THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2023/0012

BETWEEN:

HAIMEN ZHONGNAN INVESTMENT DEVELOPMENT (INTERNATIONAL) CO. LTD.

Applicant/Appellant

and

CITHARA GLOBAL MULTI-STRATEGY SPC

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Margaret Price-Findlay	Justice of Appeal
The Hon. Mde. Vicki Ann Ellis	Justice of Appeal

Appearances:

Mr. Thomas Lowe, KC with him Ms. Marie Stewart for the Applicant/Appellant
Mr. Peter Burgess with him Ms. Eleanor Morgan and Ms. Sophie Christodoulou for the Respondent.

2023: July 31;
August 4.

Interlocutory appeal – Stay of winding up order pending appeal – Principles governing grant of stay pending appeal – Court's exercise of discretion to stay of a winding-up order pending appeal – Whether the Court's refusal of the stay will render the Company's appeal nugatory.

On 10th October 2022, Cithara Global Multi-Strategy SPC (hereafter "Cithara" or "the respondent") filed an originating application seeking the appointment of [joint] liquidators over Haimen Zhongnan Investment Development (International) Co. Ltd. (hereafter "the Company" or "the applicant") after the Company had failed to comply with the requirements of a statutory demand served on it on 19th August 2022.

On 29th November 2022, the Company filed a notice of opposition opposing the liquidation application and seeking dismissal of the same on the ground that, *inter alia*, Cithara lacked standing as a creditor to make the application.

On 5th July 2023, Mangatal J, sitting as a judge of the Commercial Court of the Territory of the Virgin Islands ("the BVI"), granted the liquidation application and appointed 3 joint liquidators of the Company. The learned judge, however, stayed the order for a period expiring on 25th July 2023. In her written judgment dated 19th July 2023, she concluded that Cithara had standing as a creditor to present the liquidation application pursuant to section 162(2)(b) of the BVI Insolvency Act.

On 5th July 2023, immediately following the oral announcement of the court's decision, the Company applied for, and the court allowed an interim stay of the execution of the oral judgment of Mangatal J dated 5th July 2023 and the written judgment dated 19th July 2023 (the "Judgment") on an urgent basis (the "Interim Stay"), until 14 days after the court delivered its draft written judgment, that is, until 25th July 2023 as the draft written judgment was delivered on 11th July 2023, in order to allow time for the applicant to make a formal stay application.

On 21st July 2023, the Company issued a draft certificate of urgency and a letter to the Registrar stating that it intended to file a stay application and asking for it to be listed urgently on 25th July 2023.

On 24th July 2023, the Company filed an appeal against the Judgment, as well as the order dated 5th July 2023 (the "Order"). On that same day, the Company also filed an application seeking a stay of execution of the Order of Mangatal J pending the determination of the appeal (together with affidavit(s) in support of the application, exhibit(s) and written submissions in support).

Cithara, having been served with the application, affidavit(s) in support and written submissions on the afternoon of 24th July 2023, promptly informed the Court of its intention to oppose the application and its obvious inability to respond to the extensive application, affidavit(s) and submissions by the following day, 25th July 2023.

On 25th July 2023, a single judge of the Court made an order that: (i) the respondent [Cithara] shall file and serve written submissions with authorities by 4 pm on Friday 28th July 2023 in response to the application and submissions filed and served by the applicant [HZID] on 24th July 2023; (ii) the applicant's application filed on 24th July 2023 for a stay of execution of the judgment of Mangatal J dated 5th July 2023 shall be heard by the Full Court on Monday 31st July 2023; and (iii) the interim stay granted by Mangatal J until 25th July 2023 is extended until 31st July 2023.

On 31st July 2023 the application for a stay of execution was heard by the Full Court.

Held: dismissing the application, making consequential orders and awarding costs to the respondent to be paid out of the assets of the Company, that:

1. The principles applicable to a stay include: that (i) the Court should take into account all the circumstances of the case; (ii) a stay is the exception rather than the general rule; (iii) the party seeking a stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted; (iv) in exercising its discretion, the Court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully

considered; and (v) the Court should also take into account the prospect of the appeal succeeding but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which would usually enable a stay to be granted). The guiding principle underlying these provisions is that a successful litigant should not generally be deprived of the fruits of their litigation pending appeal except in exceptional circumstances.

C-Mobile Services Limited v Huawei Technologies Co. Ltd BVIHCMAP2014/0017 (delivered, 2nd October 2014, unreported) followed; **Novel Blaze Limited (in liquidation) v Chance Talent Management Limited (BVIHC (MAP) 2016/0047)** followed.

2. There is a general presumption against the grant of stay of a winding-up order. The dicta in the English decision of **In re A&BC Chewing Gum Ltd** explained the practical reasons for refusing a stay of the winding-up order pending appeal noting that under insolvency law, as soon as a winding-up order is made, the Official Receiver has to ascertain the assets and the liabilities of the company at the date of the order so as to find out the preferential creditors and the unsecured creditors. It follows that in the event that a stay of the winding-up order pending appeal is granted and the winding-up order is ultimately affirmed, the Official Receiver's ability to conduct the investigations into the liabilities and assets at the date of winding-up order will be seriously hampered given the time-lapse. Furthermore, even if a stay is not granted, the company may continue running its business and will not suffer any additional harm, irrespective of whether it is making any profit or not. The reasons in **In re A. & B.C. Chewing Gum Ltd**. were expressed in terms which are generally applicable to all windings up, *to wit that* a stay would probably make it very difficult for a liquidator to investigate the affairs so as to be able in a timely and efficient manner to ascertain the company's liabilities and assets and so take steps to recover those assets for the benefit of the creditors and, if a solvent estate, for the benefit of shareholders as well.

In re A&BC Chewing Gum Ltd [1975] 1 WLR 579 followed.

3. This Court is not satisfied that the Company and the Parent's reputation could be impacted in a case where the group of entities, to which the Company belongs, and the relevant Notes are rated as being "likely in, or very near, default" and "typically in default". Furthermore, it may well be that the liquidation order may have an irreversible effect on the Group's continuing efforts to restructure. However, the Court is not satisfied with the limited evidence which has been presented that there is any credible or realistic chance of this effort coming to fruition. Moreover, and assuming that it does not, the court is not satisfied that such failure will inevitably or necessarily have the nuclear effect which has been represented. Certainly, apart from the bare assertion, there has been little forensic evidence to that effect. In the circumstances, it is unlikely that refusal of the stay will render the Company's appeal nugatory.

4. In this Court's judgment, the applicant has not presented a strong enough case to rebut the presumption against the grant of a stay of the Judge's liquidation order. We accept the submissions advanced by the respondent on the strength

of the appeal and the likely effect of the refusal to grant the stay. In carrying out the balancing exercise, we have considered that there are insufficient reasons for denying the respondent the fruits of its victory in the lower court. The liquidation proceedings are a consequence of the Company's failure to pay the debts and failure to honour guarantees. The Company has also failed to pay interest and the principal on the Notes for over a year, and the Parent has failed to honour its guarantee despite making principal payments to onshore creditors. The liquidators are aware of the pending appeal and would then be on notice that the appeal might succeed. It then becomes a matter of commercial judgement how they will treat with the liquidation in the interim. Accordingly, we consider that a stay should not be granted and that the interim stay granted on 5th July 2023 and extended on 25th July 2023 should be lifted.

JUDGMENT

[1] **ELLIS JA:** On 10th October 2022, Cithara Global Multi-Strategy SPC (hereafter "Cithara" or "the respondent") filed an originating application seeking the appointment of [joint] liquidators over Haimen Zhongnan Investment Development (International) Co. Ltd. (hereafter "the Company" or "the applicant") after the Company had failed to comply with the requirements of a statutory demand served on it on 19th August 2022.

[2] On 29th November 2022, the Company filed a notice of opposition opposing the liquidation application and seeking dismissal of the same on the ground that, *inter alia*, Cithara lacked standing as a creditor to make the application.

[3] On 5th July 2023, Mangatal J, sitting as a judge of the Commercial Court of the Territory of the Virgin Islands, granted the liquidation application and appointed 3 joint liquidators of the Company. The learned judge, however, stayed the order for a period expiring on 25th July 2023.

[4] In her written judgment dated 19th July 2023, Mangatal J concluded that Cithara had standing as a creditor to present the liquidation application pursuant to section 162(2)(b) of the BVI **Insolvency Act**.[1]

[5] On 5th July 2023, immediately following the oral announcement of the Court's decision, the Company applied for, and the Court had allowed an interim stay of

[1] Act 5 of 2003 of the Revised Laws of the Territory of the Virgin Islands, 2000.

the execution of the oral judgment of Mangatal J dated 5th July 2023 and the written judgment dated 19th July 2023 (the "Judgment") on an urgent basis (the "Interim Stay"), until 14 days after the Court delivered its draft written judgment, that is, until 25th July 2023 as the draft written judgment was delivered on 11th July 2023, in order to allow time for the applicant to make a formal stay application.

[6] On 21st July 2023, the Company issued a draft certificate of urgency and a letter to the Court Registrar stating that it intended to file a stay application and asking for it to be listed urgently on 25th July 2023.

[7] On 24th July 2023, the Company filed an appeal against the Judgment, as well as the order dated 5th July 2023 (the "Order"). On that same day, the Company also filed an application seeking a stay of execution of the Order of Mangatal J pending the determination of the appeal (together with affidavit(s) in support of the application, exhibit(s) and written submissions in support).

[8] Cithara, having been served with the application, affidavit(s) in support and written submissions on the afternoon of 24th July 2023, promptly informed the Court of its intention to oppose the application and its obvious inability to respond to the extensive application, affidavit(s) and submissions by the following day, 25th July 2023.

[9] On 25th July 2023, a single judge of the Court made an order that:

(1) The respondent [Cithara] shall file and serve written submissions with authorities by 4 pm on Friday 28th July 2023 in response to the application and submissions filed and served by the applicant [HZID] on 24th July 2023.

(2) The applicant's application filed on 24th July 2023 for a stay of execution of the judgment of Mangatal J dated 5th July 2023 shall be heard by the Full Court on Monday 31st July 2023; and

(3) The interim stay granted by Mangatal J until 25th July 2023 is extended until 31st July 2023.

[10] On 28th July, Cithara filed written submissions (with authorities) and an affidavit (with exhibits) opposing the stay application.

[11] The grounds of the stay application were set out extensively in an affirmation filed together with the stay application and summarized in detail in the application itself.

Background

[12] By way of background and in order for the Court to understand why a full stay is important, Counsel for the applicant has submitted that it is necessary to fully appreciate the structure of the group of companies to which the Company belongs. The Company is 100% directly owned by Haimen Zhongnan Century City (Hongkong) Co., Limited. This is a limited liability company incorporated under the laws of Hong Kong.

[13] The Company is part of a group of entities (the "Group") wholly and ultimately held by Jiangsu Zhongnan Construction Group Co., Ltd (the "Parent"), a limited liability company incorporated under the laws of the People's Republic of China ("PRC") and listed on the Shenzhen Stock Exchange. The Parent is a leading property developer that was established 30 years ago and is now one of the top private construction companies in the PRC. The Parent is the only private construction company in the PRC that holds both the Premiumclass Housing Construction EPC Qualification and the Grade-A Construction Engineering Design Qualification. The Parent was ranked 16th among the 2021 Top 20 China Real Estate Developers and 5th among the 2021 Top 10 Real Estate Enterprises in Commercial Property Operation in China by the China Real 4 Estate Association and China Real Estate Appraisal Centre of Shanghai E-house China R&D Institute.

[14] The Group consists of a number of companies incorporated in the PRC, Hong Kong, and the BVI. The principal business of the Company is to act as one of the financing vehicles of the Parent, issuing and holding certain notes and other indebtedness and debt instruments. The Group has operations and projects across various locations in the PRC, including the first and second-tier cities (such as Beijing and Shanghai) and the third and fourth-tier cities (such as Nantong and Suzhou). As of 31st December 2021, the Group had a total of 503 property development projects under different development stages across the PRC. The Group employs around 17,000 people.

General Principles

[15] It is common ground between the Parties that the principles applicable to a stay of a winding up application are helpfully summarised **in C-Mobile v Huawei Technologies Ltd**[2] from which the following principles apply:

(a) the Court should take into account all the circumstances of the case;
(b) a stay is the exception rather than the general rule;
(c) the party seeking a stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted;
(d) in exercising its discretion, the Court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered; and
(e) the Court should also take into account the prospect of the appeal succeeding but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which would usually enable a stay to be granted).

[16] The guiding principle underlying these provisions is that a successful litigant should not generally be deprived of the fruits of their litigation pending appeal except in "exceptional circumstances".[3]

[2] BVIHCMAP2014/0017 (delivered, 2nd October 2014, unreported).
[3] Ibid at paragraph [43].

[17] These principles have since been considered and applied in the context in **Novel Blaze Limited (in liquidation) v Chance Talent Management Limited**.[4] In that case, this Court refused a company's application for a stay of an order of the Commercial Court appointing liquidators of the company, pending the determination of its appeal to the Court of Appeal. Webster JA gave the judgment of the Court and explained the Court's approach to a stay pending appeal and holding further that:

> "These elements are self-explanatory and apply in virtually all applications in varying degrees. The Court carries out a balancing exercise in considering the elements and no one element is decisive. The degree of importance attached to each element will vary according to the facts of each case."[5]

[18] We are also satisfied that within the specific context of a stay of a winding up order, there is a general presumption against the grant of a stay of a winding up order. In that regard, we are guided by the dicta in the English decision of **In re A&BC Chewing Gum Ltd**[6] which concerned an application for a stay of a winding up order pending appeal. Although the court in that case accepted that there was jurisdiction under the English legislation to grant a stay of winding-up proceedings the court explained the practical reasons for refusing a stay of the winding-up order pending appeal noting that under insolvency law, as soon as a winding-up order is made, the Official Receiver has to ascertain the assets and the liabilities of the company at the date of the order so as to find out the preferential creditors and the unsecured creditors. It follows that in the event that a stay of the winding-up order pending appeal is granted and the winding-up order is ultimately affirmed, the Official Receiver's ability to conduct the said investigation into the liability and assets at the date of winding-up order will be seriously hampered given the time-lapse. Furthermore, even if a stay is not granted, the company may continue running its business and will not suffer any additional harm, irrespective of whether it is making any profit or not.

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[4] BVIHCVAP2020/0006 (delivered 9th July 2020, unreported).
[5] Ibid at paragraph 10.
[6] [1975] 1 WLR 579.

[19] The reasons in **In re A. & B.C. Chewing Gum Ltd**. were expressed in terms which are generally applicable to all windings up, *to wit that* a stay would probably make it very difficult for a liquidator to investigate the affairs so as to be able in a timely and efficient manner to ascertain the company's liabilities and assets and so take steps to recover those assets for the benefit of the creditors and, if a solvent estate, for the benefit of shareholders as well. This dictum has been applied in numerous other cases including **In Re BVL Realty II Limited**;[7] **Grand Pacific Holdings Ltd v Pacific China Holdings**;[8] **Re Parmalat Capital Finance Limited**[9] and **Safe Castle Limited v China Silver Asset Management (Hong Kong) Limited**.[10]

[20] It is therefore clear that a court would not lightly exercise its discretion to stay of a winding-up order pending appeal.

Appeal Will Be Rendered Nugatory

[21] The applicant contends that if a stay is not granted pending the outcome of the Appeal, the following consequences will very likely ensue:

(i) There will be irreparable damage to the applicant's and the Group's reputation if the applicant is wound up. The compulsory requirement for the liquidators to advertise their appointment where it can come to the attention of creditors will cause irreversible damage to the commercial reputation of the applicant and the Group. This will be compounded by the listing rules affecting the Group in Hong Kong, which require an announcement to be made by the Group if the applicant is wound up.

During the course of the hearing, Counsel for the applicant indicated that the applicant would no longer seek to advance this argument. In the Court's judgment this was a sensible and well-advised concession given the robust rejoinder of respondent who submitted that to claim that the Company or the Group's current reputation will be in any way

[7] [2010] EWHC 1791.
[8] BVIHCV 2009/389 (delivered 11th January 2010, unreported)
[9] [2007] CILR 1, [3] (Smellie CJ).
[10] [2020] HKCFI 1028, Harris J.

affected by the First Instance Order taking effect is fanciful. The respondent *inter alia* asserted in written legal submissions that this is not a case where the appointment of liquidators would alter the view of any informed third party. It was submitted that the Group and the Notes are currently rated Ca and C by Moody's, the lowest ratings Moody's applies which indicate that the obligations are "highly speculative and are likely in, or very near, default" (in the case of Ca) and "*the lowest-rated class of bonds and are typically in default, with little prospect for recovery.*"[11]

(ii) The applicant further submitted that if the applicant is wound up, the entire bond issue will fall due as bankruptcy is an event of default and contractual steps taken on that basis are irreversible. This ground was pursued with little enthusiasm which was not surprising given that there are already extant Events of Default under the Indenture and have been for almost a year since the Company failed to make payment of either the second interest payment or the principal on the maturity date (8 June 2022). The relevant term of the Indenture at paragraph 6.1.7 provides that either of the following constitutes an Event of Default:

(a) the commencement of involuntary insolvency proceedings against, inter alios, the Company and those proceedings remaining "undismissed and unstayed for a period of 60 consecutive days"; or

(b) an order for relief is entered against, inter alios, the Company under any applicable insolvency law.

Each of these has already been triggered. It seems to the Court that staying the Order of the court below would make no difference as both the Petition and the Order of the court below have already triggered an Event of Default under the Indenture.

Again, staying the First Instance Order would make no difference.

[11] see Zhang 1, [35] fn 7.

(iii) The applicant has placed the greatest reliance on the final ground. Here the applicant contends that if a stay is not granted, there is a probability that the Group would collapse with disastrous consequences for its employees (the Group has 17,327 employees in the PRC) customers and creditors in that:-

1. Companies within the Group guaranteed the relevant bond. The liability on such guarantee may give rise to defaults on existing contracts.

2. There will be irreparable damage to the Group's restructuring activities, which are well underway and attracting significant creditor support. Substantial investors who prefer to restructure debts if the applicant trades would have lost their ability to achieve a negotiated outcome. Counsel for the applicant pointed out that over the past few months, the applicant, the Parent and the Group's professional advisers have been engaging in constructive dialogue with certain investors of US dollar denominated senior notes issued by the applicant with respect to a restructuring of indebtedness under its existing notes (the "Restructuring"), and he posited that significant progress has been made with certain investors of the existing notes, including the entering into of non-binding terms sheets containing the principal terms of the Restructuring among the applicant, the Parent and certain investors of the notes. Counsel advised the court that currently, investors of approximately 48.6% of the aggregate outstanding principal amount of the existing notes are signatories to such term sheets and he concluded that the applicant and the Group would suffer great and irreparable prejudice due to the fact that all the efforts made by the Company and the Group to-date would come to an abrupt end with no possibility for resumption, if a stay were not granted.

[22] By way of update, Counsel for the applicant indicated that the Parent has been working towards improving its financial situation in the PRC, including delivering buildings to achieve cash recovery; utilising rescue policies available in the PRC such as the "third arrow" policies which allows real estate companies to obtain funds more efficiently and has provided a written promise to the China Securities Regulatory Commission (the "CSRC") that the Group would complete 7 the Company's Restructuring within 6 months, in order to benefit from relevant policies that are applicable to listed companies involved in private placements and to comply with the approval requirements of the CSRC. Counsel submitted that the Company is currently finalising its restructuring support agreement (RSA) with the key investors of the notes which the Company aims to deliver for signing by the end of July 2023. In addition, the applicant's largest third-party independent investor (i.e. Brilliant Galaxy Holdings X Limited and Mighty Seed Opportunity IV Limited), have issued a letter dated 21st July 2023 to the applicant expressing that it remains fully supportive of the Company's Restructuring.

[23] Counsel concluded that in the event that the Stay was not granted, the applicant's Restructuring would unfortunately end to the detriment of all stakeholders and the Appeal would be rendered nugatory.

[24] In considering these matters, the Court has applied the relevant legal principles which govern the grant of a stay. It is clear to this Court that in advancing its application to stay a liquidation order, an applicant would have to contend with the courts demonstrated reluctance to grant the stay in winding up proceedings. In traversing the relevant threshold, an applicant must advance a case which is cogent and which persuasively that the appeal will be stifled or rendered nugatory unless a stay is granted. In exercising its discretion, the Court has applied the balance of harm test in which the likely prejudice to the successful party must be carefully considered.

[25] In that regard, it is apparent that the Parent is already in default of its guarantee obligations on the Notes and therefore any defaults on existing contracts would already have arisen. Further, for the reasons already indicated, this Court is not satisfied that the Company and the Parent's reputation could be impacted in a

case where the Group and the Notes are rated as being "likely in, or very near, default" and "typically in default".

[26] As it relates to the potential impact on the restructuring efforts it is clear that the Company's assertions in this regard were similarly advanced before the Judge in the court below. The applicants evidence and submissions there were roundly rejected by the Judge in an oral ruling delivered on 29th March 2023 disposing of the Company's application for an extension of time for determination of the liquidation application on account of the possible restructuring. The learned Judge rejected that application on the basis that:

> "…the Company's plans to propose a restructuring plan were bound to fail since the Company was nowhere near the 75% threshold required for a BVI scheme of arrangements." [12]

[27] It is apparent that the Company has been trying to garner support for its restructuring plan since November 2022. To proceed to the sanction hearing, a scheme of arrangement requires agreement from 75% in value of the creditors or class of creditors.[13] In his evidence below, Mr Xin stated that the Company had the support of "bondholders and/or beneficial owners holding over 41% aggregated principal amount of the Notes" for the restructuring [48 at ¶40]. However, in its evidence filed in support of the Application herein the Company now says that, as at 23rd June 2023, it only had 37% creditor support – a decrease of 4% since March 2023. This decrease has not been explained.

[28] While it is now asserted that the support has purportedly increased to 48.6% as at 21st July 2023, this Court has no way of telling whether such support might subsequently decrease once again. Moreover, the applicant has not provided any clear and defined evidence of the practical steps being taken to demonstrate that there is a realistic prospect of securing the necessary support within the specified 6 months' time frame. The list of initial supporting creditors is redacted and no further evidence is provided. What is advanced is that only two creditors have provided any evidence of support, which affords little comfort. What is clear

[12] Per Mangatal J judgement at paragraph 5.
[13] Section 179A(3) of the BVI Business Companies Act 2004 ("BCA 2004") of the Revised Laws of the Virgin Islands.

is that despite the passage of 8 months, the Company is still over 25% away from securing the necessary level of creditor support for the restructuring plan.

[29] Counsel for the respondent has also asserted that in any event, the Company owes US$453,000,000 in aggregate outstanding principal under offshore notes it has issued. Cithara, Ease Sail, Burlington, and Lux Aeterna Capital Limited hold approximately 23.14% of the total outstanding principal of such notes. Accordingly, to entirely block the Company's proposed scheme, additional bondholders representing only 1.86% of the total outstanding principal of the offshore notes would be needed to oppose it. On the other hand, the Company must secure an additional 26.4% of support in order to succeed. Having considered that the respondent, together with Ease Sail and Burlington (who all oppose restructuring), hold approximately 22.63% of the total outstanding principal of the notes in value, the Judge was therefore entitled to determine that the restructuring plan is 'bound to fail' and that there is no real prospect of the restructuring plan succeeding. This position is no doubt further strengthened by Lux providing a letter of support in favour of Cithara's position and in opposition to the Stay Application.

[30] The Court is obliged to balance this tenuous evidence of potential harm against the respondent's assertion that if the stay is granted the Company's Group will continue on its current track of showing preference to onshore creditors resulting in significant detriment to the other creditors of the Company.

[31] The affirmation of Wu Li dated 20th March 2023[14] supports this contention. He indicates that the Parent who is the guarantor of the Company's notes has not complied with its obligations under the Notes but has instead continued to make payments under onshore bonds in the PRC since June 2022, including at least three interest payments on is onshore notes and bonds.[15] Counsel for the

[14] See: 56-57 at 19-22.

[15] (1) an interest payment (at 7.2% per annum) of its onshore medium-term notes "20 Zhongnan Construction MTN002", with an initial issue amount of CNY 1,800,000,000 (approx. US$ 260 million) on or about 26 August 2022; (2) an interest payment (at 7.6% per annum) of its onshore bonds "19 Zhongnan 03", with a then outstanding principal amount of CNY 562,259,000 (approx. US$ 80 million) on or about 22 November 2022; (3) an interest payment (at 7.4% per annum) of its onshore bonds "20 Zhongnan 02", with a then outstanding principal amount of CNY 900,000,000 (approx. US$130 million) on or about 6 March 2023.

Company has disputed that the Parent has made the above payments although, they are recited at paragraph 32 of the Judgment below and are not the subjects of appeal. The applicant however does not deny that the sum of CNY 20,000,000 (approx. US$ 2.9 million) has been paid towards the principal amount of its onshore bonds "20 Zhongnan 02" under a put option available under those bonds on or about 6th March 2023.

[32] Since the Judgment in the court below it is however not disputed that the Parent has extended the period of onshore guarantee that it has provided in respect of at least two of its subsidiaries. The respondent has submitted that this again demonstrates a preference for onshore creditors, as there is no evidence or any resolution between the Company and the Parent for the Parent to meet the Company's obligations under the notes and repay offshore creditors.

[33] In circumstances where there has been no resolution between the Company and the Parent for the Parent to meet the Company's obligations under the Notes and repay offshore creditors, the respondent submits that granting a stay and thereby allowing yet further delay would further prejudice the Company's creditors who have a right to recover the debts they are owed, and not watch the position further deteriorate during the period of the Stay. Counsel submitted that there is a need for the independent liquidators to be able to begin to use their investigatory powers and to seek assets from the Parent and other members of the Group.

[34] While on the surface, the applicant's argument appears persuasive, a careful and thorough analysis reveals the evidential lacunas and weaknesses. Refusing the stay will mean that the liquidation will progress resulting in the eventual death of the applicant. It may well be that the liquidation order may have a devastating and irreversible effect on the Group's continuing efforts to restructure. However, the Court is not satisfied with the limited evidence which has been presented that there is any credible or realistic chance of this effort coming to fruition. Moreover, and assuming that it does not, the Court is not

satisfied that such failure will inevitably or necessarily have the nuclear effect which has been represented. Certainly, apart from the bare assertion, there has been little forensic evidence to that effect.

[35] This has to be weighed against the fact that the applicant is insolvent (clearly not able to pay its debts as they fall due) and that further delays in the liquidation have the potential to adversely impact creditors who have a right to recover the debts they are owed, and not watch the position further deteriorate during the period of the stay.

Strong Likelihood of Success of The Appeal

[36] The applicant maintains that it has strong grounds of appeal which should be taken into account in considering leave. In its written submissions the applicant identified a number of egregious errors of fact and law by the learned judge, the effect of which, they say, is that the appeal will be upheld. However, in his oral submissions before this Court, Counsel for the applicant directed his arguments at the findings of fact made by the Judge at paragraph 193 of her Judgment. There the learned Judge held:

> "[193] In conclusion, am of the view that Cithara has standing as a creditor to present the Liquidation Application pursuant to s. 162 (2)(b) of the BVI IA. Cithara is a contingent creditor under BVI law on these two bases:
>
> (1) Pursuant to §2.4.5 of the Indenture, it is entitled to receive the Certificated Note and become the registered Holder itself. Kane 1, paragraph 47. In this regard:
>
> (a) Section 24.5 of the Indenture provides that if the Notes have become immediately due and payable, upon request the Issuer will execute and the Trustee will authenticate and deliver, Certificated Notes;
> (b) While $2.4.5 does not identify precisely to whom the Certificated Notes are delivered, it is quite clear that it must be the beneficial holder. The commercial reality of the situation is that in such an event it is the ultimate beneficial holder seeking to obtain the O Certificated Notes and remove the intermediaries from the chain between it and the issuer. In any event, the Company's expert Mr

Glosband has not disputed that it is possible for Cithara to receive the Certificated Notes: Kane 2, paragraph 21; and

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

Conclusion on Cithara's Standing

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

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

(a) Section 2.4.5 of the Indenture provides that if the Notes have become immediately due and payable, upon request the issuer will execute and the Trustee will authenticate and deliver, Certified Notes;

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

(2) The effect of s 2.6 of the Indenture, s 5.3.1(a) of the Euroclear Operating Procedures. s 8-111 of the NY UCC, and the Euroclear Authorisations is that Cithara, as the ultimate beneficial holder of a note structure such as in the present case, is the person entitled to enforce the claim against the issuer and can therefore be considered a contingent creditor of the Company.

[38] Counsel submitted that the reasons set out in that paragraphs are demonstrably wrong in law and that if it is determined that the Judge is wrong in these findings then the appeal must succeed on that basis alone and there is no need to explore the other grounds referenced in the Notice of Appeal. He submitted that the Judgment reaches a conclusion which is entirely at odds with those in any other jurisdiction that has had to consider the rights of the ultimate purchasers of bonds. Bearing in mind that the decision relates to the standard terms of a bond indenture which govern trillions of USD loans, Counsel submitted that it is surprising that the Judge disregarded persuasive authorities including: **Sparkasse Bregenz Bank AG v Associated Capital Corporation (18 June 2003)** and the decision of the Privy Council in **Vendort Traders Inc v Evrostroy Group LLC**[16] and instead attempted to distinguish these on spurious grounds, adopting a wholly unconventional approach to a petition.

[39] Counsel further submitted that holding that the test for a contingent creditor in the circumstances of this case did not require the respondent to have the benefit of a right pursuant to a legal relationship such as under a contract to which the Respondent was a party (see Judgment [179]-[180]), the learned Judge disregarded established case law in England.[17]

[40] The applicant further submitted that in holding that the respondent was entitled to certificated notes, the learned Judge misread and misunderstood the Indenture which, on the applicable principles of New York law on construction, did not confer such entitlement on the respondent in that it had no entitlement to a certificate under the Indenture by virtue of Clause 2.4.5 if an event of default occurred. Clause 2.4.5 of the Indenture plainly provided that a certificate would only be provided at the request of "the Holder", defined as the person in whose name the Note was registered in the Note Register and it being common ground

[16] [2016] UKPC 15.
[17] See: Re Dunderland Iron Ore Company Ltd [1909] 1 Ch 446, Re William Hockley Ltd [1962] 1 WLR 555, Re SBA Properties Ltd [[1967] 1 WLR 799 and Green v SCL Group Ltd [2019] 2 BCLC 664; Bermuda: Bio Treat Technology v Highbridge Asia Opportunity Master Fund LP [2009] SC (Bda) 26 Civ (28 May 2009); the Cayman Islands: Perry v Lopag (23 February 2023) Re Shinsun Holdings (21 April 2023) and Australia: Community Development Pty Ltd v Engwirda Construction Co [1969] 120 CLR 455.

that this was neither the respondent or Euroclear Bank SA or NV, but Citivic Nominees Ltd., a subsidiary of Citibank. The respondent had no right under the Indenture to certificated notes.

[41] The applicant further submitted that in any event, the learned Judge misread and misunderstood the Indenture which, on the applicable principles of New York law on construction, did not incorporate the rules of Euroclear so as to enable Euroclear to provide full authority to sue the applicant. It follows that her finding that the Respondent had authority from Euroclear to bring proceedings was erroneous.

[42] The applicant also takes issue with the way in which the learned Judge treated with the expert evidence which was before her. Counsel for the applicant submitted that the learned Judge did not apply the test in **Sparkasse Bregenz Bank** when she decided to resolve the dispute between the parties as to whether Euroclear procedures were "incorporated" in the Indenture by preferring the evidence of Mr Kane, the expert for the respondent and by rejecting the evidence of Mr Glosband, the expert for the applicant, without there having been directions for expert evidence in accordance with CPR 32.6, without hearing cross-examination and without Mr Glosband having any ability to properly review and reply to Mr Kane's second report in details. Counsel submitted that the Judge also did not appear to have examined the underlying materials when commenting on differences between the experts and was not alive to the fact that her decision would lead to the duplicity of actions, in that both the trustee/holder and individual investors (such as the Respondent) could pursue winding up relief against the issuer at the same time.

[43] At the core of this appeal is the learned Judge's refusal to dismiss the Liquidation Application on the basis that the Company had established a *bona fide* dispute (of the debt) on substantial grounds. Central to that finding was the Judge's determination of whether or not there is a dispute on substantial grounds and in this case, there is an issue of statutory construction which would ultimately determine the standing of the entities advancing the winding up petition.

[44] The Judge clearly determined that there is no substantial dispute. As the issue involved a question of law and construction, it was clearly open to the Judge to determine the merits of the dispute itself on the basis of the evidence before her. This approach is consistent with English authorities and **Re Healing Research Trustee Co Ltd**[18] and **Re Datadeck Ltd**[19] and with the decisions in **Bio-Treat and Shinsun (and Leading Holdings)** which are so heavily relied upon by the applicant.

[45] In response, Counsel for the respondent has submitted that the matters relied upon by the applicant cannot be dealt with in isolation and the Judge decision to follow the approach in **Re Nortel GmbH**[20] and **Bloom v Pensions Regulator**,[21] are critical. The likely prospects of success of the appeal would depend on the correct interpretation of what the respondent describes as this "strongly persuasive" authority from the English Supreme Court and Counsel for the respondent has submitted that the submissions made and cases relied upon by the Company do not take into account.

[46] Counsel for the respondent further submitted that **Re Nortel GmbH** defines the modern trend which expands the definition of creditor and contingent creditor to ensure that all possible liabilities within reason should be dealt with as part of the insolvency regime.[22] Counsel submitted that consistent with that trend, there is an emerging judicial consensus across common law jurisdictions that underlying beneficial interest owners in note structures such as the present case can be considered contingent creditors of the debtor (and therefore creditors for the purpose of section 162(2)(b) of the **Insolvency Act**, which is more reflective of the commercial reality.

[47] Counsel further submitted the Company's reading of **Re Nortel GmbH** is incorrect and that the contention that there is a weight of contrary authority is misplaced. He argued that a careful review of the judgment relied upon by the

[18] [1992] 2 All ER 481.
[19] [1998] BCC 694.
[20] [2013] UKSC 52.
[21] [2014] AC 209.
[22] See Re Nortel GmbH, [92]-[93] (Lord Neuberger).

applicant (including the decisions in Bio Treat, Shinsun, and Leading Holdings) will reveal that they are part of an erroneous line of authorities which stem from the same root that has been severed by the decision in **Re Nortel GmbH** . The reasoning that underlies them was fully considered and correctly rejected by the Judge below in a well-reasoned judgment which cannot be persuasively critiqued.

[48] Applying the approach in **Re Nortel GmbH** to the present case Counsel submitted that it is clear that the requirements to establish a contingent creditor are met because:

> "(a) The Company took a combination of steps by entering into the relevant documentation, including the Indenture, and issuing the Notes which were then listed on the Hong Kong Stock Exchange, and by making statements in the offering memorandum to induce investors like the Respondent to purchase a beneficial interest in the Notes. In Re Nortel GmbH, Lord Neuberger considered that this first requirement was met by the relevant debtor companies becoming members of a group of companies, "undoubtedly a significant relationship in terms of law: it carries with it many legal rights and obligations in revenue, company and common law. Similar statements can be made about the issuance by the Company of debt instruments such as notes that creates significant legal relationships and carries with it many legal rights and obligations (the chain of relationships from issuer to ultimate beneficial holder).
>
> (b) These steps had a legal effect by establishing a chain of relationships between the Company and the ultimate beneficial owners of those Notes, through a chain of intermediaries with contractual (and/or equitable) relationships with one another (as set out in the structure diagram provided to the Court and set out at the Annex to the Judgment. These steps resulted in the Company being vulnerable to the liability established by the Notes. There is a very real prospect of the liability being incurred and being owed by the Company to the Respondent because there is a chain of relationships from the Company to the Respondent that would have that result. The chain of relationships in the present case is actually more certain than is required: "[i]t is not a condition of the right to prove for a debt or liability which is contingent at the date when the company went into liquidation that the contingency should be bound to occur or that its occurrence should be determined by absolute rather than discretionary factors":

[136] (at 252F) (Lord Sumption). In this respect, the position of the Company and Cithara is no different from the position of the debtor company and contingent creditor under pension legislation in Re Nortel GmbH, or the example given by both Law Lords in Nortel of becoming a party to legal proceedings carrying with them the potential to be liable for costs. To put it in the way Lord Neuberger did, the Company in this case is well inside the full shadow of the regime established by the Notes.

(c) It is entirely consistent with the regime under which the liability is imposed, i.e. the bond structure into which the Company voluntarily entered into in order to raise funding (which it ultimately received from the ultimate beneficial holders such as Cithara), to conclude that there is an obligation that falls into the definition of debt and therefore establishes the Respondent as a contingent creditor. Counsel submitted that any reasonable person with all the facts in mind would consider it consistent with the bond issuance that the ultimate investors in the Notes, such as the Respondent, could be the Company's (contingent) creditors."

[49] It follows that there is no strict requirement that there be a legal (let alone contractual) relationship between the parties; the steps taken by the company must have "some legal effect" which can include "putting it under some legal duty or into some legal relationship".

[50] Moreover, even if the decisions relied upon by the applicant were not wrong for the reasons above, it is clear from the specific terms in the **Insolvency Act** that a contingent liability is capable of giving rise to a claim in liquidation proceedings which consequently makes the person to whom the debt will be owed as a result of the contingency a creditor for the purposes of s 162(2)(a).[23]

[51] Finally, Counsel submitted that not only was the Judge correct in her interpretation of the Indenture and in concluding that Cithara has the right to receive the Certificated Note.[24] She was also correct to accept that Euroclear can provide (and has provided) authority to Cithara to progress a winding-up petition. Counsel submitted that as in this case, the Holder holds the notes as a

[23] Jinpeng Group Limited v Peak Hotels and Resorts Limited BVIHCMAP2014/0025 (delivered 8th December 2015, unreported) at [43] per Webster JA.
[24] See: Judgment, [118], [151], [172], [193(1)]).

mere nominee (i.e. trustee) for the Common Depository, which holds it for (i.e. on trust for) Euroclear, which has exercised its beneficial interest and authorised the petitioner.

[52] The respondent makes short shrift of the applicant's submission that it has repeatedly been held (citing the English cases of **Elektrim, Secure Capital, and the Hong Kong case of Leading Holdings**) that a no-action clause restricts the rights of a Holder and prevents anyone other than a Holder from taking action. In rejoinder, Counsel for the respondent pointed to the learned Judge clear finding that paragraph 6.7 of the Indenture contains the usual provision that limitations set out in the no-action clause (at §6.6) "*do not apply to the right of any Holder to receive payment of the principal of, premium, if any, or interest on, such Note, or to bring suit for the enforcement of any such payment, on 25 or after the due date expressed in the Notes, which right shall not be impaired or affected without the consent of the Holder*." Thus, the no-action clause, as is typical in New York indentures, does not prevent Holders (i.e. Cithara following issuance of a Certificated Note) from enforcing payment following the maturity of the Notes.

[53] This Court is satisfied that these arguments go a long way in derailing the applicant's evaluation of the strength of its appeal. The Court also cannot ignore the contradictory posture adopted by the applicant both at first instance and before this Court. On the one hand, the applicant claims that Cithara is not a contingent creditor in order to resist the Petition but on the other hand, it has consistently treated Cithara and other ultimate bondholders as creditors and accepts that beneficial owners of the Notes would be able to vote as "creditors" under s 179A of the Business Companies Act 2004. It has also relied on purported support from "ultimate purchasers of Existing Notes", letters from "beneficial owners" of its 2024 and 2023 Notes. The respondent has submitted that these contradictory positions betray the opportunistic and unmeritorious nature of the Company's position regarding Cithara's status as creditor which undermines the Company's claim that there is a bona fide dispute on substantial grounds. While the rationale is as yet undetermined, we are nevertheless satisfied that this paradoxical posture weakens the appeal's prospects.

[54] The Court is also persuaded that the applicant's critique of the Judge's handling of the expert evidence is unclear and warranted as the proceedings complied with provisions of CPR 32. There was no requirement that there should be cross-examination and it is clear that the applicant did not request the same. What is clear is that the learned Judge reviewed the expert evidence adduced by consent between the Parties and arrived at findings of fact to which this Court (applying appropriate appellate restraint) would ordinarily defer. As Lord Reed stated in **Henderson v Foxworth Investments Ltd**,[25] at [67] would only interfere in the following circumstances:

> "in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[55] This Court has considered the criticisms levied at the court's analysis and we are not satisfied that it would warrant a setting aside of the learned Judge's findings.

Conclusion

[56] Taking into account all of the circumstances of this case and applying the principles just enumerated, we consider that a stay should not be granted and that the interim stay granted on 5th July 2023 and extended on 25th July 2023 should be lifted. In this Court's judgment, the applicant has not presented a strong enough case to rebut the presumption against the grant of a stay of the Judge's liquidation order. We are not satisfied that there are particular circumstances making the imposition of a stay essential and it follows that we accept the submissions advanced by the respondent on the strength of the appeal and the likely effect of the refusal to grant the stay.

[25] [2014] UKSC 41, [2014] 1 WLR 2600.

[57] In carrying out the balancing exercise, we have considered that there are insufficient reasons for denying the respondent the fruits of its victory in the lower court. The liquidation proceedings are a consequence of the company's failure to pay the debts, failure to honour guarantees. The Company has also failed to pay interest and the principal on the Notes for over a year, and the Parent has failed to honour its guarantee despite making principal payments to onshore creditors. The liquidators are aware of the pending appeal and would then be on notice that the appeal might well succeed. It then becomes a matter of commercial judgment how they will treat with the liquidation in the interim.[26]

[58] However, in order to mitigate against any prejudice against the Company resulting from the refusal to grant the stay, the Court will order that the Directors of the Company may convene and hold meetings of the Board of Directors of the Company notwithstanding the appointment of liquidators to the Company and at such meetings may consider and, if thought fit, pass such resolutions (only) as may be necessary to clothe them with authority to conduct the appeal, such resolutions to bind the Company as they would have done if no liquidators had been appointed.

[59] For the reasons above, the following orders are made:

(1) The application for a stay of the order appointing the Liquidators pending the hearing of the appeal is dismissed.

(2) The interim stay granted on 5th July 2023 and extended on 25th July 2023 should be lifted.

(3) The Directors of the Company may convene and hold meetings of the Board of Directors of the Company notwithstanding the appointment of liquidators to the Company and at such meetings may consider and, if thought fit, pass such resolutions (only) as may be necessary to clothe them with authority to conduct the appeal, such resolutions to bind the Company as they would have done if no liquidators had been appointed.

[26] In the Matter of Parmalat Capital Finance Limited 2007 CILR 1 at paragraph 12.

(4) The respondent will have its costs of the application to be paid out of the assets of the Company.

I concur.
Mario Michel
Justice of Appeal

I concur.
Margaret Price-Findlay
Justice of Appeal

By the Court

Chief Registrar