EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHC(COM) 2022/0183

IN THE MATTER OF HAIMEN ZHONGNAN INVESTMENT DEVELOPMENT (INTERNATIONAL) CO., LTD.

AND IN THE MATTER OF THE INSOLVENCY ACT 2003

BETWEEN:

CITHARA GLOBAL MULTI-STRATEGY SPC

Applicant

and

HAIMEN ZHONGNAN INVESTMENT DEVELOPMENT
(INTERNATIONAL) CO. LTD.

Respondent

Appearances:

Peter Burgess, Eleanor Morgan and Sophie Christodoulou for the Applicant
Jerry Samuel, Anna Lin and Marie Stewart for the Respondent

2023: March 27; 29;
May 2; 5 (Further written submissions)
July 5;18;19.

JUDGMENT

INDEX

No.	CONTENTS	PAGES	PARAGRAPHS (INCLUSIVE)
1	**The Applications**	**4-6**	**[1] – [7]**
2	**Company's Request for further Submissions**	**5-6**	**[7]**
3	**Court's decision on 5 July 2023**	**6**	**[8]**
4	**The Issues**	**6**	**[9]**
5	**The Court Documents**	**6-7**	**[11] – [13]**
6	**The New York Law Expert Evidence**	**7**	**[13]**
7	**The Factual Background**	**8-16**	**[14] – [39]**
	The Company	**8**	**[14] – [17]**
	The Notes and Key Terms of the Indentue, Offering Memorandum and Euroclear Procedures	**8-13**	**[18] – [24]**
	The Notes and Indenture	**8-12**	**[18] – [22]**
	The Offer Memorandum	**12**	**[23]**
	Euroclear Operating Procedures	**12**	**[24]**
	Euroclear Authorizations/Statements of Account	**13**	**[25]**
	Cithara's Holdings and the Company's Non-Payment	**13-15**	**[26] – [32]**
	The present proceedings	**15-16**	**[33] – [39]**
8	**The Statutory Framework**	**16-19**	**[40] – [47]**
9	**Cithara's Arguments**	**20-32**	**[48] – [75]**
10	**The Company's Arguments**	**33-42**	**[76] – [101]**
11	**Oral Submissions by the Company**	**42**	**[102] – [103]**
12	**Cithara in Reply**	**42-43**	**[104] – [108]**
13	**Further Submissions by the parties- *Re Shinsun***	**43**	**[109]**

14	**Company's Supplemental Skeleton Argument**	**43-46**	**[110] – [115]**
15	**Cithara's Supplemental Skeleton Argument**	**46-49**	**[116] – [127]**
16	**DISCUSSION AND ANALYSIS**	**49-88**	**[128] – [207]**
	Pleading Points taken by the Company	**49**	**[128]**
	The "substantial dispute as to debt" line of cases	**50-51**	**[129] – [131]**
	The Substantive Arguments		
	Applicable Law	**51-52**	**[132] – [135]**
	The Experts	**53-55**	**[136] – [143]**
	Is Cithara a Creditor under New York Law?	**55-60**	**[144] –[153]**
	Court finds Cithara is a Creditor Under New York Law	**58-60**	**[148] – [153]**
	Is Cithera a Creditor under BVI Law?	**60-84**	**[153] –[192]**
	Re Nortel	**60-67**	**[153] – [158]**
	Bio-Treat and Shinsun	**68**	**[159] – [161]**
	Steel	**69-70**	**[162] – [164]**
	Bio-Treat	**70-75**	**[165] – [170]**
	Shinsun	**75-80**	**[171] – [184]**
	Court finds that Cithara is a Creditor under BVI Law	**80-83**	**[185] – [192]**
	Conclusion on Cithara's Standing	**84**	**[193]**
	Strike Out Application	**85**	**[194]**
	The JPL Application	**85**	**[195]**
	The Liquidation Application	**85-88**	**[196] – [207]**
	Company Insolvent	**85-86**	**[197]**
	Strong Reasons for granting	**86-87**	**[199] – [201]**
	Views of Creditors	**87-88**	**[202] – [207]**
	Disposition	**88**	**[208]**
	Appendix to Judgment	**90**	

The Applications

[1] **MANGATAL, J (Ag.)**: The Application before me is an originating application by Cithara Global Multi-Strategy SPC ("**Cithara**" or "**the Applicant**") filed 10 October 2022 seeking the appointment of Liquidators ("**the Liquidation Application**") over Haimen Zhongnan Investment Development (International) Co. Ltd, ("**the Company**" or "**Respondent**"). The Liquidation Application was listed for three hours.

[2] The Company has also filed a Notice of Opposition and has filed an ordinary application that it has referred to as a "strike out" application, dated 29 November 2022. In one of the grounds of this application it is stated that the Company "*opposes the Application on the ground that the applicant lacks locus standi as a creditor to bring the Application, on the basis that under the indenture dated 9 June 2021 ("**the Indenture**"), the Applicant is not a "Holder" as defined in the Indenture, being a person in whose name a Note is registered in the Note of Register. On this basis the Application should be struck out."* Somewhat confusingly the only relief actually sought in this application was an extension of time for the service of evidence and an adjournment of the Initial Hearing of the Liquidation Application in December 2022, which was granted on 8 December 2022. However, because the Company has referred to the ordinary application dated 29 November 2022 as "**the Strike Out Application**", I have used and will use that terminology.

[3] The Company has asserted that Cithara does not have standing as a creditor for the purpose of section 162 (2) (b) of the BVI *Insolvency Act* 2003 ("**the *BVI IA***"). If it succeeds on that point, there is no need for a separate application to strike out, as the Liquidation Application would fall to be dismissed based on Cithara's lack of standing. If the Company fails on that point, the Court would then go on to consider the Liquidation Application or other relevant applications.

[4] The Company's position is that if the Court is minded to refuse the Strike Out Application, the Company seeks an order appointing joint provisional liquidators to the Company instead of a winding up order, having filed an ordinary application, tardily, on 20 March 2023 ("**the JPL Application**.")

[5] Prior to the substantive hearing of the Liquidation Application and Strike Out Applications, on 27 March 2023 I first heard and determined an application by the Company by ordinary application dated 17 February 2023 ("**the Extension Application**"). This application was listed to be heard for one hour, immediately before the Liquidation Application. The Company sought an extension of time for determination of the Liquidation Application because of possible restructuring plans. I reserved my decision until 29 March 2023. I refused the Extension Application and gave an oral ruling on those issues, essentially on the basis that the Company's plans to propose a restructuring plan were bound to fail since the Company was nowhere near the 75% threshold required for a BVI Scheme of Arrangement. Further reasons and development of this point were set out in my oral Ruling, and I do not intend to repeat those here.

[6] After the hearing of the Liquidation Application, the Strike Out Application, and the JPL Application was completed on 29 March 2023, I reserved judgment and took time for consideration of the issues. By a consent order dated 31 March 2023 the parties agreed, pursuant to section 168(2) of the *BVI IA* to an extension of time of the period for determination of the Liquidation Application until 10 July 2023.

Request by Company to make further submissions after judgment reserved

[7] In the latter part of April 2023, the Court received urgent correspondence from Conyers, the legal practitioners for the Company, indicating that there was a recent decision of the Grand Court of the Cayman Islands that they wished permission to submit for the Court's attention, this decision having been delivered on 21 April 2023, after I had reserved judgment. Mourant, the legal practitioners

for Cithara objected. However, I determined that it was just and appropriate to allow Conyers to rely upon the Cayman judgment and to let the Court have responsive written submissions limited to 2 pages, by 2 May and by 4 May 2023 from the Company and Cithara respectively. I have read the decision of Doyle J in FSD 192 of 2022 in ***In the Matter of Shinsun Holdings (Group) Co. Ltd.*** ("**Shinsun**") and I will discuss it later in this judgment.

Court's Decision on 5 July 2023

[8] On 5 July 2023, I announced that my decision was as follows: (1) The Company's Application for the Appointment of JPLs filed 20 March 2023, is refused/dismissed. (2) The Originating Application filed by Cithara on 10 October 2022 seeking the appointment of Liquidators is granted as prayed. I indicated that my reasons/ written judgment would follow. This is my judgment, as promised.

The Issues

[9] In relation to the Liquidation Application there are essentially two issues:

(1) Is Cithara a "*creditor*" for the purposes of s.162(2)(b) of the *BVI IA*? and

(2) If so, should the Liquidation Application be granted?

[10] The JPL Application, which has close ties to the Extension Application (which as I have said I previously refused), will be dealt with separately.

The Court Documents

[11] The documents before the Court include the following:

(1) The Liquidation Application dated 10 October 2022;

(2) The first affidavit of Zhang Jun dated 10 October 2022 ("**Zhang 1**") filed by Cithara in support of the Liquidation Application and the second affidavit of Ursula Lawrence-Archer dated 23 March 2023;

(3) The notice of opposition and the Adjournment Application filed by the Company;

(4) The Strike Out Application; and

(5) The first affirmation of Xin Qu dated 29 November 2022 filed by the Company in opposition to the Liquidation Application, the second affirmation of Xin Qi dated 29 November 2022 filed by the Company in support of the Strike Out Application, and the fifth affirmation of Xin Qi, in support of the PL Application.

[12] A notice of intention to appear and affidavit of Wu Li, dated 20 March 2023 ("**Wu 1**") on behalf of Ease Sail Holdings Limited ("**Ease Sail**") and a notice of intention to appear and affidavit of Roddy Stafford dated 23 March 2023 ("**Stafford 1** ") on behalf of Burlington Loan Management Designated Activity Company (" **Burlington**" and for ease of reference referred to together with Ease Sail as the "**Supporting Creditors**"), have also been filed in support of the liquidation application (and in opposition to the Extension Application already dealt with).

The New York law expert evidence

[13] On the 8 December 2022 Small-Davis J (Ag) signed a consent order, adjourning the Liquidation Application as sought in the Strike Out Application, and dealing with, amongst other matters, the exchange of expert evidence on New York law. The following expert evidence has been adduced before the Court in relation to New York law:

(1) The affidavit of Ryan Kane dated 27 January 2023 ("**Kane 1**");

(2) The expert report of Daniel M Glosband dated 8 March 2023 ("**Glosband 1"**);

(3) The supplemental affidavit of Ryan Kane dated 22 March 2023 ("**Kane 2"**); and

(4) The reply of Daniel Glosband dated 23 March 2023 ("**Glosband 2**").

The Factual Background

The Company

[14] I have gratefully extracted from the "Factual Background" section of Cithara's Skeleton Argument (SKA) in setting out the undisputed background here in paragraphs [14] – [39]. The Company was incorporated in the British Virgin Islands ("**the BVI**") on 1 June 2017 with its registered office at Sea Meadow House, PO Box 116, Road Town, Tortola, VG1110, BVI.

[15] The Company is wholly owned by Haimen Zhongnan Century City (Hongkong) Co., Limited, another offshore entity, which itself is owned by Nantong Haimen Zhongnan Century City Real Estate Development Co., Ltd, an entity onshore in the People's Republic of China ("the **PRC**"). The company and its parent are part of a group of entities ("**the Group**") ultimately held by Jiangsu Zhongnan Construction Group Co., Ltd ("**the Parent**").

[16] The Group is in the business of property development established over 30 years ago and has operations and projects across the PRC.

[17] The Company itself is a financing vehicle of the Parent that issues and holds certain offshore notes and other indebtedness and debt instruments.

The Notes and key terms of the Indenture, Offering Memorandum and Euroclear Operating Procedures

[18] On 9 June 2021, the Company, as issuer, authorized the issuance of up to US$150,000,000 aggregate principal amount of 12% Guaranteed Senior Notes Due 2022 ("**the Notes**"), pursuant to a New York law indenture dated 9 June 2021 ("**the Indenture**") entered into between the Company, the Parent as guarantor and Citicorp International Limited ("**the Trustee**"). The Notes were issued subject to an offering memorandum dated 3 June 2021 ("**the Offering Memorandum**").

[19] The Notes were to mature on 8 June 2022 **("the Maturity Date**") and interest was to be paid on the Notes on 9 December 2021 and 8 June 2022.

[20] The Notes are structured in a manner common to New York governed note issuances. (Counsel Mr. Burgess provided a helpful Annex in which the structure of the Notes is set out. It was not controversial and is reproduced as an Annex to this judgment).

[21] The structure is as follows:

(1) **Global Note**: The Company is permitted to execute and deliver to the Trustee one or more global notes ("**the Global Note**"). The Global Note is delivered to and registered in the name of the Common Depository (which is Citibank Europe PLC) or its nominee, for the accounts of Euroclear and Clearstream. The nominee is Citivic Nominees Limited: Indenture, §2.4.3 This is the Noteholder as defined: Indenture, §§1.1, 2.6.

(2) **Participants:** Participants that hold accounts with Euroclear and/or Clearstream may buy and sell beneficial or economic interests in the Notes in dematerialised form through their Euroclear and/or Clearstream accounts; these are reflected in book-entry registrations: Indenture, §2.6.

(3) **Indirect participants**: An investor who is not a participant with an account in Euroclear or Clearstream can buy and sell interests in the Notes through a participant who holds the Notes on its behalf: Indenture, §2.6; Offering Memorandum, §232.

[22] The key terms of the Indenture for present purposes are the following:

(1) The first recital recorded that "*the Issuer has duly authorized the execution and delivery of this Indenture to provide for the issuance of up to U.S.$150,000,000 aggregate principal amount of the Issuer's 12.00% Guaranteed Senior Notes Due 2022 and, if and when issued, any Additional Notes as provided herein (collectively, the "Notes")"*;

(2) The following definitions in §1.1 "*Certificated Notes" means the Notes (with the Parent Guarantee endorsed thereon), in certificated, registered form, executed and delivered by the Issuer (and the Parent Guarantor) and authenticated by or on behalf of the Trustee in exchange for the Global Notes, upon the occurrence of the events set forth in the second sentence of Clause 2.4.5." ""Event of Default" has the meaning assigned to such term in Clause 6.1." ""Holder" means the Person in whose name a Note is registered in the Note Register." ""Notes" has the meaning assigned to such term in the Recitals of this Indenture (which term shall include the Additional Notes if any have been issued and unless the context otherwise requires).";*

(3) The second sentence of §2.4.5 provides, in relevant part : *"If… any of the Notes has become immediately due and payable in accordance with Clauses 6.1 and 6.2 and the Issuer has received a written request from a Holder, the Issuer will execute, and the Trustee, upon receipt by the Trustee of an Officers' Certificate of the Issuer directing the authentication and delivery thereof, will authenticate and deliver, Certificated Notes in any authorized denominations in an aggregate principal amount equal to the principal amount of such Global Notes in exchange for such Global Notes."*

(4) Section 2.6 provides for book-entry interests: **"*Book-Entry Provisions for Global Notes.*** *Ownership of beneficial interests in the Global Notes (the "book-entry interests") will be limited to persons that have accounts with Euroclear and/or Clearstream or persons that may hold interests through such participants. Book-entry interests will be shown on, and transfers thereof will be effected only through, records maintained in book-entry form by Euroclear and Clearstream and their participants;*

Except as provided in Clause 2.4.5, the book-entry interests will not be held in definitive form. Instead, Euroclear and/or Clearstream will credit on their respective book-entry registration and transfer systems a

participant's account with the interest beneficially owned by such participant. The laws of some jurisdictions may require that certain purchasers of securities take physical delivery of such securities in definitive form. The foregoing limitations may impair the ability to own, transfer or pledge book-entry interests.

So long as the Notes are held in global form, the Common Depositary (or its nominee) will be considered the sole holder of the Global Notes for all purposes under this Indenture and "holders" of book-entry interests will not be considered the owners or "Holders" of Notes for any purpose. As such, participants must rely on the procedures of Euroclear and Clearstream and indirect participants must rely on the procedures of the participants through which they own book-entry interests in order to transfer their interests in the Notes or to exercise any rights of Holders under this Indenture……."

(My emphasis).

(5) Section 6.1 of the Indenture set out the Events of Default, which included:

"***6.1. Events of Default***

Each of the following events is an "Event of Default" in this Indenture: 6.1.1 default in the payment of principal of (or premium, if any, on) the Notes when the same becomes due and payable at maturity, upon acceleration, redemption or otherwise; 6.1.2 default in the payment of interest or Additional Amounts on any Note when the same becomes due and payable, and such default continues for a period of 30 consecutive days";

(6) Section 6.7 sets out the right to payment clause: **Rights of Holders to Receive Payment** "*However, such limitations [referring to §6.6, the "No Action Clause"] do not apply to the right of any Holder to receive payment of the principal of, premium, if any, or interest on, such Note, or to bring suit for the enforcement of any such payment, on or after the due date*

expressed in the Notes, which right shall not be impaired or affected without the consent of the Holder."; and

(7) Section 12.6.1 sets out the governing law applicable to the Indenture: "*Each of the Notes, the Parent Guarantee and this Indenture shall be governed by, and construed in accordance with, the laws of the State of New York."*

[23] The key part of the Offering Memorandum is the following:

"***Action by Owners of Book-Entry Interests***

Euroclear and Clearstream have advised that they will take any action permitted to be taken by a Holder of Notes only at the direction of one or more participants to whose account the book-entry interests in the Global Note are credited and only in respect of such portion of the aggregate principal amount of Notes as to which such participant or participants has or have given such direction. Euroclear and Clearstream will not exercise any discretion in the granting of consents, waivers or the taking of any other action in respect of the Global Note. If there is an Event of Default under the Notes, however, each of Euroclear and Clearstream reserves the right to exchange the Global Notes for individual definitive notes in certificated form, and to distribute such individual definitive notes to their participants."

[24] The key term of the Euroclear Operating Procedures, which are referenced in §2.6 of the Indenture, is the following: "***5.3.1.3 Services for securities in default***

(a) We will not take any action, legal or otherwise, to enforce your rights against any issuer or any guarantor in respect of a security. ***We authorise you and/or the underlying beneficial owners*** *of such securities to maintain proceedings against issuers, guarantors and any other parties. This is to the extent that we, our nominee, a Depository or their nominee acts as registered owner of any security held in the Euroclear System, or in any other relevant situation.*

(b) Subject to any applicable law, decree, regulation, order, injunction or request of any governmental agency or body or other authority, we are not required to take any legal or other action.

(c) <u>Upon your request, we will issue a statement of account for the purpose of the filing of a claim.”</u>

(Emphasis mine).

The Euroclear Authorizations/Statements of Account

[25] Euroclear has issued three statements of account in relation to Cithara's holdings for the purposes of the Liquidation Application, which contain the following language: *“[w]e authorize, in accordance with our Operating Procedures of the Euroclear System, the underlying Beneficial Owner of the abovementioned security to maintain proceedings against issuers, guarantors and any other parties. This is to the extent that we, our nominee, a Depository or their nominee acts as registered owner of any security held in the Euroclear System, or in any other relevant situation.”*

Cithara's holdings and the Company's non-payment

[26] Cithara holds the ultimate beneficial interest in the Notes in the principal sum of US$7,000,000. Cithara indicates that it holds its interest in the Notes as an indirect participant through participants with book-entry interests registered in the Euroclear System (namely Guotai Junan Securities (Hong Kong) Limited, Credit Suisse AG, and Bank of China (Hong Kong) Limited*):* see Euroclear letters dated 17 February 2023 in Exhibit ULA-2.

[27] The first interest payment of US$420,000, which fell due on 9 December 2021, was paid by the Company to Cithara.

[28] On 24 May 2022, the Company made an Exchange Offer and Consent Solicitation ("**the Exchange Offer**"), by which the Company offered to exchange the Notes with new notes to avoid payment default. Cithara did not accept the Exchange Offer.

[29] The Company failed to make payment of either the second interest payment or the principal on the Maturity Date (8 June 2022). These sums remain outstanding.

[30] There has not been any issue taken by the Company with Cithara's assertion that these constitute Events of Default under the Indenture.

[31] As well as the Notes held by Cithara, the Company has defaulted on the following other notes issuances:

(1) US$ 157,012,200 12% Guaranteed Notes due 2023 (issued by the Company and guaranteed by the Parent) (ISIN: XS2484448787) which are due to mature on 5 June 2023 with interest paid semi-annually ("**the 2023 Notes**"). Cithara's skeleton makes the comment that the Company refers to the Notes as the "2021 Notes", by reference to their creation date. (According to the SKA, Cithara adopts the more usual approach of referring to the notes series by their maturity year in relation to the 2023 Notes).

On 22 December 2022, the Trustee issued a notice to holders informing them of the Company and Parent's failure to pay interest due on 6 December 2022, which would constitute an Event of Default under the 2023 Notes after the grace period of 30 consecutive days.

(2) US$250,000,000 11.5% Guaranteed Senior Notes due 2024 (issued by the Company and guaranteed by the Parent) (ISIN: XS2288886216) which are due to mature on 7 April 2024 with interest paid semi-annually ("**the 2024 Notes**"). In relation to the 2024 Notes:

(a) On 7 November 2022, the Company made an announcement on the Hong Kong Exchanges and Clearing Limited and The Stock Exchange of Hong Kong Limited ("**the HKSE**") 7 November 2022 that "Interest due under the Notes on October 7, 2022 has not been paid prior to the expiration of the 30- day grace period. Such nonpayment will constitute an event of default under the Notes." Trading of the 2024 Notes on the HKSE was suspended.

(b) On 14 November 2022, the Trustee issued a notice to holders informing them of the Company and Parent's failure to pay interest due on 7 October 2022, which constitutes an Event of Default under the 2024 Notes.

[32] According to Cithara, and this has not been disputed by the Company, despite its obligations as Parent guarantor under the Notes (and the 2023 and 2024 Notes) and the payment defaults, the Parent has continued to make payments under onshore bonds in the PRC since June 2022, including:

(1) an interest payment (at 7 .2% per annum) of its onshore medium-term notes "20 Zhongnan Construction MTN002", with an initial issue amount of CNY 1,800,000,000 (approx. US$ 260 million) on or about 26 August 2022;

(2) an interest payment (at 7.6% per annum) of its onshore bonds "19 Zhongnan 03", with a then outstanding principal amount of CNY 562,259,000 (approx. US$ 80 million) on or about 22 November 2022;

(3) an interest payment (at 7.4% per annum) of its onshore bonds "20 Zhongnan 02", with a then outstanding principal amount of CNY 900,000,000 (approx. US$130 million) on or about 6 March 2023; and

(4) CNY 20,000,000 (approx. US$ 2.9 million) towards the principal amount of its onshore bonds "20 Zhongnan 02" under a put option available under those bonds on or about 6 March 2023.

The present proceedings

[33] On 19 August 2022, the Applicant served a statutory demand dated 19 August 2022 ("**the Statutory Demand**") on the Company at its registered office in the BVI.

[34] On 10 October 2022, the Applicant served the Liquidation Application and Zhang 1 on the Company at its registered office.

[35] The Liquidation Application was initially listed before Wallbank J (Ag) on 5 December 2022

[36] The Liquidation Application was advertised as required by the *BVI IA* Rules.

[37] The Company issued a notice of opposition dated 29 November 2022 opposing the Liquidation Application on the basis the Applicant lacks standing to make the Liquidation Application. On the same date, the Company issued the Strike Out Application seeking to adjourn the hearing and related directions.

[38] On 8 December 2022, the Court made a consent order that the hearings of the Liquidation and Strike Out Applications be relisted to be heard together and for the exchange of expert evidence on New York law.

[39] The Liquidation Application was relisted for the hearing at 10:00 am on 27 March 2023.

The Statutory Framework

[40] Part VI of the *BVI IA* sets out the provisions relating to liquidation. Section 159 (1)(a) provides as follows:

> "***Appointment of liquidator***

159. (1) The Court may appoint the Official Receiver or an eligible insolvency practitioner as liquidator— (a) of a company, on an application under section 162".

[41] Section 162 provides:

"***Appointment of liquidator by Court***

162. (1) The Court may, on application by a person specified in subsection (2), appoint a liquidator of a company under section 159(1) if—

(a) the company is insolvent; […]

(2) Subject to subsections (3), (4) and (5), an application under subsection (1) may be made by one or more of the following— […]

(b) a creditor".

[42] Section 168 provides for the period during which a liquidation application must be determined:

"***Period within which application shall be determined***

168. (1) Subject to subsection (2), an application for the appointment of a liquidator shall be determined within 6 months after it is filed.

(2) The Court may, upon such conditions as it considers fit, extend the period referred to in subsection (1) for one or more periods not exceeding 3 months each if— (a) it is satisfied that special circumstances justify the extension; and (b) the order extending the period is made before the expiry of that period or, if a previous order has been made under this subsection, that period as extended."

[43] Part I of the *BVI IA* sets out preliminary provisions, including the following, in relevant part. Section 8 sets out the meaning of "*insolvent*":

"***Meaning of "insolvent"***"

8. (1) A company or a foreign company is insolvent if— (a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;

(b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or

(c) either—

(i) the value of the company's liabilities exceeds its assets; or

(ii) the company is unable to pay its debts as they fall due."

[44] Section 9 speaks to the "***Meaning of "creditor", "secured creditor" etc.***

9. (1) A person is a creditor of another person (the debtor) if he or she has a claim against the debtor, whether by assignment or otherwise, that is, or would be, an admissible claim in— (a) the liquidation of the debtor, in the case of a debtor that is a company or a foreign company…]

[45] Section 10 addresses the subject of the "***Meaning of "liability***" as follows:

"***Meaning of "liability"***

10. (1) For the purposes of this Act, "liability" means a liability to pay money or money's worth including a liability under an enactment, a liability in contract, tort or bailment, a liability for a breach of trust and a liability arising out of an obligation to make restitution, and "liability" includes a debt.

(2) A liability may be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion.

…”

[46] Admissible claims are the subject of section 11 as follows:

“***Admissible claims***

11. (1) For the purposes of this section, “relevant time” means the time of the commencement of the liquidation of a company or a foreign company or the commencement of the bankruptcy of an individual, as the case may be.

(2) Subject to section 12, the following liabilities are admissible as claims in the liquidation of a company or foreign company or in the bankruptcy of an individual—

(a) liabilities of the company, foreign company or individual at the relevant time;

(b) liabilities of the company, foreign company or individual arising after the relevant time by virtue of any obligation incurred before the relevant time; and

(c) any interest that may be claimed in accordance with this Act or the Rules.”

[47] In addition, Part V sets out provisions applicable to the liquidation of companies and to bankruptcy of individuals. Section 152 deals with the quantification of claims in liquidation of a company and subsection 152(3) provides as follows:

“(3) Where a claim is subject to a contingency or, for any other reason, the amount of the claim is not certain, the liquidator, or the bankruptcy trustee, shall— (a) agree an estimate of the value of the claim as at the relevant time; or (b) apply to the Court to determine the amount of the claim.”

Cithara's Arguments

The JPL Application

[48] It was submitted that the JPL Application should not be heard at the listed date for hearing because it was served late for no good reason other than as a tactic to give Cithara a very limited time in which to respond. In the event the Court does hear it, Counsel submits, it should nonetheless be dismissed because: (a) it is predicated on the Restructuring Plan, which has no real prospects of success for the reasons set out in relation to the Extension Application; (b) it would leave the Company in the hands of the directors, contrary to the wishes of Cithara and the Supporting Creditors; and (c) like the Extension Application, the JPL Application is another delaying tactic that causes prejudice to the Company's creditors.

[49] Cithara requests that the Court grant the Liquidation Application and make an order winding up the Company. Mr. Burgess, Counsel for Cithara, submitted that the Court can conclude on the materials before it that Cithara is a contingent creditor with standing under section 162(2)(b) of the *BVI IA*. He submitted that the Court can follow the usual approach and grant the Liquidation Application.

[50] In short, Cithara takes the position that the Court should grant the Liquidation Application because:

(1) The Company is hopelessly insolvent (having failed to comply with the requirements of a statutory demand and being clearly cashflow insolvent);

(2) The Company was set up for the sole purpose of raising finance. It was and is a special purpose vehicle. It does not and has never traded;

(3) The initial payment default in relation to the Notes occurred months ago, on 8 June 2022. This is a longstanding default. This debt claim is not in dispute;

(4) Furthermore, the Company has also failed to make payments in relation to the 2023 Notes and the 2024 Notes, and there is a total outstanding principal amount of US$422,412,200 for these three series of notes;

(5) The total outstanding principal amount owed to Cithara and the Supporting Creditors under the three notes series is no less than US $102,515,000. Cithara and the Supporting Creditors together hold 22.63% of the total outstanding principal of such Notes;

(6) This is a material and significant sum in respect of which the Company has broken its promise to pay. Cithara and the supporting creditors want the Company to be wound up and, such views should be respected and treated as paramount. The Court should not attach any weight to the views of creditors purportedly opposing the Liquidation Application since they have not provided any evidence or reasons for their opposition. This is unlike the Supporting Creditors who have submitted extensive evidence setting out their reasons for supporting the Liquidation Application; and

(7) There is no credible restructuring plan and the guarantor of the Notes, the Parent, has ignored its payment obligations to the offshore holders of such notes, and continues to favour its onshore creditors notwithstanding its clear guarantee obligations.

Cithara is a Creditor for the purpose of Section 162(2)(b)

[51] Cithara points out that the sole basis on which the Company seeks to resist the Liquidation Application is on what Counsel refers to as "the technical point" that Cithara, as the ultimate beneficial noteholder, is not a "creditor" for the purpose of section 162(2)(b) of the *BVI IA*.

[52] Counsel Mr. Burgess contends that the Company's objection is misconceived and runs contrary to the modern trend of expanding the definition of creditor and contingent creditor to ensure that all possible liabilities within reason should be dealt with as part of the insolvency regime. Reference was made to the U.K. Supreme Court's decision in ***In re Nortel GmbH; Bloom v Pensions Regulator***[1]. Consistent with that trend, the argument continues, there is an emerging judicial

[1] [2013] UKSC 52, [2014] AC 209 [92]- [93] (Lord Neuberger) [AB/17/250-251].

consensus across common law jurisdictions that underlying beneficial interest owners in note structures such as the present case can be considered contingent creditors of the debtor (and therefore creditors for the purpose of section 162(2)(b)), which is more reflective of the commercial reality).

[53] Further, Mr. Burgess observes that it is notable that the Company does accept that beneficial owners of the Notes would be able to vote as "creditors" under s 179A of the BCA 2004 and has also relied on letters from ultimate beneficial owners of its notes to claim that "major creditors" oppose the Liquidation Application.

[54] It was urged upon the Court that these contradictory positions betray the opportunistic and unmeritorious nature of the Company's position regarding Cithara's status as creditor.

Applicable laws

[55] Counsel argues that the issue of whether Cithara has standing as a "creditor" under the *BVI IA* is a mixed question of New York law and BVI law:

(1) The nature and extent of the parties' rights and obligations under the Notes and the Indenture are governed by New York Law: Indenture, §12.6.1; and reference was made to Fletcher, *The Law of Insolvency* (5th edn, 2017) paragraph 30-053. Accordingly, these issues are questions of New York law on which the parties have adduced expert evidence.

(2) The question of whether this is sufficient to make Cithara a creditor under the *BVI IA* is then, necessarily, a question of BVI law, since it involves the interpretation of a BVI statute to determine whether Cithara falls within the set of persons on which the statute confers jurisdiction to wind up the Company, and reference was again made to Fletcher*, The Law of Insolvency* (5th edn, 2017) paragraph 30-052.

[56] In Cithara's submission, there is no material difference between New York law and BVI law on the meaning of "creditor" in this context, so the Court need not be unduly concerned with mapping the precise contours of the applicable laws.

Cithara is a creditor under New York law

The expert evidence of Mr Kane is to be strongly preferred

[57] Cithara submits that the expert evidence of Mr Kane is to be strongly preferred. It was contended that Mr. Kane's opinions are well-supported by authority, logical, and consistent with the BVI and common law approach to "creditor" and "contingent creditors".

[58] In Mr Kane's opinion, were this purely an issue of New York law, Cithara would be a creditor of the Company under New York state law and U.S. federal law: Kane 1, paragraph 11. In this regard:

(1) The analogous concepts of "claim" and "creditor" are broad under both U.S. bankruptcy law and analogous New York state law: Kane 1, paragraph 11, 42-44; and

(2) Beneficial holders of notes issued by a company are generally recognised as creditors of that company since they hold the claims against the debtor: Kane 1, paragraph 46.

[59] Further, even if a New York court determined that Euroclear was the creditor instead of Cithara, Cithara would still be considered a "creditor" with standing to bring winding up proceedings under New York law because:

(1) Cithara is a contingent creditor of the Company. The US Bankruptcy Code defines "claim" to include a right to payment that is "contingent", and Cithara is a contingent creditor because it could receive the Certificated Note and become the registered holder itself: Kane 1, paragraph 47. In particular:

(i) Section 2.4.5 of the Indenture provides that:

"*If…any of the Notes has become immediately due and payable in accordance with Clauses 6.1 and 6.2 and the Issuer has received a written request from a Holder, the Issuer will execute, and the Trustee, upon receipt by the Trustee of an Officers' Certificate of the Issuer directing the authentication and delivery thereof, will authenticate and deliver, Certificated Notes in any authorized denominations in an aggregate principal amount equal to the principal amount of such Global Notes in exchange for such Global Notes."*

(ii) Moreover, if the Holder is permitted to take action under the Indenture, Euroclear will follow the directions of ultimate beneficial holders (via their participants) to take such action: Kane 1, paragraph 23;

(2) Cithara is the authorised agent of a creditor of the Company. In this regard:

(a) Claims can be filed by creditors' authorised agents as well as creditors: Kane 1, paragraph 48;

(b) The Indenture states that *"participants must rely on the procedures of Euroclear…and indirect participants must rely on the procedures of the 24 participants through which they own book-entry interests in order to…exercise any rights of Holders under this Indenture":* Indenture, §2.6; Kane 1, paragraph 22;

(c) The Euroclear Operating Procedures generally authorise beneficial owners of securities, such as Cithara, to maintain legal proceedings in connection with securities registered in the Euroclear System: Kane 1, paragraph 35, 59-62; Euroclear Operating Procedures, §5.3.1.3(a). The global authorisation set out in the Euroclear Operating Procedures obviates the need for any additional or multi-step authorisations: Kane 2, paragraph 4;

(d) Moreover, in the present case, Euroclear issued the Euroclear Claim Filing Statements for the purpose of these proceedings: Kane 1, paragraph 61. Euroclear have issued updated letters which expressly provide that - Kane 2, Exhibits 1-3: *"[w]e*

authorize, in accordance with our Operating Procedures of the Euroclear System, the underlying Beneficial Owner of the abovementioned security to maintain proceedings against issuers, guarantors and any other parties. This is to the extent that we, our nominee, a Depository or their nominee acts as registered owner of any security held in the Euroclear System, or in any other relevant situation."; and

(e) Accordingly, US Federal Courts have noted the "practical fact" that "these beneficial owners are entitled to sue": see Kane 1, paragraph 54. New York Courts have found, in a very similar structure such as in the present case, that a beneficial owner is authorised to bring claims on behalf of the registered holders since the moment it becomes a beneficial owner of the notes: Kane 1, paragraph 62 citing ***Cortlandt St. Recovery Corp. v. TPG Capital Mgt. L.P***[2] [25-26 (see Appendix B to Kane 1, Exhibit 3. Mr Kane has set out why Mr Glosband's attempts to distinguish Cortlandt are incorrect: Kane 2, paragraphs 6-9.

[60] Mr. Burgess submits that the decision in ***Cortlandt*** is directly on point because the New York Court held that as a result of Rule 5.3.1.3(a) of the Euroclear Operating Procedures, the beneficial holder is authorised to bring claims on behalf of the registered holders as soon as it becomes a beneficial owner: Kane 2, paragraph 6.

[61] There are no contractual bars to Cithara commencing the Liquidation Proceeding. In this regard:

(1) The "no-action" clause in the Indenture that places limitations on suits (see Indenture, §6.6) expressly does not apply to the right of any Holder to receive payment of the principal or interest or to bring "suit" for the enforcement of any such payment: Indenture, §§6.6, 6.7; Kane 1, paragraph 63;

[2] 2022 N.Y. Misc. LEXIS 6181 (N.Y. Cty. Sup. Ct. Oct. 25, 2022).

(2) It is well settled that such provisions preserve an absolute right to institute suit after non-payment of principal or interest: Kane 1, paragraph 65;

(3) The common U.S. legal meaning of "suit" is any proceeding by a party against another in a court of law, which includes involuntary bankruptcy, or liquidation proceedings: Kane 1, paragraphs 67-68 citing ***Envirodyne Indus. v. Connecticut Mut. Life Co***[3]*:*Appendix B to Kane 1, Exhibit 8; and

(4) Therefore, the "no-action" clause does not prohibit Cithara, through its authorisation from the Holder, from bringing the Liquidation Proceeding as a matter of New York law: Kane 1, paragraph 63.

Cithara states that the expert evidence of Mr Glosband is not correct as a matter of New York law

[62] Mr Glosband has provided an expert opinion that opines the following (Glosband 1, paragraph 11):

(1) Cithara is not a creditor under New York state law, including Article 8 of the Uniform Commercial Code, as adopted in New York;

(2) Even if Cithara were a contingent creditor, it would not have authority to file an involuntary bankruptcy petition; and

(3) Only a Holder can bring suit for payment or file an application and the Holder has not authorised Cithara to take such action.

[63] It was submitted that these conclusions are misconceived and wrong as a matter of New York law, for the reasons set out in Kane 2. In particular:

(1) Mr Glosband omits the most relevant part of Article 8 for present purposes, §8-111 of which provides: ***"§ 8-111. Clearing Corporation Rules***

A rule adopted by a clearing corporation governing rights and obligations among the clearing corporation and its participants in the clearing corporation is effective even if the rule conflicts with this article and affects another party who does not consent to the rule."

[3] 174 B.R. 986 (Bankr. N.D. Ill. 1994).

Therefore, the argument continues, Euroclear Operating Procedure § 5.3.1.3(a) is effective even if it conflicts with the NY UCC and even if parties do not consent to the global authorization under § 5.3.1.3(a): Kane 2, paragraph 4;

(2) Mr Glosband takes the view that a contingent creditor must have a pre-existing right to payment: Glosband 1, paragraphs 17-18. This, it was contended, is self-evidently wrong. A contingent claim is not necessarily based on a pre-existing right to payment and it is clear from ***Elliott v GM LLC*** (quoted in Kane 1, paragraph 47 and Glosband 1, paragraph 18 that a person is a contingent creditor where "***the right to payment*** *is contingent on future events*" (emphasis added). Mr Glosband goes on to state that because no Holder has submitted a written request for the issuance of Certificated Notes or because Cithara has not yet sought to initiate a request to receive Certificated Notes, and as a result concludes that "*Cithara is not entitled to receive physical securities*": Glosband 1, paragraph 19 Mr. Burgess argues that this is a non-sequitur. That is because an entitlement to a right is not the same as the exercise of that right. Cithara is entitled, he submits, to receive physical securities, which means that it has a right to payment contingent on future events and is a contingent creditor. The fact it has not yet exercised those rights does not alter its entitlement to do so: Kane 2, paragraph 21; and

(3) In relation to the question of whether Cithara could present an involuntary bankruptcy petition, Mr. Glosband relies on cases which, it was posited, do not deal with the point: Kane 2, paragraphs 16-18. He ignores the authorities set out by Mr Kane that clearly hold that the beneficial holders have the claim, the right to payment, and are therefore the creditors: see Kane 2, paragraphs 14-15.

[64] Mr Glosband and Mr Kane agree that the no action clause does not prohibit a Holder from bringing winding up proceedings and that the Holder can authorise Cithara to bring such proceedings: see Kane 2, paragraph 3. However, the experts

disagree as to whether the Holder has in fact authorised Cithara to bring the winding up proceedings. In short, Cithara submits, the Euroclear Operating Procedure §5.3.1.3(a) is the authorisation, and the updated Euroclear Authorisations have been provided that expressly provide authorisation: see Kane 2, paragraph 3.

Cithara is a creditor under BVI law

Contingent creditor status is sufficient to bring an applicant for a liquidation petition within section 162(2)(b)

[65] Cithara contends that it is clear from the *BVI IA* that a contingent liability is capable of giving rise to a claim in liquidation proceedings which consequently makes the person to whom the debt will be owed as a result of the contingency a creditor for the purposes of s 162(2)(a): see ss 10(2), 11(2)(a), 9(1)(a). Reference was made to the decision of the ECSC Court of Appeal in ***Jinpeng Group Limited v Peak Hotels and Resorts Limited***[4]. This it was posited, is very similar to the position under New York and US federal law: Kane 1, paragraphs 42-44.

[66] On behalf of Cithara, it was advanced that this broad approach to "creditor" in the BVI is consistent with the approach taken in England and Wales to the definition of "creditor" in the context of schemes of arrangement, discussed further below.

[67] It is also consistent with the wider approach taken by the UK Supreme Court to the question of what constitutes contingent liabilities for the purpose of proof (which also establishes who has a debt against the company and therefore who is a creditor able to bring winding up proceedings) in the case of ***In re Nortel***. The Court rejected a narrower approach to contingent liability that had been followed in previous cases: see Nortel [91] (Lord Neuberger), [136] (Lord Sumption).

[4] (BVIHCMAP2014/0025) (ECSC Court of Appeal), [43] (Webster JA).

[68] Moreover, contended Mr. Burgess at the hearing, the Courts in fellow common law jurisdictions such as the Cayman Islands have made winding up orders on the petition of holders of the ultimate beneficial interest in New York law governed notes issuances as contingent creditors with the right to delivery of physical securities in exchange for their interests in the global security: see ***Re LDK Solar Co Ltd.***[5]

Cithara is a contingent creditor

[69] It was Counsel's further contention that, in the context of English law governed bond structures becoming subject to schemes of arrangement, English cases have consistently held that ultimate beneficial holders are contingent creditors where the terms of the global note provide that, in certain circumstances, definitive (i.e. certificated) notes can be issued directly to the ultimate beneficial holders of the notes. The issue was first dealt with by Norris J in ***Re Castle Holdco 4 Ltd***[6], an unopposed convening hearing:

> "*21…The form of the funding by means of global notes poses some difficulties. As I have indicated, the notes are in each case held by a nominee for a common depository. The common depository is not of course the owner of the notes. The notes are in fact held through two electronic book entry systems operated by Euroclear and Clearstream, by ultimate owners. Those ultimate owners, the account holders, may themselves be beneficial owners or, alternatively, they may themselves hold for clients sometimes directly or sometimes through intermediaries such as banks and brokerage houses.*
>
> *22. When the Scheme of arrangement comes to be considered, it ought obviously to be considered by those who have an economic interest in the debt, that is to say, by the ultimate beneficial owner or principal. Castle Holdco itself is not generally concerned with who is the ultimate beneficial*

[5] (FSD 0016 of 2016) (Winding Up Petition dated 5 February 2016).
[6] [2009] EWHC 3919 (Ch).

owner. Indeed the security documents themselves contain a provision that Castle Holdco shall treat the common depository or its nominee as the absolute owner of the global security for all purposes. However, the security documentation does contain a mechanism whereby the beneficial owner can upon request become a direct creditor of Castle Holdco.

23. On the occurrence of an event of default, there is a provision that the global security is to be transferred to the beneficial owners in the form of definitive securities upon the request by the owner of a book entry interest. It has been submitted to me, and I accept, that the ultimate beneficial owners may therefore be properly regarded as contingent creditors of the company and indeed of each of the subsidiaries who have provided a guarantee.

24. Accordingly, when the meeting is convened, it is to those principals or beneficial owners that the relevant notices ought ultimately to be directed, and it is their votes not the vote of the common depository or of the nominee which will count. To avoid any danger of double-proof or double-counting of votes, in each Scheme the common depository has undertaken not to vote."

[70] In ***Re Gallery Capital SA***[7] [AB/14/169-70], another unopposed convening hearing, Norris J considered the question again, at [8]-[11] as follows:

"8. Some brief comment is required as to who those holders are. In the way that is now customary, the Old Notes were issued in a form in which there is a single holder of a global note, with note-holders receiving their interests via depositories (three in number, DTC, Euroclear and Clearstream), who in turn deal with account-holders or custodians who may hold on their own account or for others, clients and participants. It is the ultimate beneficial owners of the Old Notes, held by account-holders

[7] [2010] 4 WLUK 287.

on their own account or for others, who are required to vote, for it is their economic interests that are affected by the schemes.

9. I am satisfied that they indeed are the people who are to vote as class members at the class meeting and that the arrangements made, with respect to the completion, on the instructions of the underlying beneficial owners, of the account-holder letters are satisfactory.

*10. I am also satisfied that each of those ultimate beneficial owners is a contingent creditor entitled to vote**. It is true that at present the direct rights of action are vested in the holder of the global note, but the terms of the global note are such that, in certain events (one of which is not at the option of Gallery), definitive notes can be issued directly to the ultimate beneficial owners.***

11. I am therefore satisfied that they are "contingent creditors" for the purposes of a scheme of arrangement, and I am satisfied that as contingent creditors they will under the present arrangements be able to cast their votes in relation to the schemes."

(My emphasis)

[71] It was pointed out that this was followed in ***Re Co-operative Bank Plc***[8] , where the court had the benefit of multiple represented parties (the trustee and a group of creditors, as well as the company). Hildyard J relied on Norris J's judgments, which he described as *"logical and justified*". He said, at [40], that:

"*I have stressed that my conclusion in that regard is case-specific, **it being the case here that the beneficiaries have an absolute right to require the Bank to issue definitive notes directly. It seems to me that since there is such a mechanism to trigger a direct right and therefore obtain control over that contingency,** which is defined, they are properly described as contingent creditors and thus as creditors for the purposes of the relevant provision of the Act."*

[8] [2013] EWHC 4072 (Ch)

(My emphasis).

[72] In ***Re Noble Group Ltd***[9] (a convening hearing with multiple parties) Snowden J explained:

> *"This issue has arisen in a number of other schemes and it is now well established that if the relevant instruments provide that beneficial Noteholders can acquire direct rights against the Issuer in some (even remote) circumstance, the underlying beneficial Noteholders can properly be classified as "contingent creditors" of the company."*

[73] Counsel submitted that this is now very well established at first instance in England and Wales. Michael Green J recently explained in ***Re CFLD (Cayman) Investment Limited***[10] :

> *"The Bond holders do not own their own certificates. Rather, they are held in registered global form as registered global certificates which Bond holders are entitled to have registered in their names and it is now the established practice to treat such Bond holders as contingent creditors. That practice has been followed on a large number of occasions."*

[74] Furthermore, the argument continues, the noteholders can be considered contingent creditors if they are entitled or authorised to enforce the claim against the debtor, and in certain circumstances could bring a claim against the debtor under the bond documentation: ***Re PJSC Commercial Bank Privatbank***[11] and ***Re PJSC Commercial Bank Privatbank***.[12]

The Liquidation Application should be granted

[75] Accordingly, proceeding on the basis that the Court is with Cithara on its status as a creditor for the purpose of section 162(2)(b) of the *BVI IA*, Mr. Burgess submitted that the Court should grant the Liquidation Application applying the general rule

---

[9] [2019] BCC 349, [162].
[10] [2022] EWHC 3496 (Ch) [17].
[11] 2015] EWHC 3186 (Ch), [9]- [13] (Asplin J).
[12] 2015] EWHC 3299 (Ch), [13], [15] (David Richards J).

taken by common law courts in relation to applications for winding up proceedings, namely that an unpaid creditor is entitled to a winding-up order against an insolvent company: McPherson & Keay's *Law of Company Liquidation* (5th edn, 2021) paragraph 3-062.

The Company's Arguments

The Strike Out Application

[76] Mr. Samuel on behalf of the Company contends that the Strike Out Application seeks the dismissal of the Liquidation Application as an abuse of the court's process on the basis that Cithara lacks standing as a creditor to make the application.

The Statutory Demand and the Debt

[77] Mr. Samuel outlined that the particulars of the debt alleged by Cithara are pleaded in the Statutory Demand served on the Company on 19 August 2022. He indicates that the fact of service is not in dispute and further that it is common ground, that the Company did not apply to set aside the Statutory Demand within the statutory timeline, given the Statutory Demand was not brought to the Company's attention until the date of the filing and service of the Liquidation Application.

[78] The Company posits that it is now accepted that, where the applicant relies on failure to pay an alleged debt following service of a statutory demand, the company's failure to challenge the statutory demand does not preclude its resistance to a later winding-up application. Counsel referred to ***Everbright Sun Hung Kai Company Ltd v Walton Enterprises Ltd***.[13] In any event, the Court notes that no argument to the contrary has been made by Cithara during the course of the hearing.

[13] 1 BVIHC (COM) 2020/0022 (unreported, 9 April 2020) at [22] per Jack J [Ag].

[79] Accordingly, Counsel submits, the fact that in this case the Company did not apply to set aside the Statutory Demand does not prevent it from resisting the Liquidation Application. In any event, as the evidence discloses, Counsel submits, there were good reasons why the Respondent did not apply to set aside the Statutory Demand.

[80] Counsel referred to the fact that the evidence filed in support of the Liquidation Application alleges that, amongst other matters, the Company defaulted on its obligations to pay Cithara (allegedly as 'Holder' under the Indenture) the principal sum of US$7,000,000 and interest in the sum of US$417,666.67 due on 8 June 2022 under 12% Guaranteed Senior Notes ("**Notes 2**") issued by the Respondent. The total sum of US$7,417,666.67 is allegedly due and payable by the Company.

[81] Thus, argues Counsel, the Liquidation Application is based on the Debt, allegedly payable to the Applicant under Notes 2. On the Applicant's evidence, it is alleged that the Debt arose because of the Respondent's default in relation to principal and interest payments due to the Applicant under the Note and clause 6.1 of the Indenture.

[82] The Company's evidence in support of the Strike Out Application, Counsel characterizes as disputing the legal basis of the Debt. The evidence is that Global Notes (such as Notes 2) were issued to Citivic Nominees Limited ("**Citivic**"), a nominee of Citibank Europe PLC in its capacity as common depository. That fact is not disputed. Thus, the obligation to make principal and interest payments by the maturity date was, it is contended, to Citivic (i.e. not to Cithara) and any event of default by reason of failure to make such payments enabled proceedings or actions to be brought only by the Trustee or "Holders" of the Notes.

[83] Reference was made to Clause 1.1 of the Indenture which defines a "*Holder*" as "*the Person in whose name a Note is registered in the Note Register*" and clause 2.5.1 requires the name and address of the Holder to be recorded in the Register. It

is common ground, contends Mr. Samuel, that the Applicant is not a person whose name is entered on the Register.

The Indenture and standing under NY Law

[84] Counsel states that in summary, the main conclusions drawn from the Applicant's Expert Report may be summarised as follows:

(1) The Applicant is a creditor under New York state law and US federal law because the concepts of "claim" and "creditor" are broad enough to include beneficial holders of notes. As a beneficial holder of the note, the Applicant would be recognized as a creditor and would be considered a creditor being authorized to bring suits against the Respondent under the Euroclear Operating Procedures. At a minimum, the Applicant has a contingent claim against the Respondent, because it could receive a Certificated Note, which would make it a registered holder;

(2) Under New York law standing is satisfied when a plaintiff has suffered an actual injury caused by the defendant, such that the Applicant has standing because of the Respondent's failure to pay the Debt has injured the Applicant. In so far as contractual standing involves a question of whether a party has a right to enforce the contract, the Indenture provides that beneficial holders may exercise the rights of the Holders through the Euroclear Operating procedures, which authorizes beneficial holders to maintain claims against issuers. Thus, the Applicant is properly authorized to bring the Liquidation Application against the Respondent; and

(3) There are no contractual bars to the Applicant commencing the Liquidation Application. The no-action clause under the Indenture which places limitation on suits is trumped by the non-impairment clause under clause 6.7 of the Indenture, which provides that nothing in the Indenture shall impair a Holder's right to bring suit for enforcement of its right to receive payment of interest and principal due on the Notes. Therefore, the no-action clause does not prohibit the Applicant through its authorization from

the Holder from bringing the Liquidation Application as a matter of New York law. The Applicant's expert therefore concludes that under New York law, the Applicant has standing and contractual standing to bring the Liquidation Application.

[85] Conversely, the main conclusions drawn from the Company Expert Report, Counsel summarised as follows:

(1) With regard to whether the Applicant is a creditor under New York law, the Company's Expert states that the Applicant would not be eligible to file an involuntary bankruptcy petition under the United States Bankruptcy Code;

(2) Further, Article 8 of the New York Uniform Commercial Code establishes the rights of beneficial owners of securities such as the Applicant in its capacity as the owner of a beneficial interest in the Global Notes. The Applicant is not a party to the Indenture, rather it is a holder of a book-entry interest as defined in clause 2.6 and it has no rights under the Indenture. Under clause 2.6 the common depository will be considered the sole holder of the Global Notes for all purposes under the Indenture and holders of book-entry interests will not be considered the owners or Holders of Notes for any purpose. Thus, the Applicant is not a creditor of the Respondent under New York law as it has no rights to act against any person other than its intermediary, cannot act against either Euroclear or the Respondent and is therefore not a creditor of the Respondent. The Applicant's expert does not consider Article 8 at all;

(3) The Applicant is not a contingent creditor of the Respondent because it does not satisfy the first element of the definition of creditor, i.e. it does not have a "right to payment". By reason of Article 8, under the Indenture the Respondent does not have an obligation to the Applicant and the Applicant does not have a right to payment from the Respondent. The Applicant is not entitled to receive physical securities and is not a creditor, contingent or otherwise;

(4) A claim may be filed by a creditor's authorized agent, but the Applicant is not the registered holder's authorized agent. The Applicant may obtain authorization, but it has not done so. New York law permits a registered Holder to grant authority to a beneficial owner to bring a suit against an issuer, but the Applicant has not obtained such authorization; and

(5) New York courts have consistently held that Persons who are not Holders do not have standing to take action under either a No Action clause or Right to Payment Clause in respect of the Indenture or the Notes. Thus, since the Applicant is neither a party to the Indenture nor a Holder, it does not have standing to take any action under the Indenture and specifically does not have standing to sue under the Right to Payment Clause.

[86] Whilst in its original submissions prior to the Extension Application the Company had complained about the Applicant's Expert filing a supplemental affidavit only on 22 March 2023, the complaint became essentially academic since Glosband 2 was not objected to by Cithara and was admitted in evidence.

[87] Reference was made to the oft-cited decision of ECSC Court of Appeal in ***Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation***[14], which Mr. Samuel submits usefully summarised the settled principles governing winding up orders in relation to substantial disputes. At paragraph 3 of that decision, the principles identified by the Court which Counsel submits are apposite to this case are as follows:

> "*The law governing the making of winding up orders is well settled and could easily be set out at this stage. The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. …*

[14] Civil Appeal No. 10 of 2002.

To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding. …

If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to present the petition, accordingly the presentation of such a petition would be an abuse of the process of the Court. "

[88] On the principles above, the Company submits that it is clear from the expert evidence that the Liquidation Application is founded on a contractual debt in relation to which there is a substantial dispute as to whether the Applicant is a creditor entitled to present the application.

[89] It was Counsel's submission that the experts disagree on whether the Applicant is a creditor or a contingent creditor and on whether it is eligible to bring a bankruptcy petition under New York law. Further, he submitted that in deciding the weight to be attributed to the competing expert evidence, it is highly relevant that the Applicant's Expert Report failed to deal with the fundamental effect of Article 8 of the New York Uniform Commercial Code, which establishes the rights of beneficial owners of securities and clearly establishes that the Applicant "has no rights to act against

any person other than its intermediary" and as a non-party to the Indenture "cannot act against either Euroclear or the Respondent" under the Indenture.

[90] Accordingly, the argument was made that it follows that the Applicant has no legal or factual basis to establish the Debt in the Statutory Demand and contrary to the Applicant's evidence in support of the Liquidation Application, the Applicant is not a Holder under, nor a party to, the Indenture.

[91] Alternatively, in so far as the experts disagree and the Court cannot resolve that disagreement of fact on the affidavit evidence, Counsel submitted that oral examination in an action related to enforceability of the Indenture would be required, such that there is a genuine and substantial dispute as to whether the Applicant has standing as a creditor under the Indenture to present the Liquidation Application. In the circumstances, presentation of the Liquidation Application, the argument continues, is an abuse of process and should be dismissed (***Mann and Another v Goldstein and Another***[15]).

Ulterior Motives

[92] The evidence is, Counsel asserts, that since the launch of the Exchange Offers, the Company has been, with great effort, attempting to engage in good faith settlement discussions with the Applicant and Ease Sail to gather their views on the Company's proposed restructuring. However, both the Applicant and Ease Sail have disregarded the Company's efforts by making unreasonable offers and/or demands to the Respondent which are likely to prejudice the interests of other creditors of the Respondent. As such, the Respondent, for the benefit of the creditors as a whole, has not and cannot accept the settlement terms proposed by the Applicant and Ease Sail. An example of the Applicant's and Ease Sail's recalcitrant posture toward to the Company, the argument continues, is their refusal to provide any response whatsoever to the Respondent's request for the signing of

[15] [1968] 1 WLR 1091.

the NDA. It is patent that such refusal is a self-imposed obstacle, the argument continues, designed to fuel criticism of the Respondent for a lack of restructuring information. This is unsurprising, comments Counsel, since Cithara and Ease Sail are seeking to exert pressure on the Company in order to seek better financial returns at the detriment of other bondholders and/or beneficial owners of the Notes.

[93] The Company submits that this is a classic example of an abuse of the Court's process by using the winding up court for an ulterior motive. Mr. Samuel argued that where an applicant applies to wind up a company knowing that the company has (or has raised) a bona fide triable defence to the claim, such an application is brought in bad faith and constitutes an abuse of process. Reference was made to: ***In re A Company***[16] and ***Unicorn Worldwide Holdings Ltd v Bluestone Securities Ltd***; and ***Anchorman Kavac Ltd v Capener*** [17] .

[94] Reference was made to ***In re A Company***[18], albeit, concedes Counsel, that no abuse was found in that decision, where it was stated that, "*The true position is that a creditor petitioning the Companies Court is invoking a class right … and his petition must be governed by whether he is truly invoking that right on behalf of himself and all others of his class rateably, or whether he has some private purpose in view. It has long been the law that a petition presented for the purpose of putting pressure on the company is not properly presented*".

Solvency

[95] According to Mr. Samuel, it is not disputed that the Company is balance sheet solvent. The Company however, the proposition continues, needs time to realise its assets and provide better return to its stakeholders, especially those holders and beneficial owners of the Notes.

[16] (No. 0012209 of 1991) [1992] 1 WLR 351.
[17] BVIHCM 2018/0031 (unreported 3 July 2018) at [8] per Adderley J [Ag]
[18] [1983] BCLC 492 (approved by the Privy Council in Ebbvale Ltd v Hosking [2013] UKPC at [28]

Provisional Liquidation

[96] If the Court is not minded to grant the Strike Out Application, then the Company invites the Court to make an order under section 170 of the Act, appointing Mr Ryan Jarvis, Mr Ho, Kwok Leung and Ms Chu, Ching Man (Karen) as joint provisional liquidators ("**the Proposed JPLs**") of the Respondent on the principles set out in ***In the Matters of Constellation Overseas Ltd et. al.***[19] for appointment of "soft touch" liquidators.

[97] It was further argued, amongst other matters, that it is well established that a company's own application for the appointment of JPLs has always been treated more favourably than that of a creditor (See: ***Constellation*** at para. 56 reference to ***Re London, Hamburg and Continental Exchange***[20]). Consequently, if the company consents, as is the case here, the appointment is almost "as a matter of course" (See: Palmers Company Law, para. 15.290)

[98] It was submitted that in principle, the role of provisional liquidation is not limited to preserving assets and maintaining the status quo. The appointment may be used as a vehicle to procure corporate rescue and for resolving the financial affairs of insolvent companies (See: Palmers *Company Law*, para. 15.295). As in ***Constellation***, the purpose of this appointment is to give the Respondent and the Group the opportunity to restructure their obligations or to otherwise achieve a better outcome for creditors than would be achieved by liquidation. The threshold for the appointment is that the Court must be satisfied that there is "some prospect" of promoting a restructuring.

[99] The Company relied upon its earlier submissions and evidence as to the status of restructuring and submitted that there is clear evidence of some prospect of promoting the restructuring process already underway.

---

[19] Claim No. BVI HC(COM) 2018/0206, 0207, 0208, 0210 AND 0212.
[20] [1866] 2 LR Eq 231.

Liquidation Application

[100] Mr. Samuel submitted that whether an order should be made to wind up the Respondent would only arise for determination if the Extension and Strike Out Applications are both dismissed and the Court refuses to appoint provisional liquidators. Counsel further and boldly postulated, that in the unlikely event that the Liquidation Application arises for determination, that the onus is on Cithara to show that all statutory requirements have been satisfied in order for the Court to make a winding up order.

[101] Counsel invited the Court to dismiss the Liquidation Application based on the Applicant's lack of standing. Further and alternatively, if the Strike Out Application is dismissed, the Company seeks an order in the terms of the draft order appointing the Proposed JPLs.

Oral Submissions by the Company

[102] In his oral submissions, Mr. Samuel submitted that the question of whether or not the debt exists is entirely a question of New York law, and that Cithara's submissions as to the applicability of BVI Law is wrong; Cithara fails or succeeds, he contends, on whether or not the debt is established as a matter of New York law.

[103] Additionally, in oral submissions Mr. Samuel relied heavily upon the decision of Bell J, sitting in the Supreme Court of Bermuda in ***Bio-Treat Technology Ltd. v Highbridge Asia Opportunities Master Fund.***[21] Counsel submitted that the facts in ***Bio-Treat*** were almost identical to the facts in this case.

[21] [2009] Bda. L.R. 29.

Cithara in Reply

[104] In his Reply, Mr. Burgess argued that the point made by Mr. Glosband had been completely dealt with in Kane 2, where Mr. Kane stated, at paragraphs 4 and 5 that Mr. Glosband had ignored section 111 of Article 8.

[105] Mr. Burgess submitted that the ***Bio Treat*** case was wrongly decided. Counsel argues that, to the extent that ***Bio-Treat*** narrows the concept of "*contingent creditor*", it has been overruled by ***Re Nortel***. Further, that the cases upon which ***Bio Treat*** relied were also relied upon in the decision in ***R (Steele) v Birmingham City Council and Anor***[22] which itself was expressly overruled in ***Re Nortel***.

[106] It was further submitted that Bell J's decision was wrong in that he conflates the concepts of prospective creditor and contingent creditor.

[107] In ***Bio-Treat*** two of the cases that Bell J relied upon, i.e. ***Community Development*** and ***Re William Hockley***, were referred to in ***Steele***, and in ***Nortel***, ***Steele*** was expressly overruled. It was submitted that these decisions should not be followed in the BVI.

[108] In response to the ulterior motive point made by Mr. Samuel in relation to the NDA, Mr. Burgess posited that it is an odd point, based upon an erroneous assumption that Cithara is under an obligation to enter into an NDA, which it was submitted it was not.

Further Submissions by the Parties in relation to Cayman decision *Shinshun*

[109] As indicated at paragraph [7] of this judgment, at the Company's request, I granted permission for further submissions to be made about the recent decision of Doyle J in ***Shinshun*** sitting in the Grand Court of the Cayman Islands.

[22] [2006] 1 W.L.R 2380.

Company's Supplemental Skeleton Argument

[110] In ***Shinsun*** it was held that a winding up petition should be dismissed in view of the Petitioner's lack of standing and lack of authority. The judgment in Shinsun, Counsel argued, is based on similar facts to this case, is highly relevant to the present proceedings and provides persuasive authority for the same conclusion in these proceedings. The key reasons are as follows.

Similar Material Facts

[111] Firstly, Counsel submitted, the material facts in both cases are strikingly similar. The Petitioner in Shinsun was a beneficial owner of a note issued by Shinsun Holdings (Group) Co., Ltd ("**Shinsun Holdings**"). Shinsun concerned determination of the Petitioner's standing as a creditor/contingent creditor to present a winding up petition before the Grand Court against the issuer. New York law expert evidence was adduced on the interpretation of a New York law governed indenture, which, Counsel asserts contained similar terms to the Indenture issued by the Respondent in these proceedings. Counsel states that the key similarities are summarised in the following table:

Relevant Provisions of the Indenture in <u>Shinsun</u>	**Relevant provisions of the 2022 Notes Indenture**
Section 2.04(e) (see para.5(2) of the judgment)	Section 2.4.5
Section 2.05 (see para.5(3) of the judgment)	Section 2.5.1
Section 2.05 (c) (see para.5(4) of the judgment)	Section 2.5.3
Section 2.06 (b) (see para.5(5) of the judgment)	Sections 2.5.7 and 2.5.8
Section 6.01(b), (g) (see para.5(6) of the judgment)	Sections 6.1.2, 6.1.7
Section 6.02 (see para.5(6) of the judgment)	Section 6.2

Section 7.01(b) (see para.5(7) of the judgment)	Section 7.1.2 (last sentence)

[112] It was contended that the structure of the holding and ownership of the notes issued by Shinsun Holdings was strikingly similar to the structure of the Notes issued by the Company, being held and registered under the name of the common depositary/its nominee ("**the Holder**"). Below the Holder is Euroclear as the clearing system and below Euroclear are the intermediaries. As in this case, submits Counsel, the Petitioner's relationship was with the intermediaries, such that the Petitioner had no direct contractual relationship with the issuer. Both notes were issued in the form of a global note, structured almost identically to the Notes in this case and containing similar provisions.

Identical Experts and Evidence

[113] Secondly, the submission continues, the same New York law experts gave evidence in both cases and relied on similar legal reasoning/authorities in reaching their conclusions. The two New York law experts who provided New York law evidence in Shinsun, Mr Daniel Glosband and Mr Ryan Kane, are the same experts who provided evidence in these proceedings. In Shinsun, Mr Glosband and Mr Kane were directed to prepare a joint expert report and both appeared before Doyle J at the hearings of Shinsun for examination/cross examination. Mr. Samuel submitted that the ***Shinsun*** judgment is carefully and thoroughly considered and Doyle J benefitted from examination of the experts in order to fully understand their reasoning and the underlying supporting documents and authorities. In the final analysis, even with the benefit of cross examination, comments Mr. Samuel, Doyle J preferred Mr Glosband's evidence and held that the Petitioner in ***Shinsun*** is not a creditor/contingent creditor or some otherwise authorised legal entity with standing to progress the winding up petition

Similar Authorizations

[114] Thirdly, the Company's argument continued, the petitioners in both cases either hold or are supported by beneficial owners holding approximately 25% in principal amount of the respective notes and are authorised by Euroclear (not the Holder) to present the winding up petitions. The fact that the Petitioner in Shinsun indirectly holds approximately 25% in principal amount of the note did not prevent dismissal of the petition. Doyle J was not convinced that the Petitioner has the necessary authority from Euroclear to present the winding up petition. The Judge concluded that to have legal standing to progress a winding up petition, a petitioner must have actual standing on the date of determination of the petition. Mr. Samuel referred to the Judge's holding that one cannot backdate standing and further that the Petitioner has had opportunities to arrange a valid substitution, but had not done so. Mr. Samuel noted that Doyle J was also critical of Mr Kane's evidence, which suggested that the authority from Euroclear would override the express terms of the indenture.

Distinguishing the Scheme cases under English Law

[115] The Company's final submission related to the fact that Doyle J distinguishes the Scheme cases under English law and is consistent with, Mr. Samuel submitted, the Bermuda authorities. Together with ***Bio-Treat***, submits Mr. Samuel, both the Cayman Islands and Bermuda line of authorities have ruled consistently that investors in respect of bonds issued by a company as issuer were not creditors or contingent creditors of the company. It was further argued that Cithara's attempts to apply the English authorities related to schemes of arrangement by analogy are unhelpful. ***Shinsun*** held that the scheme voting cases are confined to their particular context and a broad definition in that context achieves a different and legitimate purpose. The Company invited the Court to follow the approach taken in ***Shinsun.***

Cithara's Supplemental Skeleton Argument

[116] Cithara submits that, with the greatest respect to the Judge, ***Shinsun*** is wrong in law and should not, and need not, be followed in this jurisdiction, since the BVI, unlike the Cayman Islands (see ***Shinsun,*** [62]) has its own unique statutory provisions including ss 8-11 of the *BVI IA* that set out the meaning of creditor.

[117] In short, ***Shinsun***, it was submitted, gives insufficient regard to the stronger, persuasive and leading ***Re Nortel*** authority. Counsel Mr. Burgess further posits that Shinsun: (i) is based on the narrow interpretation of decisions that has been disapproved by ***Re Nortel***; (ii) proceeds on the mistaken premise that a pre-existing direct contractual relationship between contingent creditor and debtor is required for contingent standing; (iii) is inconsistent with ***Re Nortel*** and the modern approach to contingent standing; and (iv) the conclusion on authorisation ignores the fact that the Holder holds the Notes merely on behalf of Euroclear.

[118] It was further advanced that ***Shinsun*** can be distinguished on the facts. In the instant case, the Notes matured before even the Statutory Demand was served and accordingly it is unarguable that the Petitioner has the right to receive the Certificated Note and become the registered Holder itself. This distinguishes ***Shinsun*** where the acceleration, and therefore the petitioner's right to obtain certificated notes, was also in dispute: see ***Shinsun,*** [15], [25], [26], [168].

Shinsun is based on the narrow interpretation disapproved *by Re Nortel*

[119] Counsel comments that the Judge relied heavily on ***William Hockley, Community Development***, and ***Bio-Treat*** (see [145]). Counsel asserts that reliance on these cases is flawed, and that ***Bio-Treat*** was wrongly decided (as submitted at the hearing).

[120] Counsel contends that the narrower approach based on ***Community Development*** and ***Hockley*** was rejected by the UK Supreme Court in **Re *Nortel***; ***Steele***, which

was based on that interpretation, was expressly overruled. As Lord Neuberger and Lord Sumption explained ([91], [136]) (emphasis provided by Counsel):

"the previous authorities in relation to provable debts suggested a "narrower meaning of contingent liability" than was adopted by the majority in In Re Sutherland. That observation neatly illustrates why ***they were wrongly decided***."

"There are a number of problems about these cases. … In the earlier cases, this can perhaps ***be regarded as the legacy of the older principle which admitted only contractual debts to proof***. But that consideration cannot explain the more recent decisions. In my view ***they were wrongly decided***."

(Counsel's emphasis)

[121] Moreover, the argument continues, the reliance in ***Shinsun*** on ***Secure Capital*** and related commentary (see [145], [114]-[124]) is misplaced, since that case and the 'no look through' principle relate only to direct contractual claims. Mr. Burgess contends that the interpretation of standing as "contingent creditor" under a statute is a separate matter.

<u>Shinsun erroneously requires a pre-existing direct contractual relationship</u>

[122] Running through ***Shinsun*** is, Cithara suggests, the mistaken assumption that there must be a pre-existing direct contractual relationship between the contingent creditor and debtor. In Counsel's view, the Judge considered that unless or until the petitioner obtains certificated notes in its name it cannot establish it is a creditor, actual or contingent: [143], [153]. The Judge, it was advanced, has conflated "creditor" and "contingent creditor".

[123] This is wrong, Counsel declared, and is a legacy of the older principle referred to by Lord Sumption in ***Re Nortel***. A contractual relationship is not necessary. The debtor must simply take steps that may make it liable to a creditor, subject to a contingency: - ***Re Nortel***, [77], [136]

<u>Shinsun is inconsistent with the strongly persuasive case of Nortel and the modern approach</u>

[124] Cithara submits that the Judge was correct to accept that the petitioner in that case had a present right to require the delivery of certificated notes which would make the petitioner the holder of the notes. However, he was wrong to conclude that that was insufficient to give rise to standing.

[125] Rather, the submission proceeds, he should have concluded that since the petitioner holds that right, it is a contingent creditor. The Company has made itself liable, it was argued, under the Indenture to pay the sums due on the Notes to the Petitioner subject to the contingency provided for in the Indenture.

[126] Further, Mr. Burgess contends, the Judge was wrong to reject (at [147]) the approach to contingent creditor standing taken by numerous cases in the English scheme cases. The rationale, it was submitted, underpinning the English scheme decisions is to ensure that the scheme involves the ultimate beneficial owners (and not the nominee). This, Cithara argued, applies equally to winding up proceedings, which seek to give effect to the basic principle of the law of insolvency that every debt or liability capable of being expressed in money terms should be included: ***Re Nortel*** [92]- [93].

<u>The Holder is a mere nominee for Euroclear, who has given authorisation</u>

[127] ***Shinsun*** is wrong, Counsel concluded, to take the view that Euroclear cannot provide authority to the Petitioner to progress a winding up petition. As in this case, the Holder holds the notes as a mere nominee (i.e. trustee) for the Common Depository, which holds it for (i.e. on trust for) Euroclear, which has exercised its beneficial interest and authorised the Petitioner: see Wood, [27-019]

DISCUSSION AND ANALYSIS

Pleading Point taken by the Company

[128] In his oral submissions, Mr. Samuel referred to the grounds of the Liquidation Application and took the point that in the grounds Cithara has referred to itself as "the Holder" of the Notes and that the expert evidence is that this is not so. Mr. Burgess in response stated that the ground does not say that Cithara is the "**H**older", as that term is defined in the Indenture. It states that it is the "**h**older" of the Notes, as the term is often used. Counsel further submitted that such a pleading point is neither here nor there, given the argument that has been the focus of the application and evidence as to whether Cithara is a contingent creditor. I accept Mr. Burgess' arguments on this point; the Court is concerned with the substance of the arguments, and not with form. In any event, at no point have I understood Cithara to be saying that it is the "Holder" as defined in the Indenture, and it seems plain that the sense in which the term "holder" was used in the Liquidation Application was in a general sense as commonly used.

The "substantial dispute as to debt" line of cases

[129] As regards Mr. Samuel's argument based upon the ***Sparkasse*** line of cases, here it seems plain that the debt arising under the relevant documents is undisputed. I am of the view that that line of cases does not apply in the instant case where the issue on locus is on the basis that the debt was owed to a different party than Cithara.

[130] I gain some support for my views as to the inapplicability of the ***Sparkasse*** line of cases from the discussion at paragraphs 37 and 38 of ***Bio-Treat***. There Bell J stated as follows:

> "*37. I should make reference to Mr. Hargun's argument* [on behalf of the Company] *that in relation to the issue of locus, it was sufficient for him to establish that* ***locus was substantially disputed, and in this regard he relied upon the cases concerning a debt which was bona fide disputed on substantial grounds, so that the alleged creditor had no locus standi to present a winding up petition- see <u>Mann v Goldstein</u>***

[1968] 1 WLR 1091. I am by no means convinced that those authorities which relate to a disputed debt are relevant where the issue on locus is not on the basis of whether the debt was bona fide disputed on substantial grounds, but on the basis that the debt was owed to a different party than the alleged creditor, the position in the case before me. *……*

*38. …**My reaction is that it is incumbent upon the Court to take a view on locus, and not allow a petition to proceed on the basis of arguability on locus. This appears to be the position taken in French on Applications to Wind Up Companies***."

(My emphasis)

[131] Further and in any event, I am also of the view that to accede to the Company's submission that the Liquidation Application should be dismissed, in order to allow for the bringing of another claim, for a declaration as to standing because there is a substantial dispute as to whether the Applicant has standing as a creditor, would be quite wrong, inappropriate and unwarranted. In any event, as I discuss in paragraphs below, this Court is well able to determine the questions of New York law on the basis of the evidence of the Experts presented before me. The BVI Commercial Court routinely does so in matters before it involving foreign law points.

The Substantive Arguments

Applicable law

[132] It is common ground between the parties that the nature and extent of the parties' rights and obligations under the Notes and the Indenture are governed by New York Law. This is made clear by §12.6.1 of the Indenture. The parties have each adduced expert evidence as to New York law and I will turn to examine this evidence shortly.

[133] However, the Company asserts that whether Cithara has standing as a creditor is solely a matter of New York law whereas Cithara argues that the issue of whether Cithara has standing as a creditor under the *BVI IA* is a mixed question of New York law and BVI Law.

[134] I accept Cithara's position as being the correct one. The question of the nature and extent of the parties' rights and obligations under New York law arising from the Notes and the Indenture is the first aspect of the matter. The second question is whether this is sufficient to make Cithara a creditor under the *BVI IA*. This is then a question of BVI law, since it will involve the interpretation of a BVI statute to determine whether Cithara falls within the set of persons on which the statute confers jurisdiction to wind up the Company.

[135] Fletcher, *The Law of Insolvency*, paragraphs 30-052 and 30-053, cited by Mr. Burgess, explains the correct position in England, which by parity of reasoning applies for the BVI. It is as follows:

> "30-052 ***Choice of Law*** *In every winding-up taking place in England pursuant to the Insolvency Act 1986, English law is applicable both as to matters of procedure and as to matters of substance. The former rule is in accordance with the well-established principle that matters of procedure are governed by the lex fori while the latter rule is considered to be the inevitable consequence of the exclusively statutory basis of the proceedings in question……*
>
> *30-053* ***The accepted notion of the controlling role assumed by the lex fori in an English winding-up has never precluded the possibility of specific reference being made to foreign law during the course of the winding-up for the purpose of establishing some matter whose ultimate determination will nevertheless take place subject to the rules of English law. Thus, if any indebtedness allegedly due to or from a company is properly governed by foreign law the validity of the debt, for such purposes as the lodging of proof, must be***

established by reference to its proper law*. Similarly any questions regarding the status or rights of legal or natural persons may require to be referred to that foreign law by which, in the eyes of English private international law, these matters are properly considered to be regulated in the circumstances in question."*

(My emphasis)

The Experts

[136] The Experts, Mr. Kane on behalf of Cithara, and Mr. Glosband on behalf of the Company, have both presented their views in affidavits and Reports respectively.

[137] Both experts have impressive qualifications. Mr. Kane, amongst other qualifications and experience, indicates that he is a Partner in the New York litigation department of Wollmuth Maher and Deutsch LLP. He has practiced law in New York for twenty years, specializing in commercial litigation. Prior to joining Wollmuth Maher & Deutsch, he was an attorney in the New York litigation department of Simpson Thatcher & Barton LLP. He is a member of the New York and New Jersey bars and is admitted to practice before a number of United States courts, including the United States District Courts for the Southern and Eastern Districts of New York and the United States Court of Appeals for the Second Circuit. Mr. Kane states that he received a Juris Doctor degree, *cum laude*, from Harvard Law School. He states that he has extensive experience in litigation involving indentures and similar agreements governing securities.

[138] Mr. Glosband indicates that he is a retired partner (2014), and since then OF Counsel, in the law firm of Goodwin Proctor LLP ("**Goodwin**") and he is located in Goodwin's Boston, Massachusetts office. Mr. Glosband is a member in good standing of the bars of Massachusetts and New York and is admitted to practice before the following United States Courts: the United States District Courts for the Districts of Massachusetts, Connecticut, Vermont and the Southern District of New York, the United States Courts of Appeal of the First, Second, and Eleventh

Circuits, and the United States Supreme Court. Mr. Glosband holds a Bachelor of Arts Degree from the University of Masachussetts, 1966, and a Juris Doctor Degree from the Cornell Law School, 1969. Mr. Glosband has extensive experience in working with sophisticated financial documents, including Indentures, from the perspective representing debtors and financial creditors. Mr. Glosband indicates that he has provided expert opinions for use in a number of Courts, most of which concerned the interpretation of Indentures and other contracts governed by New York law, and steps taken under the indentures to facilitate the particular scheme of arrangement.

[139] There are points upon which the Experts agree, and points upon which they disagree. However, importantly, they agree upon the New York principles regarding construction of written documents and that is a central issue which impacts on the question of standing.

[140] In my judgment, in any event, in the case of experts, since credibility is less of an issue, the default position in a commercial case is that, unless there is a request by a party for an expert to give evidence orally, then the evidence by the expert is accepted in written form. See CPR, Part 32. Further, an expert would only have to attend for cross-examination if a request is made by a party, and none was made in this case. This may also be viewed against the backdrop of the statutory framework in the *BVI IA*, notably section 168(1) which requires, subject to extensions in exceptional circumstances, that an application for the appointment of a liquidator be determined within 6 months after it is filed. This unique provision is not present in the legislation of a number of other common law jurisdictions.

[141] In my view, the Court's task is to look at the Expert evidence and examine it to see what is its inherent logicality and plausibility, in order to determine what to accept and what to reject. The Court's task is also to compare the opinions to see if one expert's opinions, or some of their opinions, are to be preferred over that of the

other, whilst bearing in mind that ultimately, it will be a matter for the Court to decide.

[142] At paragraph 11 of the ***Shinsun*** judgment, Doyle J refers to a quote from the well-known work of Dicey, which I also find useful. Paragraph 11 reads as follows:

> "***The function of the expert witnesses***
>
> *11. Before I turn to the expert evidence I should emphasize the function of expert witnesses. Mr. Lowe helpfully referred the court to Rule 2 of* ***Dicey, Morris and Collins on the Conflict of Laws***, 16th edition, paragraph 3-018 on page 113 (stated to be cited with approval in ***Alhamrani v Alranhani*** [2014] UKPC 37 at [19]):
>
> *'The function of the expert witness in relation to the interpretation of foreign statutes must be contrasted with the expert's function in relation to the construction of foreign documents. In the former case, the expert tells the court what the statute means, giving an opinion, if necessary, by reference to foreign rules of construction. In the latter case, the expert merely proves the foreign rules of construction and the court itself, in light of these rules, determines the meaning of the documents.'*

[143] I have accepted that the question of the nature and extent of the parties' rights and obligations arising from the Notes and the Indenture is a matter governed by New York law. And that whether this is sufficient to make Cithara a creditor under the *BVI IA* is then a question of BVI law, since that will involve the interpretation of a BVI statute to determine whether Cithara falls within the set of persons on which the statute confers jurisdiction to wind up the Company. In this case, my view therefore is that the main role of the experts on New York law is to identify the rules of interpretation of documents. Ultimately however, it will be a matter for the Court to say what it finds to be the New York law position, applying the principles of construction of documents as outlined by the experts as accepted by the Court.

Is Cithara a Creditor under New York law?

[144] Having reviewed the evidence and supporting authorities referred to by the experts. it is plain to me that Mr. Kane's evidence is by far the more logical and persuasive account and is fully supported by New York authority.

[145] As argued by Mr. Burgess in his Reply, the point made by Mr. Glosband has been completely dealt with in Kane 2, where Mr. Kane stated, at paragraphs 4 and 5 that Mr. Glosband had ignored section 111 of Article 8. At paragraphs 4 and 5 of Kane 2, Mr. Kane states as follows:

> *"4. The Glosband Report does not dispute that the plain language of Rule 5.3.1.3(a) of the Euroclear Operating Procedures authorizes beneficial holders (Cithara) to bring proceedings against issuers (the Company when notes are registered in the name of Euroclear's Depository's Nominee (Citivic). The global authorisation in the Euroclear Operating Procedures obviates the need for any additional authorizations, including the multi-step authorization process demanded by the Glosband Report (p.25). Rather, the Glosband Report argues that the authorization in the Euroclear Operating Procedures should be ignored because the authorization is not permitted by New York Uniform Code Article 8. DG para 34. This is an incorrect statement of New York law and ignores Section 111 of Article 8, which states:*
>
> *'A rule adopted by a clearing corporation governing rights and obligations among the clearing corporation and its participants in the clearing corporation is effective even if the rule conflicts with this article and affects another party who does not consent to the Rule."*
>
> *…..Therefore, Euroclear Operating Procedure Rule 5.3.1.3 (a) is effective even if it conflicts with Article 8 and even if it affects parties who do not consent to the global authorization under Rule 5.3.1.3.(a).*

5. Further, the Glosband Report ignores that the Indenture and Offering Memorandum state that beneficial holders must exercise their rights through the Euroclear Operating Procedures, which of course include Rule 5.3.1.3 (a). See, e.g., Indenture at § 2.6 ("Participants must rely on the procedure of Euroclear and Clearstream and indirect participants must rely on the procedures of the participants through which they own book-entry interests in order to transfer their interest in the Notes or to exercise any rights of Holders under this Indenture"); see also Offering Memorandum …. Therefore, the Euroclear Procedures' authorization does not 'supersede the terms of the Indenture' as contended by the Glosband Report…, rather, the Indenture expressly states that beneficial holders (through participants) must rely on the Euroclear Procedures to exercise rights of Holders under the Indenture."

[146] There are a number of reasons why I find Mr. Glosband's opinion that the Euroclear Operating Procedures are not incorporated by reference in the Indenture completely unpersuasive and inherently and demonstrably faulty. This can be shown by reference to Mr. Glosband's own Report and the cases he refers to. At paragraphs 7-9 of Glosband 1, Mr. Glosband discusses principles of construction and interpretation of contracts under New York law, which are (unsurprisingly, to my mind), very similar to English and BVI principles. At paragraphs 7 and 9, Mr. Glosband states as follows:

"***Construction of Contracts Under New York Law***

7.The indenture is governed by New York law…Courts applying New York law consistently treat indentures as contracts to be interpreted under basic contract law. For example, in answering questions posed by the Supreme Court of the State of Delaware relative to a no-action clause in an indenture, the Court of Appeals of New York stated: "A trust indenture is a contract, and under New York law, " [i]nterpretation of indenture provisions is a matter of basic contract law……In construing a contract, we look at its language, for 'a written agreement that is complete, clear

and unambiguous on its face must be enforced according to the plain meanings of its terms…"…

9. The objective of these principles of contract interpretation is to determine and enforce the intent of the parties as noted in In re Motors Liquidation Co., 943 F, 3d 125, 131 (2d Cir. 2019):

*"**When interpreting a contract under New York law, our 'primary objective is to give effect to the intent of the parties as revealed by the language of their agreement**" Chesapeak Energy Corp. v Bank of N.Y. Mellon Tr. Co 773 F.3d 110, 113-14 (2d Cir, 2014) (quoting Compagnie Financiere de CIC …..v Merrill Lynch…. 232 F.3d 153, 157 (2d Cir. 2000)). "**The words and phrases in a contract should be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all its provisions."** Id. at 114….."If an ambiguity is found, 'the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract."…."*

(My emphasis).

[147] Mr. Glosband disagrees with Mr. Kane that the Indenture incorporates the Euroclear Operating Procedures. This is how Mr. Glosband reasoned at paragraph 33 of Glosband 1:

> "*…. While the Indenture **refers** to the 'procedures of Euroclear' in Clause 2.6, it never **incorporates** the Euroclear Procedures into the Indenture. New York law is clear that an extrinsic document can only be incorporated into a contract if it is done so explicitly: "New York law prohibits the incorporation of extrinsic writings into an agreement unless those writings are specifically incorporated by reference" (ESPN, Inc. v Office of the Commissioner of Baseball, 76 F.Supp. 2d 383, 404 [SDNY 1999]). "**The mere fact that a contract refers to another contract** does not mean that it has incorporated the other contract (MBIA Insurance Corp. v Patriarch Partners….."-[Zucher v Waldmann, 2015 NY Slip Op 50055 (U) (Sup Ct. Kings County 2016]*

(My emphasis).

Court finds that Cithara is a creditor under New York Law

[148] It is plain to me, applying the New York law techniques of construction and interpretation of contracts, (which are so similar to our own techniques in BVI), that the plain and ordinary meaning of the words in §2.6 of the Indenture are clear. The meaning is that the Euroclear Procedures are incorporated by reference as stated by Mr. Kane. This is not a circumstance in which the clause in the Indenture simply **refers** to the Euroclear Procedures; the express words of the Indenture state that participants **must rely on the procedures of Euroclear** and indirect participants must rely on the procedures of participants through which they own book-entry interests.
(My emphasis).

[149] I also find that the decision of the Supreme Court of New York in ***Cortlandt*** upon which Mr. Kane relies, is directly on point, and that Mr. Glosband's attempts to distinguish the decision are not valid for the reasons set out in Kane 2 at paragraphs 6-9. Specifically, though in the judgment, the Court used the term "registered holder" in relation to Euroclear, it seems plain that Mr. Burgess is correct that this was just a short-hand way of expressing the relationships within the documentation. This is because Euroclear was <u>not</u> the registered holder in the ***Cortlandt*** Indenture. According to the Indenture, which was attached to the Glosband Report, the Euro Notes were "deposited *with and registered in the name of, The Bank of New York Depository (Nominees Limited) as nominee for Euroclear".*

[150] In ***Cortlandt***, the Court had before it applications relating to standing of beneficial holders of notes and specifically considered that Rule 5.3.1.3(a) was incorporated by reference. At paragraphs [*25]-[*26], the New York Court held:

> "*….Cortlandt does indeed successfully allege standing to bring claims related to the sub-notes registered to Euroclear. As noted*

*earlier….**Euroclear's Operating rule 5.3.1.3(a) which was incorporated into the*** **[Offering Memorandum]** ***by reference, states that "Euroclear "will not take any action, legal or otherwise, to enforce your rights against any issuer or any guarantor in respect of a security", and explicitly authorizes "the underlying beneficial owners of such securities to maintain proceedings against issuers, guarantors and any other parties" where Euroclear is the registered holder of the security*** [Amended Complaint at 17]. *Thus, SPQR has been authorized to bring claims on behalf of the registered holders since the moment it became a beneficial owner of the sub-notes, and, by extension, Cortlandt has been authorized to bring the same claims by virtue of receiving an assignment from SPQR."* (My emphasis)

[151] I also accept Mr. Kane's opinion that Cithara would be a contingent creditor of the Company under New York law as the US Bankruptcy Code defines "claim" to include a right to payment that is "contingent", and under §2.4.5 of the Indenture, Cithara is a contingent creditor because it could receive the Certificated Note and become the registered holder itself.

[152] I accept Mr. Kane's opinions that under New York law Cithara would be a creditor or contingent creditor of the Company for the reasons advanced in his affidavits and as discussed in paragraphs 80-85 of Cithara's SKA. The views expressed by Mr. Kane are in my view more in keeping with the principles for construction of documents outlined by both experts. They are also consistent with the plainly commercial and pragmatic approach taken in the decision of the New York Court in ***Cortlandt***. In my view ***Cortlandt*** is of great assistance and apposite.

Is Cithara a Creditor Under BVI Law?

Re Nortel

[153] Turning to the substantive arguments on this issue, in my view, a good starting point in gaining a general understanding of the meaning of creditor and contingent creditor is to turn to the leading decision of the UK Supreme Court in ***Re Nortel***. Though it is clear that when construing the meaning of the words "*creditor*" or "*contingent creditor"* in a statute, context and purpose of the legislation will be important, nevertheless it is useful to examine ***Re Nortel*** as the decision makes it plain that the modern trend is to give an expanded definition of contingent obligation. The decision discusses the basic principle of the law of insolvency that every debt or liability capable of being expressed in money terms should be included. It also teaches, amongst other matters, that direct contractual claims are not the only legal basis upon which a contingent obligation may arise. A contingent obligation can also arise under statute as a separate matter.

[154] The Rule that was central to the appeal before their Lordships was Rule 13.12 of the English Insolvency Rules 1986, which provides as follows:

> ***"****(1)* ***'****Debt' in relation to the winding up of a company, means…any of the following-(a) any debt or liability to which the company is subject….at the date on which the company went into liquidation; (b) any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date…*
>
> *(2) For the purposes of any provision of the Act or the Rules about winding up, any liability in tort is a debt provable in the winding up, if either-(a) the cause of action has accrued…at the date on which the company went into liquidation…or (b) all the elements necessary to establish the cause of action exist at the date it went into liquidation; …or (b) all the elements necessary to establish the cause of action exist at that date except for actionable damage.*
>
> *(3) For the purposes of references in any provision of the Act or the Rules about winding up to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent, or whether*

its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or a matter of opinion…

(4)…except in so far as the context otherwise requires, 'liability' means (subject to paragraph (3) above a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment, and any liability arising out of an obligation to make restitution.

(5) This rule shall apply where a company is in administration and shall be read as…if references to winding up were references to administration."

[155] There is in my view a need to quote fairly extensively from the judgment in ***Re Nortel*** in order to properly analyze the relevant issues in the instant case, and in order to resolve the competing arguments by Counsel. Counsel for the Company is relying on the decisions and reasoning in ***Bio-Treat*** and ***Shinsun***, whilst Counsel for Cithara takes the diametrically opposite view and asserts that reliance in ***Bio-Treat*** and ***Shinsun*** on the decisions in ***Re William Hockley*** and ***Community Development*** is flawed.

[156] At paragraphs 74, 76-79, 81, and 87-93 Lord Neuberger shed light upon the issues as follows:

"*74. That issue thus centres on the meaning of the word "obligation" in rule 13.12(1)(b). The meaning of the word "obligation" will, of course, depend on its context. However, perhaps more than many words, "obligation" can have a number of different meanings and nuances. In many contexts it has the same meaning as "liability", but it clearly cannot have such a meaning here. Indeed, in the context of Rule 13.12, it must imply a more inchoate, or imprecise meaning than liability, as the liability is what can be proved for, whereas the obligation is the anterior source of that liability.*

…..

76. Where the liability arises other than under a contract, the position is not necessarily so straightforward. ***There can be no doubt but that an <u>arrangement</u> other than a contractual one can give rise to an "obligation" for the purposes of sub-paragraph (b).*** *As Lord Hoffman said, (albeit in a slightly different context) in relation to contingent liabilities arising on a liquidation, in Secretary of State for Trade and Industry v Frid [2004] 2 AC 506, para 19, 'How those debts arose- whether by contract, statute or tort, voluntarily or by compulsion-is not material.*

77. ….It would be dangerous to try and suggest a universally applicable formula, given the many different statutory and other liabilities and obligations which could exist. However, I would suggest that, at least ***normally, in order for a company to have incurred a relevant "obligation" under Rule 13.12 (1)(b), it must have taken, or been subject to, some step or combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under Rule 13.12(1)(b).***

78. When deciding whether a particular state of affairs or relationship is sufficient to amount to the "incur[ring]" of an "obligation", - "by reason of which" the liability arose, considerable assistance can, I think, be gained from the majority decision in <u>In re Sutherland, decd</u> [1963] A.C.235. That case was concerned with whether an arrangement was within the expression "contingent liabilities" in section 50 of the Finance Act 1940. As Lord Reid explained at p. 247, at the relevant date:

*' the position of the company…was that, by applying for and accepting allowances in respect of these ships, it had become bound **by the statute** to pay tax under a balancing charge when it ceased to use these ships in its trade, if the moneys which it received for them exceeded any expenditure on them which was still unallowed.*

79. In those circumstances, the majority concluded that the obligation was a contingent liability at the relevant date.

…….

*81. It is true that in <u>In re Sutherland</u>, the House of Lords was concerned with the meaning of "contingent liabilities" in the context of estate duty, whereas these appeals are concerned with the meaning of "obligation" from which a contingent liability derives in insolvency legislation. It was suggested that the reasoning of Lord Reid should not, therefore, be relied on here. I do not agree. **Lord Reid gave a characteristically illuminating and authoritative analysis of an issue of principle. It appears to me that the issue of (i) what is a contingent liability and (ii) what is an obligation by reason of which a contingent liability arises, are closely related.** In <u>In re Sutherland</u> the House had to decide whether what a company had done was sufficient, in Lord Reid's words, to have "committed [it]self" to a contingent liability. As I see it, that is much the same thing as having incurred an obligation from which a contingent liability may arise, for the purposes of rule 13.12(1)(b).*

……..

<u>The earlier authorities</u>

87. I should refer to the authorities which the Court of Appeal and Briggs J understandably held bound them to reach a contrary conclusion. Those authorities were mostly concerned with individual bankruptcy rather than corporate insolvency. However, the meaning of the expression "debt" in the two regimes is very similar: rule 12.3 applies to both, and section 382

of the 1986 Act has a very similar definition of provable debt for bankruptcies as Rule 13.12 for liquidations.

88. In a number of cases, it has been held that, where an order for costs was made against a person after an insolvency process had been instituted against him, his liability for costs did not arise from an obligation which had arisen before issue of the bankruptcy proceedings, even though the costs order was made in proceedings which had been started before that insolvency process had begun : see for instance In re Black; Ex p Bluck (1887) 57 LT 419, In re British Gold Fields of West Africa [1899] 2 Ch 7, In re A Debtor (No 68 of 1911)[1911] 2 K.B. 652, and In re Pitchford [1924] 2 Ch. 260.

89. In my view, by becoming a party to legal proceedings in this jurisdiction, a person is brought within a system governed by rules of court, which carry with them the potential for being rendered legally liable for costs, subject of course to the discretion of the court. An order for costs made against a company in liquidation, made in proceedings before it went into liquidation, is therefore provable as a contingent liability under Rule 13.12(1)(b), as the liability for those costs will have arisen by reason of the obligation which the company incurred when it became party to the proceedings.

90. ***I have little concern about overruling those earlier decisions****, although they are long-standing. First, the judgments are very short of any reasoning, and consist of little but assertion. Secondly, they were decided at a time when the legislature and the courts were less anxious than currently for an insolvency to clear all the liabilities of a bankrupt (as they were all concerned with individual insolvencies)….. Thirdly, those cases are impossible to reconcile logically with the earlier case of Ex p Edwards (1886) 3 Morr 179, where, on identical facts (save that it was an arbitration rather than litigation) it was held that an order for costs did give rise to a provable debt. Fourthly, the unsatisfactory nature of those decisions can*

be seen from the way in which the Court of Appeal sought to evade their consequence in *<u>Day v Haine</u>* *[2008] ICR 1102, a case which I consider to have been rightly decided.*

*91.**For the same reasons**, I consider that the decisions of the Court of Appeal in **<u>Glenister v Rowe</u>** [2000] Ch 76 and the **<u>Steele</u>** case [2006] 1 WLR 2380 **were wrongly decided**…….The reasoning of Arden LJ in the latter case at paragraphs **21-23** is instructive, because, as she says, "**the previous authorities in relation to provable debts suggested a narrower meaning of contingent liability"** than was adopted by the majority in <u>In re Sutherland</u> .**That observation neatly illustrates why they were wrongly decided.***

92. <u>The Report of the Review Committee on Insolvency Law and Practice</u> (1982) (CMND8558) ("the Cork Report"), para 1289, described it as a:

"basic principle of the law of insolvency that every debt or liability capable of being expressed in money terms should be eligible for proof…so that the insolvency administration should deal comprehensively with, and in one way or another discharge, all such debts and liabilities."

93.The notion that all possible liabilities within reason should be provable helps achieve equal justice to all creditors and potential creditors in an insolvency, and, in bankruptcy proceedings, helps ensure that the former bankrupt can in due course start afresh…"

(My emphasis)

[157] Lord Sumption elucidated the concept of contingent debts in paragraphs 132 and 136 as follows:

"*132.**Contract is not the only legal basis on which a contingent obligation of this kind may arise. A statute may also give rise to one**. A good example is the substantive obligation which English law has always held to be owed by a debtor under a foreign judgment. It is the basis of the common law action to enforce it. Another is the obligation of a*

creditor arising from a statutory scheme of distribution in an English insolvency, not to seek by litigation in a foreign court a priority inconsistent with the scheme….

In both of these examples, a legal relationship is created between the debtor and other persons, albeit without contract. *In the first, it is the legal relationship with the judgment creditor arising from the fact that the judgment debtor was subject to the jurisdiction of the foreign court, whether by virtue of residence or submission. In the second, it is the legal relationship of the creditor with the debtor company and with other creditors arising from the statutory scheme of distribution.* ***If the mandatory provisions of a statute may create a legal relationship between the company and a creditor (or potential creditor) giving rise to a provable debt, then there is no reason why it should not do so contingently on some future event****.*

….

136. In the present case, the Court of Appeal considered itself to be bound by a line of cases in which it was held that a liability for costs arising from a judgment given after the commencement of the insolvency was not provable as a contingent debt, even if the litigation was in progress when the company went into liquidation. The case law begins with In re Black; Exp Bluck…..and continues with In re British Gold Fields of West Africa… In re a Debtor and In re Pitchford … and ***Glenister v Rowe****….* ***The reasoning of those cases has recently been applied to other claims said to represent contingent liabilities: see R(Steele)*****…..** ***There are a number of problems about these cases. One of them, as it seems to me, is the absence of any real attempt to analyze the effect of the statutory scheme in creating an obligation to meet a liability contingently on some specified event. In the earlier cases, this can perhaps be regarded as the legacy of the older principle which admitted only contractual debts to proof. But that***

consideration cannot explain the more recent decisions. In my view, they were wrongly decided.*"*

(My emphasis).

[158] It is to be noted that in the course of the judgment, the Supreme Court held a number of cases to have been wrongly decided. This includes the decision in ***R(Steele) v Birmingham City Council*** [2006] 1 WLR 2380. I will return to a discussion of ***Steele*** later in this judgment when I turn to discuss the cases of ***Bio-Treat*** and ***Shinshun*** upon both of which the Company so heavily relies.

Bio-Treat and Shinsun

[159] At the hearing, Mr. Samuel forcefully banked on the 2009 Bermuda decision of Bell J in ***Bio-Treat*** as well as subsequently, the very recent decision of Doyle J in ***Shinsun***. I intend to deal with each of these cases separately. However, there are a number of points of commonality between the two cases and indeed, in ***Shinshun*** reliance was placed on the decision in ***Bio-Treat***. Firstly, both cases relied upon the decisions of ***In re Hockley (William) Limited*** [1962] 1 WLR 555; and the Australian decision in ***Community Development Pty Ltd v Engwirda Construction Co Ltd.*** (1969) 120 CLR 455. Secondly, in both cases the learned judges took the view that a pre-existing direct contractual relationship between the contingent creditor and the debtor is required.

[160] The judgment of Bell J in ***Bio-Treat*** was delivered some years before the leading decision of the UK Supreme Court in ***Re Nortel***. As regards ***Shinsun***, it does not appear, from a reading of the decision, whether the learned judge was referred, (as I have been), to the decision in ***Steele***, although at paragraph 67 of the judgment, Doyle J does discuss accepting Learned Counsel Mr. Lowe K.C's submission that ***Re William Hockley*** "*remains good law*". In his Reply, Mr. Burgess referred me to the decision in ***Steele*** because in that case, which was expressly overruled in ***Re Nortel*** the Court of Appeal of England and Wales relied upon both of the decisions in ***Re William Hockley*** and ***Community Development***. In my view the reasoning

in ***Re William Hockley*** does appear to fall within the type of reasoning deprecated by Lord Neuberger in ***Re Nortel*** as suggesting a *“narrow meaning of contingent liability” …* and that *“can perhaps be regarded as the legacy of the older principle which admitted only contractual debts to proof”*

[161] ***Community Development*** was an Australian case, but to the extent that it applied ***Re William Hockley,*** it too seems to represent a case decided applying a narrow meaning of “contingent liability” and based upon “*the legacy of the older principle that admitted only contractual debts to proof.”*

Steele

[162] I would not ordinarily refer to a decision that has been expressly overruled by the UK Supreme Court, but because of the way in which the arguments in this case have been developed, I do think it necessary to refer to the judgment of Arden LJ (as she then was) in ***Steele*** briefly. At paragraphs 21-22 of the judgment, the decision in ***In re Sutherland*** and the wide meaning that case gave to contingent debt is discussed. Arden LJ then referred to the decision in ***Glenister v Rowe***, which was itself overruled in ***Re Nortel***, and characterizes that decision as giving a narrow meaning to contingent liability. It was then in paragraph 23 of ***Steele*** that Arden LJ made the comment, referred to in ***Re Nortel*** by Lord Neuberger, about the narrow meaning of contingent liability. However, in paragraph 23, Arden LJ extended her discussion about the meaning of contingent liability to a discussion about cases in which who is considered a contingent creditor for the purposes of a winding up were considered. Her Ladyship commenced paragraph 23 by stating that “*This narrower meaning of contingent liability is also applied for the purposes of deciding who is a contingent creditor who may apply to the court for a winding up order against the company.”* It was then that Arden LJ discussed both ***Re William Hockley*** and ***Community Development***. At paragraph 24 she expressed the view that what both judges described in passages she quoted really seemed more to be future or prospective liabilities, and not contingent liabilities. However, she nevertheless indicated “*But that point does not affect the fact that both judges*

considered that for there to be a contingent liability for the purposes of provisions with which they were concerned there had to be an existing legal obligation."

[163] At paragraph 25 Arden LJ then went on to hold that the decision in ***In re William Hockley*** supported the views at which the Court arrived in ***Steele***, applying what she herself described as the "*narrow meaning of contingent liability"*, which approach was disapproved in ***Re Nortel***. At paragraph 27, Arden LJ said this: "*I would add that both **Re William Hockley** and **Community Development** were cited in the argument of Counsel in Glenister v Rowe ….."*

[164] As I have said, both ***Glenister v Rowe*** and ***Steele*** were overruled in ***Re Nortel***. I think that an important point to note is that the Supreme Court overruled these two decisions without qualification. There was no indication from the Court that there was any distinction to be made between cases considering the meaning of "contingent creditor" in a narrow way in relation to the section of the Insolvency Act under consideration in ***Glenister*** and ***Steele,*** i.e. section 382 of the 1986 Act, and cases, which those cases referred to, such as ***Re William Hockley***, considering the meaning of "contingent creditor" in a narrow way, in relation to the predecessor section to section 224(1) of the Act (i.e. section 224(1) of the Companies Act 1948) i.e. regarding winding up. The significance of that, in my judgment, particularly having regard to the wide approach taken by the Supreme Court as to what constitutes a contingent liability, is that if there was a difference when considering who is a creditor or contingent creditor for the purposes of bringing winding up proceedings, one might expect that the Supreme Court would have said so in ***Re Nortel***. But it did not. The upshot of this is that in my view, whilst it cannot definitively be said that the cases of ***Re William Hockley*** and ***Community Development*** have been disapproved, reliance on them is perhaps tenuous, or at the very least, they cannot be said to provide firm foundation.

Bio-Treat

[165] As the Company has understandably placed such heavy reliance upon ***Bio-Treat***, and as that case has been followed in ***Shinsun***, I think it is appropriate to discuss the cases in some detail. There are some similarities in relation to the documentation and relationships under discussion in ***Bio-Treat*** and in the instant case. At paragraphs 3,4,10, 44-47 and 50, Bell J reasoned as follows:

> ***"The nature of the Dispute***
>
> *3. The dispute between the parties arises from the issue of certain bonds by the Company in respect of which Highbridge Asia and Highbridge International were investors. But as is apparently the practice in the international bond markets, Highbridge was not a direct investor. The bonds were issued in the form of a global bond, the holder of which was the Bank of New York Depository (Nominees) Limited ("**the Bank of New York**"). The Bank of New York in fact held the global bond for the account of two international clearing systems, one of which was an entity referred to as Euroclear, which in turn had its contractual relationships with certain financial institutions (Goldman Sachs in the case of Highbridge) which had contractual relationships with investors such as Highbridge. Hence there were three links in the chain between the Company as Issuer and Highbridge as investor.*
>
> *4. The bonds were issued on 18 January 2006, in the sum of SGD 206 million, and were zero coupon convertible bonds due 18 January 2013. However, the terms of the bonds provided for the exercise of a put option requiring the Company to redeem the bonds at an appropriate premium on various redemption dates, the first such being 18 January 2008. At that time, approximately 70 % of the aggregate face value of the bonds were put to the Company. This result in what the Company has described as "an offshore-onshore liquidity mismatch", which arose because the company conducts its business principally in the People's Republic of China ("PRC"). The Company's cash reserves were onshore in the PRC, and in view of exchange controls regulating the remittance of funds out of the PRC, the Company took the view that it was in its best interests to*

retain those funds within the PRC, and utilize offshore financing to repay the bonds which had been the subject of the exercise of put options. In the event, the Company repaid substantially less than the amount put.

……

The Parties' Positions

10. Essentially, the Company relies upon the fact that its contractual relationship is not with Highbridge, but rather with the Bank of New York, which it contends is the party contracting directly with the Company. Consequently, the Company maintains that the Highbridge is not a creditor which is entitled to serve a statutory demand within the meaning of section 162(a) of the Act, nor a contingent (or prospective) creditor within the meaning of section 163(1) of the Act, and hence not in a position to present a winding-up petition. ***Further, the Company relies upon the need for there to be an existing obligation as between the Company and Highbridge, which would permit the argument that a liability could arise upon the happening of some future event, and enable Highbridge properly to be classified as a contingent creditor.***

……

Finding on Creditor in Equity Issue

44. To my mind this alternative argument on the part of Highbridge ties in with its primary argument of a direct contractual relationship with the Company. In the absence of such a contractual relationship, I simply do not see how Highbridge can claim to be a creditor in equity. The reality is that because of the structure of the global bond, Highbridge has no direct relationship with the Company, and hence cannot be a creditor in equity, and I so find.

Highbridge's Status as a Contingent or Prospective Creditor.

45. Highbridge's argument that it has status as a contingent or prospective creditor to present a petition starts from the premise that consequent upon the Company's default, Highbridge is entitled to require the Bank of New York to exchange the global bond for definitive bonds, and to require the transfer to it by the Bank of New York of such number of definitive bonds as represent its beneficial interest in the global bond. As indicated, that process has been put in hand, and the argument upon which Highbridge relies is that upon registration as the holder of the definitive bonds, Highbridge will then become a current creditor of the Company, if, contrary to its primary case, it is not so already. It is then said that because Highbridge can become a current creditor, it is now both a contingent and/or prospective creditor of the Company.

46. Mr. Riihiluoma referred to an Australian case, ***Community Development*** *Pty. Ltd. v Engwirda Construction Co. (1969) 120 CLR 455, in which Kitto J. referred to the judgment of Pennycuick J* ***In Re William Hockley Ltd****. [1962] 1 WLR 555 in the following terms:*

"In re William Hockley Ltd., Pennycuick J suggested as a definition of "a contingent creditor" what is perhaps rather a definition of "a contingent or prospective creditor", saying that in his opinion it denoted "a person towards whom, under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date." The importance of these words for present purposes lies in their insistence that there must be an existing obligation and that out of that obligation a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that must happen or only an event that may happen."

47. The critical words are of course "under an existing obligation". I indicated when dealing with the primary issue that in relation to those other rights which Highbridge might have against the Company, those were not issues for me to decide. However, in relation to the argument

that Highbridge is a contingent or prospective creditor, the starting point is whether there is an existing obligation, with particular reference to its entitlement to definitive bonds. In this regard, there does seem to me that there is a distinction to be drawn between an existing obligation which may give rise to a liability, and an obligation which will lead to a contractual relationship between different parties, which once established may give rise to a liability.

Finding on Highbridge's status as Contingent or Prospective Creditor.

……

50. I do therefore accept Mr. Hargun's contentions on behalf of the Company, and find that, ***prior to the issue of the definitive bonds, Highbridge cannot be said to have the requisite contractual relationship with the Company, as is necessary to found the status of contingent or prospective creditor.*** *I therefore find that pending the issue of the definitive bonds to Highbridge, it is neither a contingent or prospective creditor of the Company, and hence does not have locus on this ground to present a winding-up petition."*

(My emphasis).

[166] In my judgment, the portions of paragraph 50 of ***Bio-Treat*** that I have highlighted, and the reference by Bell J to ***Re William Hockley*** and ***Community Development***, which applied ***Re William Hockley*** in paragraphs 46 and 47 of the judgment, demonstrate where the learned judge may have been taken down a dubious path in thinking that a pre-existing direct contractual relationship between contingent creditor and debtor is required for standing as a contingent creditor.

[167] In any event, ***Bio-Treat*** was decided in 2009, and whilst the relationships and bond documents discussed in the case may be similar to those in this case, they may not be identical. Whilst Bell J referred to the underlying documentation in paragraphs

12-21 of the judgment, there is no discussion about a similar clause to the express §2.6 of the Indenture in the instant case or of an equivalent Rule to Rule 5.3.1.3(a) of the Euroclear Operating Procedures. It also appears that Bell J did not have the benefit of expert evidence on New York law to guide the construction of the documents. Indeed, there was no indication in the judgment as to whether there was a governing law clause such as section 12.6.1 of the Indenture in the instant case, which indicates that the documents are governed by, and fall to be construed in accordance with the laws of the State of New York.

[168] Further, it is not apparent from the judgment whether there were, in the Bermuda Companies legislation, sections equivalent to the wide and express statutory provisions in the *BVI IA* that set out the meaning of "*creditor*".

[169] For these reasons, I am of the view that ***Bio-Treat*** is distinguishable and/or, respectfully, ought not to be followed in this jurisdiction.

[170] I note that in paragraph 83 of ***Shinsun*** Doyle J refers to the fact that in Bermuda, in the decision of Kawaley CJ (as he then was), sitting in Bermuda in ***Titan Petrochemicals Group Limited*** [2014] SC (Bda) 74 Com (23 September 2014) declined to follow ***Bio-Treat***. However, Doyle J points out that this was in the context of considering the legal standing of those with the underlying beneficial interest in a Global Note to vote as creditors in respect of a scheme of arrangement. Doyle J goes on to observe that, at paragraph 24 of the judgment, Kawaley J :"*…was, at pains, to stress that :"Nothing in this present Judgment should accordingly be read as in any way doubting the soundness of the factually and legally distinguishable case of **Re Bio-Treat**…., particularly as regards the standing of contingent creditors to present winding-up petitions."* paragraph [83], ***Shinsun***.

Shinsun

[171] I now turn to discuss ***Shinsun*** itself. This case did indeed, as submitted by Mr. Samuel, involve some very similar features to those in the instant case. Some of these similarities are, the underlying documentation, including a New York law governed Indenture, the fact that the same two experts who gave evidence in the instant case gave evidence before the Cayman Court, and relied upon similar cases and reasoning as relied on here in the BVI Court. Importantly, the issue was one of standing of a Petitioner in a similar position to Cithara. The case also involved discussion about the relevance of the Scheme cases to a determination of a contingent creditor's standing to bring winding up proceedings.

[172] First of all, I accept Mr. Burgess' submission that ***Shinsun*** can be distinguished on the facts in so far as in the instant case the Notes matured before even the Statutory Demand was served and accordingly, it is unarguable that Cithara has the right to receive the Certificated Note and become the registered Holder itself. This is a distinguishing feature since in ***Shinsun*** the issue of acceleration, and therefore the Petitioner's right to obtain certificated notes was also in dispute: see ***Shinsun***, paragraphs [15], [25], [26], and [168].

[173] In ***Shinsun*** there were the same experts as in this case, notably Mr. Kane and Mr. Glosband. There was oral evidence and cross-examination of the experts, and Doyle J at paragraph 159 stated: "*..I had no hesitation in preferring the expert evidence, insofar as it concerned the main issues of standing and authority, of the experienced and well qualified Mr. Glosband to that of Mr. Kane"*

[174] However, at paragraph 30 of the judgment, Doyle J stated that the witnesses in the main stuck to their opinions and no significant concessions were made. Paragraph 30 reads as follows:

"***The oral expert evidence***

30. During their oral evidence the expert witnesses in the main stuck to their opinions in their respective reports and the joint memorandum and no significant concessions were made. I have considered the oral expert evidence. I do not set it all out in this judgment. It forms part of the court record and I have full regard to it. ***The important point is that in the oral expert evidence it was confirmed that the relevant principles of construction as a matter of New York law were agreed between the experts, and I have full regard to them in construing the Indenture in this case.***"

(My emphasis).

[175] At paragraph [12], having reviewed the quote from Dicey at paragraph [11] which I referred to earlier, at paragraph [142], Doyle J pointed out that the experts were in agreement as to the rules of construction. Doyle J goes on to refer to the evidence of Mr. Glosband as setting out the general rules of construction. Those rules are in essentially the same terms as I quoted from Mr. Glosband's Report in paragraph [146] above.

[176] I note that in ***Shinsun*** Doyle J referred to both ***Re William Hockley*** and ***Community Development.*** The judge referred to and relied upon those cases at paragraphs [64-68] and [145] and this led him to one of his conclusions that there needed to be a pre-existing direct contractual relationship between the contingent creditor and the debtor. At paragraphs [143], [145] and [153] it is stated:

"*The standing issue*

143. I set out below my brief reasons for determining that the Petitioner does not have standing as a contingent creditor. ***Applying the agreed principles in respect of the construction of the Indenture, there is no contractual relationship between the Petitioner and the Company. The Petitioner is not a party to the Indenture. The principle of privity of contract and what English judges, lawyers and academics would***

__describe as the "no look through" principle are in play.__ The evidence before me establishes no obligation, whether existing or otherwise, upon the Company to the Petitioner whether in contract, tort, equity or otherwise. In such circumstances and put simply the Petitioner is not a contingent creditor of the Company. The Petitioner appears to have fundamentally misunderstood the legal position in respect of its investment and the terms of the Indenture.

……

145. Mr. Basdeo was unable to refer to any local judgments in support of his submission that an investor in the position of the Petitioner had standing to progress a winding up petition against the issuer of a note. Indeed there are powerful overseas authorities (…__Community Development, Re William Hockley, Bio-Treat, expressly preserved by Kawaley CJ in Titan)…..to the contrary.__

……..

153. I agree with the Company that the Petitioner's position is analogous to that of the bank in SBA Properties. The Company is right to refer to Re SBA Properties and there is strength in its submission that it is the standing of the Petitioner which is contingent, in the first place, upon it succeeding in bringing itself into a direct contractual relationship with the Company, and that is regardless of whether the debt is also properly to be treated as contingent."

(My emphasis)

[177] As previously stated, it does not appear from the judgment whether ***Steele*** was cited to the judge, but to the extent that he relied upon ***In re William Hockley*** and ***Community Development*** and to the extent that the case appears to have focused on whether there was a pre-existing direct contractual relationship, I am of the respectful view that the decision in ***Shinsun*** should not, and need not, be followed in this jurisdiction.

[178] I have noted that at paragraphs [67] and [68] of the judgment in ***Shinsun***, Doyle J stated that he accepted the Company's submission that ***Re William Hockley*** remained good law, by referencing, by example, two cases in which the case was referred to i.e., the decision of Norris J in ***Green v SCL Group*** [2019] 2 BCLC 664 and to the decision of Segal J in ***Perry v Lopag Trust*** an unreported decision of the Cayman Islands Grand Court, delivered 23 February 2023. Respectfully, I am not sure that reference in these two first instance judgments (one in England, and one in the Cayman Islands) to the case of ***Re William Hockley*** demonstrates that its reasoning (as opposed to its survival) is still good law since it was never expressly overruled. For the reasons I have stated earlier in the judgment, reliance on ***Re William Hockley*** is not a step that should be, or needs to be followed in the BVI.

[179] In short, a contractual relationship is not necessary. The debtor must simply take steps that may make it liable to a creditor, subject to a contingency. I accept Cithara's submission that the bond structure can be equated and is analogous to the steps taken by a debtor that make it liable to a creditor, subject to a contingency, as discussed in ***Re Nortel***. Although in ***Shinsun*** at paragraphs [70]-[75] there is reference to ***Re Nortel*** there does not seem to have been any reference to the paragraphs, for example paragraph [76], [132] and [136] of ***Re Nortel*** where the important point was made that contract is not the only basis upon which contingent obligations may arise.

[180] It follows from what I have said that I accept Cithara's submission that the "no look through" principle discussed in ***Shinsun*** is not applicable in the case before me, since that principle and the cases discussing it, relate only to direct contractual claims. Further, the interpretation of standing as "*contingent creditor*" under a statute is a separate matter.

[181] It also appears that in ***Shinsun*** the Indenture may have been worded differently or the case was argued differently, or the focus was different, than it has been in the case before me. I say this because I do not see where there has been reference in the judgment to any article or clause of the relevant Indenture equivalent to §2.6 of the Indenture in the instant case, which expressly refers to the Euroclear Procedures-see paragraph [5] of the judgment. Indeed, I note that in the table produced by the Company in its Supplemental SKA there is no reference to §2.6. There is also no reference to the wording of the Offering Memorandum as containing a clause such as the Offering Memorandum in this case under the heading "***Action by Owners of Book-Entry Interests***".

[182] This may explain why at paragraphs [47]-[51], the judgment refers to the ***Cortlandt*** decision and makes no reference at all to paragraphs [25]-[26] upon which Cithara relies so heavily in the case before me. Those are the paragraphs where the New York Court held, on the Amended Complaint, that the Euroclear Procedures, and specifically, Rule 5.3.1.3. (a) were incorporated into the Offering Memorandum by reference. This is despite the fact that at paragraph [32] Doyle J states that Mr. Kane in oral evidence referred to section 5.3.1.3. (a) and sets out its terms.

[183] At paragraph [158] the judge stated that:" *At times Mr. Kane came dangerously close to suggesting, or at least implying, that the Euroclear procedures overrode the clear express terms of the Indenture".* There is not even at this juncture any reference to a clause similar to §2.6 and thus it may be that the documentation under consideration in ***Shinsun*** was different to that in this case. This is another basis upon which the case may be distinguishable.

[184] In ***Shinsun***, at paragraph [147], Doyle J rejected the approach to contingent creditor standing in the English Scheme decisions as follows:

> *"147. Moreover I was not persuaded by Mr. Basdeo's attempts to apply the English cases on schemes of arrangement by way of analogy. Those cases arose in the very different context of voting rights in respect of*

> *schemes of arrangements. It should not be surprising that the words "creditor" or "contingent creditor" may mean one thing in one context and another thing in another context. As Lord Neuberger said in* ***Re Nortel*** at paragraph 74 "However, perhaps more than many words, "*obligation" can have a number of different meanings or nuances."*

In my judgment, this Court should take a different view as to the relevance of the Scheme cases because of the width of the *BVI IA* provisions, as further discussed below. It is for this and other reasons discussed above, that I accept Mr. Burgess' submission and find, respectfully, that the BVI Court should not, and need not follow, ***Shinsun***.

Court finds that Cithara is a creditor under BVI law

[185] In my judgment, it is plain from the express provisions of the *BVI IA* that a contingent liability is capable of giving rise to a claim in liquidation proceedings which consequently makes the person to whom the debt will be owed as a result of the contingency a creditor for the purposes of section 162(2)(a). This is clear when the Act as a whole is read, and in particular on a reading of ss. 10(2), 11(2)(a) and 9(1)(a). Section 9(1) provides that a person is a creditor of another person if he has a claim against the debtor whether by assignment or otherwise that would be an admissible claim in the liquidation. An admissible claim includes a liability of the company, which itself can be present or future, and certain or contingent: ss.11(2), 10(1).

[186] I derive some support for my conclusions from the decision of the ECSC Court of Appeal's decision in ***Jinpeng Group Limited v Peak Hotels and Resorts Limited***[23], where Webster JA at paragraph 43 adopted a wide approach to the concept of "*contingent creditor*". I also accept that the position under BVI law is very similar to the position under New York law and US Federal law as outlined by Mr. Kane.

---

[23] BVIHCMAP 2014/0025.

[187] This broad approach to the meaning of "*creditor"* is consistent with the approach taken in England and Wales to the definition of "*creditor*" in the context of schemes of arrangement. I therefore hold that, because of the width of the language in the *BVI IA* dealing with the meaning of creditor, the approach to contingent creditor standing taken in numerous English scheme cases cited by Cithara, is apposite and helpful in construing the meaning of "*creditor*" and "*contingent creditor*" in the instant case. I am of the view that, applying the reasoning in those cases, where ultimate beneficial bond holders in a similar position to Cithara have been held to be contingent creditors, I am satisfied that Cithara falls to be treated as a contingent creditor for the purposes of the *BVI IA*.

[188] The width of the *BVI IA* provisions is also consistent with the wider approach in ***Nortel*** The following statement of the authors of commentary on the UK insolvency legislation, *Sealy & Milman: Annotated Guide to the Insolvency Legislation (25th edn, 2022)* IR 2016, r.14.1 could with equal applicability be said of the *BVI IA* provisions discussed above. In my view, the *BVI IA* provisions fittingly reflect commercial reality and have due regard to the important underlying rights of those with the real economic interests. The learned authors state:

> "*[i]t is clear that we now have a wider, more flexible concept of provable debt-that is a welcome development that reflects commercial reality."*

[189] In his Supplemental SKA, Mr. Samuel sought to argue that "*both the Cayman Islands and Bermuda line of authorities have ruled consistently that investors in respect of bonds issued by a company as issuer were not creditors or contingent creditors of the company."*

[190] I have already indicated that, respectfully, I do not think that ***Bio-Treat*** and ***Shinsun*** should be followed in the BVI. However, it is also the case that, the Cayman Court has in point of fact made winding up orders previously upon

petitions by beneficial bondholders. These are the orders made in ***LDK Solar Ltd.***, made by Andrew Jones J on 6 April 2016, and by myself, whilst sitting on the Grand Court of the Cayman Islands in ***China Forestry Holdings Ltd.,*** order made on 18 June 2015. These orders are referred to in paragraphs [84]-[89] and [146] of ***Shinsun***. I entirely agree and accept that these were both cases where ultimately the orders were unopposed and no written judgments were handed down. Nevertheless, it is the case that such orders have been made in the past. It goes without saying, however, that I remain of the view that I expressed in ***Re Homeinns Hotel Group*** [2017] (1) CILR 206 at paragraph 7, quoted and agreed with by Doyle J at para 89 of ***Shinsun***, that:

> *"It is trite that generally….. orders made by consent (and therefore not the subject of contest) or orders made without opposition, particularly when a written ruling is not available, are of limited assistance to a court which now has the task of adjudicating on the same issues, now in contest between the parties before the court…"*

[191] I accept Cithara's argument that Euroclear can provide authority to Cithara to progress a winding up petition. The Holder holds the notes as a mere nominee (i.e. trustee) for the Common Depository, which holds it for (i.e. on trust for) Euroclear, which has exercised its beneficial interest and authorised Cithara to bring the Liquidation Application.

[192] The discussion by the author Wood, *International Loans, Bonds, Guarantees, Legal Opinions, (*3rd 2019) of "Clearing Systems and Global Securities), at paragraph 27-019, is helpful in this regard. It is stated:

> "***Structure*** *These days, most debt securities are held in a clearing system, such as Euroclear in Brussels, Clearstream in Luxembourg, and the Depository Trust Corporation in the U.S.*
>
> *The basic structure is that the issuer issues a global security representing the entire issue to a common depository - a large bank - which in turn holds the benefit of the security on trust for the clearers, who in turn hold*

their interests on trust for investor-participants who are members of their clearer and who hold accounts with the clearer. These participants, if they are not the owners, hold their interests for their clients, such as brokers, who in turn hold for the ultimate investors who are the real owners. So, the interests in the global branch out to the clearers, each branch is further split amongst the participants in the clearer, each sub-branch is further split amongst the brokers, and each of those is further split amongst the real owners. The split is like the roots of a tree spreading from the trunk to ever-smaller roots branching-off. Each holder holds in trust for the next owner, so that there is a chain of intermediaries. …

The global note states that the issuer promises to pay the bearer the principal of and interest on the entire issue on the stated terms.

The purpose of clearing systems is largely to facilitate transfers and pledges (as well as safe custody and administration). Transfers are simply from the account of the seller to the account of the buyer in the books of the intermediary concerned and there is no need for transfer paper. There is no need to go to the expense of printing definitive bearer certificates - which look like bank notes, but only much bigger."

Conclusion on Cithara's Standing

[193] In conclusion, I am of the view that Cithara has standing as a creditor to present the Liquidation Application pursuant to s. 162 (2)(b) of the *BVI IA*. Cithara is a contingent creditor under BVI law on these two bases:

(1) Pursuant to §2.4.5 of the Indenture, it is entitled to receive the Certificated Note and become the registered Holder itself: Kane 1, paragraph 47. In this regard:

(a) Section 2.4.5 of the Indenture provides that if the Notes have become immediately due and payable, upon request the Issuer will

execute and the Trustee will authenticate and deliver, Certificated Notes;

(b) While §2.4.5 does not identify precisely to whom the Certificated Notes are delivered, it is quite clear that it must be the beneficial holder. The commercial reality of the situation is that in such an event it is the ultimate beneficial holder seeking to obtain the Certificated Notes and remove the intermediaries from the chain between it and the issuer. In any event, the Company's expert Mr Glosband has not disputed that it is possible for Cithara to receive the Certificated Notes: Kane 2, paragraph 21; and

(2) The effect of §2.6 of the Indenture, §5.3.1.3(a) of the Euroclear Operating Procedures, §8-111 of the NY UCC, and the Euroclear Authorisations is that Cithara, as the ultimate beneficial holder of a note structure such as in the present case, is the person entitled to enforce the claim against the issuer and can therefore be considered a contingent creditor of the Company.

Strike Out Application

[194] For the reasons I have explained earlier, I do not really think that any question of striking out properly arose (as opposed to dismissal of the Liquidation Application). However, for the avoidance of doubt, I dismiss the Strike Out Application.

The JPL Application

[195] I now turn to consider the Company's JPL Application. Although it was presented very late in the day relative to the hearing, I have gone on to consider it. I am of the view that this application should be dismissed, because it is predicated on the Restructuring Plan, which in my Ruling on the Extension Application, I have already indicated is not viable and/or is bound to fail, and has no real prospects of success for the reasons argued by Cithara in relation to the Extension Application. I also take into account Cithara's strongly held views and concerns and legitimate

preference of having its chosen Liquidators appointed, and for not leaving the Company in the hands of the Directors, as the appointment of "*soft touch*" provisional liquidators would do.

The Liquidation Application

[196] It is well understood that the basic rule is that where a creditor's debt is undisputed and not satisfied, and there are no exceptional circumstances, the creditor is entitled to expect the court to exercise its jurisdiction and make a winding-up order: see French, *Applications to Wind Up Companies* (4th edn, 2021) paragraph 7.656 approved by ***Re Hellas Telecommunications (Luxembourg) II SCA (in administration)***[24], cited in Cithara's SKA.

[197] I accept that the requirements to wind up the Company are present: The Company is plainly insolvent on the basis it failed to comply with the requirements of the Statutory Demand as well as on the cashflow basis: ss 8(1)(a), 8(1)(c)(2) of the *BVI IA*. The Company has not denied this:

(1) The principal and interest on the Notes was due on the Maturity Date of 8 June 2022. Again, the Company does not dispute this;

(2) The Company has failed to make those payments. This is admitted; and

(3) The only ground of dispute is Cithara's status as creditor.

[198] Accordingly, since there is no real prospect of the Restructuring Plan succeeding and I accept, as I did on the Extension Application that there has been no evidence presented that it would it will provide a better return to creditors over a liquidation, hence my refusal of the JPL Application, the basic rule should govern and guide the Court's exercise of its discretion.

Strong reasons in favour of granting the Liquidation Application

[24] [2011] EWHC 3176 (Ch), [2013] 1 BCLC 426, [88] (Sales J).

[199] In addition, I find that there are strong reasons to grant the Liquidation Application. Ease Sail and Burlington have the same standing as Cithara and I therefore consider their views as Supporting Creditors. The Supporting Creditors state that the Company's primary assets will be intergroup loans to other members of the Group. They submit that properly appointed liquidators need to take control of the Company in order to commence, as necessary, claims against other companies within the Group that have obviously defaulted on their obligations to the Company.

[200] Mr Xin, the sole director of the Company, is also the CFO of and a direct of the Parent: Xin 1, paragraph 12 Cithara contends that it is very unlikely that he will commence any actions in the interests of the creditors of the Company if they could jeopardise the solvency of other Group companies, including the Parent. In my view, that is a reasonable consideration to take into account.

[201] From the Parent's continued payment of onshore bonds, it appears that the Group has taken the decision to pay onshore creditors first, and I accept that this is having a detrimental effect on the Company's (offshore) creditors. This situation and the continuing prejudice to the Company's creditors' interests would continue until the Company is put into liquidation.

Views of Creditors

[202] Those who oppose the petition of a creditor of an undisputed debt must actually give reasons for their opposition: ***Re Television Parlours Plc***[25]; *French,* paragraph 7.683. Where no reasons of opposition have been given by a creditor, no weight need be given to its view: ***Re Phoon Lee Piling Co Ltd***[26] [AB/11/144-5]; *French, paragraph* 7.683 [AB/25/391]. 106. This is because, as stated in *French* para. 7.684, the Court is effectively asking whether the matters raised by opposing creditors outweigh the normal rule of policy that an unpaid admitted creditor will

[25] [1988] BCC 95.
[26] [2003] 2 HKLRD 391, [32] (Kwan J).

normally be granted a winding up order unless there are exceptional circumstances: see *French*, paragraph 7.684.

[203] The creditors who the Company claims oppose the Liquidation Application have not filed notices of intention to appear and have not filed evidence. The significant creditors have provided neutrally worded letters that give no reasons for the position taken.

[204] I accept Cithara's submission that this absence of any reasoned support effectively negates these (weak) statements of non-support.

[205] In contrast, Ease Sail and Burlington, have indicated their support for the Liquidation Application by filing notices of intention to appear and evidence in support setting out extensive reasons for the Court to grant the Liquidation Application.

[206] Ease Sail is a significant creditor of the Company, holding not less than US$ 59.5 million principal under the 2023 and 2024 Notes. Ease Sail supports Cithara's Liquidation Application.

[207] Burlington has also issued a notice of intention to appear setting out its reasons. Burlington's position is the same as that of Cithara and Ease Sail. It supports the Liquidation Application. It queries, (in my view, understandably) for how long creditors are supposed to wait for repayment of the sums due to them under the notes where the Parent is preferring to fund its operational business and the property development industry in the PRC is in extreme difficulty.

Disposition

[208] In all of the circumstances I hold that the Liquidation Application should be made and the Company be wound up. I have dismissed/refused the JPL Application and granted the Liquidation Application. I make an order in the terms sought by the Applicants essentially in terms of the draft order, Hearing Bundle, Tab 2. For completeness, I note that when I handed down my decision on 5 July 2023, I omitted to refer to the Strike Out Application (although it is plain from my judgment what the result is). As stated previously, it seems to me that if the Company's argument had succeeded as to standing, it would not really be so much a matter of striking out the Liquidation Application. It would rather have been that the Liquidation Application would be dismissed/refused. However, for the avoidance of doubt, and as I have not yet signed a formal order, I order that the Striking Out Application be also dismissed.

[209] The parties are at liberty to seek a consequentials hearing date from the Registry should the need arise.

[210] I wish to record my great appreciation for the hard work and thoroughness displayed by Counsel for both sides. Submissions have covered some very important and novel insolvency law issues, and have referred to numerous decisions emanating from other common law jurisdictions.

Ingrid Mangatal (Ag)
High Court Judge

By the Court

Registrar

ANNEX TO JUDGMENT