IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 192 of 2022 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)
AND IN THE MATTER OF SHINSUN HOLDINGS (GROUP) CO., LTD.

Appearances:	**Brett Basdeo and Barnaby Gowrie of Walkers for the Petitioner** **Tom Lowe KC and Andrew Jackson of Appleby (Cayman) Ltd for the Company**
Before:	**The Hon. Justice David Doyle**
Heard:	**28 February 2023 and 1 March 2023**
Supplementary written submissions and authorities filed:	**9 March 2023 (and 28 March 2023 with transcript references) by the Petitioner; 14 March 2023 by the Company**
Draft Judgment circulated:	**17 April 2023**
Judgment Delivered:	**21 April 2023**

HEADNOTE

Determination of whether the Petitioner has legal standing to progress a winding up petition – whether the Petitioner is a contingent creditor – whether the Petitioner was authorised to progress a winding up petition

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JUDGMENT

The main issues before the court

1. Issues as to standing and authority have arisen in these proceedings: Does Shenwan Hongyan Strategic Investments (H.K.) Limited (the "Petitioner") have locus standi (legal standing) to progress a winding up petition against Shinsun Holdings (Group) Co., Ltd. (the "Company") or is it otherwise authorised to progress the proceedings?

2. The Petitioner says that it is a contingent creditor with standing and is otherwise authorised to progress these proceedings. The Company says that the Petitioner is not a contingent creditor, does not benefit from proper authority and does not have standing.

Summary

3. For reasons which follow, having considered the evidence, the relevant law and the submissions, I have determined that the Petitioner does not have standing or authority to progress these proceedings and the petition must therefore be dismissed.

The relevant legal structure

4. The Company issued 12% Senior Notes Due 2023 (the "Notes") pursuant to a New York law governed indenture dated 18 August 2021 (the "Indenture"). The parties to the Indenture were the Company, various entities as subsidiary guarantors and China Construction Bank (Asia) Corporation Limited (the "Trustee"). The Trustee also acted as the "Common Depository". The Petitioner was not a party to the Indenture. The registered holder of the relevant note was CCB Nominees Limited (the "Holder"). It appears that below the Holder in the structure was Euroclear as the clearing house and below Euroclear was the Hong Kong Monetary Authority ("HKMA" or the "Participant") and below the

Participant was the Petitioner. The Petitioner had no direct contractual relationship with the Company.

The Indenture

5. I set out some of the relevant parts of the Indenture as follows:

(1) Section 2.04 concerns the form of the Notes and at Section 2.04 (d) it is provided that each of the Notes shall be delivered by the Trustee to the Common Depositary and shall be registered in the name of the Holder as nominee for the Common Depositary;

(2) Section 2.04 (e): "If at any time the Common Depositary notifies the Company that it is unwilling or unable to continue as the Common Depositary for such Global Notes, a successor Common Depositary with respect to such Global Notes shall be appointed. If (i) a successor Common Depositary for such Global Notes is not appointed within 90 days after the Company receives such notice or becomes aware of such ineligibility, (ii) either Euroclear or Clearstream, or a successor clearing system is closed for business for a continuous period of 14 days (other than by reason of holidays, statutory or otherwise) or announces an intention to permanently cease business or does in fact do so, or (iii) any of the Notes has become immediately due and payable in accordance with Sections 6.01 and 6.02 and the Company has received a written request from a Holder, the Company will execute, and the Trustee, upon receipt of an Officers' Certificate of the Company directing the authentication and delivery thereof, will authenticate and deliver, Certificated Notes (which may bear a Note Legend) in any authorized denominations in an aggregate principal amount equal to the principal amount of such Global Notes in exchange for such Global Notes." (my underlining);

(3) Section 2.05 concerns registration and the register: "(a) The Notes are issuable only in registered form. The Company will keep at the office or agency to be

maintained for the purpose as provided in Section 4.02 (the "Registrar"), a register (the "Register") in which, subject to such reasonable regulations as it may prescribe, it will register, and will register the transfer of, Notes as provided in this Article. The name and address of the registered holder of each Note and the amount of each Note, and all transfers and exchanges related thereto, will be recorded in the Register. Such Register shall be in written form in the English language or in any other form capable of being converted into such form within a reasonable time. Such Register shall be available to the Trustee for inspection at all reasonable times and upon reasonable notice.";

(4) Section 2.05 (c) provides: "A Holder may register the transfer of a Note only by written application to the Registrar stating the name of the proposed transferee and otherwise complying with the terms of this Indenture. No such registration of transfer shall be effected until, and such transferee shall succeed to the rights of a Holder only upon, final acceptance and registration of the transfer by the Registrar in the Register. Prior to the registration of any transfer by a Holder as provided herein, the Company, the Trustee, the Agents and any agent of any of them shall treat the Person in whose name the Note is registered as the owner thereof for all purposes whether or not the Note shall be overdue, and neither the Company, the Trustee, nor any such agent shall be affected by notice to the contrary. Furthermore, any Holder of a Global Note shall, by acceptance of such Global Note, agree that transfers for beneficial interests in such Global Note may be effected only through a book-entry system maintained by Euroclear and Clearstream (or their respective agents) and that ownership of a beneficial interest in the Note shall be required to be reflected in a book entry. At the option of the Holder, Notes may be exchanged for other Notes of any authorized denomination and of a like aggregate principal amount, upon surrender of the Notes to be exchanged to the Registrar. When Notes are presented to the Registrar with a request to register the transfer or to exchange them for an equal principal amount of Notes of other authorized denominations, the Registrar shall register the transfer or make the exchange as requested if the requirements for such transactions set forth herein are met. To permit registrations

of transfers and exchanges, the Company, each Subsidiary Guarantor and, if applicable, each JV Subsidiary Guarantor (if any) shall execute and the Trustee shall authenticate Notes at the Company's request." (my underlining);

(5) Section 2.06 (a) – (d) provides: "(a) Each Global Note initially shall be deposited with the Common Depositary and registered in the name of the Common Depositary or its nominee for the accounts of Euroclear and Clearstream.

(b) Transfers of a Global Note shall be limited to transfers of such Global Note in whole, but not in part, to the Common Depositary, its successors or their respective nominees. Interests of beneficial owners in a Global Note may be transferred, and transfers increasing or decreasing the aggregate principal amount of Global Notes may be conducted only in accordance with the rules and procedures of Euroclear and Clearstream. In addition, Certificated Notes shall be transferred to all beneficial owners in exchange for their beneficial interests in the Global Note under the circumstances set forth in Section 2.04(e).

(c) In connection with the transfer of an entire Global Note to beneficial owners pursuant to Section 2.06(b), the Global Note shall be deemed to be surrendered to the Paying and Transfer Agent for cancellation, and the Company shall execute, and the Trustee shall authenticate and deliver, to each beneficial owner identified by the Common Depositary in exchange for its beneficial interest in the Global Note, an equal aggregate principal amount of Certificated Notes of authorized denominations.

(d) The registered holder of a Global Note may grant proxies and otherwise authorize any person to take any action which a Holder is entitled to take under this Indenture or the Notes." (my underlining);

(6) Article 6 concerns default and remedies:

Section 6.01 (b) provides an "Event of Default" as: "default in the payment of interest on any Note when the same becomes due and payable, and such default continues for a period of 30 consecutive days;"

Section 6.01 (g) provides another "Event of Default": "an involuntary case or other proceeding is commenced against the Company or any Significant Restricted Subsidiary (or any group of Restricted Subsidiaries that together constitutes a Significant Restricted Subsidiary) with respect to it or its debts under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect seeking the appointment of a receiver, liquidator, assignee, custodian, trustee, sequestrator or similar official of the Company or any Significant Restricted Subsidiary (or any group of Restricted Subsidiaries that together constitutes a Significant Restricted Subsidiary) or for any substantial part of the property and assets of the Company or any Significant Restricted Subsidiary (or any group of Restricted Subsidiaries that together constitutes a Significant Restricted Subsidiary) and such involuntary case or other proceeding remains undismissed and unstayed for a period of 60 consecutive days; or an order for relief is entered against the Company or any Significant Restricted Subsidiary (or any group of Restricted Subsidiaries that together constitutes a Significant Restricted Subsidiary) under any applicable bankruptcy, insolvency or other similar law as now or hereafter in effect;" (my underlining)

Section 6.02 provides: "*Acceleration.* If an Event of Default (other than an Event of Default specified in clause (g) or (h) of Section 6.01) occurs and is continuing under this Indenture, the Trustee or the Holders of at least 25% in aggregate principal amount of the Notes then outstanding, by written notice to the Company (and to the Trustee if such notice is given by the Holders) may, and the Trustee at the written direction of such Holders (subject to being indemnified and/or secured to its satisfaction) shall, declare the principal of, premium, if any, and accrued and unpaid interest on the Notes to be immediately due and payable. Upon a declaration of acceleration, such principal of, premium, if any and accrued and unpaid interest

shall be immediately due and payable. If an Event of Default specified in clause (g) or (h) of Section 6.01 occurs with respect to the Company or any Significant Restricted Subsidiary (or any group of Restricted Subsidiaries that together constitutes a Significant Restricted Subsidiary), the principal of, premium, if any, and accrued and unpaid interest on the Notes then outstanding shall automatically become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holder." (my underlining);

(7) Article 7 concerns the Trustee. Section 7.01 (b) concludes with the following wording:

> "During the continuance of an Event of Default, the Trustee shall act only upon the written direction of the Holders of at least 25% of the aggregate principal amount then outstanding, subject to its receiving indemnity and/or security to its satisfaction." (my underlining); and

(8) Section 12.07 provides that each of the Notes and the Indenture "shall be governed by, and construed in accordance with, the laws of the State of New York."

The Note

6. The Note is headed in the name of the Company. There is reference to the "holder of this security" and certain conditions are attached in respect of offer, sale and transfer of the security. There is reference to the Indenture which governs the Note. The Note is stated to be "registered in the name of the Common Depositary or a nominee thereof". It is provided that "No transfer of this security in whole or in part may be registered, in the name of any person other than the common depositary or a nominee thereof, except in the limited circumstances described in the Indenture."

7. On page 3 there is reference to the Company promising to pay "CCB Nominees Limited, as the nominee of the common depositary for the account of Euroclear and Clearstream or

registered assigned thereof, upon surrender hereof" the principal sum on 18 August 2023 "or on such earlier date as the principal and premium (if any) hereof may become due in accordance with the provisions hereof."

8. The Certificate of Authentication is dated 18 August 2021 and is signed on behalf of China Construction Bank (Asia) Corporation Limited as Trustee.

9. The reverse of the Global Note contains provisions under the following headings:

1. Principal and Interest
2. Indenture; Subsidiary Guarantee

It is provided that the Notes are subject to the terms of the Indenture and to the extent permitted by applicable law in the event of any inconsistency between the terms of the Note and the terms of the Indenture, the terms of the Indenture "will control"

3. Optional Redemption
4. Registered Form; Documentation; Transfer; Exchange
5. Defaults and Remedies

"If an Event of Default (other than an Event of Default specified in clause (g) or (h) of Section 6.01) occurs and is continuing under this Indenture, the Holders of at least 25% in aggregate principal amount of the Notes then outstanding, by written notice to the Company and to the Trustee may and the Trustee at the written direction of such Holders (subject to being indemnified and/or secured to its satisfaction) shall, declare the principal of, premium, if any, and accrued and unpaid interest on the Notes to be immediately due and payable. Upon a declaration of acceleration, such principal of, premium, if any, and accrued and unpaid interest shall be immediately due and payable. If an Event of Default specified in clause (g) or (h) of Section 6.01 occurs with respect to the Company or any Significant Restricted Subsidiary (or any group of Restricted Subsidiaries that together constitutes a Significant Restricted Subsidiary), the principal of, premium, if any, and accrued and unpaid interest on the Notes then outstanding shall automatically become and

be immediately due and payable without any declaration or other act on the part of the Trustee or any Holder."

6. Amendment and Waiver
7. Authentication
8. Governing Law

"This Note shall be governed by, and construed in accordance with, the laws of the State of New York."

9. Abbreviations

10. Note (iii) of the Transfer Notice provides that none of the Trustee, the Paying and Transfer Agent and the Registrar shall be obligated to register this Note in the name of any person other than the Holder unless and until the conditions to any such transfer or registration set forth in the Note and in Section 2.05 of the Indenture shall have been satisfied.

The function of the expert witnesses

11. Before I turn to the expert evidence I should emphasise the function of expert witnesses. Mr Lowe helpfully referred the court to Rule 2 of *Dicey, Morris and Collins on the Conflict of Laws*, sixteenth edition, paragraph 3-018 on page 113 (stated to be cited with approval in *Alhamrani v Alhamrani* [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."

12. In this case one of the rare areas of agreement between the two experts (Mr Daniel M Glosband ("Mr Glosband") for the Company and Mr Ryan Kane ("Mr Kane") for the Petitioner) are the general rules of construction set out in Mr Glosband's report dated 5 January 2023 at paragraphs 9 to 13. In short summary in construing the Indenture in this case I look to its language for "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." The "primary objective is to give effect to the intent of the parties as revealed by the language of their agreement." The inquiry should be limited to "what is written in the indenture". Whether a contract is ambiguous is a question of law to be determined by the court. If a court determines that a contract is ambiguous, the determination of the intent of the parties is a question of fact and the court may accept extrinsic evidence to ascertain the intended meaning. However, ambiguity is absent where the contract's language provides "a definite and precise meaning unattended by danger of misconception in the purport of the contract itself and concerning which there is no reasonable basis for a difference of opinion."

13. In Mr Glosband's opinion the Indenture is not ambiguous. On the material provisions which impact on the points that arise for determination in this case, I agree.

The expert evidence in the case

14. I now turn to consider the expert evidence in this case.

Mr Glosband's evidence

15. Mr Glosband at paragraph 14 of his report says that New York courts have consistently ruled that persons who are not holders do not have standing to take action in respect of the Indenture or the Notes under either a No Action Clause or a Right to Payments Clause. The Petitioner is not a Holder pursuant to section 1.01 of the Indenture and consequently the acceleration of the Notes was improper. The Notes have not been properly accelerated, and therefore they are not immediately due and payable. At paragraph 18 of his report Mr

Glosband opines that since the Petitioner did not have standing to issue directions to the Trustee to accelerate the Notes, those directions were a nullity under New York law.

16. Mr Glosband at paragraph 19 opines that a holder of an ultimate beneficial interest is not entitled to initiate winding up proceedings against the issuer of the Notes.

17. Mr Glosband at paragraph 20 opines that the Petitioner does not have standing to (a) bring suit for payment of principal or interest due in respect of the Note pursuant to Section 6.07 of the Indenture (the "Right to Payment Clause") (and a winding up petition would be considered a suit for payment) or (b) commence any other proceeding in respect of the Indenture or the Notes pursuant to Section 6.06 of the Indenture (the "No Action Clause").

