

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: 1-3 July 2020

Draft Ruling

Circulated: 16 July 2020

Ruling Delivered: 3 August 2020



[REDACTED VERSION]

HEADNOTE

Worldwide Freezing Order- cross-applications to continue and discharge ex parte order-legal function and purpose of non-proprietary freezing injunctions-scope of assets of defendant available for enforcement-correct legal approach to assessing risk of dissipation-proper scope of disclosure obligations

RULING

Introductory

1. By an Ex Parte Summons dated May 1, 2020, the Plaintiffs applied for a Worldwide Freezing Order which I granted on May 8, 2020 ("WFO"). A Writ and Statement of Claim were filed on May 12, 2020. On the same date the Plaintiff filed a Return Date Summons seeking the continuance of the WFO until trial.
2. On May 25, 2020, I heard an application by the Defendant which sought to stay its disclosure obligations in part until the full inter partes hearing and to clarify the scope of the WFO. I resolved those issues in a Ruling dated June 4, 2020.
3. By a Summons dated June 10, 2020, the Defendant, a Cayman Islands holding company which was a NASDAQ listed company until the end of June, 2020, applied for, *inter alia*, the WFO to be set aside or discharged. Alternatively, the Defendant sought variations to narrow the scope of the WFO. It was agreed that the respective cross-applications should be heard together at the beginning of July, 2020.
4. The Plaintiffs are holders of Convertible Bonds under an Indenture governed by New York law dated January 14, 2020. They seek damages for fraudulent misrepresentations contained in the Preliminary Offering Memorandum ("POM") dated January 7, 2020 and the Final Offering Memorandum dated January 9, 2020 ("FOM") (together the "Offering

Memoranda”). The alleged misrepresentations related to the true 2019 Quarter 3 earnings performance of the Defendant (and its subsidiaries). Key facts relied upon by the Plaintiffs for seeking the WFO included the following:

- (a) on January 31, 2020, Muddy Waters LLC published a report accusing the Defendant of, inter alia, over-reporting its 2019 sales volume and average price of products sold (the “Muddy Waters Report”);
- (b) on February 3, 2020, the Defendant published a vigorous denial of the Muddy Water Report;
- (c) on February 6, 2020, in a conference call participated in by representatives of the 1st and 12th Plaintiffs, the Defendant made further assurances that the allegations in the Muddy Waters Report were unfounded;
- (d) on April 2, 2020, the Defendant issued a press release announcing:
 - (i) that Mr J Liu, Chief Operating Officer (“COO”), was being internally investigated for fabricating transactions,
 - (ii) that the preliminary view was that late 2019 sales data had been overstated by some RMB 2.2 billion (US\$310 million), and
 - (iii) investors should no longer rely on the 2019 financial statements.



5. As contemplated by the Offering Memoranda, the “Bond Proceeds” received by the Defendant were forwarded to its operating subsidiaries in Mainland China (“PRC”), commencing in late January 2020. This deployment of what were admittedly the Defendant’s monies continued after both the Muddy Waters Report was published and after the Defendant admitted in early April 2020 that it believed its late 2019 sales data had been overstated. The transfer of funds from “offshore” to “onshore” continued despite some of the Plaintiffs seeking assurances that monies to meet their potential claims would be kept offshore.

6. At the heart of the dispute as to whether the WFO should be continued or discharged lies the question of whether continuing to invest in the operating subsidiaries in the PRC after the fraud was discovered was either:



- (a) arguably improper and outside of the ordinary course of business and therefore evidence capable of supporting a finding that a risk of future dissipation exists; or
- (b) clearly within the ordinary course of business and therefore providing no potential support for a finding of past dissipation of the Defendant's assets, capable of buttressing the Plaintiffs' case that a future risk of dissipation existed.
7. Developments out of Court were fast moving. A Board meeting to consider the removal of Chairman Lu was scheduled for July 2, 2020, the second day of the three day hearing. A members' meeting was convened for July 5, 2020 to consider removing the Chairman and the Chairman of the Special Committee from the Board. On the first morning of the hearing the Defendant announced that the Special Committee had publicly confirmed that the 2019 sales data had been misstated. On the afternoon of the second day of the hearing, the Defendant announced that the resolution to remove Chairman Lu from the Board (as recommended by the Special Committee established in March 2020 to investigate the fraud) had not been passed. The hearing was adjourned at its scheduled conclusion on July 3, 2020 to enable the parties to update the Court on, in particular, the July 5, 2020 Extraordinary General Meeting (the "EGM").
8. At the outset of the hearing on July 1, 2020, I refused the Defendant's application for an adjournment to await the outcome of the July 2, 2020 and July 5, 2020 meetings. It seemed obvious to me that the benefits to be gained from postponing the three day hearing were far outweighed by the countervailing factors of delay and wasting costs.
9. The Plaintiff obtained the WFO and sought to continue it on the premise that the Defendant was controlled by wrongdoers responsible for a fraudulent misstatement of accounts. The critical risk of dissipation requirement was pivotally dependent on the thesis that the Defendant had already dissipated assets by racing to place the Bond Proceeds onshore while misleading enquiring investors into believing that funds would be retained offshore and, therefore, obviating the need for any urgent application for injunctive relief. By the end of the hearing I was satisfied that the merits of the application stood or fell on the solidity of the thesis that pre-action acts of dissipation had already occurred. And, despite

having embraced the Plaintiff's thesis at the ex parte stage, when I reserved judgment, I was on the brink of concluding that on both legal and factual grounds, that this thesis was fundamentally flawed.



Legal principles governing the grant of freezing injunctions

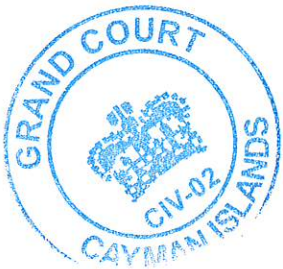
General principles

10. There was no dispute about the governing legal principles. However, Mr Potts QC reminded the Court of certain foundational principles governing the *Mareva* injunction jurisdiction which defines the type of lens through which one views the factual terrain. In the Defendant's Skeleton Argument, it was firstly submitted:

"14.14. A useful starting point, under Cayman Islands law, is paragraph 42 of Chadwick P's judgment in the Cayman Islands Court of Appeal's decision in Algosai v Saad [2011] (1) CILR 178 (which has been cited with approval in a number of English cases):

'It is necessary to keep in mind the basis upon which a court exercises the Mareva jurisdiction. It is to ensure that the effective enforcement of its judgment (when obtained) is not frustrated by the dissipation of assets which would be available to the claimant in satisfaction of that judgment. It is trite law that the jurisdiction is not exercised in order to provide the claimant with a security for his claim which he may otherwise have. But, as it seems to me, it is equally plain, as a matter of principle, that the jurisdiction is not exercised in order to give the claimant recourse to assets which would not otherwise be available to satisfy the judgment which he may obtain. The court needs to be satisfied of two matters before granting Mareva relief. First, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and, second, that there is good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the claimant'".

11. Reliance was also placed by the Defendant on *Lakatamia Shipping Company Limited v Morimoto* [2019] EWCA Civ 2203, and the statement of principles (at paragraph 34) of Haddon-Cave LJ. For present purposes, I found the following limbs of that statement of the principles applicable to granting freezing injunctions to be of greatest significance to the present case:



“(4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty...

