



BVI Commercial Court hands down judgment in long-running dispute concerning Lunan Pharmaceutical Group Limited

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Walkers has secured a comprehensive victory for its client, Ms Zhao Long, in a long running dispute regarding the ownership of shares in a significant PRC pharmaceutical company in a judgment of the BVI Court demonstrating the BVI Court's ability to effectively adjudicate complex cross-border commercial disputes involving PRC assets and wide ranging questions of both BVI and PRC law.

On 20 July 2021, the British Virgin Islands ("BVI") Commercial Court handed down judgment in favour of Walkers' clients, Zhao Long and Kunlun Newcentury Investment Holdings Co Ltd (the "Claimants") in a complex litigation concerning the ownership of shares in a BVI company ("Endushantum") which in turn holds a quarter of the issued share capital of a significant PRC pharmaceutical company called Lunan Pharmaceutical Group Limited ("Lunan" and the "Lunan Shares") as well as shares in other group companies (together with the Lunan Shares, the "PRC Shares").

From 2011, the shares in Endushantum were held by a BVI trust for the benefit of the founder of Lunan, Mr Zhao Snr (the "Zhao Trust"). Shortly before his death in 2014, Zhao Snr executed instructions to transfer title to the shares in Endushantum to his daughter, Ms Zhao Long. Those instructions were not followed. Justice Jack held that a transfer of shares in Endushantum, the issuance of new shares in that company to third parties and the establishment of a new BVI trust following the death of Zhao Snr was a breach of the Zhao Trust. The Judge has found that the third parties receiving shares in Endushantum were knowing recipients and the Claimants, Ms Zhao Long and another BVI company, are entitled to the return of the shares in Endushantum.

Justice Jack dismissed counterclaims made by Lunan (and supported by evidence from those that controlled Endushantum). Lunan had sought to establish a claim to title to its own shares as held by Endushantum based on a share entrustment agreement dating back to 2001 (the "Share Entrustment Agreement") whereby those shares were purported to be purchased by and held for Lunan itself by another company (incorporated in Missouri, the "Missouri Co") and subsequent transferee Endushantum. Ms Zhao Long's counsel's submissions included that: (1) the Share Entrustment Agreement was invalid as a matter of PRC law; and (2) that the purchase of the Lunan Shares had been funded by a loan from Lunan to Missouri Co in 2001, and that the entrustment arrangement was terminated when the loan had been repaid by the founder of Lunan, Mr Zhao Snr.

Having heard expert evidence on a number of issues of PRC law, the Judge found that the Share Entrustment Agreement was invalid as Lunan was prohibited from holding its own shares under the PRC Companies Law and, that the entrustment was intended as a temporary arrangement and would have been extinguished by repayment of the loan. Justice Jack found that Zhao Snr was the ultimate beneficial owner of the Lunan Shares as held through Missouri Co and subsequent transferee Endushantum following repayment of the loan to Lunan. The loan was repaid using the proceeds of dividends in other PRC companies which Justice Jack found that, on a balance of probabilities, Zhao Snr was entitled to.



In February 2021, less than a month before trial in the BVI proceedings, Lunan disclosed that since 2019 it had separately pursued litigation against Endushantum before a court in the PRC (the “Linyi Proceedings”) seeking to enforce its purported contractual rights in relation to the purported entrustment of the Lunan Shares for Lunan. A judgment was obtained by Lunan in April 2020 that recognised (but did not enforce) its purported contractual rights (the “Linyi Judgment”). Although Endushantum had given undertakings not to transfer the PRC Shares, it then transferred the PRC Shares to entities controlled by Lunan in breach of its undertakings and in purported reliance on the Linyi Judgment. Lunan then pursued claims to recognise the Linyi Judgment in the BVI proceedings. That recognition was resisted by Ms Zhao Long on the basis that the proceedings were collusive.

Justice Jack agreed and refused to recognise the Linyi Judgment. He concluded that the PRC Court was seriously misled: key documents were mischaracterised and not disclosed to the PRC Court, strongly arguable defences were not raised, and no mention was made of the BVI proceedings or Ms Zhao’s interest. No weight could be placed on the collusive judgment and the failure to disclose it to the BVI Court in a timely manner was held to be “*a grievous interference with the proper administration of Justice by this Court and... was intended to be such*”. The Judge found that the collusive Linyi Proceedings and the improper transfer of the Lunan Shares in breach of undertakings were “*deliberate decisions made in order to spirit the Lunan shares away*.”

This factual background to the case is complex and serves as a useful reminder as to the appropriate approach a judge should take when considering witness evidence. Justice Jack took a holistic approach in reviewing witness evidence in reaching his conclusions in circumstances where there had been inadequate disclosure. The case also demonstrates the BVI Court’s ability to effectively adjudicate complex commercial disputes involving PRC assets and wide ranging questions of both BVI and PRC law. A copy of the judgment is available [here](#).

The Walkers team representing the successful Claimants includes BVI based Oliver Clifton, Meenaa Azmayesh, Yegâne Güley, and Hong Kong based Callum McNeil, John Crook, Melodie Leung, and Vivian Kwan. Walkers instructed Tom Lowe QC of Wilberforce Chambers.

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