18. At paragraph 21 Mr Glosband opines that the No Action Clause does not apply to the initiation of a winding up petition, which would be a suit for payment under Section 6.07 if presented by a Holder. The Petitioner is not a Holder so he has no rights to act under the No Action Clause or under the Right to Payment Clause.

19. At paragraph 23 Mr Glosband opines that the Petitioner has no right to receive physical securities.

20. At paragraph 25 Mr Glosband opines that since the Petitioner is not a Holder even if the Notes are overdue it has no rights against the Company. Mr Glosband adds that without any rights against the Company, the Petitioner is not a creditor of the Company "contingent or otherwise, under U.S. or New York law".

21. At paragraph 26 Mr Glosband opines that "the Petitioner is not a creditor or a contingent creditor as a matter of U.S. or New York law since it does not hold and has no right to receive Certificated Securities under the terms of the Indenture."

Mr Kane's evidence

22. Mr Kane provides a summary of his opinions at paragraphs 10 – 16 of his opinion dated 10 January 2023:

> "10. *First*, the principal of, and accrued and unpaid interest on, the relevant Notes was immediately due and payable as of 1 April 2022 because, on that date, an Event of Default ("EOD") had occurred and the Trustee sent a notice of acceleration to the Company in accordance with Section 6.02 of the Indenture. Even had the Trustee not sent the notice of acceleration to the Company, the principal of, and accrued and unpaid interest on, the relevant Notes would still be immediately due and payable because the Winding Up Proceeding resulted in another EOD under Section 6.01(g) of the Indenture, resulting in an automatic acceleration without the need for any declaration of acceleration pursuant to Section 6.02 of the Indenture.
>
> 11. *Second*, as a result of the acceleration, the Petitioner has the right to receive Certificated Notes (as defined in the Indenture). According to Section 2.04(e) of the Indenture, following the Notes having become due and payable (which they have), the Company must execute Certificated Notes upon the Holder's request in an aggregate principal amount equal to the principal amount of such Global Notes in exchange for such Global Notes. The fact that the Indenture defines "Holder" to refer to the registered holders as opposed to beneficial holders, such as the Petitioner, does not change my opinion because the Euroclear Operating Procedures authorize beneficial holders to exercise the registered holder's rights to maintain proceedings under the Indenture. Given that Euroclear will not take any actions to enforce a beneficial holder's rights according to its Operating Procedures (as explained below), this authorization must encompass any steps necessary to bring proceedings, such as the provision of the requisite notice to issue Certificated Notes, or the authorization could be rendered illusory.

The scope of the authorization is consistent with the Offering Memorandum's disclosure that Euroclear will follow the direction of its participants (and therefore indirectly the beneficial holders) to take any action Euroclear is permitted to take under the Indenture. Moreover, if the Company insisted on a notice from the registered holder, similar to provisions of the Euroclear Operating Procedures, the Petitioner is authorized by its participant in Euroclear (HKMA) by section 5.5.5 of the CMU Reference Manual to enforce its rights and therefore to request that Euroclear, as registered holder (by the Nominee of its Common Depositary), provide a request for Certificated Notes.

12. *Third*, the Petitioner is a creditor of the Company under New York state law and U.S. federal law. The concepts of "claim" and "creditor" are broad under both U.S. bankruptcy law and analogous New York state law. Here, the Petitioner is a creditor of the Company for multiple reasons, including that beneficial holders of notes issued by a company generally are recognized as creditors of that company. Even if only the registered holder was determined to have a direct claim against the Company, the Petitioner would still be considered a creditor because it is authorized to bring suits against the Company under the Euroclear Operating Procedures and because, at a minimum, the Petitioner has a contingent claim against the Company because it is entitled to receive a Certificated Note (as described above), the provision of which would make the Petitioner itself a registered holder.

13. *Fourth*, the remaing questions all relate to the issue of whether the Petitioner has standing to bring the Petition under New York law and, if so, whether anything in the Indenture deprives the Petitioner of standing. The concepts of "standing" and "contractual standing" are distinct concepts under New York and U.S. federal law. Standing generally is satisfied when a plaintiff, or petitioner, has suffered an actual injury caused by the defendant.

Petitioner has standing here because the Company's failure to pay the Debt has injured the Petitioner.

14. "Contractual standing" involves the question of whether a party has the right to enforce the contract. While the Indenture indicates only Holders, defined as registered holders (here the Nominee), have the right to bring claims, it also provides that a registered holder may authorize any Person, including beneficial holders like the Petitioner, to take any action the registered holder is entitled to take under the Indenture. The registered holder for the Notes is the Nominee of the Common Depositary for Euroclear, and the Euroclear Operating Procedures authorize beneficial holders to pursue any claims against issuers that Euroclear, its nominee, or its Depositary or its Depositary's nominee are entitled to bring. As a result, the Petitioner holding a beneficial interest in the Notes is properly authorized to bring the Winding Up Proceeding against the Issuer.

15. There are no contractual bars to the Petitioner commencing the Winding Up Proceeding. While the Indenture has a "no action" clause that places limitations on suits, see Indenture 6.06, the no-action clause is trumped by the non-impairment clause in Section 6.07 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. The common U.S. legal meaning of "suit" is any proceeding by a party against another in a court of law, which includes bankruptcy, or winding up proceedings.

16. Therefore, the Petitioner has both standing and contractual standing to bring the Petition against the Company under New York law, and there is no contractual prohibition on the presentation of the Winding Up Proceeding."

The joint memorandum of the experts

23. I have also considered the joint memorandum between Mr Glosband and Mr Kane dated 8 February 2023.

24. At paragraph 11 it is recorded that the experts agreed on the following matters:

> "a. The Company did not make payment of interest due on 18 February 2022. An EOD has occurred under Section 6.01(a) of the Indenture and is continuing.
>
> b. As a result of the EOD, pursuant to Section 6.02 of the Indenture, the Trustee or the Holders of at least 25% in aggregate principal amount of the Notes then outstanding, by written notice to the Company may declare the principal of and any accrued and unpaid interest, on the Notes to be immediately due and payable.
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> c. The Petitioner sent the March Notice to the Trustee on 21 March 2022.
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> d. The Trustee issued the Acceleration Notice to the Company on 1 April 2022 (the efficacy of that notice is now disputed by the Company) and sent the Trustee's April Email to the Petitioner.
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> e. On 4 April 2022, the Company issued the April Announcement which stated that "at the written request of holders of the 2023 Senior Notes, the trustee of the 2023 Senior Notes sent the Company a notice of acceleration" and "thus the principal of, premium, if any, and accrued and unpaid interest on the 2023 Senior Notes has become immediately due and payable …"
>
> f. If an EOD occurs under Section 6.01(g) of the Indenture, the principal of, and any accrued and unpaid interest on, the Notes is automatically

immediately due and payable without any further action by the Holder, the Trustee or the Company (or anyone else).

g. The Winding Up Petition was presented on 16 September 2022 and remained undismissed or unstayed for a period of 60 consecutive days."

25. The experts disagreed on the following matters:

Question 1: Whether or not the principal of, and accrued and unpaid interest on, the Notes is immediately due and payable

Mr Kane: The principal of, and accrued and unpaid interest on, the Notes is immediately due and payable as a matter of New York law. First, the Trustee's 1 April 2022 Accelaration Notice following the EOD arising under Section 6.01(b) resulted in the principal and accrued and unpaid interest on the Notes being immediately due and payable. Second, the Petitioner's direction to the Trustee to declare the principal of, and accrued and unpaid interest on, the Notes immediately due and payable was effective under the Indenture and the Euroclear Operating Proceedings as recognised by the Trustee. Third, even if acceleration did not occur upon the Trustee's Notice of Acceleration, it would have occurred automatically after the occurrence of an EOD arising from Section 6.01 (g) of the Indenture.

Mr Glosband: The Acceleration Notice and Winding Up Petition are nullities.

The Petitioner was a beneficial owner and not a Holder of the Notes. The Petitioner has not received an authorisation from a Holder and has no contractual right or standing to take actions which a Holder could take under the Indenture. Section 6.02 of the Indenture provides that only Holders of 25% in aggregate principal amount of Notes can direct the Trustee to give

an acceleration notice to the Company and the Petitioner is not such a Holder. The acceleration is a nullity and the Notes are not due and payable.

The purported automatic acceleration under Section 6.02 of the Indenture based on the pendency of the petition for more than 60 days is not effective since the Petitioner was not a Holder and did not have standing to file the petition such that the petition is a nullity. The Petitioner cannot, by its unauthorised, improper action, manufacture an EOD. A party cannot take advantage of its own wrong.

The Petitioner has not been authorised under Section 2.06 (d) of the Indenture "by the registered holder of a Global Note" "to take any action which a Holder is entitled to take under the Indenture or the Notes."

New York law recognises that authorisation by a registered holder permits a beneficial owner to act under an indenture or similar instrument. It does not permit such actions in the absence of authorisation.

Since the Petitioner is not a Holder, has not received an authorisation from a Holder and has no contractual right or standing to take actions which a Holder could take under the Indenture, it did not have the right to direct the Trustee to give an acceleration notice to the Company and it did not have the right to file the winding up petition and cause an automatic acceleration.

In the absence of a proxy from the registered holder (i) Euroclear does not have any contractual basis under the Indenture to provide an authorisation to HKMA or the Petitioner and (ii) does not have a proxy from the registered Holder that would allow it to take any action that a Holder could take under the Indenture. Euroclear is not the registered Holder and only the registered Holder of the Notes can grant proxies under the Indenture.

26. *Question 2: Whether the Petitioner currently has the right to receive Certificated Notes as defined in the Indenture*

The experts agree on the following matters:

(i) Section 2.04 (e) of the Indenture sets forth when Certificated Notes may be issued;

(ii) the first two circumstances (failure of the Common Depository or where Euroclear is closed for 14 days) are not applicable on the facts;

(iii) the last basis is if any of the Notes become immediately due and payable in accordance with Sections 6.01 and 6.02 and the Company has received a written request from a Holder;

(iv) Section 2.06 (b) provides that the Certificated Notes shall be transferred to all beneficial owners in exchange for their beneficial interests in the Global Notes under the circumstances in Section 2.04 (e);

(v) Euroclear issued a 17 October 2022 Statement of Account ("SOA") for the Purposes of Filing a Claim to the HKMA stating that HKMA had a US$50,000,000 principal holding of Notes in a Euroclear account and that HKMA informed Euroclear that the holding was allocated to the Petitioner on HKMA's books. On 1 February 2023, Euroclear issued the Updated Euroclear SOA.

The experts disagree concerning the following matters:

Mr Kane: As a result of the acceleration of the Notes, the Petitioner has the right to receive Certificated Notes. The Petitioner may directly request Certificated Notes due to the authorisation in the Euroclear Operating Procedures and in the Updated Euroclear SOA to the extent that a Certificated Note is necessary to maintain proceedings. Alternatively, if the Company insisted on a receipt of a request from a registered holder, the Petitioner may direct the registered holder to make a request for Certificated Notes on behalf of the Petitioner. In any event, Section 2.06 (b) of the Indenture makes it clear that the Certificated Notes will be distributed to the beneficial holders such as the Petitioner.

The Petitioner currently can instruct the HKMA and the HKMA can instruct the Holder to request the issuance of Certificated Notes to the Petitioner. The Petitioner can instruct HKMA, and HKMA will instruct Euroclear to exercise the rights of a Holder under the Indenture. The fact that a request for Certificated Notes has not been made to date is irrelevant to the question at hand, which is whether the Petitioner has the right to receive Certificated Notes (it does) as opposed to whether it has initiated steps to obtain Certificated Notes.

Mr Glosband: The Petitioner does not have the right to obtain Certificated Notes and, even if it were authorised to request the delivery of Certificated Notes, it does not state that it has done so. Only a Holder can submit a written request for issuance of Certificated Notes if one of the conditions set forth in Section 2.04 (c) of the Indenture exists. The Petitioner is not a Holder and has not received a proxy from the Holder. The acceleration request is a nullity so even a Holder could not request issuance of Certificated Notes. The Euroclear Operating Procedures 5.3.1.3 (a) are not incorporated into the Indenture. There is still no written request by a Holder that Certificated Notes be issued.

27. *Question 3: Whether or not the Petitioner is a creditor of the Company*

Whether the Petitioner is a creditor/contingent creditor is one of the principal questions for determination by the Court but I note the respective positions of the experts on this fundamental question.

Mr Kane: The Petitioner is a creditor of the Company under New York and U.S. law for multiple reasons. Whether the Petitioner can file a winding up proceeding in the Cayman Islands is a matter of Cayman Islands law.

Mr Glosband: Even if the Petitioner was a contingent creditor of the Company, it would not be qualified to file an involuntary petition in the U.S., since Bankruptcy Code Section 305 requires that its claim not be contingent. Unless it either becomes a Holder by receiving a Certificated Note (and it has not requested or received one, but merely argued

that it has a right to request one) or receives a proxy to act under the Indenture as if it were a Holder (and it has not) the Petitioner's rights are against its broker HKMA and not against the Company.

Article 8 of the Uniform Commercial Code establishes the legal structure of the Petitioner's beneficial interest in the Notes. The Petitioner has rights against HKMA (its broker). The Petitioner has an account with HKMA in which its beneficial ownership in a fungible portion of the Note is shown.

The Petitioner is an "entitlement holder" holding a "securities entitlement" to a pro rata share of the "financial asset" held by HKMA as a "securities intermediary", the financial asset is the rights of the custodian HKMA against Euroclear with respect to the Global Note.

The Petitioner has no direct rights against the Company. At best, it has a contingent right to receive Certificated Notes if a Holder makes a demand on the Company pursuant to Section 2.04 (e) of the Indenture.

A party who does not have direct rights against a debtor does not have standing to act as a creditor.

28. *Question 4: Whether under the terms of the Indenture and/or Notes, a holder of the ultimate beneficial interest in the Notes is entitled to initiate winding up proceedings against the issuer of the Notes*

The experts agree on the following:

(a) "standing" and "contractual standing" are separate concepts under New York and U.S. law;

(b) under section 2.06 (d) of the Indenture and New York law, the Holders under the Indenture may authorise any person, including beneficial holders, to take any action which a Holder is entitled to take under the Indenture. The experts disagree regarding how the Holders may authorise another person to take such action.

Mr Kane: The Petitioner is entitled to initiate winding up proceedings against the Issuer under the terms of the Indenture and/or Notes as a matter of New York. The Petitioner is authorised and has contractual standing to bring the petition. The Indenture expressly permits the registered holder, Euroclear (by the Nominee for its Common Depositary) to "grant proxies and otherwise authorize". The Updated Euroclear SOA "clearly is sufficient to confer contractual standing on the Petitioner to maintain this proceeding as a matter of New York law."

The authorisation contained in the Euroclear Operating Procedures also authorises the petition.

A specific proxy is not required to grant the Petitioner authority to bring the petition under the Indenture as a matter of New York law. Section 2.06 provides two options to grant authority: (1) proxies; or (2) "otherwise authorize".

Mr Glosband: The Petitioner is not a Holder and does not have a proxy from a Holder. Therefore, it is not entitled to initiate winding up proceedings against the Company, the issuer of the Notes.

29. *Question 5: Whether a holder of the beneficial interest in the Notes is entitled to initiate winding up proceedings against the Issuer of the Notes, and, if so, whether there are requirements under the Indenture with which they would have to comply before they would be entitled to initiate winding up proceedings*

The experts agree on the following:

(a) Section 6.06 of the Indenture (the "No Action" clause) does not apply to the initiation of a winding up petition, and there are no requirements under the Indenture with which a Holder would have to comply before it would be entitled to bring a suit for payment under Section 6.07 of the Indenture;

(b) U.S. courts treat involuntary bankruptcy petitions as "suits" for the purposes of contractual rights to sue under provisions essentially identical to Section 6.07 of the Indenture;

(c) the Petitioner is not a "Holder" within the definition of the Holder in the Indenture, and is neither a party to nor bound by the Indenture;

(d) the Petitioner, absent adequate authorisation, does not have contractual standing to bring suit for payment, which is protected under Section 6.07 of the Indenture, it is not bound by the contractual prohibition on suits (or commencement of any other action) pursuant to Section 6.06 of the Indenture, but the Holders under the Indenture may grant proxies and otherwise authorise any person, including beneficial holders, to take any action which a Holder is entitled to take under the Indenture or the Notes, and in turn a person so authorised would, as with a Holder, not be bound by Section 6.06 of the Indenture in light of Section 6.07 of the Indenture.

Mr Kane: disagrees that only the Holder would be entitled to initiate a winding up proceeding because the Holder has authorised the Petitioner to maintain this proceeding through both the global authorisation in the Euroclear Operating Procedures and the additional authorisation in the Updated Euroclear SOA or alternatively the Petitioner is a contingent creditor as it has the right to receive Certificated Notes.

Mr Glosband: the Petitioner is not a Holder and does not have a proxy from a Holder. Therefore it is not entitled to initiate winding up proceedings against the Company, the issuer of the Notes.

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.

31. During cross-examination, Mr Kane accepted that the registered holder was CCB Nominees Limited who he described as "Euroclear's depository nominee".

32. Mr Kane referred to section 5.3.1.3 (a) of the Operating Procedures of the Euroclear System which provides:

> "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 act as registered owner of any security held in the Euroclear System, or in any other relevant situation."

33. Reference was also made to the HKMA Central Moneymarkets Unit CMU Reference Manual at 5.5.5:

> "Securities in Default
> The MA will not take any action, legal or otherwise, to enforce a participant's rights against any issuer or any guarantor in respect of securities in default. The MA

authorises the participants and/or underlying beneficial owners of such securities to maintain proceedings against issuers, guarantors and any other parties. This is to the extent that the MA, acting as the operator of the CMU, acts as registered owner of any securities held in the CMU systems, or in any other relevant situation."

34. Mr Kane appeared to accept that the Euroclear Procedure was governed by laws of Belgium (section 22 of the Terms and Conditions governing use of Euroclear refers to the laws of Belgium as the governing law) and that he was not an expert in the laws of Belgium. Mr Kane was unable to point to a single statement in the Euroclear Procedure where Euroclear was given authority by the registered holder of a security deposited with Euroclear and simply asserted that "if you join a system and use a system, you are bound by it."

35. In respect of the acceleration notice dated 1 April 2022 Mr Glosband, under cross-examination, stated that the evidence made it quite clear that the Trustee was acting as instructed by the Petitioner and the Petitioner was not a party authorised under the terms of the Indenture to give that instruction and in his opinion the Trustee acted improperly under the terms of the Indenture.

36. Mr Glosband was referred to section 6.01 (g) of the Indenture in respect of acceleration and stated "assuming the petition was properly initiated" and added "no one other than the Trustee or a Holder could initiate the proceeding …" later qualifying that as "I don't know or recall whether the Indenture permits a Trustee to initiate insolvency proceedings … but certainly it would permit a Holder to bring a suit including an involuntary bankruptcy petition via section 6.07". Mr Glosband referred to a "generally applicable principle of United States law that says that a wrongdoer should not be allowed to benefit from its own wrongdoing … [the Petitioner] shouldn't be allowed to benefit by causing the automatic acceleration from its own improper act." Mr Glosband confirmed that if the petition was improperly filed it should be disregarded as a nullity.

37. Mr Glosband did not accept that "Euroclear is actually CCB Nominees Limited's principal". He stated that CCB Nominees' principal is China Construction Bank (Asia) Corporation Limited.

38. Mr Glosband was asked if he agreed that the Company as the issuer of the Notes was "bound by the terms of the Euroclear documentation along with the respective rules of the Hong Kong Monetary Authority" and responded:

> "I've seen nothing in these documents or my other experience that would contractually bind the company to the Euroclear operating procedures."

Mr Glosband added:

> "The Petitioner is a stranger to the Indenture. It has no rights to instruct the Trustee under the Indenture, it's not a party to the Indenture … its rights to instruct the Holder are through the intermediary chain, and the intermediary chain is a function of Article 8 of the Uniform Commercial Code and it's quite clear that it can give instructions to its intermediary … in this case the Hong Kong Monetary Authority. The Hong Kong Monetary Authority could pass those instructions along as the Hong Kong Monetary Authority's instructions to Euroclear for those instructions to be "Dear Euroclear, please get us an authorisation from the Holder". They could say that, but there's no indication that that process has been followed here. That sequence of steps is delineated in Article 8 of the Uniform Commercial Code which applies here. This is part of New York law and this Indenture is governed by New York law."

39. Mr Glosband accepted that the Holder could grant authorisations for action to be taken on its behalf "but I don't see anything in the Indenture that permits Euroclear to grant that authorisation ... The Petitioner is not a Holder and does not have authority from a Holder…".

40. Mr Glosband stated "I do not believe there is any privity between the Company and the Petitioner".

41. Mr Glosband agreed that if Certificated Notes were issued to the Petitioner that the Petitioner would have rights under the Indenture and be bound by it because "it would be a Holder in its own right". Mr Glosband remained firm in his position that the Company was not bound by "the operating procedures for Euroclear".

42. Mr Glosband referred to section 2.05 (c) of the Indenture which he said "tells the Trustee you can ignore notices from anyone other than the Holder. So there's, to my mind, a disconnect between the way it behaved here and what its obligations were under the Indenture."

43. Mr Glosband stated:

> "… the Petitioner has no enforceable obligation here … it's not a party to the Indenture, it has no enforceable obligation that it can enforce against anyone who is a party to the Indenture."

44. Mr Glosband agreed that if Certificated Notes were issued to the Petitioner that the Petitioner would become a creditor of the Company as it would be a Holder.

45. Mr Glosband confirmed that the Uniform Commercial Code overrode the HKMA and Euroclear provisions.

Some American authorities

46. The experts referred to numerous American authorities, not all of them helpful or particularly relevant to this court's determination of the issues in this case. The following however, in particular, caught my eye.

47. *Cortlandt St. Recovery Corp v TPG Capital Mgt., L.P.* was decided by the Supreme Court of New York, Robert R Reed, J on 25 October 2022. In that case it was noted at page 3 that Cortlandt did not own any of the sub notes at issue but it alleged that it had the necessary authorisations and assignments to bring the suit. Specifically Cortlandt alleged that the beneficial owners or assignors of the sub notes at issue executed an assignment on 14 August 2013 in which they transferred to Cortlandt "all right, title and interest to all claims, including ownership, proprietary, legal, equitable, and beneficial interests in all claims arising from, related to, or concerning the Sub Notes". It was also noted that:

> "… the assignors themselves also did not originally purchase the sub notes at issue, but it is alleged that the assignors were at all times authorized by the registered holders of the sub notes, such as Clearstream and Euroclear, to bring suit on the notes … This authorization allegedly is evidenced by the Euroclear operating rules, incorporated by reference to the indenture and the OM, which expressly authorize the assignors to bring suit on the notes … It is further evidenced by the "Statements of Account for the Purpose of Proof of Holding" … and "Certificates of Holding" issued by Euroclear and Clearstream, respectively, which allegedly confirm that the assignors are authorised to "maintain proceedings against issuer, guarantors, and any other parties"."

48. In respect of *Cortlandt I* it was noted at page 5 that to determine whether Cortlandt had standing to bring a claim in 2011, Justice Friedman first analysed the language of the no-action clause of the indenture which provided that only a "holder" of the notes may maintain an action to recover on the notes. Justice Friedman rejected an argument that Cortlandt, although not a registered holder of any of the notes, had standing because it was an assignee with "a right to collect".

49. In respect of *Cortlandt II* Justice Edmead determined that Cortlandt lacked standing to bring a breach of contract claim.

50. In respect of the Amended Complaint it was stated that Euroclear and Clearstream, described in that case as the registered holders of the sub-notes, had authorised the assignors and Euroclear had stated that the beneficial owners was authorised to maintain the proceedings related to sub notes on its behalf.

51. The conclusion of the court was as follows:

> "Accordingly, it is
> ORDERED that the motions (sequence number 009 and 010) of TPG Capital Management, L.P., David Bonderman, James Coulter, TPG Genpar IV, L.P., TPG Partners IV, L.P., TG Advisors IV, Inc., T3 Genpar II, L.P., T3 Partners II, L.P., T3 Parallel II, L.P., and Apax Partners, L.P. to dismiss the amended complaint are granted in part and denied in part as follows:
>
> (1) dismissing the amended complaint in its entirety as against David Bonderman and James Coulter because this court has no personal jurisdiction over the two defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and
>
> (2) dismissing the amended complaint's causes of action for fraud and breach of contract to the extent that such causes of action seek to recover damages related **[*53]** to sub notes registered to Clearstream because plaintiff has not demonstrated standing to pursue this action on behalf of Clearstream's registered holders; and
>
> The motions to dismiss are denied in part:
>
> (3) to the extent Cortlandt has demonstrated standing to pursue causes of action for fraud and breach of contract related to sub notes registered to Euroclear; and

(4) to the extent Cortlandt has alleged sufficient facts to survive dismissal of its claims related to causes of action for fraud and breach of contract against all named defendants **[**17]** except for David Bonderman and James Coulter."

52. In *Mackay Shield LLC v Sea Containers Ltd* 300 A.D. 2d 165 (2002) Supreme Court, Appellate Division, First Department, New York 19 December 2002 the headnote reads:

"(1) Since standing to sue upon indentures which plaintiffs seek to enforce is, pursuant to the indentures, expressly reserved to "holders" which indenture defines as those in whose name senior note is registered, and inasmuch as plaintiffs are not registered holders, they are without standing to sue, regardless of whether they are beneficial holders …

Concur-Nardelli, J.P., Tom, Ellerin, Friedman and Marlow JJ."

53. *Springwell Nav. Corp. v Sanluis Corporación, S.A.* 46 A.D. 3d 377 (2007) appears to have applied *Sea Containers* and the headnote reads:

"Plaintiff, beneficial holder of interest in note, had no right to sue upon indenture agreement for interest payments since indenture agreement specifically reserved that right to registered holder of note; nor did plaintiff have right to sue on note itself, inasmuch as plaintiff was not holder of negotiable instrument …

Plaintiff was the beneficial holder of a $ 1 million interest in an Unrestricted Global Note issued by defendant. The court properly found as such, plaintiff had no right to sue upon an indenture agreement for interest payments (see *McKay Shields v Sea Containers*, 300 A.D. 2d 165 [2002]), since that document specifically reserved that right to the registered holder of the Note …

Concur – Lippman, P.J., Andrias, Williams, Buckley and Malone, JJ ..."

54. In my judgment these authorities reflect the principles of privity of contract and the "no look through" principle. Moreover, despite the persistent protestations of the Petitioner and its reliance on *Cortlandt* and the terms of the indenture in that case, the evidence in the case before me does not establish that Euroclear was a registered holder of the Notes. The Holder in the case before me was CCB Nominees Limited.

The Euroclear "authority"

55. Initially the Petitioner put in a statement of account issued by Euroclear on 1 February 2023 but the correct name of the Petitioner was not specified. That plain error was unfortunate. A corrected version was issued by Euroclear SA/NV in Belgium on 13 February 2023 to HKMA Re: "Shinsun Holdings (Group) Co.," and headed "Statement of Account for the Purposes of Filing a Claim". It read as follows:

> "Dear Sir, Madam,
>
> We hereby certify that on 19 Jan 2023, HONG KONG MONETARY AUTHORITY had a holding of USD 50,000,000 principal amount of the captioned securities in Euroclear Securities Clearance Account 67255 with us. Please note that the above holding was blocked on 19 Jan 2023, as it was blocked from 17 Oct 2022 until 01 Feb 2023.
>
> Please note that the above holding has been blocked in such account as from settlement date 13 Feb 2023. This holding can be unblocked only at your request and only provided that you are able to meet any further requirements we may have for unblocking your holding in the circumstances under which your request is made.
>
> We also note that you have informed us that the above holding is allocated on your books to SHENWAN HONGYUAN STRATEGIC INVESTMENTS (H.K.) LIMITED. In accordance with normal procedures, such information is not reflected

in our books and therefore is not reviewed independently by us. Accordingly we cannot be held liable as to the accuracy of such information.

We 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."

The Law

56. I now refer to some of the relevant law.

Section 94 (1) (b) Companies Act

57. Section 94 (1) (b) of the Companies Act (2023 Revision) (the "Act") provides that an application to the court for the winding up of a company shall be by petition presented by "any creditor or creditors (including any contingent or prospective creditor or creditors)".

58. The Petitioner says that it is a contingent creditor. The burden of proof is on the Petitioner to prove that it is a "contingent creditor" within Section 94 (1) (b) of the Act.

GFN

59. Vos JA in *GFN Corporation Limited* 2009 CILR 650 addressed the question whether the court can or should make a winding up order on a creditor's petition based on a disputed debt without deciding, on a balance of probabilities, that the debt is in fact due and owing to the Petitioner (paragraph 36). The appeal raised squarely the question of whether the Chief Justice at first instance had been right to think that a creditor's standing could be established by showing a good arguable case for an indebtedness at the presentation stage

and nothing more as to standing on the hearing or whether the dispute as to whether the company was actually indebted had to be resolved at the hearing of the petition in favour of the petitioner if a winding up order were to be made (paragraph 43). Vos JA summarised important dicta in a number of cases between 1858 and 2009 and, in the context of that appeal, summarised the relevant principles as follows at paragraph 94:

> "94. Having summarized the important *dicta* in a number of cases between 1858 and the present day, I should summarize the principles that I believe emerge in relation to the present law as follows:
>
> (a) A person with a good arguable case that a debt is due and owing to him from a company may present a petition to wind up as a "creditor" under s.96 of the Companies Law.
>
> (b) The normal rule of practice is that the court will dismiss or stay a petition in circumstances where there is a *bona fide* and substantial dispute as to the existence of the debt upon which the petition is based.
>
> (c) In an appropriate case, however, the winding-up court can refuse to dismiss or stay the petition and can determine the question of a disputed debt in the petition itself.
>
> (d) Appropriate cases include those where the court doubts that the debt is actually disputed *bona fide* on substantial grounds, or where the creditor, if he established his debt, would otherise lose his remedy altogether, or whether other injustice might result.
>
> (e) Where the winding-up court decides to hear a petition based on a disputed debt, it will only make a winding-up order on the grounds that the company is unable to pay its debts or that it is just and equitable to wind up, having

determined that the petitioner is, on a balance of probabilities, a creditor of the company.

(f) The trilogy of Russian bank cases may constitute a single legitimate exception to para (e) above. It is, however, beyond the scope of this judgment to express a concluded view of the correctness of those decisions."

60. Vos JA at paragraph 101 stated that:

> "The court cannot wind up a company at the behest of [a] creditor without proof that his debt is, on a balance of probability, actually due and owing …"

adding at (b) that:

> "…since the legislature has laid down that only a creditor or contributory (or, in some cases, other specified persons) can present a petition to wind up, one would expect that creditor to establish his status before any final order is made at his instigation …"

61. It appears therefore that the Petitioner in the context of the case presently before me must, if it is to be permitted to progress the winding up petition, prove on a balance of probabilities that it is a contingent creditor.

62. What is the definition of a "contingent creditor" in this context? The statute does not provide a definition. We must therefore resort to the relevant caselaw.

Bona Film

63. McMillan J in *Bona Film Group Limited* (FSD unreported judgment 13 March 2017) accepted and followed the guidance of Buckley LJ in *Stonegate Securities Limited v*

Gregory [1980] 1 Ch. 576 and the statement: "… the expression 'contingent creditor' means a creditor in respect of a debt which will only become due in an event which may or may not occur" (page 579 E). Buckley LJ at pages 579 – 580 also gratefully adopted the statement of Ungoed-Thomas J in *Mann v Goldstein* [1968] 1 WLR 1091, 1098 – 1099:

> "For my part, I would prefer to rest the jurisdiction directly on the comparatively simple proposition that a creditor's petition can only be presented by a creditor, that a winding up jurisdiction is not for the purpose of deciding a disputed debt (that is disputed on substantial and not insubstantial grounds), since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court …"

Re William Hockley

64. Pennycuick J in *Re William Hockley Ltd* [1962] 1 WLR 555 in an oft quoted statement at page 558 stated:

> "The expression "contingent creditor" is not defined in the Companies Act, but must, I think, denote 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. (See Buckley on the Companies Act, 13th ed., notes at pp 460 to 462). It is necessary, therefore, to consider the nature of the petitioning creditor's rights as they stood at February 7, 1962 [the date the petitioning creditor presented the petition]". (my underlining)

65. *Re William Hockley Ltd*, a first instance English decision, was applied by the High Court of Australia (Barwick CJ, Kitto, Taylor, Windeyer and Owen JJ with Taylor J dying before the delivery of the judgment) in *Community Development Pty Ltd v Engwirda Construction* (1969) 120 CLR 455. Kitto J quoted the well-known extract above, noted that it was perhaps a definition of "a contingent or prospective creditor" and stressed:

> "The importance of these words for present purposes lie in their assistance 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." (my underlining)

66. Owen J reviewed various cases and concluded:

> "In the present case the appellant was, at all material times, under a contractual obligation to pay to the respondent the amount, if any, which might be found by an arbitrator to be due to it under the building contract. Whether or not that obligation would ultimately result in a debt becoming payable by the appellant to the respondent was dependent on a contingency, namely the making of an award in the respondent's favour by an arbitrator acting under cl 26 of the building contract. In these circumstances I am of the opinion that the respondent was, at the date of the presentation of the petition, a contingent creditor for the appellant." (my underlining).

67. I accept Mr Lowe's submission that *Re William Hockley* remains good law. I give just two recent examples. First, it was referred to by Norris J in *Green v SCL Group Ltd* [2019] 2 BCLC 664 at paragraph [89]:

> "A contingent creditor is a person towards whom, under an existing obligation, a company may or will become subject to a present liability upon the happening of some future event." (my underlining)

68. Second, Segal J in *Perry v Lopag Trust* (FSD; unreported judgment 23 February 2023) referred to *Re William Hockley Ltd* and the reference to the need for "an existing obligation".

Re SBA Properties Ltd

69. In *Re SBA Properties Ltd* [1967] 1 WLR 799 the headnote reflects that the Board of Trade brought an action in the name of a company for the recovery of damages against four defendants, one of which was a bank, in reliance of section 169 (4) of the Companies Act 1948 and subsequently petitioned under section 169 (3) of the Act for the winding up of the Company. The bank applied to strike out the action as having been brought without authority, the action was stood over pending the hearing of the petition in case the liquidator chose to ratify the proceedings in the action. On the hearing of the petition the bank applied for an order for cross-examination of a witness for the Board of Trade, the bank claiming to be entitled to be heard as a contingent creditor in respect of the costs of the action if that action was adopted by the liquidator. It was held at first instance by Pennycuick J in the Chancery Division of the High Court of England and Wales that the question whether a person was a contingent creditor depended on the circumstances existing at the date of the hearing, and as at that date nothing had been done by the company in the action so as to raise any contingent liability for costs, then notwithstanding the future possibility of ratification by the liquidator, the bank was not a contingent creditor and had no standing in the matter. In *Re Sutherland, decd* [1963] AC 235 HL was applied. Pennycuick J at page 803D stated:

> "It is not in dispute that any liability which the company may, through its liquidator, incur to the bank in the course of proceedings after the commencement of the winding up does not represent a contingent liability for present purposes."

Re Nortel

70. Mr Lowe also referred to *Re Nortel GmbH* [2014] AC 209 and the judgments of members of the Supreme Court of the United Kingdom. In that case the critical question was what constituted an "obligation incurred" for the purposes of rule 13.12 (1) (b) of the Insolvency Rules 1986 (paragraph 130).

71. Rule 13.12 (3) provided that for the purposes of references in the Act or the Rules about a 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 as a matter of opinion.

72. Lord Neuberger at paragraph 78 referred to *In re Sutherland, decd* [1963] AC 235 and at paragraph 79 quoted from Lord Reid at page 248 of the report of his judgment in *Sutherland*:

> "[I]f an Act says I must pay tax if I trade and make a profit, I am not before I begin trading under a contingent liability to pay tax in the event of my starting trading. In neither case have I committed myself to anything. But if I agree by contract to accept allowances on the footing that I will pay a sum if I later sell something above a certain price I have committed myself and I come under a contingent liability to pay in that event."

73. Lord Neuberger continued at paragraph 81:

> "81 It is true that in *In re Sutherland*, 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 *In re Sutherland* 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).

> 82 I note that the approach to contingent liabilities adopted in *In re Sutherland* was considered helpful in two cases concerned with insolvency law decided by judges experienced in the field: Pennycuick J *In re SBA Properties Ltd* [1967] 1 WLR 799, 802-803, and David Richards J in *In re T & N Ltd* [2006] 1 WLR 1728, paras 48-61…"

74. At paragraph 96 under the heading "Conclusion on the provable debt issue" Lord Neuberger indicated that he agreed with the judgment of Lord Sumption on this issue.

75. Lord Sumption referred to Rule 13.12 (1) (b) and at paragraph 131 stated:

> "131 The paradigm case of an "obligation" within the sub-paragraph is a contract which was already in existence before the company went into liquidation. It is implicit in the argument of those who contend on this appeal that there is no provable debt, in this case that contract is not just the paradigm case but the only one. Yet when one asks what it is about a contract that qualifies it as a relevant source of obligation, the answer must be that where a subsisting contract gives rise to a contingent debt or liability, a legal relationship between the company and the creditor exists from the moment that the contract is made and before the contingency occurs. The judgment of Lord Reid in *In re Sutherland, decd* [1963] AC 235 was concerned with a very different statutory scheme, but his analysis is nevertheless illuminating because it makes precisely this point at pp 247-248:
>
> > "It is said that where there is a contract there is an existing obligation even if you must await events to see if anything ever becomes payable, but that there is no comparable obligation in a case like the present. But there appears to me to be a close similarity. To take the first stage, if I see a watch in a shop window and think of buying it, I am not under a contingent liability to pay the price: similarly, if an Act says I must pay tax if I trade and make a profit I am not before I begin trading under a contingent liability to pay tax in the event of my starting trading. In neither case have I committed

> myself to anything. But if I agree by contract to accept allowances on the footing that I will pay a sum if I later sell something above a certain price I have committed myself and I come under a contingent liability to pay in that event.""

Re Dunderland Iron Ore Company, Limited

76. I should also briefly deal with an old English authority I brought to the attention of counsel, namely *Re Dunderland Iron Ore Company, Limited* [1909] 1 Ch 446. In that case a trust deed for securing debenture stock, made between the company and the trustees for the stockholders, provided that the company would pay half-yearly interest direct to the stockholders, whose receipt should be a good discharge to the trustees and the company. The certificate delivered to each stockholder stated the rate of interest and dates of payment, and certified that the stockholder was the registered holder of the stock which "is issued subject to the provisions contained" in the trust deed, but it did not contain any direct covenant with the stockholder to pay him the interest. It was held, on the basis of the English statutory provision then in force, that stockholders whose interest was in arrears were not entitled to present a winding-up petition as creditors under section 82 of the Companies Act 1862. Gore-Browne KC appeared for the petitioners and drew attention to the fact that clause 2 of the trust deed provided that the stockholders are to be regarded as the beneficial owners.

77. Swinfen Eady J put it to him that the petitioners were not covenantees and could not sue without the trustees. Gore-Browne, a big name in corporate law, retorted "Is that really necessary? They are equitable creditors for the 65l interest due and are entitled to give a receipt for it. Is that not sufficient to enable them to present a petition as creditors under s. 82?" Swinfen Eady J in an impressive concise *ex tempore* judgment unhesitatingly answered that question in the negative:

> "There is no covenant by the company with them. The covenant in the trust deed is between the company and the trustees … In my opinion the true legal position is

> that the debenture stockholders, although cestuis que trust, are not creditors of the company. They have not any direct contract with the company. The contract is between the company and the trustees, and in these circumstances I am of opinion that the petitioners are not creditors entitled to present a winding-up petition … (page 452). The fact that there is a covenant between the company and the trustees that the company will pay the principal and interest to the stockholders does not entitle them to sue the company as direct creditors and does not make them creditors entitled to present a winding-up petition."

Bio-Treat

78. Puisne Judge Geoffrey R Bell (as he then was) in *Bio-Treat Technology Limited v Highbridge Asia Opportunities Master Fund LP* [2009] SC (Bda) 26 Civ (28 May 2009) referred to various cases including *Re Dunderland Iron Ore* and in effect held that the investors in respect of certain bonds issued by the company in that case were not creditors or contingent creditors of the company. At paragraph 33 Bell J rejected a submission that Highbridge as the party with the underlying economic interest in the global bond could properly be regarded as being a creditor of the company. At paragraph 40 Bell J rejected a submission that Highbridge was an equitable creditor on the basis of its underlying economic interest holding at paragraph 44 that:

> "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."

79. In fairness I should record that Mr Basdeo for the Petitioner, in the case presently before me, did not submit that the Petitioner was a creditor in equity.

80. At paragraph 45 Bell J, sitting in Bermuda, referred to Highbridge's argument in that case which is remarkably similar to the Petitioner's argument in the case before me:

> "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 will become a current creditor, it is now both a contingent and/or prospective creditor of the Company."

81. Bell J referred to the Australian case *Community Development* and the English case *Re William Hockley* and at paragraph 47 stated:

> "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, it 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."

82. Bell J, in cogent terms, set out his finding on Highbridge's lack of status as a contingent or prospective creditor as follows:

"48. I have referred to the pertinent provisions of the exchange provisions. While there maybe some confusion of language, there is nothing in the relevant wording which suggest that an end investor such as Highbridge would have a direct right as against the Company in relation to the issue of definitive bonds. So the position does seem to me to be that until definitive bonds are issued in favour of Highbridge, there is no existing obligation owed by the Company to Highbridge.

49. Indeed, as Mr Hargun pointed out, this appears to have been Highbridge's understanding; when Highbridge wished to take advantage of the Company's default and convert its interest in the global bond to definitive bonds, it wrote not to the Company, but to the Bank of New York, by letter dated 25 February 2009, and it directed its notices towards the Bank of New York as opposed to the Company, in the following terms:

> "We hereby give BoNY notice that we require the Company to exchange the global bond for definitive bonds. We require BoNY to convey our direction to the Company and take all necessary steps to effect an exchange within the timeframe contemplated by the Bonds."

50. I do therefore accept that Mr Hargun's contentions on behalf of the Company, and find that, prior to the issue of 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 nor a prospective creditor of the Company, and hence does not have locus on this ground to present a winding-up petition."

Titan

83. Ian RC 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 *Re Bio-Treat* 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 but at paragraph 24 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 Technology Limited* [2009] Bda LR 29, particularly as regards the standing of contingent creditors to present winding-up petitions."

Two Cayman Orders without reasoned judgments

84. The Petitioner has produced no direct local Cayman judgment to directly support its position that a beneficial owner of notes rather than the actual holder of notes has standing to present and progress a winding up petition. The best it can do insofar as Cayman law is concerned is to refer to two orders in what it describes as "two factually identical cases upon the petition of a beneficial bondholder." The first is an order made on 18 June 2015 by Mangatal J in *China Forestry Holdings Co Ltd.* There is nothing on the face of that order which refers to the standing of the petitioner. The second is an order of Andrew Jones J made on 6 April 2016 in *LDK Solar Co. Ltd.* Again there is nothing on the face of that order which refers to the standing of the petitioner. Frankly I am not assisted by these orders that are not supported by reasons for judgment. It is not clear whether the standing of the petitioner was an issue in those cases or whether the court benefited from full or any argument on the standing issue. Moreover the facts of the cases and in particular the standing of the petitioners are not to be found in the orders but I have read the petitions which were provided in the voluminous material put before the court. In the *China Forestry* petition it is stated that:

"The Petitioners are creditors of the company by virtue of holding the ultimate beneficial interest in certain Notes .... issued by the Company and a presently exercisable right to convert this beneficial interest into a legal interest."

85. In the *LDK Solar* petition it is stated that:

"The Petitioners are contingent creditors of the Company by virtue of holding the ultimate beneficial interest in US$146,522,244 of the 2018 Notes, and having a contingent right to delivery of physical securities for exchange of their interests in the global security."

86. There is also reference to the petitioners being holders of American Depository Shares issued by the Company which represent ordinary shares of the Company.

87. It is added that "the Petitioners, having a right to individual, definitive Physical Securities, are therefore contingent creditors of the Company, the contingency being the issue and delivery of the Physical Securities."

88. It seems to be common ground that in each of these cases the petitioners were presented by beneficial owners of similar notes. Reference is made to an email dated 10 October 2022 from Walkers, the attorneys representing the Petitioner, to Appleby, the attorneys representing the Company:

"... only winding up orders were made. The petitions in *China Forestry* and *LDK* were ultimately unopposed and no written judgments were handed down."

89. Mangatal put it well in *Re Homeinns Hotel Group* 2017 1 CILR 206 at paragraph 7 when she stated:

"It is trite that generally, not just in this area of the law, orders made by consent (and therefore not the subject of a 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 …"

90. The Petitioner says it is a contingent creditor because it has a present right due to the operation of the Clearing Systems to instruct the Participant to request delivery of Certificated Notes, which, if exercised, would make it a "Holder" of the Notes.

91. The Company says that it is the Petitioner's standing 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. The Company adds that, in other words, the Petitioner presently has no standing at all, and will not unless or until the "contingency" which would give it standing actually happens.

Some English cases on standing and schemes of arrangement

92. The Petitioner refers to a line of first instance English authorities (including in *Re Co-operative Bank Plc* [2013] EWHC 4072 (Ch), *Gallery Capital SA* [2010] WL 4777509 (Ch) and *Re Castle Holdco 4 Limited* [2009] EWHC 3919 (Ch)), in the context of section 895 of the Companies Act 2006 of England and Wales, in which judges sitting at first instance in the English High Court have determined in effect that beneficial owners of global notes should be treated as contingent creditors and therefore entitled to vote at the relevant scheme meetings.

93. Norris J in *Castle Holdco 4* stated:

"22. Being satisfied as to the categories of meeting, I turn briefly to consider the composition. 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.

23. 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 owner. Indeed the security documents themselves contain a provision that Castle Holdco shall treat the common depository or its notminee 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.

24. 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."

94. Hildyard J in *Re Co-operative Bank plc* pragmatically and with commercial awareness which is typical of English commercial judges dealt with what he called a "wrinkle" as follows:

"36. It remains for me to determine matters of procedure in respect of the single class meeting. In that regard there is one what one might call a wrinkle. This is that instead of the trustees under the trust deeds on which the notes are held voting, it is proposed that those beneficially interested in the relevant debt instruments should vote in the place of trustees, who will therefore not vote.

37. This caused me some initial anxiety, since of course the statutory enabling of a scheme depends upon the votes of creditors by the prescribed margin. I was concerned lest, for all the economic sense of the matter, nevertheless persons beneficially interested under a trust might not be considered to be creditors for the purposes of the statutory jurisdiction.

38. I was assisted in this regard by reference to three decisions of Mr Justice Norris: *In the matter of Castle Holdco 4 Limited* [2009] EWHC 3919 (Ch), *In the matter of Gallery Capital SA* and *In the matter of Gallery Media Group Limited* [2010] WL 4777509. None of those schemes was opposed , so the Judge did not have on either occasion the benefit of dialectic argument, but nevertheless the conclusion that he reached (which was that in the particular context the beneficiaries could be treated as contingent creditors and that as such they could be treated as creditors for the purpose of the relevant provision in the Act) seems to me to be both logical and justified. I say that with diffidence, but his reasoning seems to be entirely justified.

39. I note also that in the case of *Re T&N Limited and others* [2005] EWHC 2870 (Ch) Mr Justice David Richards included contingent creditors within the definition of creditors. That appears also to be justified by subsequent authority: the right of those beneficially interested to call for the legal interest is analogous to the position of a contingent creditor.

40. 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." (my underlining)

95. Norris J in *Gallery Capital* stated:

> "8. Some brief comment is required as to who those holders are. In the way that is now customary, 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 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" <u>for the purposes of a scheme of arrangement</u>, 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 underlining)

96. I also note the comments of Miles J in *Re New Look Financing Plc* [2020] EWHC 2793 (Ch) in the context of scheme creditors. In that case the company was the issuer of notes

pursuant to a New York law governed indenture. At paragraph 4 the judge noted that the holders of the notes and "the beneficial holders of those notes entitled to the issue of definitive notes are the Scheme Creditors under the term of the Scheme. As is customary in schemes involving such notes, only the beneficial holders shall vote on the Scheme. The other holders of the legal rights to the notes, including GLAS Trustees Limited as trustee, have confirmed in writing that they will not vote on the Scheme."

97. At paragraph 34 Miles J adds:

> "It is well established that beneficial owners of notes held through a clearance system are capable of voting on a scheme of arrangement. It is sufficient if a beneficial holder of notes is a contingent creditor of the issue provided that the security documentation contains a mechanism by which he can upon request or on default become a direct creditor of the issuer (here, the Company). I am satisfied that this applies to the SNNs [Senior Secured Notes] in the present case. As I have already indicated, to the other potential Scheme Creditors, such as the trustees under the Indenture, have indicated in writing that they will not vote, so there is no risk of double counting."

98. These commercially pragmatic judicial decisions at first instance on voting rights and schemes need, I would respectfully suggest, to be treated with caution and confined to their context. As Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at paragraph 28 and many others have stressed in law context is everything. In these schemes of arrangement cases all parties wished the beneficial owners to be counted and their standing was not contested. I do not think it safe to apply them in the present context before the court.

Re Asia Momentum

99. Prior to the hearing I referred *Re Asia Momentum Fund (SPC) Ltd (in Voluntary Liquidation)* (FSD unreported judgment 6 April 2022; Kawaley J) to the attention of

counsel. Unsurprisingly, Mr Basdeo seized the opportunity to place great reliance upon it whilst Mr Lowe sought to distinguish it and in effect suggested that it should be restricted to its own facts and circumstances and had no application to the case presently before the court. The headnote in *Re Asia Momentum* refers to the broad context being a presentation of a petition to convert a voluntary liquidation into a liquidation under the supervision of the court and the petition being presented by the beneficial owner of the sole investor in the relevant company. Kawaley J accepted that it was fundamental to the jurisdiction to grant a Supervision Order that the petitioner "should establish its position standing as a contingent creditor." The JVLs submitted that the petitioner "as a mere beneficial owner of shares in the Company could not itself assert a claim against the Company." Kawaley J stated:

> "19. I did not find *In the matter of Exten Investment Fund (IVL)*, FSD 96 of 2017 (IMJ) to be of assistance in relation to the narrow standing point which arises in the present case, although I am guided by it in accepting the broader principle that a contingent creditor (as well as an actual creditor) qualifies as a petitioner under section 131. The Petitioner's counsel more aptly relied upon my own recent decision in *Re Adamas Heracles Multi Strategy Fund*, FSD 133 of 2021 (IKJ) in relation to a winding-up application. Although that application was not opposed, I recorded the following findings:
>
> > "*12. The Companies Act (2021 Revision) section 94(1) (b) confers standing to petition on 'any creditor or creditors (including any contingent or prospective creditor or creditors)'. A qualifying creditor clearly has standing to seek to influence the Court's decision on the identity of the JOLs to be appointed on the winding-up of a company.*
> >
> > *13. In my judgment the requisite standing requirement clearly has been made out in both evidential and legal terms. AOF is a contingent and/or prospective creditor of Heracles since*

having given notice to terminate its custodian agreement with HSBC it will in the foreseeable future acquire the rights of a redemption creditor now legally held by its nominee."

20. In *Adamas Heracles*, the registered shareholder's status as a creditor was not in doubt and I found that the beneficial owner was a contingent creditor because it would "*in the foreseeable future*" acquire the rights held by its nominee as a redemption creditor. Although the reasoning was somewhat thin, the fundamental conclusion was that the prospect of the beneficial owner/petitioner acquiring whatever rights the registered shareholder possessed by virtue of its status as a nominee conferred on the petitioner the standing of contingent creditor. The contingency in that instance was not whether or not potential claims against the respondent company would succeed; rather it was whether or not (or rather precisely when) the beneficial owner would acquire the legal rights held by its nominee in relation to its redemption claim, having given notice to terminate the nomineeship contract. My analysis (but not the result) might well have been somewhat different had I been able to consider the Court of Appeal's decision in *Lancelot*.

21. I accordingly find based primarily on *Re Lancelot Investors Fund, Ltd (in Official Liquidation)* (Unreported), CICA 27/2013, 27 April 2015, that the general legal principles on the standing of a beneficial owner to seek relief as a creditor against a company which is in liquidation may be summarised as follows:

(a) where shareholder rights have been extinguished because redemption has taken place but the nominee shareholder has not been paid, the nominee shareholder has the right to prove as a

redemption creditor in the liquidation even if the nomineeship agreement still subsists;

(b) the beneficial owner has standing to prove as equitable assignee of the nominee's (legal) redemption claim;

(c) where a shareholder's rights have been extinguished because redemption has taken place and the nominee shareholder has been purportedly fully paid, the nominee shareholder has the right to prove as a contingent creditor in the liquidation of any alleged shortfall or any other sums considered to be due and the beneficial owner also has standing to prove as equitable assignee of the nominee's contingent claim;

(d) where the beneficial owner has the right to prove in a company's liquidation as equitable assignee of its nominee, it also has the standing to petition as an actual or contingent creditor, as the case may be, either to wind-up or obtain a supervision order. It matters not whether or not the nomineeship agreement is still in effect or has been terminated.

22. How these general principles fall to be applied in practice will be subject to the exigencies of the peculiar factual circumstances of each case. However, in many cases (because of the standardization of articles of association and nomineeship agreements) the legal terrain may often be broadly the same …

26. In my judgment it was clear that the factual position could be viewed in either of the following main ways:

(a) the nomineeship agreement came to an end in relation to the shares held by the nominee for the benefit of the Petitioner when redemption occurred under the implied terms of the contract. The legal right to assert any claims against the company derived from the shares (including proving in the Company's liquidation) reverted to the Petitioner when redemption occurred; **or**

(b) the nominee retained the legal ownership of all rights of action against the Company derived from the shares, but the Petitioner was entitled to terminate the nomineeship agreement upon reasonable notice with the result that any such legal rights would revert to the Petitioner. The Petitioner accordingly had the standing as equitable assignee of the former registered shareholder's legal rights to exercise all rights as a creditor against the Company, despite the fact that such rights were derived from the shares. Because even if the contractual obligation to return all such rights to the beneficial owner under the nomineeship agreement had not been triggered by a valid termination notice, in equity the nominee had an obligation to return such rights which were at all times held on trust for the Petitioner.

27. Irrespective of whether case (a) or (b) in the preceding paragraph applied, the Petitioner had standing to petition as a creditor because, post-redemption, no question of the legal relationship between the registered shareholder and the Company arose as a live issue. The legal rule that prohibits a company from taking cognizance of anyone other than the registered shareholder and generally impedes a beneficial owner from asserting shareholder rights against a company is simply not engaged beyond the scope of the shareholder/company relationship."

Re Lancelot

100. In *Re Lancelot Investors Fund Limited (in official liquidation)* 2015 (1) CILR 328 the Cayman Islands Court of Appeal (Chadwick P, Mottley and Martin JJA) considered the issue as to whether the appellant had standing to appeal against a rejection of a proof of debt. Martin JA at paragraph 17 stated:

> "There is no doubt that in ordinary circumstances the rights attaching to shares may only be pursued by the registered shareholder … The principle is also the foundation of the rule that only a registered shareholder may bring proceedings to vindicate shareholder rights …"

101. At paragraph 19 Martin JA added:

> "It seems to me, however, that the position changed when the company went into liquidation. At that point, all claims against the company – including Fortis's claim to the redemption proceeds of the PS-1 shares – became provable in the winding up. The various claims would rank for dividend, and, by virtue of O.18, r.9 (1) of the Companies Winding Up Rules 2008, the right to receive a dividend is assignable … If, therefore, Fortis validly assigned the benefit of its proof to KBC, KBC will be entitled to be treated as a creditor in relation to the proof, and entitled as a creditor to appeal to the court under O.16, r.17 of the 2008 Rules against the rejection of the proof."

102. Martin JA at paragraph 22 referred to the legal relationship between the relevant parties including a custodian agreement. Martin JA stated:

> "22. I accept that the relationship between Fortis and KBC during the currency of the custodian agreement was that of bare trustee and beneficiary. The terms of the agreement make clear that Fortis was a mere nominee, with no interest of its own in the assets it held and no decision-making powers. However, so long as Fortis's

rights in respect of the company were in its capacity as shareholder, the company was not obliged to recognize the trust relationship between Fortis and KBC, and KBC could not have maintained an action as equitable assignee. Once Fortis's relevant capacity changed to that of proving creditor, however, there was no obstacle to KBC maintaining a claim as equitable assignee, even while the custodian agreement continued. Once it came to an end, the provisions of cl. 13.6 took effect as a separate equitable assignment – arising not from the bare trust that had previously prevailed, but from the obligation to transfer everything to KBC. That obligation was to transfer in due form, contemplating a registered transfer of any shares and a formal assignment of the benefit of the proof, and if that had been done, there would have been a legal assignment of the benefit of the proof once notice had been given to the official liquidator. Before it was done, however, the obligation to do so took effect in equity, giving rise to an equitable assignment to KBC. An equitable assignee may sue in his own name, although it is necessary that the assignor be joined in the proceedings prior to judgment so as to be bound by the result: see *Roberts v. Gill & Co.* (5) ([2011] 1 A.C. 240, at para. 67). Moreover, although this is less clear, it seems to me that an equitable assignee has the benefit of the debt and so is, subject to giving notice, entitled to be regarded as a creditor for the purpose of O.16, r.17 of the 2008 Rules and as such entitled to maintain an appeal (subject again to joinder of the assignor).

23. In my judgment, therefore, KBC was in principle entitled to maintain a claim as equitable assignee of the benefit of Fortis's proof of debt, and in consequence had standing to appeal against the rejection of the proof. The claim could only have succeeded (if justified on other grounds) if Fortis had been joined as a party prior to judgment, but evidence adduced (without objection) on this appeal suggests that it would have been willing to be joined, and there would have been no good reason to refuse permission for its joinder."

103. As with most of these cases a significant amount turns on the express wording of the relevant agreements. In our case the express wording of the Indenture is of significant importance.

The "no look through" principle; privity of contract and section 8 of the New York Uniform Commercial Code Law

104. David Richards LJ in *Secure Capital SA v Credit Suisse AG* [2017] EWCA Civ 1486, as a matter of English law, considered the issue as to whether an investor with an interest in Notes issued in bearer form and held through the Clearstream system had a direct claim for breach of contract against the Issuer of the Notes. The judgment did not concern the issue of standing to present winding up petitions but made informative comments about the Clearstream system and the position of investors, seen through English law eyes.

105. David Richards LJ at paragraph 33 noted that the judge at first instance correctly characterised the issue as contractual and had held that it was to be decided according to English law as the proper law of the contract. At paragraph 36 David Richards LJ commented:

> "The judge considered the works of notable academic and industry commentators which were unanimous in their view that, in the case of immobilised securities, the ultimate investor does not have a cause of action directly against the issuer, unless otherwise provided by the term of the Notes and ancillary documents."

106. At paragraph 8 David Richards LJ referred to "Clearstream, like Euroclear based in Belgium, operates an electronic trading system for interests in securities."

107. At paragraph 9 David Richards LJ refers to the appeal concerning securities represented by a bearer note and "a descending succession of interests."

108. At paragraph 10 David Richards LJ states:

> "The system operates on the basis of a "no look through" principle, whereby each party has rights only against their counterparty. Payments of sums due on the securities were made by the issuer or other payer to Clearstream which then makes payment to the Account Holders in respect of their recorded interests. The Account Holders pass on the appropriate sums to their Account Owners."

109. At paragraph 47 David Richards LJ referred to the "no look through provision" as "fundamental to the workings of the settlement systems in interests in immobilised securities."

110. It appears from paragraph 56 that the investor advanced an argument that, unless the law of the settlement system is identified as the proper law, there would be no-one able to recover substantial damages in contract for breach of contract thus creating a lacuna and conferring immunity on the issuer. David Richards LJ at paragraph 57 stated that a lacuna could not in any relevant sense be said to exist if it is precisely the consequences of the express terms of the Notes and ancillary documents.

111. The investor proposed a "novel conflicts rule for immobilised securities" (paragraph 58) and submitted (paragraph 59) that "its approach accorded with commercial realities and expectations and with the nature of an immobilised bearer security and the manner in which it is intended to function in practice."

112. David Richards LJ gave such assertion short shrift stating at paragraph 59:

> "This assertion is unsupported by evidence or academic or other literature. It is contradicted by the extensive literature to which the judge referred to in his judgment at [58], which emphasises that the purpose of immobilised securities is to prevent a direct link between investors and the issuer. It is apparent from the literature that market participants operate on this basis."

113. Irwin LJ and Beatson LJ agreed.

114. Realistically conscious that the court would be guided by some general background commentary in this area from textbok writers as indeed were Hamblen J, and Richards LJ, Beatson LJ and Irwin LJ in *Secure Capital*, Mr Lowe helpfully brought to the court's attention a couple of textbooks. I fully appreciate that these texts deal with the position under English law as opposed to the position under the law of New York. London and New York are however two major players in international finance and it is unsurprising that useful guidance can be obtained from some of the English commentators in this area of international finance. Richard Salter KC in contributing chapter 7 entitled "Enforcing Debt Securities" to *Intermediation and Beyond* (2019) edited by Louise Gullifer and Jennifer Payne, starts the second half of paragraph 1 of that chapter by stating at page 129:

> "Many investors (in the terminology used in this book 'ultimate account holders' (UAHs)) still think that they own the notes and other securities that they buy. They think that they are actually buying the notes or other securities in which they are investing, and are highly surprised to learn, when things go wrong, that all they have is the ultimate economic interest, and not any actual ownership or other rights against the issuer."

115. At footnote 4 the author refers to an observation from R McCormick and C Stears *Legal and Conduct Risk in the Financial Markets* 3rd edn (Oxford University Press 2018) at 26.07:

> "[The investor] no longer has any direct contractual relationship with [the Issuer] at all, as a matter of law. Commercially, however, he still regards himself as an investor in the company."

116. At page 132 Mr Salter states:

> "The conventional legal analysis of this structure is that it separates the issuer of the securities from the ultimate investor in those securities, the UAH, so that there

is no relationship between the investor and the issuer, only between the investor and its own immediate intermediary."

117. At page 138 having considered *Secure Capital* Mr Salter stated:

"The result is that, in most circumstances, the only person entitled to sue the issuer of the notes governed by English law will be the common depositary – a party with no interest whatever in doing so …"

118. Mr Salter at page 138 refers to words which he credits to Goode and Gullifer:

"[t]he benefits of the 'no look through' principle are structural and contribute greatly to the efficient operation of the system and, to a large extent, to legal certainty."

119. Mr Salter at page 139 states:

"Unfortunately, while the 'no look through' principle may well be to the advantage of issuers and intermediaries, it has many disadvantages for UAH investors in debt securities. These investors are by no means all themselves also issuers or intermediaries. They are, however, the ones who get the downside of the advantages that this principle confers on others, even though they are also the ones who ultimately pay the price of the securities and bear the economic risk."

120. Mr Salter at page 140 refers to the legal problems which the concept of the "descending succession of interests" and the "no look through" principles cause for the ultimate investors in debt securities as having been apparent from the start. Mr Salter refers to comments from Roy Goode to the effect that: "an indirect investor" cannot enforce any rights directly against the issuer.

121. Mr Salter at page 142 states:

> "From the point of view of many UAH investors, however, the major drawback of the 'no look through' approach is that all rights to sue the issuer are held and excercisable only by the bearer of the note – either the ICSD or the depository – not by any of the intermediaries involved, and certainly not by the UAH. It is a principle of English trust law that beneficiaries can look only to the own trustee, not to that trustee's trustee; and, as *Secure Capital* confirms, this means that investors can only claim against their immediate intermediary, and not against a sub-custodian, an intermediary higher up the chain, or the issuer."

122. At page 144 Mr Salter under a heading regarding agency notes that there may be no one who has both the right to enforce the bonds and an interest in doing so. Mr Salter refers to the need "for someone other than the UAH (who has no right to do so) to initiate formal insolvency proceedings…"

123. At footnote 83 on page 148 Mr Salter notes that recent decisions such as *Secure Capital* "suggest that the English courts, given their traditional preference for certainty, are likely to continue to give precedence to the formal legal structure over the economic realities in such cases." Lord Reed in *Departing from Precedent: The Experience of the UK Supreme Court* (20 January 2023) referred to one of the problems which confronts any final court of striking "a balance between ensuring legal certainty, through the consistency of its decisions, and ensuring the continued relevance of its case law in the face of changing conditions." Certainty is indeed important in many areas of the law and is of special importance in the corporate and commercial fields. Investors and others need to know exactly where they stand.

124. I stress that I fully appreciate that Mr Salter and the next authors I shall come to are setting out the position as a matter of English law rather than New York law but as Mr Lowe and Andrew Jackson note, at paragraph 11 of their helpful skeleton argument dated 21 February 2023:

> "It is unsurprising that such principles would apply under New York law in matters of international finance."

125. Mr Glosband, the Company's expert, candidly admitted that he had not heard of the "no look through" principle but did refer to the contractual position and the well known concept of privity of contract upon which the "no look through" principle appears to be founded or at least supports. Mr Kane, the Petitioner's expert, was not familiar with the "no look through" principle either but accepted that as "a general matter" New York law applies a rule of privity of contract.

126. Mr Lowe also referred the court to Goode and Gullifer on *Legal Problems of Credit and Security* (Sweet & Maxwell Seventh Edition 2023) edited by Professor Louise Gullifer which at paragraph 6-27 on page 275 referred to the "No look through principle" as follows:

> "Under English law, and many other legal systems, the investor's right of co-ownership (or single ownership) and the other rights embodied in the securities entitlement discussed above is treated as a separate bundle of rights exercisable only through and against the investor's own intermediary. The account holder thus has a relationship exclusively with its own intermediary and neither it nor its secured or execution creditors can assert rights against higher-tier intermediaries or the issuer. This is known as the "no look through" principle."

127. Professor Gullifer at page 275 adds, again under the heading "No look through principle" that:

> "The concept of the securities entitlement under UCC art. 8 and the bundle of rights defined in the Geneva Securities Convention art. 9 identify the securities intermediary as the exclusive source of the customer's rights and remove the temptation to think of it as having rights which are traceable up the chain of intermediaries."

128. At page 277 Professor Gullifer refers to an account holder's lack of direct rights against the issuer of the securities.

129. Mr Glosband referred to Section 8 of the New York Uniform Commercial Code Law ("UCC"). Under Section 8-501 of the UCC the Petitioner (an entitlement holder) acquired a security entitlement when the securities intermediary indicated by book entry that a financial asset had been credited to its securities account. It is further provided that an entitlement holder's property interest with respect to a particular financial asset may be enforced against the securities intermediary only by the exercise of the entitlement holder's rights under Section 8-505 through 8-508 of the UCC. Under Section 8-505 of the UCC a securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. Under Section 8-506 of the UCC a securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder.

Submissions

130. I have considered all the written and oral submissions put before the court in this case. It should be obvious from the Law and the Determination sections of this judgment the submissions I have accepted and those I have rejected and the reasons for such acceptance or rejection.

The main written submissions made on behalf of the Petitioner prior to the hearing

131. The following is taken from the skeleton argument of the Petitioner dated 18 January 2023:

(1) it is agreed that the Petitioner is not a Holder under the Indenture;

(2) the Petitioner can take action via the Euroclear and Clearstream clearing systems (the "Clearing Systems") making further analysis as to New York law irrelevant;

(3) the Petitioner has an economic interest in the Company which is held in a common cleared bond structure;

(4) the Petitioner is a contingent creditor as a matter of Cayman Islands law because it is able to obtain Certificated Notes utilising the chain of instructions via Clearing Systems (and thus would itself become a Holder of the Notes);

(5) there is no contractual prohibition on the presentation of the petition which is binding on the Petitioner, because the Petitioner is not a Holder bound by the terms of the Indenture;

(6) as a matter of New York law as referred to in the expert evidence the Petitioner is a creditor and is expressly authorised to bring these proceedings. The Petitioner requests that the court make a winding up order based on the contingent creditor analysis;

(7) while the traditional way to bring proceedings against an issuer in a global structure would be for the trustee to do so, this is not necessary. The Petitioner was asked to pay up to US$500,000 as a retainer for the Trustee to commence these proceedings (depending "on the actions that the noteholders instruct the trustee to take"; email 25 March 2022 China Construction Bank (Asia)). Accordingly, the Petitioner decided to commence these proceedings itself. To the extent necessary, the Trustee has indicated that it will substitute into the petition but the Petitioner says this court has jurisdiction to make a winding up order in any event;

(8) it is notable that the Grand Court has previously made winding up orders in two factually identical cases upon the petition of a beneficial bondholder (*China Forestry Holdings* and *LDK Solar*);

(9) the Petitioner is a contingent creditor with standing to present the winding up petition; alternatively the Petitioner is duly authorised to bring proceedings in the Cayman Islands;

(10) there is no dispute that an event of default has occurred;

(11) with respect to the Holder's right to request a Certificated Note, the Petitioner is entitled to instruct HKMA as its Participant, and HKMA can then instruct Euroclear, and if HKMA does so then Euroclear will not exercise any discretion with respect to the taking of any action with respect to the Global Note;

(12) the Petitioner is a contingent creditor because it has a present right due to the operation of the Clearing Systems to instruct its Participant to request delivery of Certificated Notes, which, if exercised, would make it a "Holder" of the Notes;

(13) upon the notes becoming immediately due and payable the Petitioner is entitled (by way of a request by the Holder via the Clearing Systems) to Certificated Notes (pursuant to sections 2.04 (e), 2.06 (b) and (c), 6.01 and 6.02 of the Indenture);

(14) the Petitioner would, if certain contingencies were satisfied, become a direct creditor of the Company. These contingencies are (i) the execution of the Certificated Notes by the Company; (ii) the delivery of an Officer's Certificate to the Trustee by the Company, and (iii) the authentication and delivery of the Certificated Notes to the Petitioner by the Trustee following a request by the Holder, resulting in the Petitioner itself becoming the Holder of the Notes. Here the contingencies can be satisfied:

(a) the Notes are immediately due and payable; and
(b) the beneficial holder can (via its Participant in Euroclear, HKMA) give any necessary instruction to Euroclear to seek the same;

(15) the contingent claim analysis as a matter of Cayman Islands law does not require either (a) an actual request by the Holder for the Certificated Notes to have been made; and/or (b) a request by the beneficial holder to the Holder as nominee for the Common Depository (or on behalf of the Holder) for Certificated Notes to have been made;

(16) it cannot be said that the Petitioner will never be entitled to Certificated Notes;

(17) as such the Petitioner is a contingent creditor as a matter of Cayman Islands law;

(18) the Notes are due and payable; and

(19) reference is made to a trilogy English cases (*Re Co-operative Bank plc*, *Gallery Capital* and *Re Castle Holdco 4*) on schemes in which the English court has determined that the beneficial holders of such notes should be treated as contingent creditors and therefore entitled to vote at the relevant scheme meetings.

132. The following is taken from the written submissions of the Petitioner dated 21 February 2023:

(1) the Petitioner has a legitimate interest in the affairs of the Company as the underlying beneficial holder of the Notes. It is a contingent creditor. There are several contingencies, each of which are sufficient to prove its standing as a contingent creditor of the Company (actually, or alternatively on the balance of probabilities), but primarily the contingency of the delivery of the Certificated Notes to it;

(2) the Petitioner may act via the Clearing System to instruct the Holder to exercise its rights under the Indenture. Having this contingent right makes the Petitioner a contingent creditor, if the Notes are due and payable. The Notes are due and payable. Accordingly, the Petitioner can (a) instruct the Holder via the clearing systems to make the necessary written request or (b) demand for Certificated Notes, meaning that the Petitioner is a contingent creditor as a matter of Cayman Islands law;

(3) further and/or alternatively, the Petitioner has been authorised by Euroclear (as the principal) of CCB Nominees Limited (as the nominee) via the Enhanced Consent

Letter which "must be sufficient". The Holder is the nominee of the principal, Euroclear. Accordingly, the nominee could act on the instructions of its principal. The nominee would not refuse to act on instructions from its principal and act outside its agreed operating procedures. The Enhanced Consent Letter is clear evidence of an instruction/authorisation from the principal (Euroclear) that permits the Petitioner's actions. The strict reliance on instructions emanating from the Holder intrinsically ignores the overarching infrastructure created by Euroclear. CCB Nominees Limited is not an entity with its own agenda and protocols. It is a function of the wider Euroclear procedures;

(4) even if the authorisation is not sufficient and an additional letter from the Holder is required, this is merely an additional contingency that the Petitioner need ask Euroclear (via its nominee) to issue a direct authorisation to the Petitioner;

(5) the Petitioner made the commercial decision to bring these proceedings itself, as a contingent creditor (or as an actual creditor authorised by the Holder via Euroclear) so as to control the proceedings and avoid a hefty upfront cost to the Trustee (as agent for the Holder);

(6) the Petitioner's position is that while it can instruct the Trustee to bring the petition (via an instruction to the Holder using Clearing Systems) it does not need to – all it needs to do is to be able to give an instruction to the Holder using the Clearing Systems to request either a proxy or the written request for the Certificated Notes, for the latter which the Company is then obliged to deliver to all beneficial holders under Section 2.06 (b) of the Indenture;

(7) if the Petitioner cannot use the Clearing Systems to instruct the Holder, with the Holder then empowered to instruct the Trustee to take action then there is no party with an economic interest in bringing enforcement proceedings with respect to the defaulted Notes with such power meaning that no one will seek repayment upon a default;

(8) Mr Glosband at 16-3 of the joint memorandum says "At best, it (the Petitioner) has a contingent right to receive Certificated Notes if a Holder makes demand on the Company under the circumstances stated in Indenture 2.04 (e) …" Having the contingent right makes the Petitioner a contingent creditor, if the Notes are due and payable;

(9) the Petitioner has established, via the chain of authority, its legitimate interest in the affairs of the Company, its status as a contingent creditor of the Company and/or the authorisation given to it to bring these proceedings based on the debt owing under the Notes that it has the requisite standing;

(10) the Notes have been accelerated and are due and payable (being the condition required for the issuance of the Certificated Notes);

(11) the Trustee validly accelerated the notes;

(12) the Petitioner was authorised to instruct the Trustee to accelerate the Notes;

(13) the Notes have been automatically accelerated pursuant to the plain language of the Indenture (section 6.01 (g));

(14) the Petitioner does not dispute that Article 8 of the UCC, entitled Investment Securities, establishes the legal structure of the Petitioner's beneficial interest in the Notes;

(15) the Petitioner is authorised to bring these proceedings in accordance with the Enhanced Consent Letter;

(16) the 2022 *Cortlandt Street* Decision of the New York Court of Appeal confirms that an authorisation given by Euroclear is sufficient authority; and

(17) the Petitioner's position is that:

(a) it is a contingent creditor because it has the right to direct the Holder to request Certificated Notes or to provide it with a proxy utilising the Clearing Systems and the chain of authority provided therein;

(b) in the alternative, it is a creditor because it has been authorised by Euroclear to bring these proceedings, either:

(i) by the Euroclear Operating Procedures, which are binding on the Company pursuant to Article 8 of the UCC and/or

(ii) by the Enhanced Consent Letter;

(c) the Trustee had the power to accelerate the Notes of its own accord, it in fact accelerated the Notes and this has been accepted by the Company.

The main post hearing supplementary written submissions made on behalf of the Petitioner

133. I gave the Petitioner an inch and it took a mile in its lengthy post hearing supplementary written submissions and the further additional authorities it refers to, which went well beyond the leave the court gave to it to concisely respond to the additional authorities provided by the Company on the second day of the hearing. The Petitioner made the following main points:

(1) *Nortel* does not establish that a contingent creditor requires a pre-existing direct legal relationship between the debtor and creditor;

(2) *Bio-Treat* should not be followed in the Cayman Islands;

(3) the Court should adopt a broad definition of what constitutes a contingent creditor and should follow *Re Adamas Heracles Multi Strategy Fund* (FSD unreported judgment 10 August 2021, Kawaley J), *Re Asia Momentum* and *Re Lancelot Investors Fund Limited*,

KBC Investments Limited v Varga (as official liquidator of the company) [2015 (1) CILR 328] (CICA) on which *Re Adamas Heracles* and *Re Asia Momentum* are based;

(4) the definition of creditor is not materially different in the scheme and winding up contexts;

(5) the Petitioner is the ultimate beneficial holder of the Notes and a "beneficial owner" referred to in Section 2.06 (b) of the Indenture entitled to receive the Certificated Notes under Section 2.04 (e) (iii) of the Indenture;

(6) the Court should either find that the Euroclear authorisation is sufficient as a matter of New York law or alternatively follow the Cayman judgments rather than a single anomalous Bermudan case and find that the Petitioner has standing as a contingent creditor because it has the right to receive the Certificated Notes (by directing the Holder, which is CCB Nominees as nominee for China Construction Bank (Asia) Limited, the Common Depository for Euroclear and Clearstream, to request Certificated Notes or to provide it with a proxy utilising the Clearing Systems and the chain of authority provided therein); and

(7) the Court should adopt the modern wide approach to the definition of a contingent creditor for the purposes of winding up as well as schemes and find that the Petitioner has standing to present the petition.

The main written submissions made on behalf of the Company prior to the hearing

134. The following is taken from the Company's skeleton argument dated 20 January 2023:

(1) the appropriate conclusion to be reached on the facts, and in light of the expert evidence of New York law, and as a matter of Cayman Islands law, is that the Petitioner lacks standing;

(2) Mr Glosband opined that the Trustee's acceleration notice dated 1 April 2022 was a nullity, having been issued on the instructions of a non-Holder, such that the Notes are not immediately due and payable. It may also be observed that the Trustee was acting under the misapprehension that the Petitioner was a Holder;

(3) it is fundamental (see *Re William Hockley* and the reference to "an existing obligation" and *Re SBA Properties*) with respect to the question of standing, that where a petitioner claims to be a "contingent creditor" it must actually be in a debtor-creditor relationship with the company in question. The Petitioner does not fit that description. Its position is analogous to that of the bank in *Re SBA Properties*; and

(4) the way in which the Petitioner pleads its position is plainly misconceived. It is its standing 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. In other words, it presently has no standing at all, and will not unless or until the "contingency" which would give it standing actually happens.

135. The following is taken from the Company's skeleton argument dated 21 February 2023:

(1) the Petitioner lacks standing on the application of conventional legal principles and principles of construction of the Indenture;

(2) as the court has previously noted the Petitioner has opted to take a high-risk strategy in pursuing these proceedings. It was open to it to seek to substitute the Trustee as petitioner or authorisation from the Holder of the Note. It declined to seek substitution apparently on financial concerns. There is no evidence that the Petitioner has sought, let alone obtained, authorisation from the Holder. Instead, it has required the current, highly-technical debate on the issue of standing to be had;

(3) the production of a letter from Euroclear Bank SA/NV to the HKMA dated 1 February 2023 headed "Statement of Account for the Purposes of Filing a Claim" does not assist the Petitioner as the Indenture only permits the Holder (not Euroclear) to authorise a person to take actions which the Holder is entitled to take under the Indenture or the Note and there is no evidence that Euroclear has a proxy (or other authorisation) from the Holder to take such action. The Indenture cannot be modified by provision of the Euroclear Operating Procedures that are not incorporated in the Indenture;

(4) the court will need to determine the following two issues:

(a) whether the Statement of Account is sufficient to provide the Petitioner with authority to pursue the proceedings on behalf of a party which has standing, based on the terms of the Indenture; and

(b) whether, regardless of the Statement of Account, the Petitioner has standing as a contingent creditor to apply for a winding up of the Company, by reason of its claim that it is presently entitled to receive Certificated Notes under the Indenture;

(5) the "no look through" principle falls to be applied in this case. There is nothing in the Indenture which creates a direct relationship between the Petitioner, as the ultimate account holder/investor and the Company as the issuer;

(6) applying the agreed New York law rules of construction, section 2.06 of the Indenture is complete, clear and unambiguous on its face and should be given its plain meaning. Accordingly, the Petitioner required a proxy or specific form of authorisation from CCB Nominees Limited (the Holder) itself to pursue these proceedings. The Statement of Account is wholly insufficient;

(7) it is fundamental, with respect to the question of standing, that where a petitioner claims to be a "contingent creditor", it must actually be in a debtor-creditor relationship with the company in question. It is wholly inadequate for a party to

plead, in effect, that its standing is itself contingent upon the happening of some future event or at some future date;

(8) the Petitioner does not fit the description of a contingent creditor as set out in *Re William Hockley*. Its position is analogous to that of the bank in *Re SBA Properties*. It is its standing 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; and

(9) the Petitioner has not received any Certificated Notes. Unless or until that occurs (and regardless of the timeframe in which it may be expected to occur), the Petitioner cannot establish that it is a creditor of the Company, actual or contingent.

The main post hearing supplementary written submissions made on behalf of the Company

136. In admirably concise and well focused post hearing supplementary written submissions the Company made the following main points:

(1) the definition of any "creditor" must be that a legal relationship exists between the debtor and the creditor. Lord Neuberger in *Re Nortel* stated that a person must have "incurred an obligation from which the contingent liability may arise" (page 240A [81]);

(2) the *Re William Hockley* definition was correctly followed in *Bio-Treat*;

(3) *Re William Hockley* is consistent with *Re Sutherland* and was followed by the High Court of Australia in *Community Development* and is still routinely relied upon (*Green v SCL Analytics* [2019] 2 BCLC 664 [89] and was applied in the Cayman Islands by Segal J in *Perry v Lopag Trust* (FSD unreported 23 February 2023 at [95]). It clearly remains good law;

(4) no case has ever accepted that a person is a contingent creditor in a winding up when the contingency or uncertainty relates to the very existence of a legal relationship. That person is not a creditor at all;

(5) *Re Lancelot* was a proof-of-debt appeal. The Petitioner cannot say it has "a claim in equity" against the Company in the legally recongised sense that was accepted in *Re Lancelot*. The Petitioner has not adduced any evidence that it has a real beneficial interest;

(6) the Petitioner's argument that it could issue instructions in the hope that these would go up the chain which would then have to be acted upon by the "Holder" is misconceived:

(i) since there is no evidence of a valid acceleration notice under clause 6.02 there can be no valid request under clause 2.04(e). The Trustee can only make a declaration at the request of the "Holder" (see also last sentence of clause 7.01 (b)). There was no evidence of a request by the "Holder" here – only a request by the Petitioner;

(ii) Mr Glosband's citation of cases and interpretation in respect of the validity of an acceleration notice was not challenged and neither was his evidence that a winding up petition could not be relied upon by the Petition if it has improperly instituted the petition;

(7) the Petitioner is not a contingent creditor. In no case has an ultimate account holder been permitted to wind up a bond issuer. On the contrary, the older cases and *Bio-Treat* are against such an outcome. The scheme voting cases are confined to their particular context; a broad definition in that context achieves a different and legitimate purpose (as recognised in *Re Co-Operative Bank plc* at [36 – 40] and *Titan* at [11] – [15]);

(8) there is no evidence to show a valid acceleration; and

(9) there is no evidence to show that the Petitioner had the necessary authority under clause 6.06 to bring the action from (i) CCB Nominees; or (ii) a holder of certificated notes as required by the Indenture.

The oral submissions made on behalf of the Petitioner and the Company

137. I have full regard to all the oral submissions put before the court over the two day hearing but do not set them all out in this already too lengthy judgment. With the exception of the oral submissions in respect of *Bio-Treat* there were no persuasive fresh substantive oral submissions, material to my determination of the main issues in this case, over and above those already canvassed in the written submissions.

138. In his oral submissions Mr Basdeo stressed the following main points:

(1) the Company has produced the draft Creditor Support Agreement which, if the Petitioner agrees to the proposed restructuring, in effect confirms that entities in the position of the Petitioner are contingent creditors;

(2) the contingency is the right to call for, via the instructions through the chain of authority, the Certificated Notes to be delivered to the Petitioner;

(3) standing is a mix of Cayman law and New York law;

(4) the better view is that the Petitioner does not need to concern itself with the chain of authority, the series of actions contingent upon the delivery of the Certificated Notes as an underlying beneficial holder mean that it can become a Holder and therefore a direct creditor of the Company and this is sufficient to fall within the definition of a contingent creditor;

(5) the test as to standing is in two parts. The standing to bring the petition as a creditor is on a "good arguable case" basis. If the court goes on to hear the petition it will

only make a winding up order having determined that the Petitioner is on "a balance of probabilities" basis a creditor or contingent creditor of the Company;

(6) *Re Dunderland Iron Ore* takes us nowhere;

(7) *Re Co-operative Bank plc*, *Re Castle Holdco 4* and *Gallery Capital* are highly persuasive and extremely helpful in the "consideration of the contingent creditors of collapsing the structure";

(8) the case has been made out that the Petitioner is on the "balance of probabilities" a contingent creditor and this is recognised and taken cognisance by the Company;

(9) the Petitioner is the beneficial owner and through the structure and the Euroclear and HKMA procedures has the ability to receive Certificated Notes provided certain actions are taken and if those actions are taken a debt exists which is payable to the Petitioner. There is no existing obligation but there is a "legal interest" and an "economic interest" in the Notes. No request has been made to the HKMA as it is not necessary;

(10) in respect of *Bio-Treat* "every case would depend on its context" and things have moved on since *Titan* insofar as we have cases deciding that underlying beneficial holders are contingent creditors in a scheme context; and

(11) once the Petitioner received the Certificated Notes it would become a direct creditor of the Company. The Petitioner does not need to go through "certain chains of instructions" to get to the point of being an actual creditor with Certificated Notes. Under the Petitioner's control "is the contingency which would make the debt now a contingent debt, into an actual debt and therefore we are a contingent creditor and have the standing necessary for His Lordship to consider making the winding up order."

139. In his oral submissions Mr Lowe stressed the following main points:

(1) it is for the court to interpret the Indenture on the foreign rules of construction as agreed by the experts;

(2) CCB Nominees Limited is the Holder;

(3) there is no incorporation into the Indenture of the Euroclear procedure and Euroclear is not authorised to give account holders the powers of the Holder;

(4) it is loose language to describe an interest in a book entry as a beneficial interest. The reference in section 2.06 (b) of the Indenture to "interests of beneficial owners in a Global Note" is not to the Petitioner. It is to HKMA which is the account holder at Euroclear. The Petitioner is not the beneficial owner of the Note;

(5) the contractual structure is important and care must be taken in respect of the terminology used in the Notes;

(6) the acceleration letter cannot be valid. It is not suggested that the Holder gave notice to the Trustee. The Petitioner gave notice without involving the Holder. There was no valid request to the Trustee. The Petitioner cannot prove that there has been a valid acceleration notice because the Trustee was not competent to act without a request from the Holders. If there is an invalid acceleration then the consequent proceedings are invalid;

(7) the "no look through' principle is simply English shorthand which in effect describes the position under New York law as outlined in Mr Glosband's evidence;

(8) to be a creditor you need an existing legal relationship with a debtor, whether you are an existing creditor or a contingent creditor. Uncertainty as to contingent standing is not sufficient;

(9) *Bio-Treat* is an important case which has many similarities with the case presently before the court; and

(10) the meaning given to "creditor" in the context of schemes serves a different purpose.

Determination

140. Having considered the relevant legal structure, the terms of the Indenture and the Note, the function of the expert witnesses and the expert evidence, the Euroclear "authority", the relevant law and the submissions made on behalf of the parties at some considerable length I can take the Determination section of this judgment relatively briefly.

141. The main two questions for determination are:

(1) whether the Petitioner has standing as a contingent creditor and if not
(2) whether the Petitioner is authorised to progress these winding up proceedings.

142. For the brief reasons which follow I answer both questions in the negative.

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.

144. In my judgment the Petitioner is not a creditor or a contingent creditor of the Company and consequently it has no legal standing to progress the winding up petition.

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 (*Secure Capital*; *Community Development*; *Re William Hockley*; *Bio-Treat* expressly preserved by Kawaley CJ in *Titan*) and much academic commentary (see the examples in *Secure Capital* and the textbooks referred to in this judgment) to the contrary. Mr Glosband's evidence was consistent with these authorities and the American authorities he relied upon.

146. The best Mr Basdeo could do, insofar as the law of the Cayman Islands was concerned, was to refer to two orders, one in *China Forestry* the other in *LDK Solar*, (without accompanying reasoned judgments) in what he describes as "two factually identical cases upon the petition of a beneficial bondholder". I agree with Mangatal J in *Re Homeinns Hotel* that such orders are of limited assistance. Mr Basdeo eventually conceded that *China Forestry* and *LDK Solar* were of "limited assistance".

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".

148. Furthermore, I was not persuaded by Mr Basdeo's attempted reliance upon *Re Asia Momentum* which is plainly distinguishable from the facts and circumstances of the case presently before me. That case did not concern the standing of a legal entity in the position of the Petitioner in the case presently before me. The company in that case was already in liquidation and the issue was whether a supervision order should be granted.

149. Kawaley J at paragraph 22 of his judgment in *Re Asia Momentum* accepted that the legal principles he had outlined "will be subject to the exigencies of the peculiar factual circumstances of each case". *Re Asia Momentum* was in the context of an application for a supervision order. The case presently before me is in the context of an application for a winding up order. The facts and circumstances of this case are different to the facts and circumstances of *Re Asia Momentum*. Our case does not concern "nomineeship agreements" that had come to an end. There was no redemption. There was no equitable assignment. Moreover, Kawaley J was not dealing with the standing of a contingent creditor in the context of a winding up petition but in context of supervision order with voluntary liquidators already in place. Bell J in *Bio-Trust* was and Kawaley CJ in *Titan* did not doubt the soundness of Bell J's decision "as regards the standing of contingent creditors to present winding-up petitions" (paragraph 24 of Kawaley CJ's judgment).

150. Kawaley J in *Re Asia Momentum* did not benefit from the caselaw, academic commentary and the detailed arguments that have been presented to this court in this case in respect of the standing of an investor to present and progress a winding up petition against the issuer of a note. Such issue was not before the court in *Re Asia Momentum*. Moreover, in the case presently before the court the relevant contractual arrangement provided for in the Indenture and the Note still subsists. It is trite, as Mr Basdeo wisely accepted, that context is important and each case must be considered on its own facts and circumstances and applicable relevant law.

151. I asked the expert witnesses and counsel if there was an event of default and Certificated Notes were delivered or transferred to the Petitioner whether the Petitioner had an enforceable debt against the Company under New York law. They all responded in the affirmative. With hindsight and upon reflection I do not think that such question and the unanimous responses to it assist the court in properly determining the standing issue as a matter of law. The highwater mark of the Petitioner's submissions on legal standing was that it was a contingent creditor because it had a present right, under the terms of the Indenture, to require the delivery of Certificated Notes, via an instruction to HKMA and then HKMA could instruct Euroclear, which would eventually (provided all parts of the

chain proceeded smoothly) make the Petitioner a Holder of the Notes under the terms of the Indenture. In my judgment, however, this submission confuses and conflates the concept of contingent creditor with contingent standing. The Petitioner has to prove actual standing as a contingent creditor at least at the date of the hearing. It has been unable to do that. Its standing is not actual but contingent. Contingent standing is insufficient. A legal entity either has standing or it does not. Moreover, the Petitioner has no relevant existing legal relationship with the Company. There is no existing obligation owed by the Company to the Petitioner. Put simply, the Petitioner does not have the necessary existing relationship with the Company to found the status of contingent creditor and hence it does not have the requisite legal standing to progress the winding up petition.

152. In my judgment the Petitioner in its voluminous arguments and persistent, almost stoically stubborn, attempts to establish standing has confused and conflated two distinct and separate issues in respect of the word "contingency". The phrases "contingent creditor" and "contingent standing" are separate and distinct phrases. It is not sufficient for the Petitioner to establish, on a balance of probabilities, that it has "contingent standing". The Petitioner must prove, on a balance of probabilities, that it is a "contingent creditor". To do that it must show that there is an existing obligation owed by the Company to the Petitioner which may or will result in a liability. The Petitioner has failed to do that. I agree with the Company that it is wholly inadequate for a party to plead, in effect, that its standing is itself contingent upon the happening of some future event at some future date.

153. I agree with the Company that the Petitioner's position is analogous to that of the bank in *Re 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. The Petitioner has not received the Certificated Notes and does not appear to have taken any proper steps to obtain them and to obtain legal standing. I agree with the Company that unless or until the Petitioner obtains Certificated Notes in its name it cannot establish that it is a creditor, either actual or contingent. It is its standing which is

contingent, in the first place, upon it succeeding in bringing itself into a direct contractual relationship with the Company and this is regardless of whether the debt is also properly to be treated as contingent. It is insufficient in law to have "contingent standing" in respect of winding up petitions in this context.

154. To have legal standing to progress a winding up petition a petitioner must have actual standing on the date of the determination of the petition. You cannot "back date" standing. The requisite legal standing has to exist as at the date of the hearing of the petition. Standing cannot be dependent on a contingency.

155. Moreover it would be difficult conceptually to have two creditors in respect of the same debt. In the case presently before the court, the right to sue the Company under the relevant documentation is not vested in the Petitioner.

156. I have arrived at these conclusions by a consideration of the Indenture and evidence in this case and the relevant law on contingent creditors and legal standing.

157. The experts in this case appeared at times to trespass into legal areas of determination which were matters for the court. I have to say, however, that Mr Glosband's evidence appeared to make much more sense and was far more compelling than the evidence of Mr Kane.

158. Mr Kane rightly accepted that he was unable to opine as to Belgium law but seemed nevertheless content to support a major plank of the Petitioner's case on standing and authority, to opine, or at least comment on Euroclear procedures (which he agreed would be governed by Belgium law) when it suited the Petitioner's case. 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.

159. Mr Glosband's evidence correctly focused on the express terms of the Indenture, New York law, and the absence of any legal relationship between the Petitioner and the Company. I got the impression that Mr Glosband's evidence would have been the same whichever side

had instructed him, perhaps the true test of objective, reliable and independent expert evidence. His evidence was, in the main, clear and easy to follow. His opinions were consistent with the authorities and the clear wording of the Indenture. 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.

The authority issue

160. I can deal with my reasons for answering the second main question in the negative with even more brevity.

161. In respect of the letter of authority from Euroclear Mr Kane seemed reluctant to accept that it was Euroclear rather than CCB Nominees that wrote the letter: "I don't know who wrote the letter". The letter was signed by Euroclear. Mr Kane's responses to the simple questions put to him on this point were unsatisfactory and perhaps reflected a sub-conscious partisan desire to advance, or at least protect, the Petitioner's case.

162. In my judgment, taking into account the clear express wording of the Indenture, the Petitioner has not been duly authorised to progress these winding up proceedings.

163. All the Petitioner can point to is what it described as the Enhanced Consent Letter from Euroclear and it asserts, somewhat desperately I have to say, that such "must be sufficient" but does not give persuasive reasons as to why it is sufficient. Its reliance on Euroclear Operating Procedures, insofar as they are not incorporated into the Indenture, is misplaced. The Enhanced Consent Letter from Euroclear is not sufficient as it is not provided for in the Indenture. The Petitioner can define the communications from Euroclear in such terms as it sees fit. It can label them S of A, Enhanced Statement of Account, Enhanced Consent Letter, Conclusive Authority, or whatever. However the Euroclear communication is labelled it is insufficient to confer the requisite authority and standing upon the Petitioner. The proxy or other appropriate authority needs to come from the registered holder under the express terms of the Indenture. Euroclear is not a registered holder within the terms of

the Indenture. Euroclear is not in a position to provide authority to the Petitioner to progress a winding up petition against the Company. The Holder has not given a proxy or other authority. The Petitioner is not authorised to progress the winding up petition. Moreover, it has no legal standing to do so.

164. Put simply the Enhanced Consent Letter is insufficient because it has not been issued pursuant to the Indenture. The Indenture (Section 2.06 (d)) only permits the Holder (not Euroclear) to authorise a person to take the actions which the Holder (CCB Nominees Limited) is entitled to take. I agree with the Company that the Indenture cannot be modified by any provisions of the Euroclear Operating Procedures that are not expressly incorporated into the Indenture. The evidence reveals that the Holder has granted no authority by way of proxy or otherwise properly authorising the Petitioner to progress the winding up petition. Mr Kane is factually and legally quite wrong in the joint memorandum on page 21 to state that "the Indenture expressly permits the registered holder, Euroclear (by the Nominee for its Common Depositary) to grant proxies or otherwise give authority". The Petitioner's reliance on *Cortlandt* in this respect is misplaced. Euroclear is not the registered holder of the relevant Global Note. It is beyond reasonable dispute that CCB Nominees Limited is the Holder under the terms of the Indenture and it has given no proxies or authority to the Petitioner pursuant to Section 2.06 (d) of the Indenture or otherwise.

165. The Petitioner's complaint in effect that if it cannot use the Clearing Systems to instruct the Holder then there is no party with an economic interest to bring enforcement proceedings is misplaced. The position is governed by the terms of the Indenture and any enforcement proceedings must be taken pursuant to the Indenture and any other relevant documents to which relevant entities are parties. The proper procedures must be followed. There is no room for impermissible shortcuts. Certainty is important in commercial structures. In respect of the Petitioner's misplaced complaint I am reminded of the response of David Richards LJ in *Secure Capital* to the complaint that unless the appellant's arguments were accepted there would be no-one able to recover substantial damages for breach of contract and thus a lacuna would be created. David Richards LJ had little difficulty in dismissing such misplaced complaint at paragraph 57 stating that a lacuna

could not in any relevant sense be said to exist if it is precisely the consequences of the express terms of the Notes and the ancillary documents.

Three further points

166. For the sake of completeness I should deal with 3 further points.

(i) Has the debt been duly accelerated?

167. Mr Kane appeared unable or unwilling to give a clear and straightforward answer to the clear and straightforward question: "… if the Trustee sued the Issuer, on the basis of an invalid notice of acceleration, the Company would have a good defence to that claim?" Mr Kane initially responded with "They may, it depends on the facts … If the Trustee breached the Indenture by giving notice and the Issuer was damaged then I suppose the Issuer could have a claim against a Trustee … I'm just making the point that this is not what the Indenture says. It says quite the opposite … If there's acceleration, there's acceleration. If, contrary to the Indenture, the Trustee was prohibited to effect that acceleration, that would be an issue between the Issuer and the Trustee, it would not say that there is no acceleration … My opinion is that the Trustee can unilaterally send a notice of acceleration." I do not accept that response as satisfactory or as properly reflecting the position under the Indenture and New York law. I much prefer the evidence of Mr Glosband on the acceleration point.

168. I do not agree with the Petitioner that the debt has been duly accelerated. The Trustee cannot validly accelerate the Notes without a written direction from the Holder. Under the clear express terms of the Indenture only the Holder can do that and there is no evidence that the Holder has taken any steps to validly accelerate the debt. Under Section 7.01 (b) of the Indenture during the continuance of an Event of Default, the Trustee can act only upon the written direction of the Holders of at least 25% of the aggregate principal amount then outstanding. The Petitioner has produced no evidence that the Trustee was acting on the written direction of the Holder in respect of an acceleration notice. The request to the

Trustee appears to have wrongly come from the Petitioner rather than the Holder. In such circumstances the acceleration is not valid.

169. The fact that the Company has publicly confirmed the acceleration from the Trustee is nothing to the point. The fact that the Company has confirmed by its announcements to the Hong Kong Stock Exchange that the Notes have been accelerated and has confirmed the position in its evidence is neither here nor there. Either the acceleration procedure was properly conducted in accordance with the clear and express terms in the Indenture or it was not. There is no evidence before the Court that the acceleration procedure was properly conducted in accordance with the terms of the Indenture. Under the Indenture (at Section 6.02 and Section 7.01 (b)) it is the Holder that has to instigate the process, not the Petitioner or the Trustee. The acceleration notice issued by the Trustee on the instructions of the Petitioner rather than the Holder and was not in accordance with the terms of the Indenture. It had no validity. This is supported by Mr Glosband's evidence which I accept on this point.

(ii) The draft "Creditor Support Agreement"

170. In a draft document entitled "Creditor Support Agreement" specifying the Company as the Listco it is stated that each consenting creditor is a "contingent creditor of Listco" and a "Consenting Creditor" is defined as meaning "a person holding a beneficial interest as principal in the Transaction Notes who has agreed to be bound by the terms of this Agreement as a Consenting Creditor in accordance with Clause 6". Transaction Notes mean (a) the Unsecured Notes (b) the Secured Notes and (c) the PRC Holdco Notes. The fact that the Company in subsequent draft documents has described certain entities as contingent creditors is also nothing to the point. Whether or not the Petitioner is a contingent creditor is a matter for determination by this court, not by the Petitioner, the Company or the experts.

(iii) Can the Petitioner take advantage of Section 6.01 (g) of the Indenture?

171. I do not agree with the Petitioner that it can take advantage of Section 6.01 (g) of the Indenture. Its reliance upon that provision begs the question. If it does not have standing, as I have held in this judgment, it cannot validly commence winding up proceedings. If the winding up proceedings have not been validly commenced then Section 6.01 (g) does not come into play. It is of no assistance whatsoever to the Petitioner in this case. Such conclusions are supported by the well reasoned and persuasively stated expert opinions of Mr Glosband on behalf of the Company, which I also accept on this point. The Petitioner has not validly commenced winding up proceedings against the Company. The requirements of Section 6.01 (g) of the Indenture have not been validly satisfied. There has been no relevant event of default. The Petitioner cannot properly take advantage of Section 6.01 (g) of the Indenture.

Conclusion

172. Standing back and looking at the matter objectively I have concluded that the Petitioner has not satisfied me, on a balance of probabilities, that it is a creditor or a contingent creditor or some otherwise authorised legal entity with standing to progress the winding up petition presented in this case. The winding up petition should be dismissed in view of the Petitioner's lack of standing and lack of authority. The Petitioner was given many opportunities to arrange a valid substitution but these were not taken.

173. Counsel should within the next 7 days provide a draft Order reflecting the determinations in this judgment. I am minded to make an order for costs against the Petitioner but am content to decide the costs position on paper if necessary and any concise (no more than 5 pages) written submissions in that respect should be filed within the next 14 days, together with a draft of the Orders sought.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT