020, complained about the pressure the CFO was under dealing with various contentious matters. While I consider it prudent of him not to have prepared a hasty response to all aspects of the evidence arrayed against the Defendant, I must nonetheless resolve the present controversy based upon the state of the evidence as it presently is. The additional evidence is sufficiently significant to warrant my taking it into account at this stage, in large part because it was not reasonably available to the Plaintiffs at the start.

54. I find that the Plaintiffs have made out a clearer case of a risk of dissipation than at the ex parte hearing. If they are right about what Mr Schakel said to three of their deponents in the immediate aftermath of the announcement by the Defendant of the discovery of an accounting fraud which seriously misled investors about the Defendant's true financial position, two obvious potential inferences arise. Either the bulk of the Bond Proceeds were transferred to the PRC otherwise than in the ordinary course of business without the knowledge of the CFO (at first blush more likely). Or the CFO knew or suspected that the Bond Proceeds had been inappropriately transferred, and was seeking to conceal the true position from potential claimants (at first blush less likely). The Defendant's April 2, 2020 Press Release announced that a Special Committee had on that date recommended the suspension of the Director and Chief Operating Officer (a longstanding and close business associate of the Chairman), and the 'impugned' transfers occurred before the Chief Operating Officer suspected of fraudulently inflating the Defendant's accounts was removed from his senior position.

55. At this stage, charged pivotally with assessing the starting assumption that the Defendant is not required to give disclosure about the assets of its non-party subsidiaries, the implications of the strikingly unusual picture portrayed by the Plaintiffs' evidence may be summarised as follows:

(a) it is arguable that the Defendant has already dissipated assets by transferring huge sums to its own accounts in PRC and/or to its subsidiaries' accounts in PRC and/or [B] otherwise than in the ordinary course business;

(b) for the reasons explained below, there is a risk that future dissipation may occur either directly (in relation to assets held in the name of subsidiaries which belong to the Defendant under the extended definition in paragraph 5(a)) or indirectly (in the form of depleting the assets of the subsidiaries); and

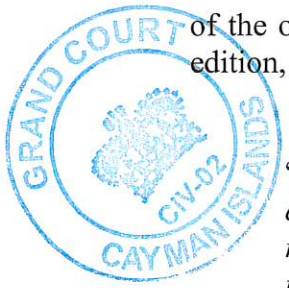
(c) the dissipation or preservation of such assets held in the name of the Defendant's subsidiaries can only be verified through an analysis of information disclosing what those assets are.

56. It is also possible, as the Defendant contends, that all or most of the transferred monies have already been used to recapitalise certain PRC subsidiaries. The Defendant may succeed in establishing that this was an entirely proper deployment of the Bond Proceeds expressly contemplated by the Private Offering Memorandum. The Defendant may also succeed in establishing that, irrespective of what may have happened prior to April 2, 2020, substantially independent management is now in place so that no real risk of dissipation exists. Nonetheless, bearing in mind the ample breadth of the discretion conferred on the Court when considering imposition of ancillary terms in a freezing order, while being guided by the principles established through case law, on balance I find that it is jurisdictionally open to me to require the information sought.

57. The critical question, however, is whether, based on the present state of play, I should require the Defendant to provide the ancillary disclosure about its subsidiaries' assets which the Plaintiffs seek pursuant to the relevant provisions of the WFO. This is not the Return Date and the Defendant has indicated unequivocally that it proposes to oppose the continuance of the ex parte Order. The pivotal evidence on this issue has been filed by the Plaintiffs in reply to the Defendant's evidence in support of its Summons seeking to be relieved from these very disclosure obligations pending the full *inter partes* hearing. It is clear from the authorities cited at the present hearing, that ancillary disclosure in relation to non-party assets is an exceptional remedy. For instance, a notification requirement only was imposed in *Lakatamia,* a more limited intrusion into the affairs of the non-party subsidiary than a 'full-blown' asset disclosure order.

58. Having not consciously considered that it was appropriate to require such disclosure at the ex parte hearing, in my judgment it is inappropriate for me to do so now when a full *inter partes* analysis of the merits of the WFO will soon be undertaken.

59. Where a challenge to a freezing order is pending, as noted above, the only rationale for requiring compliance with ancillary disclosure obligations in the interim is if the efficacy



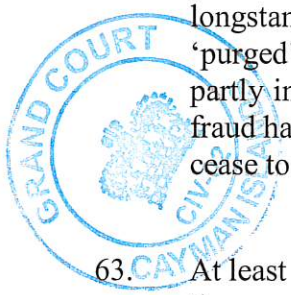
of the order would otherwise be undermined. As '*Gee on Commercial Injunctions*', 6th edition, states the principle at paragraph 6-06:

> "*In a case which is otherwise suitable for worldwide Mareva relief together with a disclosure order, it is not normally right to decline to grant the relief pending resolution of a challenge to the jurisdiction, because of the risk of rendering the relief useless.*"

60. A positive way of stating the same principle is that one should only grant the relief pending a challenge where there is a risk of rendering any subsequent grant of the relief useless. Judicial restraint should be exercised in requiring a party to comply with an order which is subject to challenge. There are considerations which potentially suggest that risk of prejudice to the Plaintiffs may be slight. The Defendant and its current management are subject to considerable public scrutiny. It is bound by the WFO not to dispose of its assets directly or indirectly through diminishing the value of its shareholding in its direct subsidiary, outside of the ordinary course of business. It is prohibited from destroying its own documents and there has been no suggestion that it cannot be trusted to comply with the 'document preservation' portions of the WFO (which apply only to its own assets). The disclosure obligations in question are not standard and the Plaintiffs did not adequately address me at the ex parte hearing on the nuances of the relevant law. And there is no concrete basis for me to find that the ancillary disclosure relief sought will be "*useless*" if not granted at this stage. I accordingly accept the submission of the Defendant's counsel that this obligation should be suspended pending the determination of the Plaintiffs' *inter partes* Summons on the Return Date.

61. Declining to impose any policing protections at all on the assets of the Defendant's subsidiaries is, however, only rationally sustainable on the assumption that (a) the Defendant will not dissipate its assets through improperly disposing of its subsidiaries' assets and/or assets of the Defendant held in the subsidiaries' names before the Return Date, and (b) that the Defendant will not procure its subsidiaries to destroy any documents evidencing the true ownership and/or value of their assets so that the Plaintiffs' ability to benefit from the suspended disclosure obligations will not be rendered nugatory if the obligations are restored. The evidence presently before the Court does not entitle me to exclude altogether the risk that assets may not be dissipated and that documents relevant to the identification of the true ownership and value of assets held by the subsidiaries may not be preserved.

62. The document preservation provisions of the WFO do not expressly apply to the documents relating to the assets of subsidiaries. I also have no basis for confidently assuming that all persons loyal to the former Chief Operating Officer (who is said to have been a close and longstanding business association of the Chairman, who remains in place) have been 'purged' from all levels of the Group structure. It appears that the new management is only partly independent of the 'ancien regime'. Once a company has admitted that a serious fraud has occurred, the good faith assumptions which might ordinarily operate in its favour cease to apply.



63. At least some of the senior management is based in the PRC and news reports disclosed at the ex parte hearing suggest that criminal investigations may be underway there[3]. Although the jurisdiction of Chinese regulators over the fraud is unclear, it appears that private law suits against the Defendant's PRC subsidiaries are being actively pursued[4]. Experience teaches that the concept of dealing with assets 'in the ordinary course of business' often has diminished clarity to persons embroiled in major commercial and regulatory crises. Even with the best of intentions, the very notion of "ordinary course of business" becomes a necessarily malleable one when a crisis supervenes. On May 20, 2020, the NASDAQ exchange gave notice of its intention to delist the Defendant's shares, although this decision is subject to appeal. According to the Third Berdon Affidavit:

> "*34. NASDAQ cited two bases for the delisting decision: (i) public interest concerns as raised by the fabricated transactions disclosed by the Company on 2 April 2020; and (ii) the Company's past failure to disclose material information…*"

64. To meet the tangible concerns which I have that the asset disclosure obligations which the Plaintiffs wish to enforce may indeed be rendered useless if they are unconditionally suspended altogether pending the determination of the Return Date hearing, which is likely to be in several weeks' time, I would grant the suspension the Defendant seeks on the following conditions.

(1) the Defendant must preserve and must not dispose or part with possession of any documents in the Defendant's possession, power or control which

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[3] Exhibit "AB-1" to the First Affidavit of Andrew Berdon.

[4] Exhibit "AB-1", page 1255: Wei Sheng and Emma Lee, '*Luckin is being sued by Chinese investors under new law: Luckin may become the first Chinese firm punished by the country for fraud perpetrated in US markets*', tech node, April 23, 2020.

evidence the existence, location or value of the assets of the directly or indirectly controlled subsidiaries and group companies listed in Schedule 3 to the WFO; and

(2) the Defendant must deliver copies of the documents to which paragraph 8 (c) of the WFO applies to its Cayman Islands attorneys on or before the date of delivery of the present judgment.

Conclusion

65. I find that the Defendant has given sufficient disclosure in relation to the Bond Proceeds, bearing in mind that the merits of the WFO as a whole will be subject to consideration at the Return Date. Any further disclosure would only be appropriate in aid of a proprietary claim entitling the Plaintiffs to trace the proceeds of their money after it has become commingled with other property. However, I accept the Plaintiffs' submission that it is legally permissible to identify particular assets in a non-proprietary freezing order.

66. I have also found that it is permissible to extend the standard definition of assets in a freezing order to include other assets which may be held in the name of a third party but are assets in which the Defendant is legally otherwise interested and over which the Defendant has control. This form of wording has been for some time accepted by the English Commercial Court. It has seemingly also been approved by this Court before, without being addressed in any published judgment.

67. I find that the Plaintiffs have, primarily based on evidence and legal arguments advanced for the first time at the present hearing, established a basis for the Court to potentially order ancillary disclosure in relation to the assets of the Defendant's non-party subsidiaries. However, the Plaintiffs have failed to establish that the ancillary disclosure sought in relation to the subsidiaries would be rendered nugatory if their entitlement to such relief is suspended pending the Return Date hearing. Whether an ancillary disclosure order should in fact be continued will in any event be determined then, so these findings are without prejudice to the issue being revisited at that hearing.

68. On the other hand, I find that some less intrusive protections should be put in place to ensure that, in the interim, the ancillary discovery remedy is not rendered nugatory. The Plaintiffs' legitimate concerns about dissipation of the assets of subsidiaries (which

indirectly impair the value of the Defendant's assets and/or which may include assets controlled by the Defendant) can be proportionately met by suspending the existing ancillary disclosure obligations subject to the condition that (1) the Defendant does not destroy any documents relating to the existence, location or value of such assets, and (2) that the documents the Defendant is required to disclose pursuant to paragraph 8 (c) of the WFO are delivered to its Cayman Islands attorneys on or before the date of the present judgment to be held by them pending the determination of the Return Date hearing.

69. I will hear counsel if required as to costs and the form of Order required to be drawn up to give effect to this Ruling. I would otherwise reserve the costs of the Defendant's Summons until the Return Date to be dealt with at the conclusion of that hearing.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT