IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NOS: FSD 76 OF 2020 (RPJ)
FSD 77 OF 2020 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2020 REVISION)

AND IN THE MATTER OF SECTION 36 (3) OF THE EXEMPTED LIMITED PARTNERSHIP LAW (2018 REVISION)

AND

IN THE MATTERS OF PRIMUS INVESTMENTS FUND, L.P. AND MAYER INVESTMENTS FUND, L.P.

IN COURT (VIA ZOOM AND LIVESTREAMING)

APPEARANCES:	Mr Matthew Goucke, Mr Niall Hanna and Ms Siobhan Sheridan of Walkers on behalf of (the "Petitioner")
	Mr Ulrich Payne of Kobre & Kim on behalf of the (the "Respondents")
BEFORE:	The Hon. Raj Parker
HEARD:	4 June 2020
Draft Judgment Circulated:	12 June 2020
Judgment Delivered:	16 June 2020

HEADNOTE

Companies Law (2020) s 92,93(c) 94 (1) (b)-creditors winding up petitions-dispute on bona fide substantial grounds-Hong Kong Law expert evidence-adjournment for BVI and Hong Kong proceedings and generally-duties of mortgagees exercising power of sale over shares.

Introduction

1. The Respondents are Primus Investments Fund, L.P. ("Primus") and Mayer Investments Fund, L.P. ("Mayer") (together, the "Debtors"). They are both Cayman Islands special purpose entities holding shares in Luckin Coffee Inc. ("Luckin Coffee"), a company incorporated in the Cayman Islands.

2. Luckin Coffee is the holding company of the largest coffee retailer in China by number of outlets. It differentiates itself from its competitors by operating small kiosks involving the pickup and delivery of items ordered and paid for through a mobile application. As a result it does not need to lease a large amount of expensive real estate. It listed on the NASDAQ stock exchange following the successful completion of an initial public offering on 17 May 2019. Its shares are not traded directly; instead a class of securities called American Depository Shares ("ADS") has been created in respect of shares in Luckin Coffee, as is common for foreign companies which list on that exchange.

3. Credit Suisse AG, Singapore branch (the "Petitioner"), asserts that the Debtors are liable for a debt of US$324,135,766.30 (principal sum as at 1 June 2020) and has issued creditor's winding up petitions[1] (the "Petitions") against each entity in this Court. The subject debt represents the balance due, following various transactions that were undertaken on behalf of the Lenders under the Finance Documents which operated to set off the liabilities owed under the Finance Documents[2], including the sale of ADSs.

4. The alleged debt arises out of a loan facility agreement dated 10 September 2019 (as amended and restated from time to time) (the "Facility Agreement"), which is governed by Hong Kong law. The Lenders under the Facility Agreement[3] provided US $533,000,000.00 as a loan facility which was secured in part by security granted in

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[1] The key evidence is contained in First Affidavit of Wong Kok Hung sworn on 23 April 2020 ("Wong Kuk Hung 1"); the First Affidavit of Catherine McBride sworn on 23 April 2020 ("McBride 1"); the Second Affidavit of Catherine McBride sworn on 1 June 2020 ("McBride 2"); the First Affidavit of Joanne Collett sworn on 1 June 2020; the First Affidavit of Guo Li Chun sworn in the Primus proceedings on 27 May 2020 (which itself exhibited evidence of the same Ms Guo Li Chun sworn on 27 May 2020 in opposition to separate winding up proceedings against Haode (i.e. the 'BVI Proceedings' as defined at paragraph 21 below) ("Chun 1"); the First Affidavit of Sunying Wong sworn in the Mayer proceedings on 28 May 2020 (Ms Wong is the sister of Mr Lu the Chairman of Luckin Coffee) ("Wong 1"); the First Affidavit of Ms Pamella Anita Mitchell, sworn on 28 May 2020; the Second Affidavit of Ms Pamella Anita Mitchell, sworn on 28 May 2020 ("Mitchell 2"); and the Third Affidavit of Ms Pamella Anita Mitchell, sworn on 29 May 2020 ("Mitchell 3"). As noted at paragraph 6 below there are significant factual similarities in the evidence attributable to Primus and Mayer. As such, the evidence referred to during the hearing and in this judgment (save for Wong 1) is the evidence that was filed in the Primus proceedings.

[2] Which include (as defined in the Facility Agreement): the Facility Agreement, the Fee Letter, the Foreclosure Document, any Transaction Security Document, any Supplemental Custodian Agreement, any Utilisation Request and any other document designated as such by the Agent and the Borrower.

[3] Barclays Bank PLC, CICC Hong Kong Finance (Cayman) Limited, Credit Suisse AG Hong Kong branch, Haitong International Investment Solutions Limited, Morgan Stanley Bank, N.A., and Goldman Sachs Bank USA (together, the "Lenders").

favour of the Petitioner over certain of the Debtors' shares in Luckin Coffee, pursuant to certain Cayman Islands law-governed share mortgages.

5. The Petitioner is the Agent and the Security Agent under the Finance Documents. The Debtors are not borrowers or guarantors under the Finance Documents. The Borrower is Haode Investment Inc. ("Haode"), which is incorporated in the British Virgin Islands ("BVI"). The Debtors granted security in favour of the Petitioner to secure the obligations of Haode under the Finance Documents. Haode, Primus and Mayer are ultimately owned and controlled by the family of Lu Zheng Yao, who is the Chairman of Luckin Coffee.

6. Aside from their names the only reason to distinguish between the Debtors for the purposes of the Petitions is that Primus granted an extra item of security (an account charge) in favour of the Petitioner.

7. Similar share mortgages were granted by Haode itself and another BVI company called Summer Fame Limited ("Summer Fame"), both of which also hold a substantial number of shares in Luckin Coffee. Summer Fame is owned by Zhiya Qian, who is a founder of Luckin Coffee.

8. The share mortgages include a *'covenant to pay'* clause in a standard form. The Debtors argue that the effect of this clause is that Primus, Mayer and Summer Fame are only liable to pay any sums for which Haode is liable and which Haode has failed to pay under the Finance Documents.

9. The Petitioner, by contrast, argues that the Debtors have covenanted as primary obligors and not merely as sureties to pay and discharge the *'Secured Obligations'* when due in accordance with the terms of the Finance Documents[4] and the and are jointly and severally liable to the Petitioner.

The fraud and steps taken by the Petitioner

10. On 2 April 2020, Luckin Coffee announced that it had discovered a fraud committed by Jian Liu (the Chief Operating Officer) and others, and had appointed independent legal and financial advisers to investigate the matter. The fraud in simple terms was to overstate the company's sales and thereby wrongly inflate its value. There was then a disastrous (75% overnight) consequential fall in the value of Luckin Coffee's shares. Trading in the shares (i.e. the ADS) was suspended between 7 April and 20 May 2020. The NASDAQ has notified Luckin Coffee that it proposes to de-list the shares and Luckin Coffee has requested a hearing before the NASDAQ 'Hearings Panel', which is pending.

11. Since the majority of the security granted to secure the obligations under the Finance Documents, was over shares held in Luckin Coffee, the value of Luckin Coffee is critical to the exposure of the Petitioner (and the Lenders) under the

[4] As defined in the Facility Agreement.

Facility Agreement. The plunge in share value triggered various defaults under the Finance Documents and the Lenders took steps to protect their positions.

12. Ms McBride, a partner in the Lenders' Hong Kong attorneys, sets out in McBride 1[5] how the Event of Default, and the notices and demands issued in connection with it work under the Facility Agreement, concluding that the resulting debt is due and payable by the Debtors, and noting that 'Partnership Demands' were sent to the Debtors on 17 April 2020 pursuant to the Facility Agreement.[6]

Submissions of the parties

13. The Debtors deny that these liabilities are due and payable and allege that, following the announcement of the fraud, the Petitioner has attempted to exert the maximum pressure it could on them, and on Haode and Summer Fame. According to the Debtors the acceleration and enforcement steps taken by the Petitioner have been invalid and prejudicial. The Debtors also submit that there is an ulterior motive behind what is sought by the Petitioner – the Debtors say the Petitioner does not in fact want to obtain winding up orders (which would reduce the assets owned by the relevant entities) - but has commenced these proceedings in order to put pressure on them with a view to extracting a quick settlement.[7] This is denied by the Petitioner, which asserts it wishes to obtain winding up orders to which it is entitled.

14. On 3 April 2020, the Petitioner served two notices on Haode. One of the notices purportedly required Haode to provide additional security under the Facility Agreement by 7 April 2020 (so as to reduce the loan-to-value ratio to 30%) (the "Top Up Notice"). At the same time, the other notice purported to cancel the Lenders' commitments under the loan and directed Haode to repay all of the amounts owing under the Facility Agreement in full by 6 April 2020 (the "MPE Notice"). It is alleged by the Debtors that these notices are fundamentally inconsistent (despite being sent at virtually the same time) and are both invalid as a matter of Hong Kong law.

15. On 6 April 2020 (one day before the stated deadline for providing additional security pursuant to the Top Up Notice), the Petitioner served a further notice purporting to accelerate all amounts outstanding under the Facility Agreement (the "Acceleration Notice"). The Acceleration Notice asserted that the Petitioner was entitled to realise the security provided by the Debtors and by Summer Fame. This notice is also alleged by the Debtors to be invalid as a matter of Hong Kong law.

16. The Petitioner says not only were these not inconsistent, but observes that the Debtors did not comply with any of the notices.

17. No communication was received from or on behalf of Haode, Summer Fame or the Debtors expressing any confusion or asserting any defects or requesting forbearance

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[5] McBride 1.
[6] McBride 1 §28-30.
[7] See Chun 1 (Mrs Chun is the wife of Mr Lu, the Chairman of Luckin Coffee) and Mitchell 3.

or indeed proposing any sort of compromise. The Petitioner invites the Court to infer from this that the defences have been belatedly *'got up'* to defeat the Petitions.[8]

18. The Debtors say that, because of the invalidity of the other notices, the demands that were made for immediate repayment of the amounts owing by Haode under the Facility Agreement were without foundation, since the relevant debts were not due and payable.

19. The Debtors further submit that the Petitioner has sold off the mortgaged shares in Luckin Coffee by way of enforcement of the share mortgages *'piecemeal'* (rather than by seeking to find a buyer for the entire shareholding). The Debtors also complain that the Petitioner has, in breach of its obligations, refused to provide basic information about its recent dealings with the mortgaged shares in Luckin Coffee.

20. The Debtors submit, albeit on allegedly incomplete information, that the Petitioner has converted all of the mortgaged shares in Luckin Coffee into an inferior class of shares with dramatically reduced voting rights (amounting to only 10% of the voting rights of the shares they originally had) and that by taking this step, and by selling off the mortgaged shares piecemeal, the Petitioner has seriously and irreparably harmed the collective voting power of the shares.

The litigation

21. The Petitioner also filed separate winding-up applications in the BVI on 23 April 2020 against Haode and Summer Fame (the "BVI Proceedings").

22. In the Cayman Islands, the Petitioner presented the Petitions on 23 April 2020, which were then filed and issued on 27 April 2020.

23. In Hong Kong, Haode commenced separate proceedings by which Haode, *inter alia*, disputes the enforcement steps taken on behalf of the Lenders, on 6 May 2020 (the "Hong Kong Proceedings").

24. In these proceedings the Petitioner seeks orders that the Debtors be wound up pursuant to the Companies Law (2020 Revision) (the "Companies Law") and the Exempted Limited Partnership Law (2018 Revision) (the "ELP Law") on the basis that the Debtors are unable to pay their respective debts under s.92 (d) of the Companies Law and s.36 (3) of the ELP Law.

25. It is accepted by the Debtors that the Petitioner would have standing to present the Petitions in its capacity as Security Agent and Agent on behalf of the Lenders, under section 94 (1) (b) of the Companies Law, which applies to the Debtors pursuant to section 36 (3) of the ELP Law. However, the Debtors say there is no debt due and payable by them.

[8] This Court granted an extension of time so that the Debtors evidence could be admitted and relied upon.

The defences to the Petitions

26. The Debtors submit that there is a bona fide dispute on substantial grounds as to whether the debts relied upon in the Petitions are due and payable.

Notices

27. The Debtors argue that the relevant notices served by the Petitioner (including the Acceleration Notice) were invalid as a matter of Hong Kong law, being the law applicable to the Facility Agreement.

28. The Hong Kong Proceedings seek declarations of non-liability under the Facility Agreement (which contains an asymmetric jurisdiction clause), equitable compensation or damages in respect of breach of mortgagee's duties, and an anti-suit injunction to restrain the continuance or commencement of proceedings against Haode.

29. The jurisdiction clause means that Haode is required to bring proceedings in Hong Kong in relation to any dispute under the Facility Agreement, although the Lenders, the Agent and the Security Agent are entitled to bring proceedings elsewhere.

30. The Debtors rely upon an expert opinion from the former Attorney General of Hong Kong. Mr John Griffiths SC CMG QC. dated 25 May 2020 to confirm that their arguments have a real prospect of success as a matter of Hong Kong law ("Debtors' Hong Kong Law Opinion").

31. As to this, the Petitioner has obtained an opinion from Mr Bernard Man SC[9] dated 1 June 2020 who, having reviewed the Debtors' Hong Kong Law Opinion, concluded in summary (at paragraph 6) that "*we do not agree with the views expressed.... in the* [Debtors' Hong Kong Law Opinion] *and it is* [our] *view that the Hong Kong law issues discussed in the* Debtors' Hong Kong Law Opinion] *do not reveal any bona fide dispute on substantial grounds as to the existence of the debt owing by Haode to the Lenders under the Facility Agreement.*".

32. It is argued by the Debtors that this Court should dismiss the Petitions on that basis, or adjourn them pending the determination of the Hong Kong Proceedings.

Debtors not insolvent

33. The Debtors argue that the Petitioner is unable to prove that the Debtors are cash flow insolvent, and that there is still substantial value in Luckin Coffee. They rely on expert evidence to show that the Debtors were balance sheet solvent as at 3 April 2020[10].

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[9] Assisted by Ms Sheena Wong.

[10] Expert report of Yuen Tsz Chun dated 28 May 2020, as exhibited to Mitchell 2.

Petitioner's conduct

34. Following the announcement by Luckin Coffee that it had discovered a fraud, the Debtors argue that the Petitioner sought (with the Lenders) to obtain immediate repayment of all outstanding liabilities despite the fact that those liabilities were not yet due and payable. The Debtors argue that the Petitioner (with the Lenders) sold off the mortgaged shares in Luckin Coffee piecemeal as quickly as possible to the first available bidders, and threatened the Debtors with the prospect of imminent liquidation by presenting the Petitions in the Cayman Islands, and commencing the BVI Proceedings against Haode and Summer Fame. It is argued by the Debtors that by taking these steps the Petitioner did not act in good faith, rationally and for a proper purpose (and/or acted arbitrarily and capriciously) and ought instead to have considered the best way to protect the interests of both the secured creditors (i.e. Petitioner and thereby the Lenders), and those of the Debtors (as the persons entitled to an equity of redemption over the mortgaged shares in Luckin Coffee).

35. It is further alleged by the Debtors that the Petitioner ought to have appreciated that the shares held by the Debtors in Luckin Coffee represented a controlling stake (including both mortgaged shares and unmortgaged shares) and that this stake has a greater value than a minority stake, so that the shares would be (or would have been) worth much more if they could be sold together to a single purchaser following a 'proper marketing process', rather than by 'fire sale' to multiple purchasers.

Adjournment so Debtors and Haode can redeem

36. Further or alternatively the Debtors argue that the Petitions should be adjourned so as to give the Debtors (and Haode and Summer Fame) an opportunity to redeem the share mortgages and repay their outstanding liabilities under the Finance Documents in full. They allege that the Petitioner's conduct (including its alleged failure to provide information about its recent dealings with the mortgaged shares) prevented them from having sufficient information to enable them to redeem the share mortgages.

Case management adjournment

37. Further or alternatively, as a matter of case management, the Debtors argue that this Court should adjourn the Petitions pending the outcome of the BVI Proceedings. This is because the Debtors allege that they are only liable to the Petitioner under the *'covenant to pay'* clause in the relevant share mortgages if and to the extent that Haode (as the Borrower) is liable under the Facility Agreement. The Debtors argue that since Haode's liability could be determined as part of the BVI Proceedings, it would be wrong to pre-empt the outcome of the BVI Proceedings by making winding-up orders in the Cayman Islands against the Debtors, before Haode's liability has been determined by the BVI Court.

The law

38. As a matter of Cayman Islands law, a winding-up petition can only be presented by certain categories of persons. Those categories include *"any creditor or creditors (including any contingent or prospective creditor or creditors"*: see section 94 (1) (b) of the Companies Law).

39. There would be no issue as to the Petitioner's standing as Agent and Security Agent of the Lenders, as creditors of the Debtors, to present the Petitions assuming the Court was satisfied that the subject debt was due and payable and that the Debtors were unable to pay the debt.

40. Section 92 of the Companies Law provides as follows:

"A company may be wound up by the Court if —

(a) the company has passed a special resolution requiring the company to be wound up by the Court;

(b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(c) the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up;

(d) ***the company is unable to pay its debts****; or*

(e) the Court is of opinion that it is just and equitable that the company should be wound up".

(my emphasis)

41. In the present case, the Petitioner relies on section 92 (d) of the Companies Law.

42. The concept of inability to pay debts is defined in section 93 of the Companies Law, which provides as follows:

"A company shall be deemed to be unable to pay its debts if —

(a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under that person's hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such

demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;

(b) execution of other process issued on a judgment, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts".

(my emphasis)

43. The Petitioner relies on section 93 (c) of the Companies Law.

44. The Debtors are exempted limited partnerships rather than companies. However, all of the above provisions apply to exempted limited partnerships under section 36 (3) of the ELP Law.

A disputed debt on bona fide and substantial grounds

45. As is well known, in the Cayman Islands the concept of insolvency reflected in section 93 (c) is that of '*cash flow*' insolvency, that is to say the inability to pay debts as they fall due: *Re Weavering [2016 (2) CILR 514] at [38].*

46. The test of inability to pay debts was considered on appeal in that case which put a gloss on Clifford J's definition of cash flow insolvency based on a company's present inability to pay debts as they fall due.

47. Martin J.A held that:

> *'In my view, the cash flow test in the Cayman Islands is not confined to consideration of debts that are **immediately** due and payable it permits consideration also of debts that will become due **in the reasonably near future**"*. (my emphasis)

48. The Petitioner claims[11], in respect of each Debtor, that *"The Partnership is insolvent because it has failed to make repayment of a demand duly served on it by the Petitioner, following the occurrence of an Event of Default under the Finance Documents, and the subsequent acceleration of the Facility pursuant to the Finance Documents. The Partnership has therefore failed to pay its debts."*

49. As I have said the central controversy is that the Debtors dispute that the debts are due and payable.

[11] §11 at page 3 of the Primus Petition (materially the same in the Mayer Petition)

50. It is well established that, if a winding-up petition is founded on a debt w... subject to a *bona fide dispute on substantial grounds*, then the Court should dismiss the petition.

51. This Court recently summarized the law in *Re Altair Investments Limited, FSD 200 of 2019, at [42]* by reference to the statement of Lord Hoffmann in *Parmalat Capital Finance [2008 CILR 202] at [9] (on appeal from the CICA):*

> *"If the petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor, first, to establish his claim in an action.* ***The main reason for this practice is the danger of abuse of the winding up procedure. A party to a dispute should not be allowed to use the threat of a winding up petition as a means of forcing the company to pay a bona fide disputed debt. This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding up order, even though there is a dispute:*** *see, for example, Brinds v Offshore N.L.(no 2) ". (my emphasis)*

52. The law as expressed in *Parmalat* was subsequently considered in the Cayman Islands Court of Appeal in relation to how the Court should approach the matter of a disputed debt.

53. In *Re GFN [2009] CILR 650 Vos J. A* referred to the judgment of *Oliver LJ in Re Claybridge Shipping [1997] 1 BCLC 572* in which he held that:

> *'But the court must... remain flexible in its approach... it ought not, in my judgment, to be an inflexible rule that Companies Court should never take upon itself the burden of determining the matter on the hearing of the petition. It does so in petitions on the just and equitable ground,* ***and it is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings... I think that*** **[the rule]** ***ought not to be assumed to be inflexible and to preclude the Companies Court from determining the issue in an appropriate case... The court must, I think, reserve to itself the right to determine disputes - even perhaps in some cases substantial disputes - where this can be done without undue inconvenience and where the position of the company... is such that the likely result in effect of striking out the petition would be that the creditor, if he established his debt, would lose his remedy altogether".*** (my emphasis)

54. Vos J.A summarised the law as follows at *§ 94 of GFN (CICA)*:

(a) A person with a good arguable case that a debt is due and owing to him from the company may present a petition to wind up as a creditor under the Companies Law.

(b) The normal rule of practice is that the court will dismiss or stay a petition in circumstances where there is a bona fide and substantial dispute as to the existence of the debt upon which the petition is based.

(c) In an appropriate case, however, the winding up court can refuse to dismiss or stay the petition and can determine the question of the disputed debt in the petition itself.

(d) Appropriate cases include those where the court doubts that the debt is actually disputed *bona fide* on substantial grounds, or where the creditor if he established his debt would otherwise lose his remedy altogether or where other injustice might result.

(e) Where the winding up court decides to hear a petition based on a disputed debt it will only make a winding up order on the grounds that the company is unable to pay its debts or that it is just and equitable to wind up, having determined that the petitioner is, on a balance of probabilities, a creditor of the company.

55. In *Re Duet Real Estate [2011] CIGC J0607-1* the Cayman Islands Court did just this. *Duet* sought a declaration that there was a genuine and substantial dispute about the existence of certain debts alleged to be owing to the petitioner, and sought to restrain the petitioner from presenting a winding up petition until such time as the dispute about the existence of the debts was resolved by arbitration. In that case the transaction documents, other than the security documents, were governed by English law. Having considered the evidence presented, Jones J determined that there was no *bona fide* dispute of substance and that the arguments made by *Duet* in that regard were *'nothing more than a disingenuous delaying tactic'* and *'there* [was] *no evidence from which to infer that there is a genuine and substantial dispute'*. He refused to grant the declaration and injunction sought.

56. Each case will turn on its specific facts. A *bona fide* dispute on substantial grounds means a real dispute on which the respondent company has a real prospect of success (as opposed to a fanciful or insubstantial prospect of success): *see Re A Company (No. 001946 of 1991) [1991] ex parte Fin Soft BCLC 737 at [740];* and *Argentum Lex Wealth Management Ltd v Giannotti [2011] EWCA Civ 1341 at [17]*. In the latter case, the Court of Appeal commented that the concept of a *bona fide dispute on substantial grounds* is similar to the test for obtaining permission to appeal viz. that there should be a realistic prospect of success: *per Longmore LJ at §17.*

57. Whilst the winding up procedure is not suitable to resolve questions of disputed fact, as there is no investigation akin to a trial with discovery of documents and cross examination, the Court should be alive to 'smokescreens' or contrived arguments presented late in the day.

58. As this Court said in *Altair:*

> *"I also bear in mind that an unwilling debtor may raise factual matters which cannot be easily determined without cross examination in order to assert a defence and in such circumstances the court should be astute to assess whether the defence put forward is genuine and of substance"- see Re A Company 6685 [1997] BCC 830 at § 832 and 835 per Chadwick J as he then was, at §44*

59. Whether to order a winding up of a company is of course a discretionary remedy. In an appropriate case, notwithstanding that it is not sitting as a 'trial court' in the traditional sense, the Court can determine the issues raised especially in those cases where the Court doubts there are substantial grounds for the disputes raised, or where substantial injustice would result from denying the petitioner its remedy.

60. In this case the Petitioner says that unless it obtains the relief sought, it is unsecured and there is a very real prospect that a final delisting of Luckin Coffee's shares from the NASDAQ will occur and the market to realise ADS's will therefore be lost. It argues that it would suffer irreparable harm if the Court did not accede to its Petitions.

61. In light of the Debtors' submissions as to the Petitioner's (and Lenders') conduct it is necessary to set out the law in the Cayman Islands on the duties of mortgagees.

Duties of mortgagees

62. A mortgagee has a wide discretion as to how and when it realises its security. If the sale was made in good faith and the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time there will be no breach of duty: see *Paradise Manor Ltd (in liquidation) [1984 -5] CILR 437.*

63. English law has considered the duty to act in good faith and not for an improper purpose in some detail see *Lightman and Moss the Law of Administrators and Receivers of Companies 5th edition paragraph 13 – 008.*

64. In the absence of dishonesty, improper motive, or bad faith there will be no breach of duty.

65. No duty of care in tort is owed by the mortgagee in relation to the actual decision to sell (see *Lightman and Moss paragraph 13-33*) and having determined to exercise the power of sale, the mortgagee is entitled to choose its own time for that sale.

66. A marketing strategy should be formulated, sales particulars should be produced and appropriately advertised: *Lightman & Moss paragraph 13-035.*

67. A mortgagee, in exercising his power of sale, owes a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it (*Cuckmere Brick [1971] 2 All E R at 643*) and

appropriate consideration should be given, in the light of offers received, as to whether the market is rising or falling and whether it has been marketed at the correct price: *R (Glatt) v Sinclair [2011] EWCA Civ 1317*.

68. In *Paradise Manor* in the Cayman Islands Court of Appeal Zacca P said:

> *'It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of these adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor.'*

69. However, unless there is a need for an urgent sale the mortgagee must fairly and properly expose the property to the market or sell at a price which is based upon such exposure: *Silven [2004] 1 WLR 997, 1006* CA.

> *"When and if the mortgagee does exercise the power of sale, he comes under a duty in equity (and not tort) to the mortgagor (and all others interested in the equity of redemption) to take reasonable precautions to obtain 'the fair' or 'the true market' value of or 'the proper price' for the mortgaged property at the date of the sale, and not (as the claimant submitted) the date of the decision to sell. If the period of time between the dates of the decision to sell and of the sale is short there may be no difference in value between the two dates and indeed in many cases (if not most cases) this may be readily assumed. But where there is a period of delay, the difference in date could prove significant.* ***The mortgagee is not entitled to act in a way which unfairly prejudices the mortgagor by selling hastily at a knockdown price sufficient to pay off his debt: see Palk v Mortgage Services Funding plc [1993] Ch 330,337-338 per Sir Donald Nicholls VC. He must take proper care whether by fairly and properly exposing the property to the market or otherwise to obtain the best price reasonably obtainable at the date of sale. The remedy for breach of this equitable duty is not common law damages, but an order that the mortgagee account to the mortgagor and all others interested in the equity of redemption, not just for what he actually received, but for what he should have received: Standard Chartered v Walker [1982]1 WLR 1410, 1416B"*** per Lightman J at §19. (my emphasis)

Decision

70. The validity of the notices is a matter of Hong Kong law[12], since the Facility Agreement and all of the relevant notices are expressly governed by Hong Kong law. I accept that the validity point raised by the Debtors underpins the basis upon which the subject debts are due and payable to the Petitioner at the present time. If they are invalid as a matter of Hong Kong law there is no proven debt.

71. I do not however accept the submission that this Court and/or these winding up proceedings are not the appropriate forum to assess the Hong Kong law expert evidence put forward in this case, or that is realistic to suggest that the inability to cross examine eminent Leading Counsel on their considered opinions (before accepting or rejecting them) deprives this Court from assessing the merits of the points of contention from written opinions which are clearly expressed. This Court is regularly provided with evidence of foreign law in support of cases brought. It is capable of assessing the Hong Kong-law arguments for the purpose of ascertaining their strength, and in my judgment should do so in this case.

72. In my view, based on the evidence presented, the points contended for in the Hong Kong Proceedings (commenced shortly after the Petitions were issued in this Court), as supported by Mr Griffiths QC, do not stand up to proper analysis.

73. The Debtors put forward arguments relating to: non-compliance of the MPE Notice with clause 7.3 of the Facility Agreement; breach of implied terms in the notices and demands; and the inconsistency of the notices served, in particular the MPE Notice and the Top Up Notice.

74. Having reviewed the competing expert opinions in depth, I am not satisfied that the arguments as to the validity of the notices served by the Petitioner between 3 April 2020 and 6 April 2020 (which is the only argument which Mr Griffiths QC described as having a "*real prospect of success*" rather than being "*at least arguable*") amount to a bona fide dispute on substantial grounds, such that I ought not to grant the relief sought.

75. The Lenders cancelled their commitments to extend loans and called for immediate repayment of extended loans. They also demanded further security. There seems to me to be nothing untoward, unclear, or inconsistent about that and there is no contemporaneous or other evidence that the Debtors were left unclear as to the steps taken to ensure they repaid all outstanding loans. The notices do not contradict each other on their face. If full repayment of the loan was to be made by Haode, any excess collateral could be released. If Haode supplied further security, the Lenders still had the right to insist on full repayment.

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[12] Dicey Morris & Collins on the Conflict of Laws (15th edition) rule 25 and paragraph 9-002: the law in question must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence; as a consequence, any disputes are to be treated as disputes of fact by this Court.

76. Similarly, I am not satisfied that the arguments put forward as to non-compliance of the MPE Notice with clause 7.3 of the Facility Agreement, and breach of implied terms in the notices and demands, have real prospects of success having regard to the views of Mr Man SC which are, on the material available, clearly to be preferred.

77. As to the non-compliance argument, there is nothing in the point that the MPE Notice had to be issued by the Lenders to the Agent and Haode. Clause 32 of the Facility Agreement allows for notices to be sent to the Debtors through the Agent, which issued the MPE Notice to itself and Haode. There is also nothing in the point that the MPE Notice requested Haode to pay the Agent. Clause 7.3 envisages that payments can be made to any account as each Lender may specify.

78. As to the implied terms point: Mr Man SC comprehensively analysed the authorities under English and Hong Kong law (which in his opinion does not materially differ from English law in this regard) and concluded the better view is that implied duties have no application. That view seems to me to be correct and there are no substantial grounds to contend otherwise.

79. The Debtors are liable to the Petitioner under the *'covenant to pay'* provision in the relevant share mortgages which by virtue of clause 2.1 says:

> *"The Mortgagor hereby covenants with the Security Agent as primary obligor not merely as surety that it will pay and discharge the Secured Obligations when due in accordance with the terms of the Finance Documents, or if they do not specify a time for payment, immediately on demand by the Security Agent."*

80. Because they covenanted as primary obligors, and not merely as surety, to pay and discharge the secured obligations, they are therefore jointly and severally liable to the Petitioner for the secured obligations[13]. I am not satisfied that there is a substantial dispute that their liability is expressly restricted to the amounts payable by Haode under the Facility Agreement or that the Petitions should be adjourned so that Haode's liability can be determined by the BVI Court at a later date.

81. The Lenders and Agent exercised their contractual rights under the Finance Documents to sell all of the mortgaged shares. They were under no obligation to wait to see if the value of the shares stabilized back up to their former value and are unlikely to have taken steps which materially de-valued their own security. They acted properly in appointing a Disposal Agent to handle the sales, which was done on an open market basis at prevailing market prices[14]. It was obviously in their interests to get the best price obtainable. I do not see any basis upon which the Petitioner could be found to have breached its duties as mortgagee (which in any

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[13] The definition of Secured Obligations in the Finance Documents is *"...all money, obligations or liabilities due, owing or incurred to any Secured Party by any* Obligor [which term includes the Debtors] *under any Finance Document at present or in the future, whether actual or contingent, whether incurred solely or jointly with any other person and whether as principal or surety, together with all interest accruing thereon and all losses incurred by any Secured Party in connection therewith"*.

[14] McBride 2.

case would only serve to reduce the amount of the debt not to extinguish it). I do not accept that such alleged conduct amounts to a bona fide substantial ground on which to dispute the debt.

82. That being so, the Petitioner is a creditor and entitled to the relief sought absent some other good reason not to grant it. There appears to be no other stakeholder with an economic interest in the Debtors. I reject the Debtors' submissions that it would be appropriate to adjourn the Petitions to allow Haode (the Borrower under the Facility Agreement) and the Debtors in their capacities as obligors, to repay the debts by refinancing or realising their assets. There is no evidence to suggest that the Debtors are in a position to meet their contractual commitments if the Lenders were willing to forebear exercising their contractual rights. There is no credible evidence that there is a reasonable prospect that the debt will be paid within a reasonable time.[15] It is to be inferred from their failure to pay that they are unable to pay their debts, which at 1 June 2020 stood at US$324,135,766.30.

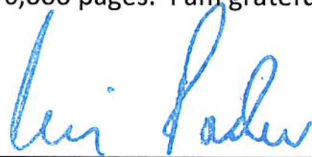
83. I also reject the submission that the Court ought to adjourn the Petitions to allow the BVI Proceedings and/or Hong Kong Proceedings to take their course. In the circumstances the Petitioner finds itself in that would not be a fair or appropriate exercise of my discretion and may irreversibly prejudice it from recouping its debt.

84. The Petitioner has established that the Debtors have failed to pay a substantial debt where the realisable assets lie in unmortgaged ADS's in a company whose share price has plummeted and whose shares may soon be de-listed from the NASDAQ .

85. I will grant the winding up orders sought, the formal requirements having been complied with.

86. The orders are to include a provision that the Joint Official Liquidators may take action against the General Partners of the Debtors (if necessary) and, in respect of Primus, to require provision of share certificates from third parties.

87. Counsel for the Petitioner Mr Goucke and Counsel for the Debtors Mr Payne were both commendably efficient and cogent in their submissions notwithstanding that the hearing bundles provided electronically (and some in hard copy) ran to over 6,000 pages. I am grateful to them both and to their respective teams.



THE HONOURABLE MR JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

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[15] Chun 1 (sworn by the wife of the Chairman of Luckin Coffee, Mr Lu) which (at §20) refers to third parties who would be interested in acquiring a stake, does not satisfy the Court otherwise.