(6) What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.”

12. I am guided by these legal principles. Establishing a risk of dissipation requires the Plaintiffs to make out an arguable case not only that fraud has occurred, but also that the nature of the alleged fraud is indicative of the fact that dissipation has occurred and/or will occur. Whether dissipation has or is likely to occur means establishing that the Defendant has or is likely to deal with its assets otherwise than it would legitimately ordinarily do. The Defendant is not as a matter of legal principle required to modify its ordinary course of business to preserve assets as security for the Plaintiffs' contingent claims.

The enforcement principle

13. Mr Potts QC argued that a legal vice with the WFO was that it breached what he described as the “enforcement principle”. In *Algozaibi v Saad* [2011 (1) CILR 178], Sir John Chadwick P stated that “*as it seems to me, it is equally plain, as a matter of principle, that the jurisdiction is not exercised in order to give the claimant recourse to assets which would not otherwise be available to satisfy the judgment which he may obtain*” (at paragraph 42). It was therefore wrong in principle for the WFO to deploy the “extended definition” of assets and/or ancillary disclosure obligations in a way which impacted on assets which were beyond the reach of any judgment enforcement measures the Plaintiffs could hope to utilize. If this minimum requirement was not met, the *de facto* control over the assets of subsidiaries used to justify the extended definition of assets was irrelevant¹. He fortified this submission by citing the following *dicta* of Janice Pereira CJ and Paul Webster JA (Ag) in the Eastern Caribbean Court of Appeal case of *Broad Idea International Limited-v-Convoy Collateral Limited*, BVIHCMAP2019/0026, Judgment dated May 29, 2020 (unreported):



“[60] On this point, Mr. Morgan, QC submitted that the fact that Dr. Cho has substantial control over assets which are held by Broad Idea is likely to be of critical importance to the question whether there is a real risk that the assets will be dissipated or otherwise put beyond Convoy’s reach. However, he stated that, the existence of substantial control is not, of itself, enough. It is necessary that the court be satisfied that there is good reason to suppose either: (i) that Dr. Cho can be compelled (through some process of enforcement) to cause Broad Idea to use its assets to satisfy any possible judgment; or (ii) there is some other process of enforcement by which Convoy can obtain recourse to the assets held by Broad Idea. There is great force in Mr. Morgan’s submission.”

14. Mr Houseman QC submitted that *Broad Idea* was only directly concerned with the Chabra jurisdiction and that any views expressed about the broader position were strictly obiter. It is clear that the main focus of the joint judgment was the holding (at [50]) that a freestanding freezing injunction could not be granted against a non-cause of action defendant in aid of foreign proceedings, absent statutory intervention (such as occurred through our own Grand Court Law, section 11A). The next main finding was that “*the BVI court was not seized of any substantive proceedings involving a primary defendant to which Broad Idea could have been ‘added’ as a Chabra defendant*” (at paragraph [56]). It was in the context of this fact pattern where there was no prospect of any judgment being

¹ I approved the extended definition of assets in a freezing injunction in *Linden Capital LP et al-v-Luckin Coffee Inc.*, FSD 82/220 (IK J), Judgment dated June 4, 2020 at paragraphs 30-51.

200803 In the Matter of Linden Capital LP & Others v. Luckin Coffee Inc – FSD 82 of 2020 (IKJ) Ruling to continue and discharge Worldwide Freezing Injunction

enforced against New Idea's assets within the jurisdiction at all, that the opinions relied upon Mr Potts QC were expressed. In the present case, the Defendant is a substantive defendant to proceedings brought here and any judgment the Plaintiffs may obtain could be enforced directly against any assets which are located here. The Eastern Caribbean Court of Appeal expressed no views about the appropriateness of deploying the extended definition of assets in a freezing order against a substantive defendant resident in the domicile of the local court. The Plaintiffs' counsel submitted that in these circumstances the enforcement principle had no impact on the jurisdiction to deploy the extended definition as occurred in *JSC BTA Bank-v-Ablyazov (No 10)* [2015] 1 WLR 4754 (UKSC). I agree. The freezing order in that case was granted against the defendants to the English proceedings and applied the extended definition of assets not just to English assets but also to assets held by third parties abroad:

"4. Until judgment or further order...the defendant must not, except with the prior written consent of the [Bank's] solicitors-(a) remove from England and Wales any of his assets which are in England and Wales...up to the value of £451,130,000]... (b) in any way dispose of, deal with or diminish the value of any of his assets in England and Wales up to the value of... £451, 130,000...

(c) in any way dispose of, deal with or diminish the value of any of his assets outside England and Wales unless the total unencumbered value ... of all his assets in England and Wales ... exceeds £451, 130, 000..."

5. Paragraph 4 applies to all the defendants' assets whether they are solely or jointly owned and whether or not the defendant asserts a beneficial interest in them. For the purpose of this Order the defendants' assets include any asset which they have the power, directly or indirectly, to dispose of, or deal with as if it were their own. The defendants are to be regarded as having such power if a third party holds or controls the assets in accordance with [his] direct or indirect instructions...."



15. Paragraph 5 in *Ablyazov* is substantially the same form of wording which was included in paragraph 5 (a) of the WFO in this case. Lord Clarke (with whom Lord Neuberger, Lord Mance, Lord Kerr and Lord Hodge agreed) makes mention of the enforcement principle as part of the rationale for a freezing order (at paragraph 13). He then noted (at paragraph 16): *"it is important to note that the Freezing Order is not challenged in this appeal. It is not said that it ought not to have been made. Nor is it said, either that the court had no jurisdiction to make an order in the wide terms contended for on behalf of the Bank, or that, if it made such an order, it was wrong to do so as a matter of discretion. The sole question is what the Freezing Order in fact made means."* Lord Clarke went on to describe the function of the extended definition of assets in the following terms:

“36... the whole point of paragraph 5 is to extend the meaning previously given to ‘assets’. In Solodchenko Patten LJ acknowledged that the new wording catches assets which are contained within a Liechtenstein Anstalt. Assets which the respondent owned beneficially were caught by the original word ‘assets’. Assets which the respondent owned legally but not beneficially were caught by the Commercial Court extended definition (but not otherwise, according to the Court of Appeal). The last two sentences of paragraph 5 are designed to catch assets which are not owned legally or beneficially, but over which the defendant (here the respondent) has control.”

16. I accordingly reject the submission of Mr Potts QC which implied that the Plaintiffs were not jurisdictionally entitled to obtain a worldwide freezing order without first demonstrating a direct right of enforcement against assets within the jurisdiction which were legally owned by the Defendant.

Findings: was the fraud formally admitted by the Defendant on July 1, 2020 indicative of a risk of dissipation?

17. The subliminal message embedded in Mr Houseman QC’s powerful oral submissions was that because the fraud had been admitted there was as a result a risk of dissipation. However the only explicit way in which the fraud admission was deployed was to demonstrate a good arguable case that the application of the Bond Proceeds had been outside of the ordinary course of business. In the Plaintiffs’ Skeleton Argument (a beefy document which ran to 107 pages), it was firstly submitted (with reference to the *Lakatamia* case) that:



“27. The Court of Appeal also observed at para 51:

‘Where the court accepts that there is a good arguable case that a respondent engaged in wrongdoing against the applicant relevant to the issue of dissipation, that holding will point powerfully in favour of a risk of dissipation and ‘in such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend on its own particular facts and evidence.’”

18. The quoted passage is only really relevant if the Court is being invited to find that the admittedly misstated (and arguably fraudulently misstated) accounts constituted wrongdoing indicative of or relevant to the risk of dissipation contended for. However, it

was not and could not credibly be submitted that a fraudulent misstating of accounts said to have induced the Plaintiffs to purchase their bonds was indicative of a risk of dissipation. It would have been different if the fraud the Defendant admitted it was investigating on April 2, 2020 involved a misappropriation or, as Mr Potts QC put it, a misapplication of company funds. The fraud acknowledged by the now substantially completed Special Committee investigation does not, therefore, “*point powerfully in favour of a risk of dissipation*”. It has lesser evidential weight as a factor to be weighed in the scales when assessing whether, in the context of the present case, either:

- (a) the Defendant has already committed acts of dissipation; and/or
- (b) there is a risk of future dissipation.



19. Dishonesty was relied upon explicitly to inform how the Court viewed the Defendant's conduct in denying the Muddy Waters Report's allegations in early February 2020 and completing the disbursement of the Bond Proceeds in late March and early April 2020. The case was summarised in the Plaintiffs' Skeleton Argument as follows:

“33. For the reasons set out below, there is plausible evidential basis of risk of dissipation. In summary:

(a) The Plaintiffs have a good arguable case that the Defendant, acting by its Chairman, Mr Lu, other Board members, and its CFO, Mr Schakel, made fraudulent misrepresentations to the Plaintiffs in relation to the Defendant's financial performance.

(b) There is evidence that the accounting fraud that underlies those fraudulent misrepresentations was perpetrated through sham transactions between the Defendant's group companies and companies linked to the Defendant's Chairman, Mr Lu, which shows a propensity to use corporate structures and sham transactions to conceal the true state of the Defendant's financial assets.

(c) Having perpetrated the fraudulent capital raising exercise in January 2020, the Defendant immediately moved over US\$[Y] from its offshore bank account in [A] to its onshore bank accounts in the PRC (where such funds might be expected to be much more difficult to recover) in a transaction wholly inconsistent with its stated policy of keeping only 6 months of operating costs in the PRC.

(d) After being publicly accused of the fraud in a report at the end of January 2020, the Defendant issued categorical denials and proceeded to transfer further funds into the PRC, ultimately culminating in an expedited USS[X] transfer to one of its PRC subsidiaries. There is no evidence that this transfer was made pursuant to the bona fide deliberations and procedures that the Defendant itself asserts it typically undertook for transfers of this nature.

(e) The persons who perpetrated the fraud, including the Chairman and the CFO, remain in control of the Defendant and its subsidiaries, both in their capacity as members of the Board or senior management with 'complete authority' over the Defendant's finances, and in their capacity as controlling shareholders of the Defendant."

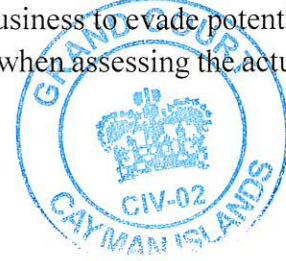
20. The Court was invited to take into account the fact that the pre-Bond issue fraudulent conduct was committed by the same persons who were involved in dealing with the Bond Proceeds in an inappropriate manner. It was also submitted that the fact that "fraudsters were in control" meant that, given the Defendant's corporate group structure with the Defendant exercising effective control over all assets in the Group, gave rise to an inherent risk of dissipation. It was argued in the Plaintiffs' Skeleton Argument (at paragraph 69):



"(e)...It is not the Plaintiffs' case that the Defendant's offshore/onshore structure is uncommon. Rather, the point is that, in the hands of a fraudster (and the Plaintiffs have a good arguable case that the Defendant is a fraudster and continues to be controlled by people who caused it to perpetrate a fraud) this common offshore/onshore structure is susceptible to be used to dissipate and conceal assets. Therefore, as noted at paragraph 58 of Berdon 4 (which refers to the Court's observations on this issue at page 35 of the 8 May 2020 hearing transcript), the structure poses risks for international creditors in situations such as the present. Comparisons to Alibaba or other legitimate companies are, therefore, inapposite. Alibaba did not commit a fraud and is not under the control of the wrongdoers. The Defendant did and is."

21. On a proper analysis, however, if the admitted misconduct is not in and of itself indicative of a risk of dissipation, no great or "powerful" weight can be given to the fraud factor when considering what in reality constitutes a freestanding question. Have the Plaintiffs established a risk of improper dissipation based on the evidence of what transpired after January 31, 2020 when the Muddy Waters Report was published? The attraction of the broad and generalised implication that "where there's smoke of fraud, there's a risk of a dissipation fire" was difficult to resist before the *inter partes* hearing.

22. Accordingly, I find that the fact that it seems clear that the Defendant's accounts were fraudulently misstated (a separate question to whether or not the pleaded fraudulent misrepresentations occurred) is not in and of itself indicative of a risk of dissipation. It does not suggest a propensity for improperly extracting assets from a business to evade potential claims. It is certainly not a relevant factor to be taken into account when assessing the actual risk of dissipation in the round.



Findings: has the Defendant dissipated assets in the past?

23. The Plaintiffs' case implicitly invited the Court to find that once the suspected fraud was discovered, the Defendant ought properly to have refrained from using the Bond Proceeds as originally contemplated when the bonds were issued. The Bond Proceeds were not an identifiable fund to which a proprietary claim attached in any event. However, this implicit assumption was somewhat obscured by a fulsome factual argument which explicitly asserted that the Defendant had acted outside of the ordinary course of business.
24. The Plaintiffs' Skeleton Argument was a substantial document which ran to 107 pages. The Plaintiffs' counsel served up these beefy submissions with generous lashings of "fraud", implying a moral imperative to grant the Plaintiffs interim relief without being distracted by overly rigorous regard to legal formalities. Mr Potts QC described the evidential analysis as akin to a work of fiction. Certainly, it was written in an unusually engaging, somewhat racy style which I found quite persuasive. If the Defendant's counsel's critique of the Plaintiffs' evidential case were to be likened to a literary review, the Plaintiffs' work received a "panning".
25. I had already determined in my Ruling of June 4, 2020 on the scope of the WFO, that the "Bond Proceeds" concept was legally misconceived in the absence of a proprietary claim, a point which I queried at the ex parte stage. Accepting the further basic legal proposition that the Defendant was entitled to deal with its own assets in the ordinary course of business, whether past dissipation had occurred turns on an analysis of the central assertions that two transactions were outside of the ordinary course of business:
- (a) the transfer of US\$[Y] onshore in January, 2020; and
 - (b) the capital injection of US\$[X] started in March 2020 (in two tranches) and concluded with apparent haste in April 2020 after the Defendant's Special Committee made its first announcement on April 2, 2020 that it believed its financial statements had been overstated for the period in question.

26. The corporate policy said to have been breached was limiting onshore working capital to what would be required to cover six months. In other words, unusually large sums were being transferred out of the Plaintiffs' easy reach when their potential claims were clearly known by the Defendant. I am unable to accept at the interlocutory stage that the Defendant's CEO, Mr Schakel:



- (a) deliberately misled investors on or about February 6, 2020 by asserting the Muddy Waters Report allegations were unfounded; and
 - (b) deliberately misled investors who called him in early April 2020 by stating falsely that most of the monies generated by the bond issue were still offshore.
27. It is not disputed that he told investors in February that he believed the allegations of false accounting were unfounded. Mr Schakel was not evidentially accused of deliberately lying about the fraud allegation in February 2020 so he was not required to deny a point which was only explicitly raised by way of argument. He has simply not expressly challenged the assertion made in the First Affidavit of Andy Chang that in a February 6, 2020 telephone call in relation to investor concerns about the Muddy Waters Report:
- “Mr Schakel...reiterated to me the accuracy of Luckin’s financial reports and dismissed the allegations made by the Report. He said that Luckin’s store data and third party payment data plainly refuted the data presented in the Report.”*
28. This firm denial, first made on February 3, 2020, and repeated to a wider group of investors by Chairman Lu on February 6, 2020 was a Company line which does not reflect well on the Defendant and its management, including Mr Schakel. The Chief Financial Officer (“CFO”) and former Credit Suisse banker was seemingly being used as a reassuring respectable face for an admittedly risky investment product being sold to (in part at least) US investors. No explanation has yet been given as to why the Muddy Waters Report was so hastily denied within days of its publication and a proper investigation only launched in late March with a preliminary conclusion announced on April 2, 2020.

29. The Third Affirmation of Mr Schakel (the "Third Schakel Affirmation") did, however, offer an indirect answer as to why the CFO may not have been aware of the true state of the PRC subsidiaries' accounts:

"23...Given my investment banking experience, much of my time was occupied with external matters, including investor relations, financing, funding, and strategy...During this period, Ms Jenny Qian (Luckin Cayman's former Chief Executive Officer)....had oversight and control over Luckin's finance and treasury functions. There was a division of responsibility between Ms Qian and me, the effect of which was she was primarily responsible for oversight of the 'on-shore' (i.e. PRC) finance and treasury functions, and I was primarily responsible for the 'offshore' activity, including investor relations, capital raising and strategic planning.

24. On 10 April 2020, when presented with preliminary findings by the Special Committee, Luckin Cayman's Board took steps to safeguard and enhance Luckin's financial controls...

104. With effect from 10 April 2020, the Board vested complete authority over Luckin's finance function in me, with a direct reporting line to the Audit Committee, which is comprised solely of independent directors."

30. The risk of future accounting malfeasance (and the implication of improper dissipation as well) was accordingly addressed by the Company conferring the level of financial control over the Group which his CFO title had initially suggested he might have exercised from the outset. It is for this reason that the Plaintiffs tactically found it necessary to discredit the CFO to support their case that the Company was not in safe hands. However there is an awkward apparent inconsistency between (a) Mr Schakel's assertion in these proceedings that he had no direct control over the finances of the subsidiaries before April 10, 2020 and (b) his willingness to represent to at least one investor on February 6, 2020 that he examined the relevant documents and found no basis for the allegations in the Muddy Waters Report. The Plaintiffs' counsel described this and similar contradictions as the "Schakel Pickle". Even if the Plaintiffs have established a good arguable case that the Defendant acted improperly in its response to the Muddy Waters Report, this factor is more relevant to the merits of the Plaintiffs' substantive claims than it is to the question of whether the



Defendant's management are as a result likely to engage in acts of unjustifiable asset dissipation.

31. Mr Schakel has proffered an explanation which is not at first blush entirely convincing as to what he said about the location of funds in early April. One call was with Mr Chang of the 1st Plaintiff on April 3, 2020; the other was with Mr Tu of the 9th Plaintiff on April 6, 2020. The position is, in light of the Third Schakel Affirmation, not so clear as to justify an interlocutory finding of bad faith without cross-examination. He contends that if he said the Bond Proceeds were mostly still offshore, he would have meant the funds were held in US dollars, whether in banks in the PRC or elsewhere. The preliminary views I expressed about the risk of dissipation based on the state of the evidence at that time in my June 4, 2020 Ruling no longer stand. Those views assumed that Mr *Schakel* was either unaware of the way in which the Defendant's funds were being transferred or deliberately misleading the investors who queried the location of the Bond Proceeds, because the Plaintiffs' evidence about what he said was unchallenged as at that date.
32. From the detached position of hindsight it seems implausible that Mr Schakel misunderstood that the investors he spoke to were concerned to know whether the monies were in the more enforcement friendly forum of Hong Kong or not. Having regard to the fact that he has a seemingly unblemished employment record, a fair view of the evidence at this stage must allow for the possibility that Mr Schakel was overwhelmed by managing an emerging multi-jurisdictional regulatory crisis during the April 2020 calls and either was not a paragon of clarity (at best) or willing to say anything to fob off the investors (at worst) and get on with what he would have been entitled to assume was "real work". After all, where the Bond Proceeds were was not, absent a proprietary claim, a legitimate investor concern. Mr Potts QC rightly submitted that the Court should doubt the inherent probability of a man of previous good character engaging in deliberate deceit, particularly at the interlocutory stage.
33. In this regard, an important strand of the evidence upon which the Defendant heavily relied was the response of the Defendant's New York attorneys, Davis Polk & Wardell ("Davis Polk") to enquiries made by the Davidson Kempner investors through their attorneys Kasowitz Benson Torres LLP ("Kasowitz"). By letter dated April 5, 2020 to the Special Committee, Kasowitz asserted that proprietary claims might exist and that the release of the Bond Proceeds and "*dissipation of such funds will only exacerbate breaches of duties which have occurred*". Davis Polk responded on April 11, 2020:

"...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...operations in accordance with the 'Use of Proceeds' section of the Offering Memorandum..."

34. This open and perfunctory admission as to how the funds had been dealt with is inconsistent with the notion that Mr Schakel would have had any motivation to deliberately mislead investors on April 3 and April 6 about where the so-called Bond Proceeds were in order to conceal illicit dealings with the Defendant's own funds in a manner generally consistent with the terms on which the investment funds were received. The Final Offering Memorandum for 0.75% Convertible Senior Notes due 2025 published on or about January 7, 2020 stated under "USE OF PROCEEDS" (at page 75):



"...In utilizing the proceeds from this offering and the Concurrent Primary Offering, we are permitted under PRC laws and regulations to provide funding to our PRC subsidiaries only through loans and capital contributions...and only if we satisfy the applicable government registration and approval requirements. We cannot assure you that we will be able to meet these requirements on a timely basis, if at all....We expect that all the net proceeds from this offering and Concurrent Primary Offering will be used in the PRC in the form of RMB and mainly by funding our PRC subsidiaries through capital contributions. In general, the relevant registration and approval procedures for capital contributions typically take approximately eight weeks to complete..."

35. I was initially persuaded that the rapid pace at which the capital contributions were effected by Ms Qian and her team shortly before she was relieved of the keys to the Company's financial kingdom on April 10, 2020 supported the inference of an extraordinary transaction. Having further considered this important passage in the FOM, in my judgment it is more arguable that investors were being told that money would be invested in the subsidiaries as quickly as possible, there were risks that regulatory approvals might not be obtained but that typically approvals would take 8 weeks. In my judgment it is wholly untenable to suggest that the FOM can be read as representing that funds will ordinarily be held offshore for at least 8 weeks. The FOM also explicitly disclosed that most of the Group's assets would be held in the PRC and that effecting service or enforcing judgments in China might be difficult. The Defendant's counsel placed particular emphasis (of the disclosure in the FOM at page 47) that "*substantially all our assets are located in China.*"
36. This leaves to consider the main plank of the Plaintiffs' case that the following transactions were outside the ordinary course of business. The transactions were the capital injections

internally approved at Olympic sprint speed with next to no corporate formalities on March 13, 2020 and March 19, 2020, with regulatory approval being obtained over 24 hours on or about April 8, 2020. There were two limbs to the Plaintiffs' case. Firstly, and it seemed to me less significantly, the Plaintiffs submitted that:

"99. Summing up, on 13 and 19 March 2020, Ms Qian approved a total of:

- (a) US\$[V] million of capital injection into Luckin China; and*
- (b) US\$X] million of registered capital increase in respect of Luckin China.*

100. Two questions arise:



- (a) First, given that the actual capital injection in April 2020 was US\$[Y] million rather than the US\$[W] million requested from and approved by Ms Qian, where is the request to and the approval by Ms Qian of the balance for the US\$[W] million balance of the capital injection?*
- (b) Second, why were the approval processes on 13 and 19 March 2020 rushed to a point where neither bore any resemblance to the meticulous procedure outlined at paragraph 55 of Schakel 3? Taking 7 minutes to approve a one-liner request for a US\$[V] million increase in the registered capital of Luckin China without any supporting documents or analysis is not what Mr Schakel describes as standard procedure. Nor could it be described as ordinary or proper business behaviour.*

101. The answer to the first question seems to be that there simply isn't any request or approval for the US\$[W] balance of the actual capital injection into Luckin China. Indeed, even Schakel 3 does not assert that there was one. In his own narrative description of the emails of 13 and 19 March 2020 at paragraph 56 of Schakel 3, Mr Schakel is adamant that the only proposal to "inject further capital" into Luckin China was Ms Liu's 13 March 2020 proposal mentioning US\$[V]. In describing all the other proposals, Mr Schakel consistently (and correctly) refers to the entirely different concept of "increase [of] the registered capital" and "additional increase in the capital limit", which is to do with increasing the maximum permitted registered capital of Luckin China (hence the need for external regulatory approvals: see below) rather than with actually injecting capital into the equity 'space' thereby created.

102. Therefore, on the Defendant's own evidence, US\$[W] out of the US\$[X] injected into Luckin China on 8 and 9 April 2020 was injected in breach of the internal approval procedures described by Mr Schakel at paragraph 55 of Schakel

3. Accordingly, at least US\$[W] was paid into Luckin China without internal authority and a fortiori outside of the ordinary and proper course of business.



103. The answer to the second question, regarding the rushed approval process, seems to be connected to certain other events that were taking place in parallel. Specifically, as Schakel 3 at paragraph 86, it was around that time, on 18 and 19 March 2020, that E&Y reported its findings regarding potential accounting issues to the Defendant's Audit Committee, which in turn reported them to the Board. The Plaintiffs asked the Defendant in correspondence to confirm the time of the Board meeting on 19 March 2020, but the Defendant elected to ignore that request for information.”

37. Lack of procedural propriety and undue haste are said to support a finding that the capital injection was outside of the ordinary course of business. The evidence must be assessed having regard to the relevant legal test. In *Lakatamia Shipping Company v Toshiko Morimoto* [2019] EWCA Civ (at paragraph 34(6)), Haddon-Cave LJ stated:

“What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof....”

38. In my judgment “ordinary course of business” in this context requires the Court to look primarily at the substantive purpose of an impugned transaction, not its form. A formally correct transaction carried out with no apparent haste would be outside of the ordinary course of business if funds were being siphoned away from the corporate structure for an illicit collateral purpose. The contemporaneous documentation (such as it is) supports the plausible view that the transactions were for ordinary business purposes (funding operating expenses which were likely to increase). The lack of supporting documentation for the decision-making, the timing of the transactions and the accelerated regulatory approval do not support a finding that unjustifiable dissipation occurred. It is more plausible that the transaction was expedited as part of a public sector/private sector drive to reboot business activity in the PRC than it is that the Defendant's agents were primarily seeking to put assets beyond their investors’ reach, even though there is no evidential basis for such speculation. The Plaintiffs are understandably suspicious; but there is no evidential support for those suspicions absent a legal imperative binding on the Defendant to preserve assets to meet contingent claims.

39. The most substantial assertion made to characterise the US\$500 million capital injection as outside of the proper and ordinary course of business was first made by Kasowitz in a letter dated April 20, 2020 to Davis Polk.



“..it has come to our attention that Luckin Coffee (China) Limited recently obtained approval for a \$500 million capital contribution on April 17 2020. This intended capital contribution-which was more than 60 times larger than any prior capital contribution declared by Luckin Coffee (China) Limited, and which was consummated five days after the Company revealed the existence of a massive fraud, and two days after we wrote you and demanded that the Company not disburse the Note Proceeds until the Special Committee’s investigation is complete-appears to be well outside the ‘ordinary course of business’, and has left our client gravely concerned.”

40. If the size of the capital contribution was obviously far in excess of what the subsidiary’s actual capital needs were, this would be a strong indicator that the true purpose of the asset transfer was an improper one. It would justify looking at the timing of the transaction, its rushed nature and the absence of administrative due process in an entirely different light. In the Third Schakel Affirmation (at paragraphs 42-43), the normality of the size of the capital injection is demonstrated by reference to a table of historic increases. Mr Houseman QC indomitably insisted that the supporting documentation relied upon by Mr Schakel did not support his conclusions. Mr Potts QC countered that they did.
41. It is difficult to confidently interpret the documents relied on by Mr Schakel without the benefit of supporting oral evidence. The document which might otherwise have most clearly indicated the historic capital contribution figures had asterisks where numbers ought to be. The document which did potentially support the CFO’s evidence was said not to do so by the Plaintiffs (on the assumption that the currency used was RMB) and to be confirmatory by the Defendant (on the assumption that the currency used was USD). Each contention was valid depending on which currency was actually applicable. The Defendant’s counsel was able to point to entry 11 for March 28, 2018 to substantiate his client’s position. This document was an English translation of a Chinese original which did not indicate on its face the currency used and also did not deal with all figures set out in Mr Schakel’s historic table.
42. Nonetheless, in the present interlocutory context, I am bound to accept Mr Schakel’s express refutation of the inherently improbable assertion that the US\$[X]capital contribution made in April 2020 was 60 times the level of injection which historically was

made. The Plaintiffs have failed to make out a good arguable case that the US\$[X] capital contribution fell outside of the parameters of the ordinary and proper course of business because of the grossly disproportionate size of the sum involved.

43. A new complaint was made for the first time at the *inter partes* hearing. In the Plaintiffs' Skeleton Argument (at paragraph 33 (c)), it was submitted that:



“Having perpetrated the fraudulent capital raising exercise in January 2020, the Defendant immediately moved over US\$[Y] from its offshore bank account in [A] to its onshore bank accounts in the PRC (where such funds might be expected to be much more difficult to recover) in a transaction wholly inconsistent with its stated policy of keeping only 6 months of operating costs in the PRC...”

44. The January transfers were only brought to the Plaintiffs' attention by virtue of discovery given pursuant to the WFO, so it is understandable that this point was not raised in the initial ex parte application. Once the spell cast by ritually intoning the word “fraud” is broken, this point loses its initial lustre. I have already found above that the FOM made it clear that most assets would be held in the PRC and framed delays in obtaining regulatory approvals for capital contributions as a business risk rather than a desired outcome. What is the source and significance of a policy to keep only six months' capital onshore? This was not a formal policy, described in the FOM, but an oral statement as to the Defendant's practice made by Mr Schakel in a telephone call and recorded contemporaneously in a note by Mr Lennon, who was also on the call. The Defendant's evidence suggested operating costs were at a level of \$[U] per month in early 2020, which was not a significant variance from the six months capital figure contended for by the Plaintiffs at the ex parte hearing.
45. It was plausible at the ex parte hearing juncture that the US\$[X] capital injection in early April was an improperly large movement of cash which was inconsistent with what the CFO said (shortly before the injection occurred) was the usual practice. The failure of Mr Schakel to refute this account in his Second Affirmation increased the cogency of the Plaintiff's case on risk of dissipation, for the reasons explained at paragraph 54 of my June 4, 2020 Ruling on the scope of the disclosure obligations in the WFO. In light of his Third Affirmation and the explanation he gives as to how he was misunderstood when he used the term “offshore” and that operating expenses were rising (an assertion supported by contemporaneous internal emails), the solidity of this previously important part of the case on risk of dissipation melts away.

46. I also am ultimately bound to find that the Plaintiffs have failed to make out a good arguable case that before the commencement of the present proceedings, unjustified dissipation of assets occurred. The so-called “Schakel Pickle” and the admitted wrongdoing which occurred in late 2019 by way of overstating the accounts does not assist the Plaintiffs by demonstrating that the Defendant’s making of the US\$[X] capital contribution in April 2020 amounted to unjustified dissipation. By way of illustration only, I am not able to make the sort of findings which Raj Parker J recently made in *Raffey International Bank A-G v- Scully Royal Ltd et al*, FSD 162/2019 (RJP), Judgment dated July 7, 2020 (unreported):

“147. There is a plausible evidential basis to suggest that the circumstances of the transfers show that they have been structured in a deliberately convoluted way in particular in relation to the Mine, the Merchant Bank and the Dividend.

148. Although I bear in mind the guidance in the decided cases in relation to the many legitimate uses of complex offshore structures, to my mind the scale and speed of the use by the MFC group in transferring these assets away from D2 points to a plan to conceal or obscure, and a scheme in order to put the assets beyond the reach of RBI.”



Findings: risk of future dissipation

47. In the Plaintiffs’ Skeleton Argument (at paragraphs 29-30), it was accepted that *“the Plaintiffs must show a real risk of future dissipation established by solid evidence rather than mere inference... to the ‘good arguable case’ standard”*. The requisite test must be viewed in the appropriate legal context, having regard to the fact that, in particular:

- (a) the Plaintiffs do not assert a proprietary claim and invested on the express basis that the Bond Proceeds would be used to fund the operations of the Defendant’s subsidiaries;
- (b) the Plaintiffs are not entitled to obtain security for any future judgment they may obtain. They are only entitled to restrain the Defendant from improperly putting assets beyond the reach of any future judgment enforcement mechanism which may be deployed;



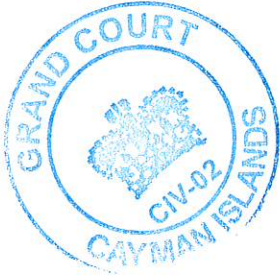
- (c) the Plaintiffs are unable to rely on the potentially evidentially significant finding that acts of improper dissipation have already occurred; and
- (d) the admitted wrongdoing in relation to misstating accounts, even when combined with a good arguable case that the Defendant acted inappropriately in precipitously denying the validity of the Muddy Waters Report before properly investigating it, are matters which:

- (i) are not “*relevant to the issue of dissipation*”, and
- (ii) do not “*point powerfully in favour of a risk of dissipation*”.
Lakatamia Shipping Company Limited v Morimoto [2019] EWCA Civ 2203 (at paragraph 51(1)).

48. In the Plaintiffs’ Skeleton, the case on risk of future dissipation was summarised as follows:

“33. For the reasons set out below, there is plausible evidential basis of risk of dissipation. In summary:

- (a) *The Plaintiffs have a good arguable case that the Defendant, acting by its Chairman, Mr Lu, other Board members, and its CFO, Mr Schakel, made fraudulent misrepresentations to the Plaintiffs in relation to the Defendant's financial performance.*
- (b) *There is evidence that the accounting fraud that underlies those fraudulent misrepresentations was perpetrated through sham transactions between the Defendant's group companies and companies linked to the Defendant's Chairman, Mr Lu, which shows a propensity to use corporate structures and sham transactions to conceal the true state of the Defendant's financial assets.*
- (c) *Having perpetrated the fraudulent capital raising exercise in January 2020, the Defendant immediately moved over US\$[Y] from its offshore bank account in [A] to its onshore bank accounts in the PRC (where such funds might be expected to be much more difficult to recover) in a transaction wholly inconsistent with its stated policy of keeping only 6 months of operating costs in the PRC.*
- (d) *After being publicly accused of the fraud in a report at the end of January 2020, the Defendant issued categorical denials and*

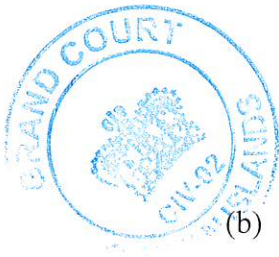


proceeded to transfer further funds into the PRC, ultimately culminating in an expedited US\$[Y] transfer to one of its PRC subsidiaries. There is no evidence that this transfer was made pursuant to the bona fide deliberations and procedures that the Defendant itself asserts it typically undertook for transfers of this nature.

- (e) *The persons who perpetrated the fraud, including the Chairman and the CFO, remain in control of the Defendant and its subsidiaries, both in their capacity as members of the Board or senior management with 'complete authority' over the Defendant's finances, and in their capacity as controlling shareholders of the Defendant.*
- (f) *The only disclosed directly-owned assets of the Defendant are:*
 - (i) **Cash Deposits.** *Approximately US\$[T1] in two bank accounts in the PRC, which is a highly liquid asset that would be easily dissipated;*
 - (ii) **BVI Shares.** *Shares in its BVI subsidiary which in turn holds, directly and indirectly, the rest of the group, such shares again being an asset that is easily transferred and the underlying value of which is easily diminished by procuring disposals of the underlying assets by/through its (indirect) subsidiaries; and*
 - (iii) **Purported Receivables.** *As addressed above, these book-entries are said to have a face value of US\$[B], but appear to be completely undocumented and subject to unspecified terms. Such assets, to the extent they truly have value, would clearly be very easily dissipated or diminished by altering the relevant book entries."*

49. The first four of the six grounds relied upon can be dealt with shortly:

- (a) there is a good arguable case that the Defendant is liable for fraudulent misrepresentation on the basis that senior management figures overstated the Defendant's subsidiaries' assets through documenting fictitious transactions. The Defendant's own internal investigations point to figures close to Chairman Lu as being culpable. Since any such fraud clearly benefitted the Group, there is also a good arguable case that the knowledge of those suspected perpetrators would be imputed to the Defendant, assuming (as



appears to be the case at this stage) that the Defendant closely controls its subsidiaries. I find no basis for any similar findings in respect of Mr Schakel, who the Plaintiffs allege himself made misrepresentations. To the extent that those apparently responsible for the admitted falsification of accounts were person with longstanding and close ties to Chairman Lu, there are reasonable grounds for suspecting that the misconduct in question occurred at least with Chairman Lu's tacit approval;

- (b) I have already explained above why I reject the contention that the character of the dishonesty which has admittedly occurred is indicative of a propensity to conceal assets. However, it is impossible to avoid the conclusion that the gap between creating fictitious transactions to persuade people to invest in an otherwise legitimate business and creating fictitious transactions to prevent the same investors from enforcing their judgments is not a yawning chasm. It does constitute a partial basis for finding that a risk of future dissipation exists, in the absence of a clean and decisive break between the Company and all senior members of management who may have been involved in the admitted false accounting;
- (c) I have already explained above why I reject the complaint that the January "on-shoring" of the Bond Proceeds was not outside of the ordinary and proper course of business;
- (d) the FOM (at pages 68-69) sought to allay investors' concerns about the credibility of negative trade reports on the grounds that they could be published by self-interested short-sellers, and implied that the Defendant would investigate all credible allegations. The Defendant's precipitous denial of the truth of the allegations made in the Muddy Waters Report, with the CFO apparently informing at least one investor that he had personally confirmed the veracity of the relevant accounts, is presently unexplained, and supports an arguable case of conduct falling short of the normal standards of commercial morality. This also provides a partial basis for finding that a risk of future dissipation exists as it is indicative of a somewhat fast and loose approach to dealing fairly with the Defendant's stakeholders and contingent creditors, it not being possible to infer dishonesty at this stage;
- (e) at the ex parte hearing, there was considerable doubt about whether wrongdoers were still in control, despite the creation of the Special Committee and its preliminary findings. On the first day of the hearing, July 1, 2020, the Defendant issued a press release reporting that its investigations had been substantially completed and that, *inter alia*, a Board meeting seeking the removal of Chairman Lu would be held on July 2, 2020. The Board did not pass a resolution to remove Chairman Lu from the Board. When judgment was reserved on July 3, 2020, the parties undertook to update

the Court on the outcome of the EGM due to be held on July 5, 2020. There was accordingly prior to the EGM, an evidential basis for concern that Chairman Lu (1) was implicated in the admitted wrongdoing, and (2) was still to a material extent in control of the Defendant and its Group. This provided further partial support for the Plaintiffs' case on a risk of future dissipation. The post-hearing update and the outcome of the EGM will be dealt with below;



- (f) the Group structure the finances of which are now under the CFO's complete control may well make it easy to dissipate assets. However, presently, there is no positive evidence of insolvency and the only vested rights enjoyed under the Bonds will accrue on their maturity in 2025. Their claims in this action are disputed and trial is on any view over a year away. The Plaintiffs are not judgment creditors with vested enforcement rights. This ground adds only minimal weight to the Plaintiffs' case on a risk of future dissipation at the present time.

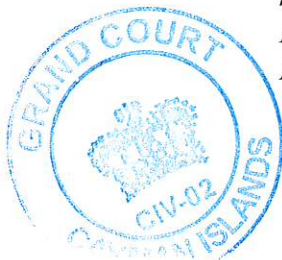
50. In the Fourth Berdon Affidavit it was asserted that the way in which the Defendant had dealt with disclosure should be taken into account. I do not accept that the way in which the disputed disclosure obligations were responded to by the Defendant supports the case for continuing the WFO to any material extent.

51. In summary, by the end of the *inter partes* hearing, the factors supporting a continuation of the WFO may be summarised as follows:

- (a) there are reasonable grounds for suspecting the falsification of accounts in late 2019 which the Company's internal investigation has attributed to senior Group management figures close to Chairman Lu were carried out with his (at least) tacit approval;
- (b) although the nature of the fraud was not in a strict sense indicative of a propensity for acts of improper dissipation, it does provide some evidence in a general sense of a risk that deliberate steps to evade enforcement might be taken at some ill-defined future date. In this regard the initial response to the Muddy Waters Report before the allegations had been properly investigated is pertinent;
- (c) the fact that Chairman Lu, suspected of involvement in the "admitted fraud", on July 3, 2020 remained at the helm at Board (and apparently) shareholder level also supported a risk of dissipation in a very general sense. It was unclear precisely how firm a grip the Special Committee had on the Defendant's affairs as its composition had been fluid during the short time of its existence.

52. An objective analysis of the evidence does not enable me to accept the assertion in the Fourth Berdon Affidavit (at paragraph 55) that “*the risk of dissipation of the valuable assets, such as by the alienation of Luckin BVI’s shares, or the ‘forgiving’ of the receivables, remains a present and clear danger to the Plaintiffs’ prospects of making any recoveries on a final judgment in their favour*”.
53. My view of the significance of the Plaintiffs’ delay in seeking relief changed somewhat, between the *ex parte* and full *inter partes* hearings. In this commercial context, a case brought by multiple plaintiffs has more conviction to it than a case brought by a sole plaintiff. As it was, the Defendant contended that the fact that the Plaintiffs were a minority of potential claimants diminished the weight to be attached to their concerns. I do not consider delay to be a significant factor in diminishing the weight of the case on risk of dissipation.
54. Based on the material before the Court at the conclusion of the *inter partes* hearing on July 3, 2020, I would refuse the Plaintiffs’ application to continue the WFO. This is essentially because they have failed to produce sufficiently cogent evidence of a risk of dissipation, even though they have adduced some evidence demonstrating reasonable grounds for their concerns. The requisite evidential requirements, accepted by the Plaintiffs, are best expressed for present purposes in *Lakatamia Shipping Company-v- Toshiko Morimoto* [2019] EWCA Civ where Haddon-Cave LJ opined as follows:

“34. I also gratefully adopt (as the Judge did) the useful summary of some of the key principles applicable to the question of risk of dissipation by Mr Justice Popplewell (as he then was) in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm)...:



(1) *The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.*

(2) *The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.* [emphasis added]

55. In these circumstances, the balance of convenience tips decisively in favour of the Defendant. The prejudice to the Defendant of being subjected to the WFO and its far from light disclosure obligations until trial outweighs the prejudice the Plaintiffs will suffer from being denied the protection of the WFO in relation to an ultimately ill-defined dissipation risk.

Findings: the evidential significance of the outcome of the July 5, 2020 EGM

56. On July 13, 2020, the Defendant reported the outcome of the EGM in a filing with the US Securities and Exchange Commission (“SEC”). Four directors have been removed from the Board, including former Chairman Lu. The new Chairman is “*Mr. Jinyi Guo, a director to the Board and the former Acting Chief Executive Officer of the Company*”. Four new independent directors have been appointed, two of whom are academics and two of whom are commercial lawyers. Even assuming in the Plaintiffs’ favour that former Chairman Lu still exercises shareholder control, the EGM results do not fortify the risk of dissipation case which was initially advanced. If the general impression at the ex parte stage was that the wheels were falling off the Luckin Coffee bus, the general impression at this stage is that attempts are being made to tighten the bolts of the wheels and that they are less wobbly than before.

Summary of findings in relation to the Plaintiffs’ Summons seeking a continuation of the WFO until trial

57. My findings may be summarised as follows:



- (a) the Plaintiffs have failed to establish a good arguable case of a risk of future dissipation because their evidence lacks the requisite solidity, viewed in light of the Defendant’s explanations advanced for the purposes of the full inter partes hearing. Their application for the WFO to be continued until trial is liable to be dismissed;
- (b) the Plaintiffs have failed to establish a good arguable case that dissipation occurred in the past, again in light of the Defendant’s explanations advanced for the purposes of the full inter partes hearing;

Findings: the Defendant’s Summons to discharge the WFO

58. The Defendant’s Summons only sought the following relief with respect to the discharge of the WFO:

“7. The ex parte Injunction Order dated 8 May 2020, as varied by Court Orders dated 19 May 2020 and 5 June 2020, be set aside or discharged in its entirety.”

59. There was no express material non-disclosure complaint in paragraph 7 or in the Defendant’s Skeleton Argument. The Summons was filed on June 10, 2020, a month after the WFO was served. It was agreed that it should be listed together with the Plaintiffs’

Summons seeking a continuation of the WFO, which by its terms provided:

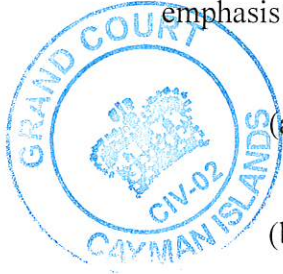


“26. This Order shall remain in force up to and including the granting of any further Order following the hearing of the Return Date, unless before then it is varied or discharged by a further Order of the Court. The application in which this Order is made shall come back to the Court for further hearing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

60. On May 12, 2020, the Plaintiffs issued a Summons seeking a continuation of the WFO until trial. The Defendant’s first foray, perhaps understandably, was to challenge the scope of the disclosure obligations by Summons dated May 15, 2020, which was heard on May 19, 2020 and May 25, 2020. But this signified that seeking to discharge the WFO was not an obvious summary matter. Instead, a full hearing with evidence was required.
61. In the result, the Defendant’s application to discharge the WFO was somewhat academic as it was self-evident that, *prima facie*, it would lapse if it was not continued after the hearing of the Plaintiffs’ May 12, 2020 Summons in any event. So the only purpose served by the Defendant’s application to discharge the WFO appeared to be to invite the Court to find that the WFO ought never to have been made. The only obvious significance of such an inquiry appears to me to be the issue of costs. What was the position at the *ex parte* stage and should the WFO have been made?
62. The position at the *inter partes* hearing stage was materially different to the *ex parte* position in the following significant respects. In the Third Schakel Affirmation (at paragraph 34 and following):
- (a) an explanation was first given for the apparent inconsistency between what the CFO told the investors about the location of the Bond Proceeds and what Davis Polk told Kasowitz. This inconsistency was solid evidence of a risk of dissipation in that it suggested that assets had been moved contrary to the CFO’s stated policy shortly after investors had made inquiries and/or requested that assets be preserved;
 - (b) the assertion that a capital contribution was pending “*which was more than sixty times larger than any prior capital contribution*” was discredited. If accurate, this assertion by the Plaintiffs provided significant support for the general risk of dissipation based on wrongdoer control. Mr Schakel suggested that the true position could easily have been gleaned from public documents, yet the supporting documents he exhibited were almost indecipherable;
 - (c) it was first explained that prior to April 10, 2020, the CFO did not have effective control over the financial operations of the Group’s PRC subsidiaries. This diminished the weight of the Plaintiffs’ concerns about the persons involved in the

accounting fraud being still involved in the management of the Defendant.

63. None of these aspects of the Plaintiffs' case were negated by the fact that the FOM disclosed that monies would be funnelled into the PRC subsidiaries, a point duly disclosed at the ex parte hearing. Nor were they diminished by disclosures in the FOM which Mr Potts QC suggested duly warned investors: "This is the Wild West here, anything can happen!" Nor were they diminished by the fresh legal focus which Mr Potts QC brought to bear and the emphasis he placed on the need for:



- (a) solid evidence of a risk of dissipation in the absence of evidence of past dissipation or a propensity to commit such acts; and
 - (b) due regard to be had to the limited function of a non-proprietary freezing injunction.
64. In my judgment the evidential requirements for establishing a risk of dissipation were, somewhat narrowly, met at the ex parte stage based on the material then before the Court and taking into account the legal and factual matters which Mr Potts QC complained in his oral submissions were not drawn to the Court's attention. The Court must have a greater margin of appreciation when asked to make an "interim-interim" injunction, which is not by its terms intended to last until trial, especially when the applicants have a strong case that the respondent has been guilty of even tangentially relevant fraud. Where the scales are evenly balanced and the alleged victims of fraud have not asserted that they can presently demonstrate a case for a freezing order until trial, the Court must be entitled to err in favour of granting limited interim relief. When a serious question of fraud has been raised and it appears that wrongdoers still have their hands on the financial controls, the Court is entitled, where the scales are otherwise somewhat evenly balanced, to err in favour of granting effective relief to the victims of the alleged fraud rather than affording the alleged perpetrators the benefit of the doubt. These often tacit evaluative assessments form part of the Court's legal duty to determine where the balance of convenience lies and when it is just and convenient to grant injunctive relief.
65. That was essentially the approach I adopted in this case. It cannot be suggested that I was 'blindsided' by the ordinary course of business point upon which Mr Potts QC significantly prevailed at the effective Return Date hearing. In the course of argument on May 8, 2020 I observed that "*there is a bit of a grey area in terms of where ordinary business expenses end and dissipation begins*"². I also expressed doubts about the legal validity of seeking disclosure in relation to the "Bond Proceeds" in the absence of a proprietary claim. Finally I complimented the Plaintiffs' counsel on the extensive full and frank disclosure which was made, including portions of the FOM upon which the Defendant heavily relied. The FOM was not a vanishing cream which made all of the blemishes in the Defendant's conduct of

² Transcript page 29 lines 5-6.

which the Plaintiffs complained magically disappear.

66. Not only was I entitled to take a more comprehensive view of the factual and legal terrain after hearing full argument and considering evidence filed by the Defendant, I was required to consider a distinctly different question: have the Plaintiffs demonstrated a sufficiently cogent risk of dissipation to justify the intrusive remedy of a freezing order with accompanying disclosure obligations being imposed until trial? My decision not to continue the WFO does not necessarily imply that the ex parte Order ought never to have been made. The one factor which was unchanged from beginning to end was the time taken by the Plaintiffs to commence the proceedings. Although I now consider that I gave insufficient attention to the relevance of delay, this was not so weighty a consideration as to have provided a freestanding basis for declining to grant the WFO at the ex parte stage.
67. In summary, I find no basis for concluding that the WFO was liable to be discharged without reference to the materials filed by the Defendant for the purposes of the July 1-3 hearing. The Defendant has failed to establish that the WFO should be discharged on the basis that it ought not to have been initially made. Based on the material reasonably available to the Plaintiffs and placed before the Court prior to the Defendant's evidence being filed for the present hearing, a good arguable case for a short interim injunction of limited duration was, just, made out. The Defendant's application to discharge the WFO before it lapsed should be dismissed.

Conclusion

68. For the above reasons, the Plaintiffs' Summons seeking a continuation of the WFO is dismissed with effect from the date of delivery of this Ruling. The Defendant's application to discharge the WFO is dismissed. I shall hear counsel as to costs and any other matters arising from the present Ruling.



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