上 海 金 融 法 院
金 融 市 场 案 例 测 试 机 制

第 三 方 意 见 书

上海金融法院:

贵院正在审理的申请人中央国债登记结算有限责任公司上海分公司、交通银行股份有限公司上海市分行、交通银行信托有限公司申请启动的关于“以区块链簿记发行的自贸区离岸债券违约处置法律规则及担保品处置规则适用的合法性、合理性”的测试案例（案号:（2024）沪 74 测试 1 号），本机构的朱志炜律师与朱林啸律师阅看了相关材料，依据《上海金融法院关于金融市场案例测试机制的规定》（试行）第十五条之规定，特针对**“债券受托管理人与债券持有人之间的诉权分配问题”**提出第三方意见，供贵院在审理过程中予以参考，并授权贵院在互联网平台公布本意见。

目 录

第 三 方 意 见 正 文

1. 关于本案诉讼主体适格问题的准据法分析

1.1 《民事诉讼法》第二百七十条规定:“在中华人民共和国领域内进行涉外民事诉讼，适用本编规定。本编没有规定的，适用本法其他有关规定。”实践中，涉外民商事诉讼法律适用公认的准则，即“程序性问题适用法院地法”。

1.2 因此，尽管本案相关信托契据中对于准据法问题存在个别约定，但诉讼主体适格性问题属于程序法问题，应当基于“程序问题适用法院地法”原则进行处理，即适用《中华人民共和国民事诉讼法》。

2. 关于本案申请人投资者 I 和信托管理人 C 原告适格性的意见

2.1 信托管理人 C 原告适格性问题

就信托管理人 C 原告适格性问题，我们认为: 信托管理人 C 作为案涉债券的受托管理人，根据《信托契据》和《募集说明书》的约定取得了债券持有人的授权，有权以自己的名义提起诉讼。具体理由说明如下:

2.1.1 第一，根据我国法律规定，债券受托管理人可以依据债券持有人的委托提起诉讼。

《中华人民共和国证券法（2019 修订）》第九十二条第三款规定:“债券发行人未能按期兑付债券本息的，债券受托管理人可以接受全部或者部分债券持有人的委托，以自己名义代表债券持有人提起、参加民事诉讼或者清算程序。”

《公司债券发行与交易管理办法（2023）》第 59 条规定:“公开发行

公司债券的受托管理人应当按规定或约定履行下列职责:(八)发行人不能按期兑付债券本息或出现募集说明书约定的其他违约事件的,可以接受全部或部分债券持有人的委托,以自己名义代表债券持有人提起、参加民事诉讼或者破产等法律程序,或者代表债券持有人申请处置抵质押物。”

参考上述规定,在中国境内发行的公司债券的受托管理人,可以依据债券持有人的委托代表持有人提起诉讼。

2.1.2 第二,根据意思自治,本案债券文件显示债券持有人已授权债券受托管理人 C 提起诉讼。

本案中,案涉债券虽不是在中国境内发行的公司债券,但根据债券发行文件可知,信托管理人 C 是债券的受托管理人(Trustee)。具言之,案涉债券的《信托契据》(Trust Deed)和《募集说明书》(Terms and Conditions of the Bonds)显示债券持有人已授权债券受托管理人 C 代表持有人提起诉讼。

具体约定如下:

(1)《信托契据》第 9.1 条约定:“9.1 法律程序 在发生违约事件后,信托管理人可随时自行决定对发行人、保证人或担保提供者提起其认为适当的诉讼,以追讨债券下未支付的任何到期金额,或强制执行其在本信托契据或条件下之任何权利,但没有义务根据第 8 条宣布债券立即到期应付,或提起任何诉讼,除非:(a)经特别决议指示,或持有未偿还债券本金金额至少百分之二十五的债券持有人发出书面要求,且(b)信托管理人已就其可能因此而承担的所有责任、诉讼、索赔和要求以及可能因此而产生的所有成本、费用和开支(包括但不限于获得其酌情认为合适的任何咨询意见)获得补偿和/或担

保和/或预先筹集资金，且信托管理人对采取任何此类行动的后果不承担任何责任，并可在不考虑此类行动对个别债券持有人的影响的情况下采取此类行动。只有信托管理人可以执行债券或本信托契据的规定，任何债券持有人无权直接对发行人、保证人或担保提供者提起诉讼，除非信托管理人有义务提起诉讼，但未能在合理时间内提起诉讼，而且这种情形持续存在。”[1]

(2)《募集说明书》第 12 条约定：“受托人可随时酌情且无需通知，采取其认为适当的法律程序以执行其根据信托契据、任何担保契据或任何担保协议所享有的债券相关权利，但除非满足以下条件，否则不受此约束：（a）持有未偿还债券本金金额至少百分之二十五的债券持有人发出书面要求，或经特别决议案指示；及（b）已获得其满意的赔偿和/或担保和/或预付款项。”[2]

根据上述约定，本案中信托管理人 C 已取得债券持有人的授权，可以代表债券持有人对发行人、担保人提起诉讼，是本案的适格原告。

---

[1] 原文为：The Trustee may at any time, after an Event of Default, at its discretion and without further notice, institute such proceedings against the Issuer or the Guarantor or the Security Provider as it may think fit to recover any amounts due in respect of the Bonds, which are unpaid or to enforce any of its rights under this Trust Deed or the Conditions but it shall not be bound to declare the Bonds to be immediately due and payable under Condition 8 or to take any such proceedings unless (a) it shall have been so directed by an Extraordinary Resolution or so requested in writing by the holders of at least one quarter in principal amount of the outstanding Bonds and (b) it shall have been indemnified and/or secured and/or pre-funded to its satisfaction against all liabilities, proceedings, claims and demands to which it may thereby become liable and all costs, charges and expenses which may be incurred by it (including, without limitation, obtaining any advice which it might in its discretion consider appropriate to obtain) in connection therewith and provided that the Trustee shall not be held liable for the consequence of taking any such action and may take such action without having regard to the effect of such action on individual Bondholders. Only the Trustee may enforce the provisions of the Bonds or this Trust Deed and no Bondholder shall be entitled to proceed directly against the Issuer or the Guarantor or the Security Provider unless the Trustee, having become bound so to proceed, fails to do so within a reasonable time and such failure is continuing. If the Trustee (or any Bondholder where entitled under this Trust Deed so to do) makes any claim, institutes any legal proceeding or lodges any proof in a winding-up or insolvency of the Issuer or the Guarantor or the Security Provider under this Trust Deed or under the Bonds, proof herein that, as regards any specified Bond, the Issuer has made default in paying any principal due in respect of such Bond shall (unless the contrary be proved) be sufficient evidence that the Issuer has made the like default as regards all other Bonds in respect of which a corresponding payment is then due and for the purposes of the above a payment shall be a “corresponding” payment notwithstanding that it is due in respect of a Bond of a different denomination from that in respect of the above specified Bond.

[2] 原文为：The Trustee may at any time, at its discretion and without notice, institute such proceedings as it thinks fit to enforce its rights under the Trust Deed in respect of the Bonds or any Deed of Guarantee or any Security Agreement, but it shall not be bound to do so unless: (a) it has been so requested in writing by the Holders of at least 25% of the aggregate principal amount of the outstanding Bonds or has been so directed by an Extraordinary Resolution; and (b) it has been indemnified and/or provided with security and/or pre-funded to its satisfaction.

2.2 投资者 I 原告适格性问题

就投资者 I 原告适格性问题，我们认为，投资者 I 作为债券持有人，与信托管理人 C 之间应当构成委托而非信托关系，在此情况下，信托管理人 C 的诉权来源于意定诉讼担当而非法定诉讼担当，同时诉权并未发生转移，投资者 I 亦有权以自己的名义提起诉讼。

具体理由说明如下:

2.2.1 首先，在中国法项下，投资者 I 和信托管理人 C 之间不构成信托关系，信托管理人 C 并非债券持有人的法定诉讼担当人。

债券受托管理人的制度设置和职责履行与信托受托人存在相似之处，但在我国法律语境下，法律关系特征上与信托存在根本区别，包括以下区别:

其一，受托管理人对债券不享有名义上的所有权。本案中，案涉债券虽应用了区块链技术，但仍然是通过传统的中央证券托管机构提供登记、托管、结算服务，通过登记确认权属。第三人在其意见书中也明确:“区块链债券作为一种技术创新行为，由中央证券托管机构利用区块链技术提供相关发行服务，业务的参与主体均为债券市场的合法市场成员，债券品种和发行规模均经监管部门批准，业务规则、运行逻辑、受监管程度等均与传统数字债券相同，同时由中央证券托管机构对债券进行登记，确认权利归属，区块链技术的应用不改变债券的法律属性。”同时，根据投资者 I 提供的《债券账户明细对账单》，案涉债券仍然通过托管机构登记在持有人名下，而非登记在信托管理人 C 名下。

其二，债券持有人与受托管理人之间不存在信托财产的转移，债券仍然是属于债券持有人的财产，而非独立于债券持有人和受托管理

人之外的“信托财产”。债券持有人将其全部或部分诉讼权利授予债券受托管理人并不影响债券持有人仍然享有对债券的处分权利。假设债券持有人目前希望转让债券，仍然是可以实现的——《募集说明书》2.(c)条约定：“根据第 2(e)条（封闭期）及第 2(f)条规定，债券不得转让，除非被转让债券的本金金额及（当持有人持有的债券并非全部转让时）未转让债券余额的本金金额均为授权面额。”[3]

其三，受托管理人依据法律规定或约定并不负有如信托受托人同等或类似程度的注意义务，也不对持有人负有信托上的忠实义务。本案中，在案涉债券的《信托契据》中，关于信托管理人 C 的义务，有大量豁免性的约定或限定信托管理人义务范围的约定，例如：第 9.2 条约定“信托管理人……并可在不考虑此类行动对个别债券持有人的影响的情况下采取此类行动”；第 11.4 条约定“《受托人条例》（香港法例第 29 章）所规定的任何法定注意义务，均不适用于受托人的任何职能、权利、权力或酌情权”[4]。此外，脱离本案而言，在很多债券中，受托管理人本身也是债券持有人，两重身份存在利益冲突，这与传统意义上的受托人忠实义务有根本区别。从这一角度认定，也难言债券受托管理人是债券持有人的信托受托人。

因此，债券受托管理人与债券持有人既然不构成信托关系，则债券受托管理人并非依据《信托法》等的法律规定，作为债券持有人的法定诉讼担当人。

2.2.2 其次，债券持有人和受托管理人之间不存在诉权的转让。

[3] 原文为：*Transfers*: Subject to Condition 2(e) (*Closed periods*) and Condition 2(f), a Bond may not be transferred unless the principal amount of Bonds transferred and (where not all of the Bonds held by a Holder are being transferred) the principal amount of the balance of Bonds not transferred are Authorised Denominations. Where not all the Bonds represented by the surrendered Bond Certificate are the subject of the transfer, a new Bond Certificate in respect of the balance of the Bonds will be issued to the transferor.

[4] 原文为：Any statutory duty of care provided for in the Trustee Ordinance (Cap. 29 of the laws of Hong Kong), shall not apply to any function, right, power or discretion of the Trustee……

本案中，我们认为，不论诉权能否脱离于实体权利进行转让，即便诉权能够单独转让，仅仅依据《信托契据》和《募集说明书》中“信托管理人接受债券持有人的委托提起诉讼”或类似的表述，并不足以认定债券持有人存在转让诉权的意思表示。

从反面而言，假设将债券持有人授权信托管理人 C 起诉的约定认定为诉权转让，那么即便受托人怠于行使诉权，债券持有人作为诉权的转让方，似乎无法干涉诉权受让方信托管理人 C 如何行使权利，也无法对已转让的权利再主张取回。这一结论与现有文件的约定是不符的。《信托契据》明确约定，债券持有人在受托管理人怠于诉讼且持续的情况下仍然可以对发行人和担保人提起诉讼。

2.2.3 第三，综合债券受托管理人的制度设计和实际操作情况，债券持有人与受托管理人之间的权利义务特征更接近于委托关系，债券受托管理人应当被认定为债券持有人的意定诉讼担当人。

意定诉讼担当是指第三人根据当事人的意愿，以自己的名义代表当事人进行诉讼活动。《最高人民法院关于印发〈全国法院审理债券纠纷案件座谈会纪要〉的通知》（下称**“《债券纠纷座谈纪要》”**）第 5 条规定：“债券受托管理人的诉讼主体资格。债券发行人不能如约偿付债券本息或者出现债券募集文件约定的违约情形时，受托管理人根据债券募集文件、债券受托管理协议的约定或者债券持有人会议决议的授权，以自己的名义代表债券持有人提起、参加民事诉讼，或者申请发行人破产重整、破产清算的，人民法院应当依法予以受理。”有观点认为，上述规定认可了受托管理人因契约或持有人会议

授权的意定诉讼担当。[5] 在其他相关监管文件对于受托管理人诉权的规定中，均可体现受托管理人的诉讼担当是一种意定诉讼担当，即其权利来源于委托授权。[6] 由于《债券纠纷座谈纪要》等相关规定并非“法律”，其中关于债券受托管理人的诉讼权限的规定一般不认为构成“法定诉讼担当”。

本案中，案涉自贸区离岸债券采取直接持有制，持有人享有完整的债券权利，也包括诉讼权利。投资者 I 作为享有完整债券权利的持有人，通过《信托契据》和《募集说明书》的约定，授权信托管理人 C 行使诉权，信托管理人 C 符合意定诉讼担当人的特征。

2.2.4 第四，本案中信托管理人 C 是投资者 I 的意定诉讼担当人，在此前提下，当事人的意思自治尤为重要，在本案中信托管理人 C 根据《信托契据》等取得诉权，且并未导致债券持有人失去诉权。

《信托契据》和《募集说明书》关于信托管理人 C 有权代表持有人提起诉讼的约定，旨在明确信托管理人 C 本身有该等授权。但纵观《信托契据》和《募集说明书》的约定，不存在任何排除债券持有人/投资者诉权的约定，没有约定持有人无权再提起诉讼，也没有约定债券持有人向信托管理人不可逆地转移诉权。

虽然《信托契据》第 9.1 条中有限制持有人起诉权利的内容，即“只有信托管理人可以执行债券或本信托契据的规定，任何债券持有人

---

[5] 杨晖:《证券法》与《会议纪要》视角下的受托管理人诉讼担当的困境与进路—基于上海法院 115 份判决的实证分析，载《金融法苑》总第 107 辑。

[6] 例如，《公司债券受托管理人执业行为准则（2023）》第二十三条：发行人不能偿还债务时，受托管理人应当督促发行人、增信主体（如有）和其他具有偿付义务的机构等落实相应的偿债措施。发行人不能按期兑付债券本息，或出现募集说明书约定的其他违约事件，受托管理人可以接受全部或部分债券持有人的委托，以自己名义代表债券持有人提起、参加民事诉讼、仲裁或者破产等法律程序，或者代表债券持有人申请处置抵质押物。又如，《上海证券交易所非公开发行公司债券业务管理暂行办法》第 5.9 条：“发行人信息披露文件存在虚假记载、误导性陈述或者重大遗漏，致使债券持有人遭受损失的，或者公司债券出现违约情形或风险的，受托管理人应当及时通过召开债券持有人会议等方式征集债券持有人的意见，并根据债券持有人的委托勤勉尽责、及时有效地采取相关措施，包括但不限于与发行人、增信机构、承销机构及其他责任主体进行谈判，提起民事诉讼，申请仲裁，参与重组或者破产的法律程序等。”

无权直接对发行人、保证人或担保提供者提起诉讼，除非信托管理人有义务提起诉讼，但未能在合理时间内提起诉讼，而且这种情形持续存在。”[7]根据该约定，除非信托管理人怠于起诉的情形持续，否则债券持有人无权直接对发行人和担保人提起诉讼。

但是，需要考虑的问题是：判断“信托管理人怠于起诉的情形持续”的标准是什么？应由哪一主体作出判断？

客观而言，一旦债券违约事件发生，就必须快速决策和实施应采取的法律行动。债券持有人显然不可能先就该问题提交法院判断后再决定是否自行提起诉讼。我们认为，结合文本和目的解释，应当认为，在债券发行文件和信托契据不存在明确约定排除持有人诉讼权利的情况下，应当以社会一般人的标准，或至多以持有人/受托管理人同行业人士的认知标准，判断是否存在“信托管理人怠于起诉的情形持续”的情形。

本案中，信托管理人于 2024 年 1 月向发行人发出《SHA 债券加速到期通知函》主张 SHA 债券构成违约，应于该通知所载之日加速到期。此后，信托管理人 C 持续采取了处置担保物的动作，直至 2025 年 5 月，信托管理人 C 提出诉讼要求发行人兑付债券本息。从债券持有人 I 的角度而言，其可以认为在债券加速到期后即应当提起诉讼，不论该等诉讼策略的选择是否为“最优方案”，持有人显然有理由认为“信托管理人怠于起诉的情形持续”的情形已经发生，投资者 I 因此直接针对发行人和担保人提起诉讼，没有违反本案《信托契据》和《募集说明书》的约定。

[7] 原文为：Only the Trustee may enforce the provisions of the Bonds or this Trust Deed and no Bondholder shall be entitled to proceed directly against the Issuer or the Guarantor or the Security Provider unless the Trustee, having become bound so to proceed, fails to do so within a reasonable time and such failure is continuing.

3. 关于本案中存在的重复起诉问题

我们认为，尽管信托管理人 C 与投资者 I 均分别享有诉权，在本案中仍应当考虑，信托管理人 C 已代表投资者 I 提起诉讼的情况下，投资者 I 的起诉是否构成重复起诉。

3.1.1 关于重复起诉的要件，《民事诉讼法》解释第 247 条第 1 款规定：（一）后诉与前诉的当事人相同；（二）后诉与前诉的诉讼标的相同；（三）后诉与前诉的诉讼请求相同，或者后诉的诉讼请求实质上否定前诉裁判结果。当后诉与前诉同时符合上述要件的，裁定不予受理；已经受理的，裁定驳回起诉，但法律、司法解释另有规定的除外。根据该规定，构成重复起诉的要件为：**当事人相同、诉讼标的相同、诉讼请求相同或后诉的诉讼请求实质上否定前诉裁判结果。**

3.1.2 本案中，信托管理人 C、投资者 I 分别于 2025 年 9 月 29 日、2025 年 9 月 30 日提出《请求书》。对此，我们认为，基于本案案情以及提起诉讼的时间节点，投资者 I 在后提出的诉讼构成重复起诉，理由如下：

第一，两诉的申请人行使的诉权有重合、被申请人和第三人相同。两诉的原告虽然不一致，但如前述分析，信托管理人 C 是投资者 I 的意定诉讼担当人，两者行使的诉权（就投资者 I 所持份额的部分）实际为同一诉权，即均为投资者 I 的诉权，信托管理人 C 已代表投资者 I 提起诉讼，投资者 I 再提起的诉讼与前诉申请人实质上重合。同时，两诉被申请人、第三人相同，故两诉当事人相同。

第二，投资者 I 提出的主位诉讼请求实质否定信托管理人 C 提出诉讼的裁判结果，投资者 I 提出的备位诉讼请求与两诉的信托管理人 C 提出诉讼的标的相同。

信托管理人C、投资者I提出的请求事项对比如下表所示:

信托管理人C请求	投资者I请求
（没有主张区块链簿记发行方式无效）	1.1 请求判决区块链簿记发行方式无效，请求被申请人一退还投资款1亿人民币和资金占用损失
-	（备位请求前提：若法院认定区块链簿记发行方式有效）
1.1 请求判令被申请人一支付债券本金10亿元与借期内利息剩余未付部分	1.2 请求判令被申请人一支付投资款本金 1 亿与借期内利息扣除按照持债比例计算的已受偿金额
1.2 请求判令被申请人一支付逾期利息	1.3 请求判令被申请人一支付逾期利息
1.3 请求就前述第1.1、1.2项请求对应本金、借期利息和逾期利息的支付，判令被申请人二承担连带保证责任	1.4 请求就前述第 2、3 项诉讼请求对应本金、借期利息和逾期利息的支付，判令被申请人二承担连带保证责任

表格 1 信托管理人C诉讼请求与投资者I诉讼请求对比

就投资者I提出的主位请求而言,信托管理人C主张继续履行合同，投资者 I 主张合同无效。根据新实体法学说，诉讼标的识别标准为诉讼中的生活事实和以此为基础的诉的声明，即纠纷事实。

本案中，虽然诉讼请求不同，但两诉的诉讼标的都是基于同一合同关系，相关纠纷事实具有一致性。并且，投资者 I 主张合同无效，如果获得支持，将直接否定信托管理人C主张继续履行合同的裁判

基础。而投资者 I 提出的备位请求则是与信托管理人 C 提出的请求一致，信托管理人 C 主张的金额已包括投资者 I 备位请求主张的金额。基于以上，应当认定两诉的诉讼标的相同。

3.1.3 综上，本案中，在信托管理人 C 已代表投资者 I 提出诉讼，请求金额已包含投资者 I 所主张的金额，投资者 I 主张区块链簿记发行方式无效、要求返还的本位请求，以及主张区块链簿记发行方式有效主张还款的备位请求，均构成重复起诉。

4. 关于中国法项下债券持有人与受托管理人的诉讼主体资格的实证分析

我国司法实践中，对于债券持有人和受托管理人的诉讼主体资格，法院通常结合债券发行文件和受托管理协议、持有人决议的内容进行解释:

例如，在**兴业财富资产管理有限公司与中安科股份有限公司公司债券交易纠纷一案（案号：(2018)沪 0115 民初 38946 号）**中，法院认为，募集说明书明确约定在债券违约时持有人有权直接追索，授权受托管理人起诉的决议并未排除债券持有人单独起诉的权利，决议中关于“受托管理人怠于起诉，债券持有人才有权直接起诉”的约定不能反推出受托管理人履行职责则排除持有人直接追索权利的结论。[8]

[8] 兴业财富资产管理有限公司与中安科股份有限公司公司债券交易纠纷一审民事判决书，(2018)沪 0115 民初 38946 号，“法院认为”部分：“首先，涉案《募集说明书》明确约定在发行人(即被告中安科公司)未按时支付债券本息或发生其他违约情形时，债券持有人(即原告)有权直接依法向发行人进行追索，因此债券持有人具有在发行人违约时进行直接追索的权利；其次，涉案债券的债券持有人会议虽通过由天风证券公司代表债券持有人向法院提起民事诉讼的议案，但该议案并未排除债券持有人单独起诉的权利；再次，虽然《募集说明书》约定“被告中安科公司未按时支付本次债券的本金和/或利息，或发生其他违约情况时，债券受托管理人将依据《债券受托管理协议》代表债券持有人向被告中安科公司进行追索……如果债券受托管理人未按《债券受托管理协议》履行其职责，债券持有人有权直接依法向被告中安科公司进行追索”，但该条款仅系赋予天风证券公司作为受托管理人在发行人违约时进行追索的权利，同时明确在受托管理人不履行职责时，债券持有人亦可进行追索，从该条款并不能反推出，在受托管理人履行其职责的同时，债券持有人直接追索的权利即被排除的结论，因此，且不论天风证券公司作为受托管理人是否履行了其职责，原告作为债券持有人进行单独起诉的权利始终存在。”

在**中信信托有限责任公司与新华联控股有限公司债券交易纠纷一案中（案号：(2021)京 0112 民初 4886 号）**，法院认为，案涉债券到期后发行人未兑付本金和利息已构成违约，但发行人未提供增信或追加担保，债券持有人会议已决议明确持有人有权采取任何方式收回本息，故认定持有人有权直接起诉。[9]

在其他类似案例中，亦有法院认可在不同情形下债券持有人仍有直接起诉的权利。根据相关案例，我国法院似乎倾向于认为，受托管理人取得起诉的授权并未排除债券持有人直接起诉的权利。

5. 关于比较法层面债券持有人与受托管理人诉权分配问题的分析

5.1 英国法层面

5.1.1 总体情况

在英国法项下，债券持有人与受托管理人之间的法律关系为信托关系，相关权利义务并非法定，而是意定为主，主要由债券发行时的法律文件——如信托契据(Trust Deed)进行明确。

该等信托契据由债券发行人、债券受托管理人、持有人共同签署，其中包含一个重要的标准合同条款，即**不起诉条款（No-action Clause）**，该等不起诉条款限制了债券持有人在债券违约情况下直接针对发行人起诉的权利。

关于不起诉条款的大致约定，英国法院审理的 2003 年的经典案例

[9] 中信信托有限责任公司与新华联控股有限公司债券交易纠纷一审民事判决书，(2021)京 0112 民初 4886 号，“法院认为”部分：“依据募集说明书约定，“若本公司未按时支付本次债券的本金和/或利息，或发生其他违约情况时，债券受托管理人将依据《债券受托管理协议》代表债券持有人向本公司进行追索。如果债券受托管理人未按《债券受托管理协议》履行其职责，债券持有人有权直接依法向本公司进行追索”，《债券受托管理协议》约定“若发行人未按时支付本次债券的本金和/或利息，或发生其他违约情况时，受托管理人将依据《债券受托管理协议》代表债券持有人向发行人进行追索。如果受托管理人未按《债券受托管理协议》履行其职责，债券持有人有权直接依法向发行人进行追索”。依据上述约定，新华联公司发生上述违约行为时受托管理人应向新华联公司进行追索。现涉案债券已于 2021 年 3 月 24 日到期，新华联公司无法兑付本金并按期支付利息，已经构成违约，自债券到期至今受托管理人虽召开债券持有人会议，但新华联公司至今并未提供增信措施或追加担保，亦未就涉诉“16 新华债”履行兑付义务，且 2020 年债券持有人会议决议明确债券持有人有权通过任何可行的法律救济方式收回本次未偿还债券的本金和利息，故信托公司有权直接以诉讼方式向新华联公司追索。”

Highberry Ltd v Colt Telecom Group plc（该案由英国法院管辖，但准据法为纽约州法）[10]中的一个典型条款范例，可供参考:

“诉讼限制条款：除非同时满足以下条件，否则债券持有人不得就本契据或票据寻求任何救济:

a.持有人向受托人发出书面通知，告知存在持续的违约事件;

b.持有未偿付票据到期时本金总额至少 25%的持有人向受托人提出书面请求，要求采取补救措施;

c.该持有人或持有人群向受托人提供令其满意的赔偿，以弥补任何成本、责任或费用（包括其理事会的合理费用和开支);

d.受托人在收到请求和赔偿提议后 60 天内未遵守该请求;

e.在这 60 天内，持有已发行票据到期时本金金额过半数的持有人未向受托人发出与该请求不一致的指示。

持有人不得利用本契约损害其他持有人的权利，或获得相对于该持有人的优先权或优先地位。”[11]

5.1.2 英国法院典型案例

实践中，英国法院普遍**承认并强制执行**债券文件中的不起诉条款，其核心政策目标是**效率与秩序**，避免众多持有人分别起诉发行人造成的司法资源浪费和可能相互冲突的判决。相关判例梳理如下:

(1)上文提到的 2003 年典型案例 *Highberry Ltd v Colt Telecom Group*

---

[10] *Highberry Ltd v Colt Telecom Group plc (No 1)* [2002] EWHC 2503 (Ch), [2003] 1 BCLC 290; (No 2) [2002] EWHC 2815 (Ch), [2003] BPIR 324.

[11] 条款原文来源于 *Highberry Ltd v Colt Telecom Group plc (No 1)* [2002] EWHC 2503 (Ch)判决书第 11 段，原文摘录如下:

“SECTION 6.6 Limitation on suits. A holder may not pursue any remedy with respect to this Indenture or the Notes unless:
(a) the Holder gives to the Trustee written notice of a continuing Event of Default;
(b) the Holders of at least 25% in aggregate principal amount at maturity of Outstanding Notes make a written request to the Trustee to pursue the remedy;
(c) such Holder or Holders offer the Trustee indemnity satisfactory to the Trustee against any costs, liability or expense (including the reasonable fees and expenses of its Council);
(d) the Trustee does not comply with the request within 60-days after receipt of the request and the offer of indemnity;
(e) during such 60-day period the Holders of a majority in principal amount at maturity of the Outstanding Notes do not give the Trustee a direction that is inconsistent with the request.”

plc [12]（该案由英国法院管辖，准据法为纽约州法）即肯定债券文件中的不起诉条款效力。

(2)2008 年的经典案例 *Elektrim SA v. Vivendi Holdings 1*[13]案例为针对不起诉条款问题的典型案例，其裁判思路被后续案例所多次引用。该案件主要争议焦点为信托契据明确约定不起诉条款时，债券持有人有无权利直接提起诉讼。法官在对信托契据以及债券的整体结构进行考量后，得出以下结论：债券持有人不能单独向发行人主张债权，否则受托人机制将无法运作。债券违约时，债券持有人应当通过受托人集体行动，以确保资产的平等分配（对应英国法项下的同等权益原则，即“*pari passu* principle”）以及有序执行，从而防止个别债券持有人之间相互竞争，避免出现受托人和债券持有人提起多重诉讼或出现重复起诉的情况。[14] 此外，该案例中法院亦引用了众多美国、加拿大法院的案例[15]以及国际法院（ICJ）审理的经典案例 *Barcelona Traction case*[16]，用于说明不起诉条款在国际上和历史上都得到承认，从而证明该等不起诉条款的合法性。

(3) 2018 年典型案例 *Fairhold Securitisation Limited v. Clifden IOM No.*

---

[12] *Highberry Ltd v Colt Telecom Group plc (No 1)* [2002] EWHC 2503 (Ch), [2003] 1 BCLC 290; (No 2) [2002] EWHC 2815 (Ch), [2003] BPIR 324.

[13] *Elektrim SA v Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178

[14] 对此，Elektrim 判决书第 91 段原审法官观点摘录如下：“The purpose of the regime was to ensure that the class of bondholders all acted through the Trustee. That ensured that they all shared equally in the fortunes of the investment and that there was no competition between the bondholders. If an individual bondholder were free to pursue a claim based on a loss caused to the bondholders as a class, then either there was the potential for multiplicity of actions or for duplication of actions brought by the Trustee on the one hand and individual bondholders on the other.”而 100-101 段 Lawrence Collins LJ 法官表示：“I am satisfied that the judge approached the question of construction in the right way and came to the correct conclusion. In particular the commercial purpose of the no-action clause leads me to conclude that the no-action clause applies to claims which are in substance claims to enforce the Trust Deed or the bonds, as well as to claims which are in terms claims to enforce them. ..... the purpose of the normal bond issue Trust Deed is that bondholders should act through the Trustee, and share equally in the fortunes of the investment, and not compete with each other. The bondholders are treated as forming a class, and give instructions to the trustee through a specified percentage of bondholders. Such a scheme promotes liquidity. The no-action clause should be construed, to the extent reasonably possible, as an effective bar to individual bondholders pursuing, for their own account, what are in substance class claims. That can apply to tortious claims as well as to contractual claims.”

[15] 在该案判决书第 3 段，法官认为 No-action clauses 在案例中广为出现，引用的案例包括：Casurina Limited Partnership v. Rio Algom Ltd. (2004) 40 BLR (3d) 112；Feldbaum v. McCrory Corp., 1992 Del. Ch. LEXIS 113；Re Colt Telecom Group plc [2002] EWHC 2503 (Ch.), [2003] 1 B.C.L.C. 290.

[16] *Belgium v. Spain* (Barcelona Traction case),1970 ICJ Rep 3, p.29.

*1 Limited (2018)*中[17]，债券发行文件中包括“不起诉条款”，相关约定如下：“除非债券受托人（在有义务这样做的情况下）未能在合理期限内执行其职责，且该违约行为持续存在，否则任何债券持有人均无权直接对发行人或交易文件的任何其他方提起诉讼或强制执行担保措施。”[18] Clifden 作为债券持有人起诉债券发行人 Fairhold Securitisation Limited 并向其索赔，其主张作为债券持有人已经指示债券受托管理人 GLAS 采取法律行动，但 GLAS 并未履行，因此 Clifden 有权越过受托管理人直接起诉（原文为：“step into the shoes of the trustee”）。在该案中，不起诉条款是否阻断债券持有人的诉权为关键问题。对此，Kramer 法官认为信托契据中的不起诉条款明确、有效且应当执行，并认为债券持有人应当先行指令债券管理人行事，只有在债券受托管理人未能在合理期限内采取法律行动时，才可以直接提起行动；而在该案中，债券持有人仅给于管理人 3 个小时考虑，便自行采取行动，法院认为该等时间并不充足，因此否定债券持有人可以有权直接提起诉讼。[19]

5.1.3 小结

此外，经检索发现，近年英国法院在处理涉及不起诉条款（No-action Clause）的案例仍然以上述典型案例为准，暂未发现有新的与上述典型案例意见相反的案例。

根据以上典型案例可知，英国法院认为，应当以尊重意思自治为基

[17] *Fairhold Securitisation Limited v Clifden IOM No. 1 Limited &Ors*，该案系未经正式刊登的 High Court Chancery Division judgment，因此暂未从公开渠道查找到正式案号，该等判决书亦未公开在 BAILII 或 National Archives 上，具体可见附件。

[18] 条款原文为："No noteholder shall be entitled to proceed directly against the issuer or any other party to the transaction documents or to enforce the issuer security unless the Note Trustee, having become bound to do so, fails to do so within a reasonable period and such failure shall be continuing ...".详见脚注 18 案例的判决书第 66 段，see *Fairhold Securitisation Limited v Clifden IOM No. 1 Limited &Ors, para.66.*

[19] 详见脚注 18 案例的判决书第 96-100 段，see *Fairhold Securitisation Limited v Clifden IOM No. 1 Limited &Ors, paras.96-100.*

础，在信托契据中不起诉条款（No-action Clause）的约定清晰明确的情况下，强调个别债券持有人不应绕过信托契据中建立的集体行动机制，而必须遵循信托契据中已商定的程序，通过受托人和集体投票来采取相应法律行动。

5.2 美国法层面

5.2.1 法律规定

在美国，处理信托受益人（Bondholders /Noteholders）和信托管理人（Indenture Trustee）之间诉权问题的法律框架与英国有相似之处，但受到《1939 年信托契据法案》（Trust Indenture Act of 1939, 以下简称 **“TIA”**）的重大影响。

根据 TIA 第 316（b）条规定，**合格的信托契据应当规定，尽管存在其他规定，任何债券持有人均享有在债券到期日后收取债券本息或在相应日期时或之后提起诉讼以强制执行该等付款义务的权利**；在没有持有人同意的情形下，该等权利不应受到损害或被影响，以下情况除外：（1）根据第 316 条第（a）款第（2）项的规定同意利息支付延期；（2）契据中包括条款限制债券持有人提起担保权益诉讼的权利，该等诉讼的提起、进行或判决的作出根据适用的法律会导致**信托契据在担保财产上的留置权（lien）被放弃、损害、豁免或丧失**；（3）任何债券持有人收取债券本息的权利不得因 LIBOR 的调

整而受损或被影响。”[20]

简而言之，根据以上条款，除了极个别持有人采取的法律行动可能会危及整体债券持有人共同利益的情况下（例如**个别持有人对担保物行使诉权**），TIA 确保债券持有人在债券到期未支付本金或利息时，有权独立提起诉讼，该权利不能被信托契据中的条款所剥夺。因此，在美国法下，对于债券持有人是否享有诉权问题的关键判断点在于是否受到 TIA 管辖：**一方面**，对于受 TIA 管辖的债券（通常是公开发行的公司债券），该法案禁止任何信托契据条款限制债券持有人在债券到期日后直接向发行人**追索本金和利息**的绝对和无条件权利；**另一方面**，在不受 TIA 管辖的债券（例如市政债券、某些私募发行或结构性产品）中，“不起诉条款”（No-action Clause）通常是有效的，美国法院倾向于执行合同条款，要求个别债券持有人遵循集体行动程序，并强调通常需要满足一定比例（如 25%）的持有人同意才能指示债券受托人采取行动。

5.2.2 示范条款文本

对于不受 TIA 管辖的债券，美国律师协会商业法部门的信托契据与信托受托管理人委员会（Committee on Trust Indentures and Indenture Trustees of the American Bar Association’s Business Law Section）在《商业律师》（The Business Lawyer）上发表了三篇重要文章，分析

[20] (b) Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder, except—
(1) as to a postponement of an interest payment consented to as provided in paragraph (2) of subsection (a);
(2) that such indenture may contain provisions limiting or denying the right of any such holder to institute any such suit, if and to the extent that the institution or prosecution thereof or the entry of judgment therein would, under applicable law, result in the surrender, impairment, waiver, or loss of the lien of such indenture upon any property subject to such lien; and
(3) that the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security shall not be deemed to be impaired or affected by any change occurring by the application of section 104 of the Adjustable Interest Rate (LIBOR) Act to any indenture security.

了信托契据的法定范本、合同条款含义等问题，并总结了涉及不起诉条款（No-action Clause）的示范条款，示范条款内容如下[21]:

持有人不得就本信托契据或债券，或就接管人或受托人的任命，或就本信托契据或债券项下的任何其他救济措施提起任何司法或其他程序，除非:

（1）债券持有人通知受托人违约事件的存在;

（2）持有至少 25%债券份额的持有人要求受托人采取法律行动以获得满意的救济;

（3）受托人在 60 天内未采取任何行动。[22]

5.2.3 美国法院典型案例

（1）区分“集体索赔”与“个人索赔”

在 1992 年特拉华州衡平法院处理的典型案例 *Feldbaum v. McCrory Corp* 中[23]，信托契据中包含不起诉条款，规定除非持有债券价值过半数的债券持有人要求受托人提起诉讼且受托人怠于提起诉讼，否则债券持有人不得基于信托契据提起诉讼；而原告系债券持有人，其基于发行人存在欺诈性转让、违反善良和公平交易的默示义务等理由，向债券发行人在特拉华州法院提起诉讼。债券持有人主张，信托契据中约定的不起诉条款（No-action Clause）仅适用于明确的合同违约，而不适用于一般的欺诈或默示义务索赔。

然而，特拉华州衡平法院驳回了债券持有人的索赔请求，认为约定的不起诉条款具有可执行性，并区分了“集体”索赔（必须遵循条款规定的程序）和针对逾期未付本金和利息的“个人”索赔（受 TIA

[21] Model Simplified Indenture, at 757 (§ 6.06).

[22] (1) a holder notifies the trustee of a continuing Event of Default; (2) holders of at least 25% of the bonds request the trustee to pursue a remedy and offer indemnity, satisfactory to the trustee, against any loss, liability and expense; and (3) the trustee fails to take any action for 60 days.

[23] Feldbaum v. McCrory Corp., Del. Ch. LEXIS 113 (1992)

保护，通常不得加以限制），而该案中的索赔被视为集体索赔，旨在为所有持有人的利益追回资金，因此不受 TIA 保护。该案例成为美国法院处理不起诉问题的关键先例，并在随后的案例中被多次引用。

（2）严格解释不起诉条款的措辞并明确适用范围

2014 年的 *Quadrant Structured Prods. Co., Ltd. v. Vertin* 案件在 1992 年案例基础上更进了一步，严格解释不起诉条款的精准措辞，以明确其适用范围。在该案中，法院同意债券持有人提起诉讼，原因是认为该案中约定的不起诉条款（No-action Clause）范围较为狭窄，其文本上只写了仅限制债券持有人提起针对信托契据（Indenture）本身的诉讼（该案中的信托契据文本中仅写明 “upon or under or with respect to this Indenture” 漏写了常见的 “or the Securities”），因而没有限制债券持有人提起针对**信托契据之外的索赔**（例如基于普通法或衡平法索赔）提起独立诉讼。[24] 基于此，法院认为债券持有人主张债券发行人违反信义义务而提起的诉讼，不属于不起诉条款限制的范围。仅三个单词之差，就导致了该案例处理结果与 1992 年 Feldbaum 案件处理结果完全不同，说明了法院对于不起诉条款文本的严格解释倾向。

5.3 香港法层面

5.3.1 法律框架

在香港法律框架下，法院在处理债券持有人或信托受益人与受托人（或发行人）之间的诉权问题时，通常采取与英国法一致的原则，即严格尊重合同条款中约定的“不起诉条款”（no-action clause）和全球票据结构中的“不可穿透原则”（no look-through principle）。

[24] *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 23 N.Y.3d 549 (2014)

5.3.2 香港法院典型案例

(1) 2020 年的 *Re REXLot Holding Ltd [2020] HKCFI 2212*[25]案件中信托契据相关约定与本案契据约定内容几乎一模一样,具有较大参考意义。在该案中，REXLot Holdings Limited 为债券发行人，发行了两笔可转债，而几家基金人系债券的最终持有人，其通过债券结算系统 Euroclear 等间接持有债券收益权，该案件中，几家基金针对债券发行人提出清盘呈请，而债券契约中包含一个“no-action clause”条款。根据该条款，债券持有人无权直接起诉，除非受托人未在合理时间内采取行动 (fails to do so)，因此出现争议：债券持有人是否有权凭借其持有债券权益而有权提出清盘呈请。

对此，法院引用了信托契据中写明 No-action Clause 的条款，具体内容主要是：“only the trustee may enforce … no bond holder shall be entitled to proceed directly … unless the trustee … fails to do so within a reasonable time”。[26] 基于以上条款，法院认为该等条款引发了相当复杂的法律争议，即在此情况下，债券持有人是否有权启动清盘呈请、该等条款是否构成法定障碍等。但是，该案法官巧妙逃避了对于该复杂的问题处理，在主审法官的建议下，债券持有人同意由受托人代替其作为清盘呈请人；而后信托受托人提出代位申请，主张应当由其代替最初的呈请人成为清盘呈请人，主审法官亦表示同意。

---

[25] *Re REXLot Holdings Limited* [2020] HKCFI 2212.

[26] 该案中，信托契据第 10.1 条约定如下：“The trustee may at any time at its discretion without further notice institute such proceedings against the issuers it may think to recover any amounts due in respect of the bonds which are unpaid or to enforce any of its rights under this trust deed or the conditions, but it shall not be bound to take any such proceedings unless... (certain conditions)..... only the trustee may enforce the provisions of the bonds or this trust deed and no bond holder shall be entitled to proceed directly against the issuer unless the trustee, having become bound to do so, to proceed, fails to do so within a reasonable time and such failure is continuing.”详见判决书第 14-20 段，see *Re REXLot Holdings Limited* [2020] HKCFI 2212, paras 14-20.

(2) 2023 年的 *Re Leading Holdings Group Limited [2023] HKCFI 1770*[27] 案件中，香港法院终于不再逃避，而是首次明确表示，在多层持有结构中，通过簿记发行系统间接享有债券权益的投资者，没有权利向法院提出发行人清盘呈请。在该案中，申请人通过星展银行（DBS）间接持有债券，而星展银行通过欧洲结算银行（Euroclear）最终持有债券。基于上述结构，法院认为申请人并非债券直接持有人，其与发行人没有直接的合同关系。此外，法院重点审查了信托契据中包括的“不起诉条款”（法院将其称之为“No Action Clause”），并强调，信托契据包含不起诉条款“No Action Clause”时，债券持有人同意放弃其提出个人索赔的权利，因此受托人获得了诉权，该等制度的目的即确保债券持有人均通过守约采取法律行动，从而避免债券持有人之间产生竞争。[28]

5.4 关于债券持有人与受托管理人诉权分配问题的比较法小结

通过对英国、美国及香港三个法域的比较法分析，可以就债券持有人与债券受托人之间的诉权分配问题得出以下初步结论:

5.4.1 第一，核心原则为尊重合同意思自治，普遍承认“不起诉条款”的效力，法域间的关键差异在于法律框架与适用范围。

从前述内容可知，三地法院的基本立场是尊重并强制执行债券发行文件（特别是信托契据）中明确约定的“不起诉条款”（No-action Clause）。其共同的核心理念是维护集体行动机制，防止个别持有人无序诉讼导致的司法资源浪费、判决冲突以及对其他持有人平等受偿权的损害。

具体来说，英国与香港立场高度一致，两者均以合同约定为首要依

[27] *Re Leading Holdings Group Limited* [2023] HKCFI 1770
[28] *Re Leading Holdings Group Limited* [2023] HKCFI 1770, para. 58.

据，未设立特殊的强制性成文法规定。法院通过典型案例（如英国的 *Elektrim* 案、*Fairhold* 案，香港的 *Leading Holdings* 案）明确支持信托契据中的不起诉条款，强调持有人必须通过受托人采取集体行动。

而美国法律框架呈现“二元化”特征。关键区别在于债券是否受 1939 年《信托契据法》（“TIA”）管辖。受 TIA 管辖的债券：TIA 第 316(b) 条为持有人提供了法定保护，确保其就到期本息支付的“个人权利”不被剥夺，不起诉条款在此范围内无效。不受 TIA 管辖的债券：其处理方式与英国法类似，法院会执行不起诉条款。此外，美国法院的判例（如 *Feldbaum* 案、*Quadrant* 案）进一步细化了对条款的解释，强调严格区分“集体索赔”（受条款约束）与“个人索赔”（可能受 TIA 保护），并对条款的措辞进行严格解释以确定其适用范围。

5.4.2 第二，司法实践呈现精细趋势，各法域法院均倾向于对“不起诉条款”进行精细化解释和适用，关注“不起诉条款”文本与索赔性质。

实践中，特别是美国法院的判例表明，法院不仅承认条款效力，还会深入分析条款的具体措辞（如 *Quadrant* 案因缺少几个关键词而限缩了条款适用范围）以及债券持有人所提索赔的法律性质（如区分合同违约索赔与欺诈或信义义务索赔），这要求债券文件起草必须极为精确。

总结而言，在债券持有人与债券管理人诉权分配问题上，比较法层面呈现出“原则统一、细节分化”的图景。虽然尊重合同意思自治、支持集体行动机制是主流，但美国因 TIA 的存在构成了重要例外，且各法域法院均倾向于对“不起诉条款”（No-action Clause）进行精细化解释和适用。

6. 关于本案中申请人投资者 I 和信托管理人 C 原告适格性的结论性意见

6.1 信托管理人 C、投资者 I 均有权提起本案诉讼

6.1.1 信托管理人 C 的诉权来源于《信托契据》和《募集说明书》的明确授权，符合意定诉讼担当的法理逻辑；投资者 I 作为债券持有人亦享有独立的诉权，案涉债券文件未排除持有人的直接诉权，《信托契据》虽对持有人的诉权有所限制，但仍约定若信托管理人怠于行使诉权时持有人有权自行起诉。本案中，根据社会一般认知或行业标准判断，投资者 I 有合理理由认为“怠于起诉情形持续”，其起诉未违反约定。

6.1.2 比较法层面，英国、香港法院普遍尊重信托契据中的“不起诉条款”（No-action Clause）效力。在信托法律框架下，英美法院多强调债券持有人通过管理人集体行动机制的有效性，避免债券持有人互相竞争并损害集体利益，进而导致集体行动机制失灵。

6.1.3 中国法与英美法律就债券持有人和管理人之间的诉权问题判断相关的法律体系及法律适用的逻辑起点有明显差异。实践案例显示，中国法院倾向于认可债券持有人诉权未被明确排除时的诉讼主体资格。

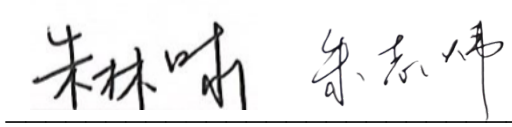
6.2 投资者 I 的起诉构成重复起诉，应当予以驳回

6.2.1 尽管信托管理人 C 与投资者 I 均享有诉权，但投资者 I 提出的请求因当事人实质重合、诉讼标的相同构成重复起诉，应当其驳回起诉。

6.2.2 允许投资者 I 另行起诉将导致司法资源浪费、判决冲突风险，违背集体行动机制的设计初衷。此外，参照英国 *Elektrim* 案、香港 *Leading Holdings* 案精神，个别持有人原则上亦应当通过受托人集体行权，避免无序诉讼。

此致

上海金融法院

意见提供人： 

朱林啸 律师 / 朱志炜 律师

广东青狮云岸（上海）律师事务所

日期：二〇二五年十一月二十四日

附件：

[1] *Highberry Ltd v Colt Telecom Group plc (No 1)* [2002] EWHC 2503 (Ch)

[2] *Elektrim SA v Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178

[3] *Fairhold Securitisation Limited v Clifden IOM No. 1 Limited &Ors*

[4] *Quadrant Structured Prods. Co., Ltd. v. Vertin* [2014] 23 N.Y.3d 549

[5] *Re REXLot Holdings Limited* [2020] HKCFI 2212

[6] *Re Leading Holdings Group Limited* [2023] HKCFI 1770

[7] 兴业财富资产管理有限公司与中安科股份有限公司公司债券交易纠纷一审民事判决书，(2018)沪 0115 民初 38946 号

[8] 中信信托有限责任公司与新华联控股有限公司债券交易纠纷一审民事判决书，(2021)京 0112 民初 4886 号

意见提供人简介:

青狮云岸律师事务所总部设于深圳，在上海设立分所，并与香港罗本信律师行建立战略合作关系。围绕金融争议解决领域的法律服务需求，青狮云岸提供诉讼与非诉紧密结合的一体化解决方案，具体包括：潜在争议分析及处置策略制定、诉讼/仲裁/执行案件代理、通过协商谈判化解纠纷、监管沟通与调查应对、专题培训与法律讲座等专业服务。

朱志炜 律师

朱志炜律师是青狮云岸（上海）律师事务所主任、合伙人。朱志炜律师的主要执业领域为金融商事争议解决和合规业务，包括银行、证券、信托、私募基金等大资管领域的诉讼、仲裁与合规及衍生领域业务、公司纠纷及公司治理、资本市场诉讼与合规等。

朱志炜律师曾任职于北京两家头部争议解决律所，擅于处理营业信托纠纷、私募基金纠纷、资管合同纠纷及其他新型、疑难金融资管案件，并曾代表多家机构处理债权清收、投资合同纠纷、对赌纠纷等，案件标的已逾百亿。2025 年获 ALB 中国区域市场法律大奖青年律师大奖，入选《精品法律服务品牌指南（2024）》并获“新锐律师”奖项。

朱林啸 律师

朱林啸律师是青狮云岸（上海）律师事务所执行主任。朱林啸律师专注于金融商事争议解决，涵盖银行、证券、信托、私募、期货及衍生品纠纷，以及公司纠纷与破产衍生诉讼。

朱林啸律师曾任职于金杜、方达、中伦、环球等红圈所以及香港周启邦律师事务所，在上海、北京、深圳、香港四地拥有丰富执业经验。擅长处理高标的、疑难复杂的金融及公司类诉讼仲裁案件，累计案件标的额超百亿元。曾代理近 20 亿元的金融借款、信托、私募基金等多类纠纷，并在破产程序中代表债权人处理相关事务。

Case no. 6972 of 2002

[2002] EWHC 2503 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

COMPANIES COURT

Royal Courts of Justice
Strand
London WC2A 2LL
Monday, November 25, 2002

Before

MR JUSTICE LAWRENCE COLLINS

- -

In the Matter of

COLT TELECOM GROUP PLC

Between

(1) HIGHBERRY LIMITED

(2) HIGHBERRY LLC

Applicants

and

COLT TELECOM GROUP PLC

Respondent

- -

- -

Mr Malcolm Davis-White (instructed by Cadwalader)for the Applicants
Mr Richard Sheldon QC and Ms Hilary Stonefrost (instructed by Slaughter & May)for the Respondent

- -

JUDGMENT
Approved by the Court for handing down

Mr Justice Lawrence Collins:

I Introduction

1. This is an unusual application for disclosure of documents, the provision of information, and directions for cross-examination in an unusual petition for an administration order presented against COLT Telecom Group plc ("COLT"). The Petitioners are Highberry Ltd and Highberry LLC. The Petitioners hold approximately £75m (or US$ equivalent) face value of Notes issued by COLT.

2. The Petitioners' case is that COLT is, or is likely to become, both cash-flow and balance sheet insolvent and that an administration order would be likely to achieve relevant purposes under section 8 of the Insolvency Act 1986, namely the survival of the company and the whole or some part of its undertaking and/or a compromise under section 425 of the Companies Act 1985.

3. The Petition is unusual in that the Petitioners claim that COLT is or is likely to become insolvent notwithstanding that COLT is a constituent member of the FTSE mid-250 index and has a market capitalisation of in excess of £550 million, that its latest balance sheet shows net assets of £977 million, and that the various series of Notes issued by COLT are not in default and do not fall due for repayment until the period 2005 to 2009. Against that, the Petitioners have in their proposals to COLT have relied on the dramatic fall in its share price since the year 2000, and on its substantial operating losses and negative cash-flows.

4. Not only is the Petition unusual (and indeed has features in common with corporate litigation in the United States) but the present application is unusual (and probably unprecedented) in that the Petitioners seek disclosure of documents and information, and cross-examination of witnesses (including expert witnesses), on the basis that, because there will be a dispute as to the solvency of COLT on the hearing of the petition, disclosure and cross-examination will be necessary to test the evidence put forward by COLT and to resolve the dispute as to its solvency. The application therefore raises some important questions of principle on the approach to be taken where there are contested issues of fact in insolvency proceedings of this kind.

II COLT and the Petitioners

5. COLT is the holding company of a group of companies ("the Group") whose trading operations are carried on by its subsidiaries. The Group's business was established in 1992 and COLT became the holding company in 1996. The business of the Group comprises the provision of advanced telecommunications services to business and government customers across Europe.

6. The Group employed just under 5,000 people as at the end of September 2002. Its annual turnover is in excess of £1 billion. COLT's balance sheet as at September 30, 2002 shows assets totalling £2.6 billion, creditors totalling £1.5 billion, net assets of £977 million and cash balances of £455 million. At that date, the Group had aggregate cash balances of £978 million.

7. COLT's assets consist primarily of cash held by it and investments in its subsidiaries comprising shareholdings in, and long term funding to, those subsidiaries. COLT's liabilities consist principally of its indebtedness on the nine series of Notes issued by it between 1996 and 1999. COLT's business has also been funded by raising equity capital totalling over £2 billion, the most recent being of about £500 million in December 2001.

8. Highberry Ltd is an English company which was incorporated in November 2001, and Highberry LLC is a Delaware corporation which was incorporated in September 2002. COLT says that the Petitioners are part of an American group called the Elliott Group, which is controlled by Mr Paul Singer, the father of Mr Gordon Singer, a director of Highberry Ltd and the person who verified the Petition. According to COLT, the Elliott Group is a "vulture fund," which specialises in the taking of "short" positions in shares of a company (in the expectation of a drop in their value) and acquiring debt securities at a discount (in the hope that their price will rise).

9. COLT says that the Petitioners have acquired Notes in the market at various times as recently as September of this year at a discount from their initial principal value. There are no outstanding sums due on the Notes held by the

Petitioners and the earliest date (in the absence of a declaration of default) on which the principal sum is due to be repaid on Notes held by the Petitioners is 2006. COLT says that it believes that the administration petition is part of the strategy of the Petitioners is to make a speculative profit from its acquisition of Notes at a discounted price, and also from their (or their affiliated companies') short position on COLT's shares and that the Petitioners are seeking to achieve the profit by forcing an unjustified transfer of value from shareholders to noteholders.

III The Notes and the "no-action clause"

10. The total outstanding value (initial principal) of the nine series of Notes issued by the Company is £1.1 billion. The Notes are long term and are not due to be repaid until various dates between 2005 and 2009. COLT has paid all its interest obligations to date on the Notes on time and in full.

11. The Notes are governed by New York law, and contain the following "no-action" provisions:

> "SECTION 6.6 Limitation on Suits A Holder may not pursue any remedy with respect to this Indenture or the Notes unless:
>
> (a) the holder gives to the Trustee written notice of a continuing Event of Default;
>
> (b) the Holders of at least 25% in aggregate principal amount at maturity of Outstanding Notes make a written request to the Trustee to pursue the remedy;
>
> (c) such Holder or Holders offer the Trustee indemnity satisfactory to the Trustee against any costs, liability or expense (including the reasonable fees and expenses of its counsel);
>
> (d) the Trustee does not comply with the request within 60 days after receipt of the request and the offer of indemnity; and
>
> (e) during such 60-day period, the Holder of a majority in principal amount at maturity of the Outstanding Notes do not give the Trustee a direction that is inconsistent with the request
>
> SECTION 6.7 Rights of Holders to Receive Payment. Notwithstanding any other provision of this Indenture, the right of any holder to receive payment of principal of, premium, if any, or interest on a Note or to bring suit for the enforcement of any such payment, on or after the due date for such payment expressed in the Notes, is absolute and unconditional and shall not be impaired or affected without the consent of such Holder."

12. No-action clauses in bond issues have a very long history, and have even been the subject of discussion in the International Court of Justice (although not the subject of decision) in relation to insolvency proceedings brought directly by bondholders: *Belgium v. Spain* (*Barcelona Traction* case), 1970 ICJ Rep 3, 104-5, *per* Judge Sir Gerald Fitzmaurice QC. They are also the subject of many decisions in the United States, and also in Canada, where the most recent appears to be *Casurina Limited Partnership v. Rio Algom Ltd.*, Ontario, August 22, 2002.

13. COLT has adduced evidence from a partner in the eminent New York law firm, Cravath, Swaine & Moore, to the effect that these provisions would be effective to

prevent the maintenance of proceedings such as these. The Petitioners propose to serve evidence in reply later today. In the course of the present hearing I expressed the view that this point might have formed the basis of an application to strike out the petition, or of an application for a preliminary issue. If COLT is right on the point, it would have been a complete answer to the petition and might have rendered unnecessary the extensive (and no doubt expensive) evidence on the financial affairs of COLT.

14. But I was informed that the issue has not been taken as a preliminary point because in response to COLT's announcement in accordance with Stock Exchange Listing Requirements of the Petitioners' threat to present an administration petition, the Petitioners published their views which included a statement that "Highberry believes that the insolvency of COLT is inevitable". In the light of the Petitioners' public statement and the allegations as to insolvency made in the Petition, COLT wishes to see off the Petitioners' attack in public in order to reassure its customers and the market.

IV The issues on the Petition

15. The main issues are on the Petition are these. The first is whether as a matter of New York law (the law governing the Notes), the terms of the no-action clauses in the relevant indentures creating and regulating the Notes prevent the Petitioners bringing these proceedings. The second is whether COLT is or is likely to become insolvent. The remaining issues (which are not relevant for the purposes of these applications) will be whether the making of an administration order would be likely to achieve either of the statutory purposes mentioned in the Petition, and whether as a matter of discretion an administration order should be made.

16. On insolvency, the Petitioners rely upon the rule 2.2 Report of Mr Heis of KPMG. As regards cash-flow insolvency he accepts that the position regarding cash-flow insolvency is that COLT is currently cash-flow solvent. But the Petitioners' case is that COLT will continue to absorb the cash that it currently holds such that there will be insufficient cash to repay a substantial amount of debt by 2006, i.e. the Notes falling due then. Mr Heis says that the forecast of Morgan Stanley, the Group's house broker, is that there will be insufficient cash to repay a substantial amount of the debt by 2006, and the current business plan appears likely to fail unless extra funding is made available to meet the repayment of current debts.

17. As regards balance sheet insolvency, Mr Heis' evidence is that it turns upon the value to be attributed to the tangible fixed assets of the group, of which COLT is the holding company. This in turn depends upon an analysis of the value to be attributed to the network infrastructure assets.

18. Financial Reporting Standard 11 (FRS 11) requires directors to carry out an impairment review if events or changes in circumstances indicate that the carrying amount of a fixed asset may not be recoverable. Such a review was carried out by COLT, and on September 27, 2002 it announced that, given the recent downturn in the telecommunications industry and in the overall economic environment, it was prudent to take further action to ensure that its assets base remained aligned with the realities of the market. Accordingly an impairment charge of £551 million was made to write down the book value of fixed assets. The results (including the review) were subject to an independent interim review report by its auditors, PricewaterhouseCoopers ("PwC").

19. The FRS 11 review comprises a comparison of the carrying amount of the fixed assets with their recoverable amount, which is defined as the higher of their value in use and their net realisable value (NRV). The value in use is defined as the present value of the future cash-flows obtainable as the result of an asset's

continued use, including those resulting from its ultimate disposal. NRV is the amount at which an asset could be disposed of, less any direct selling costs. Mr Heis concludes that the relevant "value in use" is negative and that "net realisable value" is therefore the higher figure for determining their "recoverable" amount; that net realisable value is some 10% of book value; and that that the net assets of £1,624 million would be written down by £1,500 million leading to net assets of £124 million as at December 31, 2001, and that as at June 30, 2002 there would be, on a balance sheet basis, net liabilities (on a group basis) of £13 million.

20. COLT denies that it is or is likely to become insolvent on either the balance sheet or cash-flow basis. It relies on the evidence of its Chief Executive Officer, Mr Akin (to which I shall revert) and a report by Mr Halkes and Mr Hughes of Ernst & Young ("E&Y"), which analyses the evidence supporting the petition and additional publicly available information. On cash-flow E&Y say that any prediction that COLT was unlikely to repay or refinance its bonds in 2006 was speculative and subject to considerable uncertainty, and no account was taken of the options available to COLT including increasing revenues, reducing expenditure, receiving further shareholder support and making further repurchases of bonds at a discount. On balance sheet solvency they maintain that the application of FRS 11 by Mr Heis was incorrectly performed, and they estimate that Mr Heis' impairment of £1,626 million is overstated and a more reliable estimate was between £569 million and £791 million, which would result in net assets of between £1,044 million and £822 million, and no reliable evidence had been presented to justify an increase in the impairment beyond the £551 million already reflected in the third-quarter results of COLT, which resulted in positive net assets of £978 million.

V Applicable principles on the application

21. The remaining live issues on this application are whether an order should be made in favour of the Petitioners for disclosure of documents and the provision of information by COLT, and whether (as the Petitioners contend) there should be cross-examination of Mr Akin, COLT's chief executive officer, and of COLT's experts. The Petitioners contend that because Mr Akin has asserted that COLT has expectations of better cash-flows than those relied upon by Mr Heis and that COLT will in fact pay off all its Notes and the Petitioners' case is based on incomplete information, the Petitioners ought to be able to test that assertion by seeing the documents, or having the information, on which it is based; and that the difference between the Petitioners and COLT can only be resolved by cross-examination.

22. The starting point for the Petitioners is the submission that the hearing of the petition will be a trial: under CPR 32.5 the general rule is that there is to be oral examination on witness statements unless the court otherwise orders. Consequently the burden is on COLT to satisfy the court that cross-examination on witness statements is not appropriate in these proceedings. Disclosure of documents and information is necessary for the just resolution of the issues and for the effective conduct of cross-examination.

23. The position of COLT is that the Petitioners' application for disclosure and cross-examination is based on a fundamental misconception that the hearing of an administration petition is a trial. The normal trial process does not apply: there are no pleadings, and there is no automatic disclosure.

24. In my judgment the starting point is the Insolvency Rules 1986 ("the 1986 Rules"). They apply to "insolvency proceedings," i.e. any proceedings under the Insolvency Act 1986 or the 1986 Rules: r. 13.7. By r. 7.51(1), the Civil Procedure Rules (CPR) and the practice and procedure of the High Court apply to insolvency proceedings in the High Court, with any necessary modifications, "except so far as inconsistent with these Rules." The effect of r. 7.57 is that the practice and

procedure of the High Court with regard to the use of affidavits and witness statements applies to insolvency proceedings.

25. The effect of r. 7.7(1) is that in insolvency proceedings evidence may be given by affidavit or witness statement "unless by any provision of the Rules it is otherwise provided or the court otherwise directs; but the court may, on the application of any party, order the attendance for cross-examination of the person making" the affidavit or witness statement. By r. 7.60 any party to insolvency proceedings may apply to the court for an order for (inter alia) additional information or disclosure and inspection of documents.

26. Counsel for the Petitioners did not formally abandon his argument that the hearing of an administration petition was a trial for the purposes of the CPR, but it seems to me that the effect of the 1986 Rules is absolutely clear. The hearing of insolvency proceedings (including administration petitions) will normally be on the basis of written evidence, but the court does have the power to order disclosure of documents and information and to order cross-examination under rr. 7.7 and 7.60. The 1986 Rules do not provide for disclosure akin to the procedure under the CPR, which is inconsistent with the 1986 Rules.

27. Administration petition procedure is dealt with in r. 2, which provides for evidence in support by affidavit (which can also be by witness statement: r. 7.57(5)), and for the variety of persons who can be represented at the hearing, who include not only the petitioner and the company but also persons who have petitioned for winding up, and (subject to the leave of the court) any other person who appears to have an interest justifying his appearance: r. 2.9(i)(g).

28. There have, it seems, been a very small number of cases in which the person making a r. 2.2 report has been cross-examined on it. From enquiries made by counsel, it seems that an order for disclosure is unprecedented in the context of a contested administration petition.

29. As long ago as 1883 Chitty J. said that he had had considerable experience of winding up petitions, and he had never heard of an order for general disclosure of documents: *Re Hoover Hill Gold Mining Co* (1883) SJ 434. He said: "the late Master of the Rolls had always emphatically refused such applications, saying that he was not going to assist a man to wreck a company by ransacking its documents."

30. Prior to the CPR orders for discovery and/or cross-examination were been made in proceedings under the Companies Act 1985: see, e.g *Re Lifecare International plc* [1990] BCLC 222 (application for order under section 428 for transfer of shares) and contrast *Re Cloverbay Ltd (No. 2)* [1990] BCLC 449. Orders for disclosure and cross-examination have also been made under the Insolvency Act 1986: *Re Primlaks (UK) Ltd (No. 2)* [1990] BCLC 234: application to set aside voluntary arrangement. But orders for disclosure have been refused because they were not necessary for fairly disposing of the matter: *Re Polly Peck International plc* [1993] BCC 886 (Directors Disqualification Act 1986, s. 7(2); *Re Bank of Credit and Commerce International SA (No. 4)* [1994] 1 BCLC 419 (application under Insolvency Act 1986, s. 130 for leave to commence proceedings).

31. There are some cases where the resolution of a factual dispute (e.g. as to the honesty of a director) plainly calls for cross-examination: see *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, 487. So also there may also be extremely rare cases (as an exception to the general rule that a winding up petition on a disputed debt will be dismissed) where the existence of the debt may be resolved in the winding-up proceedings after cross-examination: *Re Claybridge Shipping Co.* [1997] 1 BCLC 572, 579, *per* Oliver LJ.

32. The Petitioners point to the procedure in relation to unfair prejudice petitions pursuant to section 459 of the Companies Act 1985 as affording an analogy for disclosure and cross-examination on petitions. But I accept the submission for COLT that the section 459 procedure does not afford a helpful guide. Petitions under section 459 are not "insolvency proceedings", and in any event they do not involve a "trial" for the purposes of the CPR. For example, unless directed by the court, there are no pleadings, no automatic disclosure and no presumption that the evidence is to be given orally. The procedure in the case of a section 459 petition is governed by the Companies (Unfair Prejudice Applications) Proceedings Rules 1986 and, subject to any contrary provisions in those rules, the CPR applies. Those Rules specifically provide for the court, among other things, to give directions as to whether there should be pleadings and for there to be cross-examination of deponents of statements: see r. 5. Similar provisions govern contributories' winding up petitions: see r. 4.23, 1986 Rules.

33. Consequently in my judgment the governing provisions are the 1986 Rules, rr. 7.7(1) and 7.60, which give the court power to order disclosure and cross-examination on the application of any party to insolvency proceedings. The equivalent CPR provisions are not incorporated by reference through r 7.51(1) of the 1986 Rules, because the CPR and the practice and procedure of the High Court apply to insolvency proceedings "except so far as inconsistent with these Rules," and the 1986 Rules make express provision for these matters. Whether such an order will be made will depend upon the nature of the proceedings and the nature of the disputed questions. Any application for such an order must be viewed in the light of the overriding objective laid down by the CPR, which is not, of course, not inconsistent with the 1986 Rules, and is incorporated by reference through r. 7.51(1).

34. At the hearing of the administration petition the court must be "satisfied" (Insolvency Act 1986, section 8) that the company "is or is likely to become unable to pay its debts" within the meaning of section 123, under which both cash-flow insolvency and balance sheet insolvency must be "proved to the satisfaction of the court" (section 123(1)(e) and section 123(2)).

35. It seems to be plain that the nature and purposes of an application for an administration order, the nature of the enquiry by the court, and the usual urgency of the application, make it inevitable that only very exceptional circumstances will justify an order for disclosure or cross-examination in proceedings for an administration order.

VI The orders sought on the application

36. The Petitioners seek orders for the cross-examination of Mr Akin, the chief executive officer of COLT, and of Mr Halkes and Mr Hughes of E&Y. The request for documents and information is based on matters which are relied upon by Mr Akin in his main witness statement. The Petitioners do not seek the documents on the basis that there are documents referred to and which can be obtained under CPR 31.14. What is said is that there are matters of fact raised to dispute the allegations of the Petitioners and it is necessary for the underlying documents and information to be available to resolve the differences of fact.

37. The requests for documents and information are as follows:-

> (1) Mr Akin, in support of his evidence that COLT is a solvent and substantial going concern, relies upon the fact that the balance sheet as at September 30, 2002 was subject to an interim review by its auditors, PwC, and showed net assets of £977 million and cash balances of £455 million. The Petitioners seek copies of the documents which comprise the interim review, including instructions, documents with which PwC were provided, and a copy

of their review or report.

(2) In connection with balance sheet insolvency, Mr Akin relies upon the involvement of PwC as auditors in the impairment review, and the Petitioners ask for copies of the September 2002 impairment review, including board meetings in July and September at which impairment was discussed. These documents are said to be necessary to understand and respond to his assertions about its financial position.

(3) In reliance upon the proposition that COLT is not likely to become insolvent, Mr Akin mentions its expectation that it is going to be able to repay the Notes when they fall due, and states that that expectation is based on actual results to date. The Petitioners ask for relevant management or other accounts for information, on the ground that they are necessary to understand COLT's current position and the expectation referred to.

(4) Similarly Mr Akin refers to COLT's business plan, and the Petitioners seek copies of the documents which comprise it, as being necessary to understand and evaluate his assertion about its financial position and expectations.

(5) There are many references to cash-flow expectations, and the Petitioners seek details of, and documents supporting, the cash-flow expectations from the present to 2009, because they say that it is necessary to understand and respond to his assertions about its ability to repay the Notes in and from 2006 to 2009.

(6) Mr Akin relies on cash-flow sensitivity analyses, and the Petitioners seek copies because it is said they are necessary to understand the assumptions used by COLT and how appropriate they are in the circumstances of the present and expected operating environment.

(7) Mr Akin says that COLT will be able to repay the notes with a modest amount of external funding. The Petitioners seek documents showing the foundation for the expectation that it will be able to obtain external financing, and that it would amount to significantly less than the amount of EBITDA expected in 2006, and details of EBITDA forecasts for the period 2002 to 2009, documents detailing the amount of funding expected to be required, and any documentation on these issues relied upon in reaching the conclusions and beliefs set out in Mr Akin's witness statement.

(8) Mr Akin refers to capital expenditure and expected revenues. The Petitioners seek details of and documents evidencing COLT's forecast capital expenditure and anticipated revenue, because this is required to evaluate the expectation that net cash-flows will be higher than those relied upon by Mr Heis.

(9) Mr Akin refers to cash held in a subsidiary, COLT Telecom Finance Euro, and the Petitioners seek copies of relevant documents relating to investments in it.

(10) Mr Akin asserts, contrary to the evidence of the Petitioners, that COLT's London network has produced a positive operating profit, and the Petitioners ask for confirmation of the amount and the date on which it was achieved, and copies of the relevant management accounts or other documents showing the operating

profit referred to.

(11) The petitioners seek copies of all board and management minutes which record consideration given to any of the above matters since June 2002.

38. The Petitioners seek to support their case for disclosure in this way: the Petitioners' case is based upon publicly available information as to COLT's financial position and prospects. In rebuttal of that case, COLT seeks: (1) to rely upon evidence by way of the E&Y Report, effectively dealing with the publicly available information and saying that (a) it has been misconstrued or wrongly analysed by Mr Heis of KPMG and (b) to raise questions as to the limits of usefulness of such information; (2) to rely upon Mr Akin's witness statement, which in substance amounts to repeated assertions, based specifically upon information available to Mr Akin and the board of COLT, to the effect that COLT is in fact solvent and will remain so and that the relevant information shows a much rosier picture than the publicly available information; (3) to deny access to the Petitioners and the court to the relevant information, so that the Petitioners and the court are in a position where there are assertions that that information leads to specific answers to the issues in the case but where those assertions and answers are apparently to be simply accepted unchallenged.

39. The Petitioners say that they seek only limited disclosure. Disclosure is sought in relation to documents containing information which COLT (by the witness statement of Mr Akin) specifically asserts justifies COLT's position (a) that certain financial information available to COLT's management shows a more healthy position than the comparable publicly available information analysed by Mr Heis and/or (b) that assumptions or assertions made by Mr Heis are invalid if such information is considered.

40. COLT's position is this. It does not dispute that the court has jurisdiction to make appropriate orders for disclosure and/or further information. But it submits that the court should only grant a request for disclosure in the context of an administration petition where the Petitioners can show that there are exceptional circumstances justifying the making of such an order. There are no such exceptional circumstances in the present case. The Petitioners are not entitled to make good any deficiency in their evidence by fishing for extensive documentation or information which might bolster their case.

41. COLT says that the documentation and information sought is of a type which no publicly traded company would generally make or be required to make to an individual investor. Disclosure to the Petitioners would require the substance of the information to be made available to the market through a formal announcement in the absence of confidentiality restrictions. COLT has sought to deal with the Petitioners' allegations in as open a manner as is compatible with ensuring that the hearing of the Petition is in public, without disclosing sensitive information to competitors and the market. COLT is entitled to and wishes to see off Highberry's attack in public in order to reassure its customers and the market. The Petitioners' answer is that the court is able to deal with the confidentiality issue by appropriate undertakings and/or holding parts of the hearing in private. In the alternative, the Petitioners say that the relevant parts of Mr Akin's witness statement should be struck out.

VII Conclusions

42. This is an unusual case, but what must be the unprecedented nature of the petition does not, in my judgment, make it a case with exceptional circumstances for present purposes. It is for the Petitioners to prove the allegations made in the Petition. The Petitioners have presented the Petition on the basis of publicly available information. I accept the submission for COLT that the Petitioners should

not be permitted to have access to documents containing confidential and sensitive information which is not available to other investors for the purpose of trying to second guess the expectations of COLT.

43. On balance sheet insolvency the Petitioners seek copies of documents which comprise the interim review, including disclosure of communications between COLT and its auditors, and documents provided to PwC, and board minutes in July and September 2002 at which the impairment review was discussed.

44. The reason put forward for these requests is that the documents are "necessary to understand and respond" to COLT's assertions about its net asset position or its financial position. It is plain that this is not on its face a good reason for an order for production. It is clear that the Petitioners wish to prove that the PwC review was inadequate, and that they are fishing for documents to support that case.

45. Most of the other requests relate to cash-flow insolvency. In evaluating them, it must be borne in mind that the Petitioners do not assert present cash insolvency. They are endeavouring to satisfy the court that COLT is "likely" to be cash-flow insolvent in 2006. COLT says that its expectation is that it will be able to pay those Notes which become due in 2006 is supported by its actual results to date, its business plan, its cash-flow expectations, its cash-flow sensitivity analyses, its prospects for external financing, its forecast capital expenditure and expected revenues, and the return on capital invested on the London network.

46. The nature of the applications in respect of these matters is breathtaking. The Petitioners seek management accounts for the actual results to date, information on business plans, details of, and documents supporting, COLT's cash-flow expectations to 2009, details of EBITDA forecasts from 2002 to 2009, details of and documents evidencing COLT's forecast capital expenditure and anticipated revenues, and copies of all board (and board committee) and management minutes which record consideration given to any of these matters since June 2002. They are said to be necessary, variously, to understand or evaluate or respond to COLT's assertions, or expectations or assumptions. In some cases, the application notice schedule makes no attempt is made to justify the request, as in the case of COLT's investment in COLT Telecom Finance Euro, or the London Network return on capital expended.

47. Whether COLT has adequately responded to the Petitioner's, evidence is, of course, a matter for the judge hearing the petition, but for the purposes of this application (and only for that purpose) I am satisfied that COLT's position is clearly and comprehensibly (and comprehensively) set out, and that the Petitioners do not require the information or the documents to understand or evaluate its position. If they need the documents to respond to COLT's position, then I consider that they are simply "fishing" for information or documents to bolster their position, and that that is not a legitimate use of the exceptional power to make orders for disclosure or information.

48. The width of the requests can be illustrated by the request provoked by Mr Akin's reference to external funding:

> "(a) Documents showing the foundation for the board's expectation that COLT will be able to obtain external financing at reasonable commercial rates, and that it would amount to significantly less than the amount of EBITDA expected in 2006
>
> (2) Details of EBITDA forecasts for the period 2002 to 2009
>
> (3) documents detailing the amount of funding expected to

be required

(4) any documentation on these issues relied upon by Mr Akin and/or the board in reaching the conclusions and beliefs set out in Mr Akin's witness statement".

49. The requests are not only extensive, but in many cases vague and unparticularised. I also take into account the confidential nature of the material which is requested. The Petitioners do not respond to COLT's assertion that cash-flow expectations are amongst the most sensitive pieces of information that any publicly traded company produces and they form the basis of much of any company's medium and long term planning. Details of cash-flow expectations are not prepared for or released to the market. I accept that where justice requires that confidential documents be made available there are procedures (disclosure to professional advisers only or the court sitting in private) designed to mitigate the damage from disclosure, but I consider that confidentiality is a factor in the exercise.

50. The Petitioners do not require the material to respond to the E&Y response to Mr Heis' r. 2.2 report. The documentation sought by the Petitioners has not been made available to E&Y, who have responded to Mr Heis' r. 2.2 report on the basis of the same type of information as was available to Mr Heis.

51. Although the Petitioners say that they are seeking specific disclosure, it seems to me clear that in reality they are seeking disclosure of any documentation which might impact on the financial position of the company – in effect, standard disclosure. In fact, not only are the proceedings as a whole reminiscent of American corporate litigation, but the request for documents has many of the hallmarks of an extensive US-style discovery request.

52. On cross-examination, the Petitioners say that in these proceedings the court will have to determine the factual issues regarding solvency and the likelihood of achievement of the relevant section 8 purposes; and that there are disputes of fact and expert evidence which are properly to be resolved by cross-examination. I do not accept that there will be an issue as to the likelihood of the COLT being or becoming insolvent on a balance sheet or cash-flow basis, which can only be resolved by cross-examination. The court must be "satisfied" as to insolvency. It will not be making a decision following trial. The idea that the court could "try" the question whether COLT is "likely" to be cash-flow insolvent in 2006 (or in 2020 or 2050) is fanciful.

53. I accept the submission for COLT that it would plainly be disproportionate for the court to enter into a protracted and minute examination of COLT's position and prospects for the future in the context of an administration petition; and such an examination is not necessary for the fair disposal of the issues. It would be quite wrong to treat the hearing of an administration petition as if it were a trial. The consideration of the issues is not intended to be done by way of a very detailed and protracted investigation as in a trial. The reality of the matter is that in this case the assertion of balance sheet insolvency turns on issues of judgment in relation to the impairment review, and cash-flow insolvency turns on the future prospects of COLT, which also raise questions of judgment and speculation as to future events. It will be for the Petitioners to satisfy the court that the judgment of COLT and its advisers is wrong, and that COLT is insolvent on the balance sheet basis or is likely to become (in several years) insolvent on the cash-flow basis. There is nothing in the material before me which justifies an order which in effect requires COLT to make the petitioners' case for them.

54. Consequently, I dismiss the application for disclosure of documents and information, and for cross-examination of Mr Akin. I would have dismissed any application for the cross-examination of the E&Y experts, but I understand that it

has been agreed that the experts will be made available at the hearing of the petition, and that it is agreed that this can be dealt with by the judge hearing the petition. Since the judge hearing the petition will be seised of the New York law issue, I will order attendance for cross-examination of the experts on New York law, if the evidence for COLT is contested. If there are matters on the form of the order or any matters canvassed but not resolved at the hearing of this application, I will hear further argument.

Neutral Citation Number: [2008] EWCA Civ 1178

Case No: A3/2007/2497 & 2567

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE LEWISON
HC07C00763 & HC07C01505

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2008

Before :

SIR ANTHONY MAY
(THE PRESIDENT OF THE QUEEN'S BENCH DIVISION)
LADY JUSTICE HALLETT
and
LORD JUSTICE LAWRENCE COLLINS

- -

Between :

Case No HC07C01505

	ELEKTRIM S.A.	**Respondent/ Claimant**
	- and -	
	VIVENDI HOLDINGS 1 CORP	**Appellant/ Defendant**

AND

Case No HC07C00763

	LAW DEBENTURE TRUST CORPORATION PLC	**Respondent/ Claimant**
	- and -	
	VIVENDI HOLDINGS 1 CORP	**Appellant/ Defendant**

- -
- -

Mr Richard Millett QC and Mr Julian Kenny (instructed by **Barlow Lyde & Gilbert**) for

Elektrim S.A.
Mr Robert Miles QC and Mr Andrew Clutterbuck (instructed by **Simmons & Simmons**) for Law Debenture Trust Corporation PLC
Mr Ali Malek QC and Mr David Quest (instructed by Orrick, Herrington & Sutcliffe) for Vivendi Holdings 1 Corp

Hearing date: July 29, 2008

- -

Judgment **Lord Justice Lawrence Collins:**

I Introduction

No-action clauses

1. The principal question on this appeal relates to the construction of a "no-action" clause in a bond issue, whereby only the trustee of the issue is entitled to take enforcement action against the issuer, and bondholders cannot proceed directly against the issuer unless the trustee fails to take action in accordance with the bond documentation. Such clauses have been common in bond issues governed by English law since the nineteenth century, and in bond issues in other common law countries.

2. The use of a trustee is an effective way of centralising the administration and enforcement of bonds. Bondholders act through the trustee, and share *pari passu* in the fortunes of the investment, and do not compete with each other. The trustee represents and protects the bondholders, who are treated as forming a class, and who give instructions to the trustee through a specified percentage of bondholders. Such a scheme promotes liquidity. Individual bondholders rely on the trustee as the exclusive channel of enforcement and can be confident that on enforcement principal and interest will be distributed *pari passu*.

3. No-action clauses are the subject of many decisions in the United States and Canada. They include the recent decision of the Ontario Court of Appeal in *Casurina Limited Partnership v. Rio Algom Ltd.* (2004) 40 BLR (3d) 112, in which it upheld the lower court's approval of the approach in the United States (citing *Feldbaum v. McCrory Corp.*, 1992 Del. Ch. LEXIS 113) that in consenting to no-action clauses by purchasing bonds, bondholders waive their rights to bring claims that are common to all bondholders, and thus can be prosecuted by the trustee, unless they first comply with the procedures in the instrument constituting the bonds. As I said in *Re Colt Telecom Group plc* [2002] EWHC 2503 (Ch.), [2003] 1 B.C.L.C. 290, at [12], no-action clauses have even been the subject of discussion in the International Court of Justice (although not the subject of decision) in relation to insolvency proceedings brought directly by bondholders: *Belgium v. Spain* (*Barcelona Traction* case), 1970 ICJ Rep 3, 104-5, *per* Judge Sir Gerald Fitzmaurice QC.

4. In the United States it has been said that a primary purpose of a no-action clause is to protect issuers from the expense involved in defending lawsuits which are either frivolous or otherwise not in the economic interest of the issuer and its creditors, causing expense to the issuer and diminishing the assets available to bondholders. In protecting the issuer such clauses protect bondholders. They can extend to non-contractual claims (other than fraudulent inducement of a purchase) because interpreting the no-action clause to exclude non-contractual claims would lead to inefficient claim-splitting. If the no-action clause required a noteholder to demand that the trustee should bring all contractual claims, but the noteholder had to bring the non-contractual claims, that would lead to a situation where contractual and non-contractual claims would have to be brought by different plaintiffs, possibly in different fora: see e.g. *Feldbaum v. McCrory Corp*, ante; *US Bank National Assn v US Timberlands Klamath Falls LLC*, 864 A 2d 930 (Del Ch 2004); cf. *McMahan & Co v Wherehouse Entertainment Inc*, 859 F Supp 743 (SDNY 1994); *Re Dura Automotive Systems, Inc*, 379 B.R. 257 (SDNY 2007).

Parties

5. Elektrim S.A. ("Elektrim") is a Polish conglomerate (formerly state-owned) and now in bankruptcy, which has had substantial telecommunications interests. The Law Debenture Trust Corporation plc ("the Trustee") is the Trustee of €510,000,000 2% Bonds ("the bonds") originally issued in 1999 by Elektrim Finance BV (a special purpose vehicle), and guaranteed by Elektrim. The bonds were restructured in 2002: the maturity date was extended to December 15, 2005 and the interest rate was reduced, in return for which Elektrim agreed to make a contingent payment in 2006 (or earlier in certain circumstances), which represented 25% of the fair market value of Elektrim's assets in excess of €160m. This is referred to in this case as the "contingent payment" or the "equity kicker".

6. Elektrim had a 48% interest in Polska Telefonia Cyfrowa ("PTC") a leading mobile telephone service provider in Poland. Deutsche Telecom AG ("DT"), a major German media company, also had a substantial holding in PTC.

The dispute

7. A major French media company called Vivendi Universal SA ("Vivendi"), which had a joint venture with Elektrim, has been in dispute since 1999 with Elektrim and with DT about Elektrim's PTC stake. The Vivendi/Elektrim joint venture company is called Elektrim Telecommunikacja known as ET or Telco (and to which I shall refer as "Telco"), owned 51% by Vivendi and 49% by Elektrim. Vivendi says that Telco was formed to acquire Elektrim's 48% shareholding in PTC; that ultimately it acquired a controlling interest in Telco; that it has invested over €2 billion under various agreements and is entitled, through ET/Telco, to the PTC stake. Vivendi says that the shares in PTC had a market value of about US$3 billion.

8. DT challenged the transfer by Elektrim of the PTC shares to Telco, and claimed that it had an option over the PTC shares under a 1995 shareholder agreement, which it claimed to have exercised following Elektrim's entry into the joint venture with Vivendi. Elektrim says that it was originally entitled to the PTC stake and that, by virtue of various awards of an arbitral tribunal sitting in Vienna, Elektrim was obliged to transfer the stake to DT.

9. Vivendi claims that the transfer of the PTC shares to DT is invalid and at a substantial undervalue, and is part of a long-running fraudulent scheme by Elektrim and Mr Zygmunt Solorz-Zak (a Polish businessman who was the principal shareholder of Elektrim) to strip the assets out of Elektrim for his own benefit, and that DT has colluded in the fraud (and that the Vienna arbitration was a collusive device).

10. The battle for control of the PTC stake has been fought in numerous proceedings, including arbitrations in Vienna, Switzerland and London, and bankruptcy proceedings in Poland. There has also been related litigation (including claims brought by Vivendi against Mr Solorz-Zak) in France, Germany, and Switzerland, and in Seattle, Washington. Many millions of dollars in legal fees have been expended on this dispute.

Vivendi's acquisition of bonds

11. In 2007 Vivendi Holdings 1 Corp ("VH1"), a Delaware corporation with its principal place of business in New York and a subsidiary of Vivendi, acquired a substantial holding in the bonds, allegedly for commercial reasons. In fact it is apparent that VH1's acquisition of the bonds was for the purpose of pursuing Vivendi's battle with Elektrim by indirect means.

12. VH1 commenced proceedings in Florida against Elektrim and the Trustee alleging (inter alia) fraud against them, and also breach of fiduciary duty and negligence against the Trustee, although the fraud claims against the Trustee were later dropped. Lewison J granted anti-suit injunctions in favour of Elektrim and the Trustee, and this is an appeal by VH1 against the injunction in favour of Elektrim (permission to appeal having been given by Rix LJ) and a renewed application by VH1 for permission to appeal from the injunction in favour of the Trustee.

II The bonds and the 2002 Restructuring

13. As I have said, the restructuring of the bonds which took place in 2002 involved an extension of the maturity date to December 15, 2005 and a reduction of the interest rate, in return for which Elektrim agreed to make a contingent payment, which represented 25% of the fair market value of Elektrim's assets in excess of €160m. The Trust Deed was amended and restated on November 15, 2002 to reflect this restructuring. The Trust Deed, the bonds and the Bond Conditions were governed by and to be construed in

accordance with English law (Trust Deed, clause 29.1).

14. The effect of clause 2.3 of the Trust Deed and Condition 6(k) of the Bond Conditions was that Elektrim was required to pay the contingent payment/equity kicker on the Contingent Payment Date (which was to be 180 days after the earlier of the date of publication of Elektrim Finance's accounts for the year ending December 31, 2005, or the year ending on the December 31 immediately following disposal of interests in certain defined assets, including its interest in Telco). As I have already indicated, in broad terms the amount of the contingent payment is a specified proportion of the difference between: (a) the fair market value of Elektrim's net assets (i.e. its assets after deduction of debt apart from contingent liabilities) as determined on the Contingent Payment Date and (b) €160 million.

Default and the bondholders' committee

15. In 2005, Elektrim and Elektrim Finance defaulted on the bonds.

16. Since early 2001 the bondholders had been represented by a bondholders' committee. The bondholders included Acciona (a substantial Spanish company) and Trafalgar (an asset management company) who together held almost 40% of the bonds.

17. Everest Capital Ltd ("Everest"), a Bermuda company, purchased Elektrim bonds, on its own behalf and on behalf of various clients, including General Motors, between February 2005 and June 2006. The investment was managed by Everest Capital Inc in Florida.

18. Everest held about 8% of the bonds. Everest became a member of the bondholders' committee. The evidence was that thereafter Everest was able to participate in all advice from Bingham McCutchen or Clifford Chance, the legal advisers to the bondholders' committee; and that all information and documents made available to the Trustee or its legal advisers in the course of the prosecution of the bankruptcy petition which would have been of relevance to decisions to be made by the committee, other than that relating to the Trustee's own legal position, were sent to Bingham McCutchen or Clifford Chance.

III Arbitration, court proceedings and bankruptcy

19. The history of the proceedings is complicated, and there was no agreed chronology available to the court. I will endeavour in this section to limit the account to the matters most relevant to the issues before the court.

A Vienna arbitrations between Elektrim and DT and the Polish bankruptcy

proceedings

20. It is not possible to understand the course of the bankruptcy proceedings in Poland independently of the Vienna arbitrations and the judicial proceedings in Austria. That is because the petition debt was discharged from the proceeds of the transfer of the PTC shares by Elektrim to DT following an agreement in the course of the arbitration.

2004 arbitral award

21. DT commenced arbitration proceedings in Vienna against Elektrim and Telco challenging the transfer of Elektrim's shares in PTC to Telco. The arbitral tribunal, sitting under the auspices of the Vienna Court of Arbitration, rendered an award on November 26, 2004 declaring that the transfer of PTC shares to Telco was ineffective. But the tribunal also stated that it had no jurisdiction over Telco. On December 20, 2005 the Vienna Commercial Court set aside that part of the Vienna Award which had declared the transfer of PTC to be ineffective, because the arbitral tribunal did not have jurisdiction over Telco. A decision of the Court of Appeal in Vienna of October 10, 2006 set aside the annulment decision, but confirmed that the arbitral tribunal did not have jurisdiction over Telco.

Polish bankruptcy proceedings: March 2005

22. On March 3, 2005 the Trustee, on the instructions of more than 30% of the bondholders, issued a bankruptcy petition against Elektrim in Poland in the sum of €434,541,700. The contingent payment was not part of the petition debt. The petition was at first dismissed, but re-instated on appeal.

June 2006 arbitral award

23. After exercising its call option over the PTC shares then owned by Elektrim, DT commenced a further arbitration in Vienna against Elektrim claiming title to the PTC shares. Vivendi alleges that this arbitration was a sham in that Elektrim had separately agreed to transfer the PTC shares to DT at book value.

24. On June 6, 2006, the Vienna tribunal issued a First Partial Award ("the June 2006 Award"). For present purposes the significance of this Award is that the tribunal decided that DT had validly exercised an option over Elektrim's shareholding in PTC, and directed that the price of the shares would be established in a further award.

25. The tribunal said that it was not then in a position to determine the price. The tribunal considered that the right claimed by DT to acquire the shares at book price constituted a contractual penalty which, under Polish law, was liable to be reduced at the demand of

the party liable for it. It said (para 68):

> "… the Arbitral Tribunal has to recognize that the penalty is glaringly exorbitant. The difference of price between the book value of the shares, which is said to be inferior to 400 million Euros, and a fair market value which would revolve around 2.4 billion Euros or even 3 billion Euros manifestly leads to the conclusion that the penalty included in [the call option] is glaringly exorbitant."

The tribunal directed that the price of the shares would be established in a further award after a reduction of the penalty, the payment terms and conditions to be determined after further submissions.

26. The operative part of the Award was as follows:

> "1. DT validly exercised the call option provided by Article 16 of the Shareholders Agreement over the shares that Elektrim owned in PTC;
>
> 2. As a result of its exercise of the call option provided by Article 16 of the Shareholders Agreement and subject to payment within 30 days of the price (as determined pursuant to no. 3 below), DT will acquire the shares that Elektrim owned in PTC and will be their owner;
>
> 3. The price payable for Elektrim's shares is the price to be established by the Arbitral Tribunal taking into account that Article 16(3) of the Shareholders Agreement includes a penalty as compared to a fair market value and this price shall be determined after reduction of the penalty in a further award, the payment terms and conditions to be specified by the Arbitral Tribunal in the light of further developments and submissions;
>
> 4. Elektrim is in material default pursuant to Article 16(1) of the Shareholders Agreement;
>
> 5. The issue of the costs of arbitration in respect of the Interim Orders, the present Award as well as this entire proceeding is reserved for a subsequent Award."

September 2006 Warsaw court order

27. On September 21, 2006, on the Trustee's application in the course of the bankruptcy

proceedings, the district court of Warsaw enjoined Elektrim from disposing of its assets.

October 2006 arbitral award

28. On October 2, 2006 the Vienna arbitral tribunal in the arbitration between Elektrim and DT issued a Second Partial Award ("the October 2006 Award"). The order made by the tribunal was that DT would acquire full legal title to the shares on payment of an amount in cash not less than the current book value of the shares and the provision of an undertaking to pay any subsequent adjustment of the price. Consequently, by contrast with the June 2006 Award, the October 2006 Award authorised the transfer of the shares to DT.

29. The Award recited the operative parts of the June 2006 Award, in which the tribunal had held that DT had validly exercised an option over Elektrim's shareholding in PTC. It further declared that on payment of the price to be determined, DT would acquire that shareholding. The tribunal said (in a somewhat imperfect translation):

> "32. In the present case, [DT] itself admits that a great uncertainty shrouds both the thing to be sold and the price for which it should be deemed to have been sold on 15 February 2005.
>
> 33. First, as regards the Option Shares, [DT] has appropriately declared that the present title to the Shares is uncertain, and was uncertain at the time of the exercise of the call option. It points out that "it remains unclear whether DT has acquired 226,080 PTC shares (i.e., over 48 per cent of the PTC shares), on the one hand, or only a single PTC share, on the other" [referring to DT's submissions]. It is known that at least one parallel arbitration between different parties bears on the title on those shares. The Arbitral Tribunal is not informed about those proceedings nor concerning any finding of the other Arbitral Tribunal, so that the above mentioned uncertainty [endures] to the fullest extent conceivable. Therefore the validity of the so-called "share purchase agreement" that would have been concluded on 15 February 2005 is put to doubt by reason of the indetermination of its very subject matter, an indetermination which the present proceeding at the present stage cannot lift in any meaningful way…
>
> 34. Second, as concerns the price of the shares whichever they are, this price is neither determined nor determinable at the present time."

30. The tribunal concluded that the exercise by DT of its option fulfilled the requirement to bring about the transfer of the shares once the determination of the precise number and price had been determined. The order made by the tribunal was that DT would acquire

full legal title to the shares on payment of an amount in cash not less than the current book value of the shares and the provision of an undertaking to pay any subsequent adjustment of the price. It also ordered Elektrim to transfer "full factual control over the Option Shares" to DT.

31. The operative part of the October 2006 Award was as follows:-

> "1. Claimant will acquire legal title to the Option Shares owned by Respondent with effect as of 15 February 2005 upon payment by Claimant of
>
> (a) an amount in cash not less that the current book value price for the Option Shares, based on the most recent financial statements of PTC available at the date of payment, and
>
> (b) provision to Respondent of DT AG's irrevocable undertaking to pay the subsequent adjustment of the current book value price for the PTC shares owned by Elektrim within 30 days from the Arbitral Tribunal's award in this regard.
>
> 2. Respondent is ordered to transfer full factual control over the Option Shares to Claimant by enabling Claimant, to the extent Respondent may exert a controlling influence on these points, fully to exercise all ownership rights and power attaching to these shares, including by insuring that
>
> (a) Claimant will be listed as the owner of the shares in the National Court Register.
>
> (b) Claimant's nominees to PTC's Supervisory and Management Boards will be listed in the National Court Register."

32. On October 5, 2006 the Trustee sent a notice to the bondholders' committee notifying them of the award.

Adjournment of Polish bankruptcy petition from October 4, 2006 to October 27, 2006

33. On October 4, 2006 (when the Polish bankruptcy petition against Elektrim was due for hearing), Bingham McCutchen sent an e-mail to the Trustee's lawyers to say that certain named bondholders, who included not only Concord, Acciona and Trafalgar, but also Everest, confirmed that they approved of:

> "(1) the Trustee making an application to the Polish court to

request an adjournment of the Polish bankruptcy hearing for up to four weeks on the basis that the Bondholders require further time to consider Elektrim's composition application and the implications of the Vienna award; and/or

(2) accepting a court endorsed payment of no less than Euro 525,000,000 out of the funds paid by DT on terms that the bankruptcy petition is withdrawn; and/or

(3) applying for ET's application for bankruptcy petition to be dismissed."

34. The petition was adjourned to October 27, 2006.

Polish bankruptcy court rejects Telco application: October 12, 2006

35. On October 12, 2006 an application by Telco for an attachment over Elektrim's receivables from DT was rejected by the Polish bankruptcy court. The court said that the Trustee represented essentially all Elektrim's creditors and to prevent Elektrim from paying what it owed to the Trustee would in effect decide the bankruptcy proceedings against Elektrim.

Compromise with DT and payment of petition debt: October 20 to October 27, 2006

36. On about October 20, 2006 it was agreed between Elektrim and DT that DT would pay the book value of the PTC shares (€643 million) to Elektrim, and that Elektrim would pay €525 million to the Trustee for distribution to the bondholders.

37. On October 23, 2006, Bingham McCutchen were asked for the Trustee's bank account details, so that Elektrim could pay the petition debt. Elektrim paid €525m to the Trustee on October 26, 2006.

38. On October 27, 2006 Bingham McCutchen sent an e-mail to the Trustee's lawyers. It confirmed instructions from Acciona and Trafalgar (bondholders who, as I have said, held almost 40 per cent in value of the bonds and who together with Everest were members of the bondholders' committee). The e-mail said that the bondholders approved of the Trustee applying to the bankruptcy court for a direction that the payment by Elektrim was lawful; and if that direction was obtained, to permit the petition to be dismissed or to withdraw it.

39. In circumstances where the petition was dismissed the Trustee was to reserve its rights in relation to the quantum of the payment and any additional amounts which might be

outstanding under the Trust Deed. Mr Torres, a senior analyst at Everest Capital Inc, confirmed in a declaration attached to the Everest Assignment to VH1 that Everest had supported the decision to withdraw the petition, although he described it as the Trustee's decision.

40. At the hearing on that day the Polish bankruptcy court ruled that the payment was lawful, and that the order of the District Court of Warsaw dated September 21, 2006 (to which I have referred, and which enjoined Elektrim from disposing of its assets) did not prevent the repayment. Among the points made by the bankruptcy court in its written ruling were the following: (a) although Telco opposed withdrawal of the petition it advanced no substantial grounds for its opposition; (b) transfer of the shares was not a voluntary act of Elektrim because DT was exercising a pre-existing right, and hence was not in breach of any court order; (c) the Trustee represented all the creditors of Elektrim, and Telco was not a creditor because it had not filed for Elektrim's bankruptcy; (d) a petitioner which decided that it no longer had an interest in pursuing the bankruptcy was entitled to withdraw the petition.

41. In the light of the court's ruling, the petition was withdrawn by the Trustee on instructions of more than 30% of the bondholders, and the Trustee retained the money. The Trustee did not immediately distribute the money to the bondholders because of its concern that Telco might appeal against the dismissal of bankruptcy proceedings, resulting in Elektrim's liquidation and a possible claim by a liquidator for the return of the €525 million under "claw-back" provisions in Polish bankruptcy legislation. Telco did attempt to appeal, but its attempts failed.

Elektrim bankruptcy: August 2007

42. On August 9, 2007, Elektrim petitioned the Polish court for its own bankruptcy and was adjudicated bankrupt on August 21, 2007.

B LCIA arbitration

43. In 2005 Vivendi commenced arbitration proceedings in the London Court of International Arbitration ("LCIA") against Elektrim under their joint venture agreement claiming that Telco, the joint venture company, still owned or was entitled to the PTC shares.

44. On August 2, 2006 the arbitral tribunal (Mr Wolfgang Peter, Chairman; Mr Alan Redfern and Mr Jerzy Raski), made an order ("LCIA Order No 6") for interim measures, which enjoined Elektrim from voluntarily selling or agreeing to sell the PTC Shares. On August 25, 2006 Vivendi wrote to Bingham McCutchen and the Trustee giving notice of the order.

45. On October 23, 2006 the LCIA tribunal made a seventh interim measures order in the arbitration between Vivendi and Elektrim ("LCIA Order No 7"). By that order the tribunal declared that LCIA Order No 6 did not prevent Elektrim from applying the sum of €600 million (the book value of the PTC shares) paid or payable by DT in discharge of Elektrim's liability to the bondholders which had presented the bankruptcy petition.

46. On March 19, 2008 the tribunal by a majority ruled in favour of Vivendi. It decided (inter alia) that Elektrim was in breach of the joint venture agreement by taking actions which purported to dispose of the PTC shares, and by failing to hold them in trust for Vivendi or take such measures as would protect Vivendi's interests in the shares to the extent Elektrim had or might recover the shares. But the tribunal emphasised (at para 122) that it was not making a decision on the question of who had title to the PTC shares, which was a question for the Polish courts. This court was told that Elektrim is challenging the award in the Commercial Court.

C Trustee's first English proceedings (the contingent payment proceedings): December 2005

47. The bonds were due for redemption on December 15, 2005. On the following day, the Trustee commenced a claim in England against Elektrim seeking damages for the loss of the contingent payment/equity kicker. The basis of the action was alleged asset-stripping by Elektrim in breach of the Trust Deed resulting in the loss of the full value of the contingent payment obligation under the Bond Conditions. In February 2006 the Trustee obtained judgment in default. Subsequently the judgment was set aside and a stay of the proceedings was agreed. This court was told that these proceedings are now continuing.

D The DT press releases

48. In September and October 2006 DT issued two press releases about its interest in PTC. According to VH1, these press releases were issued by DT in conjunction with Elektrim and were materially misleading, because they gave Everest the impression that the PTC shares owned by Elektrim had been legally transferred and that DT had good title to the shares pursuant to and consistently with the June 2006 Award and the October 2006 Award. VH1's case is that Everest relied on these press statements as a basis for agreeing to the Trustee's withdrawal of the bankruptcy petition: Mr Davis' witness statement, July 20, 2007, para 44.

September 2006

49. On September 5, 2006 DT issued a press release stating that a DT group employee had been appointed chief executive of PTC and went on:

> "The new management appointment at PTC is a direct

> consequence of Deutsche Telekom's acquisition of the 48 per cent stake of PTC formerly held by the Polish company Elektrim. The acquisition is based on a call option awarded to Deutsche Telekom by a Court of Arbitration."

October 2006

50. On October 4, 2006, DT issued a press release stating:

> "In yet another award of October 2, 2006, the Arbitral Tribunal in Vienna conferred the ownership title to the disputable 48% of the shares in PTC to [DT] (with effect as of February 15, 2005), which remains in concord with the joint stand of [Elektrim] and [DT] presented to date. For this reason [DT] has paid an amount of more than Euro 600m, which surely covers the current book value of the shares in PTC."

E Vivendi's claims and Part 8 proceedings by the Trustee

51. On October 23, 2006 Vivendi wrote to the Trustee, and to Mr Roome, of Bingham McCutchen, as counsel to the bondholders' committee, and to Citibank NA as the agent, to notify them that the intended acquisition by DT of the PTC shares was unlawful; even if Elektrim and DT did successfully manage to place the money in the Polish court, it constituted the proceeds of an unlawful acquisition of PTC shares; and that any acceptance by the bondholders would constitute an unlawful attempt by Elektrim to defraud its creditors, and would constitute a preferential payment by Elektrim to one of its creditors and would be subject to challenge. The letter put the addressees on notice of the existing orders, injunctions and court decisions and of the serious implications of the acceptance of any payments, and warned that pursuant to Article 302 of the Polish Criminal Code acceptance of such monies would constitute a criminal offence. On February 1, 2007 Vivendi alleged that the €525 million were the "proceeds of [an] illegal agreement."

52. In the light of these claims, on March 26, 2007 the Trustee began Part 8 proceedings in England seeking directions, to determine whether any of the claims that had been intimated against the Trustee arising from the circumstances in which it had received the funds were a bar to distribution to bondholders.

53. On April 2, 2007, Lewison J made a representation order appointing two of the bondholders, Concord and Acciona, to represent all the bondholders pursuant to CPR, r. 19.7(2).

54. On May 1, 2007 Lewison J gave judgment in the Part 8 proceedings, holding that the

claims intimated by Vivendi to the effect that the monies received by the Trustee were tainted lacked any merit; and made an order that the claims threatened by Vivendi and/or Telco had no reasonable foundation. The basis of the decision was that the effect of the LCIA Order No 7 in the arbitration between Vivendi and Elektrim was that Elektrim was authorised to make a payment in discharge of its liabilities to the bondholders and the discharge of those liabilities could not be achieved if the money belonged to someone else. Accordingly the plain intention of the LCIA tribunal was that Vivendi would have no proprietary rights over the money. The tribunal had considered that Vivendi did not even have a prima facie proprietary right. Elektrim and Vivendi were bound not only by issue estoppel in the arbitration but also by contract since the arbitration arose out of a contractual arbitration clause. If Vivendi were to bring a claim against the Trustee in an attempt to outflank the order that would be a fraud on Elektrim and an abuse of process. In addition the Trustee had no notice of a proprietary claim at the date when it received the money and since the money was used in discharge of the Elektrim debt it followed that the Trustee was a purchaser for value.

55. Lewison J also ordered that notice of his judgment and order of May 1, 2007 be served on Vivendi and Telco pursuant to CPR, r. 19.8A, which gave Vivendi the right to apply within 28 days of service to set aside the order of May 1, 2007, failing which the order would be binding on it: CPR, r. 19.8A(8). The notice was served on Vivendi and it was informed that a further hearing of the Part 8 claim was fixed for the week of June 5, 2007.

56. What happened next is described in the following sections, but to put the events in context I mention them here. First, on May 29, 2007 VH1 acquired a substantial holding of bonds from Everest. Second, on June 1, 2007 VH1 as assignee of the bonds commenced an action in a federal court in Florida against Elektrim and the Trustee, and on Sunday June 3, before the Complaint in those proceedings was served, Vivendi issued a press release to announce the proceedings. The Trustee says, with some justification, that the intention was to seek maximum publicity for the claim, and to frustrate the Part 8 hearing before Lewison J.

57. On June 4, 2007, Vivendi's solicitors wrote to the Trustee stating that Vivendi did not intend to acknowledge service in the Part 8 proceedings. They said that notwithstanding the right under CPR, r. 19.8A to apply to set aside Lewison J's judgment of May 1, 2007, to the extent that the judgment purported to bind them, what had occurred was contrary to Article 6 of the European Convention on Human Rights.

58. A further hearing of the Part 8 claim took place on June 5-8, 2007. Vivendi did not appear. On June 8, 2007 VH1 was joined as a necessary and proper party.

59. Lewison J delivered a further judgment in the Part 8 proceedings on June 15, 2007, and declared that the bonds had not been redeemed by the payment of the €525 million and that the security granted pursuant to the Trust Deed was still in place. Subsequently the

Trustee made distributions to the bondholders, and after further payments by Elektrim the bonds were redeemed in April 2008.

60. The Trustee submitted an amended proof in the Polish bankruptcy relating to the contingent payment.

F May 2007 Assignment agreement

61. On May 29, 2007 Everest entered into an Assignment Agreement (in which it was described as a "sophisticated investor") which assigned its bonds (having a face value of €38.3 million) to VH1, together with "all current and potential causes of action and claims in law and equity, known or unknown, including … past, pending and future claims" against (among others) Elektrim and the Trustee.

62. Normally, as was submitted on behalf of Elektrim, such bonds are traded by electronic entries and an Assignment Agreement is unnecessary. It is plain on the face of the document that the purpose of the assignment was to enable Vivendi to pursue, through VH1, its claim against Elektrim in yet another forum. Although Vivendi suggested that it claimed to have a purely commercial purpose in causing VH1 to purchase the bonds, its own evidence shows that the motive was to pursue the Elektrim claim.

63. Mr Davis, Vivendi's lawyer, stated in his witness statement in these proceedings dated July 20, 2007 that VH1 and Vivendi had sound business reasons for acquiring the bonds and saw the potential to realise a significant return on their investment from the related claims concerning the contingent payment. The acquisition was a significant investment and was a reaction to Lewison J's judgment of May 1, 2007. Vivendi had considered acquiring Elektrim bonds at various stages in the past and there had been negotiations with other bondholders. Discussions with Everest began in October 2006, when Everest contacted Vivendi. The acquisition of the bonds and their claims also formed a legitimate part of Vivendi's strategy in the major dispute with DT and Elektrim concerning control of PTC. Subsequently (witness statement of September 7, 2007) Mr Davis said that VH1 had never asserted that the acquisition of the bonds and their related claims had nothing to do with the Elektrim dispute, and that his previous statement never suggested that VH1's motivation in acquiring the bonds was purely commercial.

G Florida proceedings: June 1, 2007

64. On June 1, 2007 VH1 (suing as the assignee of claims held by General Motors Corp) filed a Complaint in the United States District Court, Southern District of Florida (Miami), against the Trustee and Elektrim. The original Complaint recited Lewison J's Order of May 1, 2007, and said that it had been procured by non-disclosure, and sought a freeze on the assets in the Trustee's hands.

65. VH1 filed an Amended Complaint in the Florida proceedings on June 7, 2007. The Amended Complaint against the Trustee was (1) for breach of fiduciary duty to General Motors; (2) for breach of the Trust Deed (clause 18) by failing to exercise due care when withdrawing the bankruptcy petition in Poland; and (3) for fraudulent conspiracy to reduce the total recovery under the bonds in a manner designed to defraud other creditors of Elektrim. The claim against Elektrim was for fraud, consisting of (a) fraudulently inducing Everest, on behalf of General Motors, to purchase bonds based on false statements regarding Elektrim's assets; (b) fraudulently inducing Everest on behalf of General Motors to purchase the bonds by representing that it would make the contingent payment when in fact it was allowing assets to be stripped which were material to the calculation of the contingent payment; (c) making false statements regarding the legality of its transfer of PTC shares to DT; and (d) failing to disclose its complicity in the illegal stripping of its assets by Mr Solorz-Zak and DT.

Claim against the Trustee

66. VH1 now accepts that all the allegations of fraud against the Trustee are to be withdrawn. Following the conclusion of the hearing, the judge was provided (at his request) with a further version of the Amended Complaint with the allegations of fraud against the Trustee deleted.

67. In a lengthy section headed "Facts" (paras 7 to 47) the allegations against the Trustee which were maintained included the following:

i) The Trustee was aware of an injunction issued on November 23, 2005 by the Warsaw court in the bankruptcy proceedings to secure all PTC shares held by Elektrim and was aware that it precluded any sale of the PTC shares to DT (para 18), and was aware of Polish court orders in June and July 2006 attaching Elektrim's rights in the PTC shares, but ignored them (para 20 and 21).

ii) The Trustee was aware of the joint venture agreement between Elektrim and Vivendi prior to the withdrawal of the bankruptcy petition (para 22).

iii) The Trustee collaborated with Elektrim and DT on a plan whereby the Trustee would withdraw the bankruptcy petition in exchange for receiving the consideration owed by DT to Elektrim for the PTC shares which had been unlawfully transferred from Elektrim to DT and the Trustee did not disclose to Everest or General Motors material facts relating to this plan, including the fact that the transfer of PTC shares from Elektrim to DT had been in violation not only of outstanding injunctions, but also of the June 2006 Award (paras 33 and 34).

iv) Although the Trustee had access to the October 2006 Award, it failed to disclose

it to Everest or General Motors at any time prior to the withdrawal of the bankruptcy petition on October 26, 2006 (para 37).

v) The Trustee supported the adjournment of the October 4, 2006 bankruptcy hearing even though the adjournment was against the interest of the bondholders (para 38).

vi) When DT made a payment of €525 million to the Trustee on October 26, 2006, the Trustee did not inform either Everest or General Motors that it was acting in a manner inconsistent with the orders of the Vienna arbitral tribunal (para 40).

vii) On October 26, 2006 the Trustee, without disclosing to Everest or General Motors that DT and Elektrim had engaged in a transaction which was contrary to the direction of the Vienna tribunal, withdrew the bankruptcy petition, irreparably damaging VH1 (para 41).

viii) The Trustee did not distribute the funds but, seeking to insulate itself from liability, filed an action in the High Court in England seeking permission to distribute the funds, without disclosing that at the time it received the funds the underlying transfer of PTC shares had violated the June 2006 Award (para 42).

ix) The Trustee blocked VH1 from attending and voting at a meeting of the bondholders on June 4, 2007 (para 47).

68. The claim against the Trustee is for breach of fiduciary duty in the following respects (para 50):

i) Failing to disclose to Everest and General Motors the full contents of the October 2006 Award prior to the withdrawal of the bankruptcy petition and the effect of such withdrawal on the value of the bonds.

ii) Failing to obtain from Elektrim and disclose to VH1 the full content of the June 2006 Award before agreeing to withdraw the bankruptcy petition.

iii) Failing to disclose to Everest and General Motors that DT and Elektrim had engaged in a transaction which was contrary to the direction of the Vienna tribunal.

iv) Accepting tainted funds from Elektrim without consulting Everest or General Motors and without obtaining prior approval of the bondholders.

v) Failing to disclose to Everest and General Motors the risks of accepting tainted money.

vi) Failing to exercise adequate due diligence prior to withdrawing the bankruptcy petition by failing to conduct a full investigation of the legality of the transaction.

vii) Acquiescing in delays of the bankruptcy proceedings.

viii) Withdrawing the bankruptcy petition and thereby giving up the right to recapture fraudulently transferred assets and thus to maximise the value of the contingent payment/equity kicker.

69. It is alleged (para 51) that if Everest had known the contents of the June 2006 Award and the October 2006 Award, namely that the first award did not permit Elektrim to transfer the PTC shares in August 2006 and that the second award did not sanction that transfer, Everest would have opposed the withdrawal of the bankruptcy petition. While Everest and General Motors wanted to be paid they did not want to receive tainted money and the possible liability which would come with it.

70. It is claimed (para 53) that the Trustee had an obligation not only to warn Everest that the conduct was unlawful but also to avoid entering into unlawful transactions. Had Everest opposed a withdrawal, it would not have occurred, because the bondholders typically required unanimity before making important decisions and the other bondholders would not have wanted to participate in an unlawful transaction and incur the risks that the funds would have to be disgorged: para 54. If Everest had disclosed to the bankruptcy court that the underlying transaction had taken place in violation of both the LCIA Order No. 6 and the June 2006 Award, the bankruptcy court would not have permitted the withdrawal of the petition: para 55. General Motors would have been able to use the bankruptcy proceeding to recapture fraudulently transferred assets which would have given significant value to the equity kicker; and it would have been able to recover the principal and interest owed on the bonds without having to accept tainted money: para 56.

71. In addition (paras 60 and 62), as a result of those matters, "including actual and constructive knowledge of material information that it did not disclose to Everest or [General Motors]" the Trustee failed to exercise the degree of care and diligence required by the Trust Deed (clause 18), and its conduct constituted a material breach of its obligations.

Claim against Elektrim

72. In the section dealing with the facts, the allegations against Elektrim are as follows:

i) Elektrim represented to Everest that it owned substantial assets including the shares of PTC (claimed by VH1 to be worth more than $3 billion) (para 8).

ii) The Vienna arbitration was "in part a set-up" since DT and Elektrim had secretly agreed to transfer the PTC shares to DT in return for at least the book value of the shares, which was only a fraction of their true value, and Elektrim was willing to transfer the PTC shares at less than fair value because it had previously been paid the full market value by Vivendi for the same shares (para 15). DT and Elektrim ignored the injunctions of the LCIA and the Warsaw court and proceeded with their scheme to illegally transfer the PTC shares to DT and conspired to defraud other creditors of Elektrim and to withdraw the bankruptcy petition without informing either Everest, General Motors or the bankruptcy court of the full circumstances and consequences of the transfer (para 19).

iii) Elektrim transferred the PTC shares to DT in violation of outstanding injunctions in the order of the LCIA (para 23).

iv) On September 5, 2006 and October 4, 2006 DT, acting in collusion with Elektrim, issued materially misleading press releases upon which Everest relied (paras 26 – 27 and 35 – 36).

v) Prior to the October 2006 Award Elektrim had collaborated on a plan with the Trustee and DT whereby the Trustee would withdraw the bankruptcy petition in exchange for receiving the consideration for the PTC shares (para 33).

vi) Elektrim asked for an adjournment of the October 4, 2006 bankruptcy hearing so that it could continue to implement the illegal plan, and its lawyers failed to disclose to the court that the PTC shares had already been transferred.

73. The claim against Elektrim (para 65) is that it engaged in a pattern of fraud which included fraudulently inducing Everest on behalf of General Motors to purchase the bonds based on a false statement regarding its assets, and fraudulently inducing Everest on behalf of General Motors to purchase the bonds by representing that it would pay an equity kicker when in fact it was allowing assets to be stripped from Elektrim which were material to the calculation of the equity kicker, making false statements regarding the legality of its transfer of PTC shares to DT, and failing to disclose its complicity in the illegal stripping of its assets.

74. In particular the following allegations were made:-

i) The agreement with DT was a fraud, and, supporting the agreement to withdraw the bankruptcy petition, Everest reasonably relied upon statements of DT made in

conspiracy with Elektrim that the sale of the shares of PTC to DT was lawful and had been authorised and permitted by the Vienna Tribunal, and Everest relied upon DT's press releases which falsely stated that the transfer was made pursuant to orders of the Vienna tribunal: paras 68 and 69.

ii) All the false statements were made pursuant to a conspiracy to facilitate the unlawful transfer of PTC shares from Elektrim to DT. It is said (para 70) that "as long as the bankruptcy proceedings remained pending, the PTC shares that Elektrim had illegally transferred to DT could have been recaptured as fraudulent conveyances to the benefit" of VH1.

75. The Amended Complaint went on to assert that Elektrim did not disclose to Everest that the transfer which had occurred in August was not authorised by the Vienna tribunal: para 71. Everest would have opposed the withdrawal of the bankruptcy petition, and if it had opposed the withdrawal, it would not have occurred because the bondholders followed a course of conduct in which important decisions were made by consensus: paras 72 and 73.

76. If the bondholders had not withdrawn their petition for bankruptcy, VH1 would have been in a substantially better position because it would have been able to use the bankruptcy proceeding to recapture fraudulently transferred assets, including the PTC shares which had been transferred to DT, the value of which was much greater than the amount which had been paid by DT to the trustee: para 74.

77. Elektrim defrauded General Motors and the other bondholders by aiding and abetting the illegal stripping and fraudulent transfers of Elektrim assets, and as a result the bondholders, including General Motors, were deprived of assets which could have been used to pay the full value which Elektrim owed to the bondholders, including the full value of the contingent payment/equity kicker: paras 75 to 77.

IV Anti-suit injunctions and applicable principles

78. On June 7, 2008 Elektrim issued Part 8 proceedings against VH1 for a declaration that VH1 was in breach of the no-action clause by commencing the Florida proceedings and for an injunction enjoining VH1 from continuing the Florida proceedings, and on June 8, 2007 Lewison J made a without notice interim order.

79. As I have said, on June 8, 2007, on the Trustee's without notice application, VH1 was joined as an additional defendant to the Trustee's Part 8 proceedings, and service on VH1 was authorised on the basis that it was a necessary and proper party. By the same order an interim anti-suit injunction against VH1 was granted in favour of the Trustee to restrain the Florida proceedings.

80. On October 12, 2007, Lewison J granted final anti-suit injunctions restraining VH1 from continuing the Florida proceedings. Notice of voluntary dismissal of those proceedings was filed on October 23, 2007.

81. The injunction granted in favour of Elektrim was to enforce the no-action clause. The judge referred to cases involving jurisdiction clauses (*Donohue v Armco Inc* [2002] 1 Lloyd's Rep. 425) and arbitration clauses (*The Angelic Grace* [1995] 1 Lloyd's Rep 87) in this context, but in fact on this aspect the case involves not a question of the appropriate or chosen forum, but the question whether a party may sue at all. VH1 accepted that if the no-action clause was applicable an injunction was the appropriate remedy, because the court would ordinarily enforce a negative covenant by injunction.

82. Nor was there any substantial dispute on the principles to be applied on the alternative ground for an injunction in favour of Elektrim, or on the ground for an injunction in favour of the Trustee. An injunction could be granted if the applicant could show that the pursuit of foreign proceedings was vexatious or oppressive. This presupposed that, as a general rule, the English court must conclude that it provided the natural forum for the trial of the action; and since the court was concerned with the ends of justice, account must be taken not only of injustice to the defendant in the foreign proceedings if the plaintiff was allowed to pursue the foreign proceedings, but also of injustice to the plaintiff in the foreign proceedings if he was not allowed to do so. So the court would not grant an injunction if, by doing so, it would deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him: *Soc Nat Ind Aerospatiale v Lee Kui Jak* [1987] AC 871, 896 (PC).

83. The categories of factors which indicate vexation or oppression are not closed, but they include the institution of proceedings which are bound to fail, or bringing proceedings which interfere with or undermine the control of the English court of its own process, or proceedings which could and should have formed part of an English action brought earlier: see Dicey, Morris and Collins, *Conflict of Laws*, 14th ed 2006, para 12-073.

84. But an application for an anti-suit injunction should not be used as a means of obtaining a summary determination of the foreign claims in an English court, particularly where (as in the United States) material may turn up on discovery which may support a case which otherwise appears unlikely to succeed: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 86; *Midland Bank plc v Laker Airways Ltd* [1986] QB 689, 700. But if there are other factors which indicate oppression or vexation, the weakness of the case on the merits may be a further compelling factor.

85. In particular, an injunction may be granted to protect the process of the English court, and in particular to prevent the re-litigation abroad of issues which have been (or should have been) the subject of decision in England: *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 625, at [83]-[88].

V No-action clause

Clause 10 of the Trust Deed and condition 13 of the Bond Conditions

86. By clause 10 of the Trust Deed:

> "10.1 The Trustee shall not be bound to take any proceedings mentioned in Clause 9 or any other action in relation to these presents unless respectively directed or requested to do so (i) by an Extraordinary Resolution of the holders of the Bonds or (ii) in writing by the holders of at least thirty percent in principal amount outstanding of the Bonds and in either (i) or (ii) then only if it shall be indemnified to its satisfaction against all Liabilities to which it may thereby render itself liable or which it may incur by so doing.
>
> 10.2 Only the Trustee may enforce (i) [against the security provided by Elektrim] or (ii) the provisions of these presents. No Bondholder shall be entitled to proceed directly against [Elektrim Finance] or [Elektrim] to enforce the performance of any of the provisions of these presents unless the Trustee having become bound as aforesaid to take proceedings fails to do so within a reasonable time and such failure is continuing."

87. By condition 13 of the Bond Conditions:

> "13. Enforcement of Rights
>
> At any time after the Bonds become due and repayable, the Bond Trustee may, at its discretion and without further notice, institute such proceedings against [Elektrim Finance] or [Elektrim] as it may think fit to enforce the Bonds and the provisions of the [Trust Deed], but it need not take any such proceedings unless (i) it shall have been so directed by an Extraordinary Resolution of the Bondholders or so requested in writing by holders of at least thirty percent in principal amount outstanding of the Bonds and (ii) it shall have been indemnified to its satisfaction. No Bondholder may proceed directly against [Elektrim Finance] or [Elektrim] unless the Bond Trustee, having become bound to proceed, fails to do so within a reasonable time and such failure is continuing."

88. The Bond Conditions and the Trust Deed were to be construed as one document (Trust Deed, clause 5.1). The Bond Conditions were subject to the detailed provisions of the Trust Deed and the bondholders were entitled to the benefit of, are bound by, and are deemed to have notice of, all the provisions of the Trust Deed (Bond Conditions,

recitals). Nothing turns on the different formulations in clause 10 of the Trust Deed and condition 13, and therefore the question of the effect of a difference does not arise for decision in this case.

The judge's decision

89. The judge's approach was to consider the application of the no-action clause against the commercial context within which the words were used, and the purpose which it could be inferred that the provisions were designed to achieve.

90. The overall structure of the Trust Deed and the Bond Conditions considered in the light of the evidence led the judge to the conclusion that the bondholders could not be free to pursue their own claims to enforce performance of the bonds individually against Elektrim because otherwise the Trustee scheme did not work. Instead they must trust the Trustee to do it. Only if the Trustee failed to act could bondholders pursue their own course.

91. The purpose of the regime was to ensure that the class of bondholders all acted through the Trustee. That ensured that they all shared equally in the fortunes of the investment and that there was no competition between the bondholders. If an individual bondholder were free to pursue a claim based on a loss caused to the bondholders as a class, then either there was the potential for multiplicity of actions or for duplication of actions brought by the Trustee on the one hand and individual bondholders on the other.

92. The phrase "enforce performance of" the Bond Conditions in clause 10.2 of the Trust Deed was not confined to claims for specific performance. It must extend at least to a claim for damages for compensation for non-performance of the Bond Conditions. The phrase was apt to include any claim designed to vindicate the rights of a bondholder in his capacity as such.

93. The test of what claims were caught by the phrase should be purposive and substantive, and not procedural or dependent on the ingenuity of the draftsman. A claim designed to compensate a bondholder for the loss of something that would have belonged to him in his capacity as a bondholder was caught by the prohibition, whether the cause of action was pleaded in contract or tort.

94. A claim such as that advanced in the Florida proceedings, which was designed to secure to the plaintiff the lost value of the contingent payment/equity kicker which would have become payable under the Bond Conditions was within the prohibition because (a) the claimed loss was one which was suffered by Everest in its capacity as bondholder, and the claim was therefore one which was designed to vindicate its rights as bondholder; and (b) the allegedly fraudulent statements were not made to Everest individually but, to the extent that they were directed at the bondholders (rather than to the world generally)

they were directed to the bondholders as a class. The claimed loss was one which (if established) was suffered by all the bondholders as a class, rather than by Everest individually; and (c) the claimed loss was predicated on Elektrim having been declared bankrupt. If that had happened, the only way of recovering the value attributable to the equity kicker would have been by proving in Elektrim's bankruptcy. Proving in bankruptcy was one of the species of proceedings whose conduct in accordance with the Trust Deed and the Bond Conditions was exclusively within the control of the Trustee.

95. Consequently, the Florida proceedings were proceedings which, in substance, were proceedings to enforce the provisions of the Trust Deed and the Bond Conditions; and were therefore within the contractual prohibition.

VH1's appeal

96. The main points made by VH1 are these. VH1's claim against Elektrim was a claim purely in fraud, a Florida law tort. No claim in contract was made against Elektrim, either to enforce the Trust Deed or to claim damages for its breach. There would be nothing to prevent a bondholder from suing for misrepresentation which induced him to buy bonds.

97. That would be a personal claim, unrelated to the contract. Consequently, VH1 was not seeking to enforce the Trust Deed or Bond Conditions. The Florida claim was not a class claim which could be made on behalf of all bondholders. The claim was made to recover its own (or Everest's) losses, and not the losses of other parties. That was not a claim which the Trustee could bring. The claim was not open to all bondholders, since not all bondholders would be able to prove reliance, to prove that they saw the press releases and acted on them.

98. Where the ordinary natural meaning gave a commercially sensible result, there was no need to look any further. There was no reason to give the no-action clause a wide or purposive meaning when it could sensibly be given its literal meaning. On a literal reading, it was confined to contractual claims under or for breach of the Trust Deed. To the extent that the no-action clause is said to provide a defence to Elektrim against claims by bondholders in tort, including claims for fraud, it ought to be construed *contra proferentem* against Elektrim.

99. The judge put excessive weight on what he described as the overall structure of the Trust Deed which required the bondholders to give up their individual rights of suit against the issuer. That begged the question of what the Trust Deed provided. The bondholders did not give up any rights against the issuer but, rather, the contractual obligations of the issuer (in particular the obligation to pay) were assumed only to the Trustee and therefore could only be enforced by the Trustee. The parties did not make any provision in the Trust Deed for the possibility that bondholders might wish to bring claims in tort

against the issuer or guarantor for fraud.

Conclusion on the no-action clause

100. I am satisfied that the judge approached the question of construction in the right way and came to the correct conclusion. In particular the commercial purpose of the no-action clause leads me to conclude that the no-action clause applies to claims which are in substance claims to enforce the Trust Deed or the bonds, as well as to claims which are in terms claims to enforce them.

101. In particular, as I said in the introductory section, the purpose of the normal bond issue Trust Deed is that bondholders should act through the Trustee, and share equally in the fortunes of the investment, and not compete with each other. The bondholders are treated as forming a class, and give instructions to the trustee through a specified percentage of bondholders. Such a scheme promotes liquidity. The no-action clause should be construed, to the extent reasonably possible, as an effective bar to individual bondholders pursuing, for their own account, what are in substance class claims. That can apply to tortious claims as well as to contractual claims.

102. VH1 made its claim in the Florida proceedings as assignee of the bonds. The only loss VH1 claimed in the Florida proceedings was the loss of the contingent payment/equity kicker. The loss was said to arise from the fact that if Elektrim had been made bankrupt, the bondholders would have used the bankruptcy to recover assets of which Elektrim had stripped itself: Complaint, para 74.

103. The claims are all class claims: if Elektrim defrauded or deceived anybody by the DT press release, then it was the entire class of bondholders. The statements in the press release were not made to Everest or VH1 alone in some private capacity.

104. I accept Elektrim's argument that although framed as a claim in the tort of "fraud", the loss that VH1 claims is the loss of a contractual benefit, the contingent payment/equity kicker. Although the Complaint includes a claim that Elektrim fraudulently induced Everest to purchase the bonds, there is no suggestion in Mr Torres' declaration or in the Complaint that any representation was made to Everest before its purchase of the bonds.

105. Although the cause of action is not for breach of contract but in tort, the object of the claim is to compensate it for the loss of a contractual right or entitlement under the Bond Conditions which it had by virtue of being a Bondholder. The claim is, in effect, enforcing Everest's right as a bondholder to a share of the contingent payment. The loss of the contingent payment would be a loss which was suffered by all bondholders alike. It was a class loss, and not a loss which would be in any way peculiar to Everest. It is the same loss which the Trustee is currently seeking to recover from Elektrim in

proceedings in the Chancery Division.

106. I also accept that the allegations made in the Florida proceedings would be clear breaches by Elektrim of the Trust Deed: (1) under clause 15.1(A) of the Trust Deed, Elektrim undertakes that it will "at all times carry on and conduct its affairs and procure that its Subsidiaries carry on and conduct their respective affairs in a proper and efficient manner"; (2) stripping itself of assets would clearly be a breach of that obligation; (3) engaging in a fraudulent conspiracy with third parties for the purposes of deceiving the bondholders and facilitating asset stripping must also be a breach of the same obligation. The misconduct relied upon is a breach of a duty owed to all the bondholders.

107. I accept, therefore, that VH1's claims are the mirror image of contractual claims for breach of the Trust Deed: both the alleged wrongful acts and the alleged losses are identical. In summary, the claim is one which is designed to vindicate Everest's rights as a bondholder. I am satisfied, therefore, that the judge's approach to the construction of the no-action clause was correct and I agree with his conclusion.

VI Vexation/oppression

108. The judge indicated that he would have also granted an anti-suit injunction on the general discretionary ground of vexation/oppression in favour of Elektrim had he not been persuaded that the no-action clause applied. He granted an injunction in favour of the Trustee on that ground.

109. In view of the fact that I would dismiss the appeal in relation to the no-action clause, it is not necessary for me to say much about the injunction on that ground in favour of Elektrim. Permission to appeal has not been granted to VH1 in relation to the injunction in favour of the Trustee and what is before the court on this appeal is its renewed application for permission to appeal on notice, with the appeal to follow if permission is granted. VH1 accepts that it has a heavy burden to discharge in seeking to upset the judge's exercise of discretion.

110. The points of principle in relation to which VH1 says that the judge erred are these. It says, first, that it is important not to take too narrow or restrictive an approach to the drafting of the Complaint since, in Florida as in England, pleadings can be amended. Moreover, the anti-suit injunction granted by the judge restrains not only the proceedings as pleaded in the Complaint but any proceedings based on the allegations contained in the Complaint, an order which could only be justified if the Florida proceedings not only were unconscionable as pleaded but also could not be rectified by amendment.

111. Secondly, it says that it is not ordinarily the role of the English court to assess the merits of proceedings before a foreign court, particularly in respect of claims made under foreign law. A claim may be so unmeritorious as to be vexatious or oppressive but the

test is a high one: the claim must be so bad as to be "utterly absurd" (*SIPC v Coral Oil Co Ltd* [1999] 2 Lloyd's Rep 606, in which such cases were described as "an extremely rare category"). The court should not act as if it were hearing an application for summary judgment by the defendant to the foreign proceedings (*Midland Bank plc v Laker Airways Ltd* [1986] QB 689, at 700), since that is a matter for the foreign court, especially where the assessment of the merits involves a consideration of the evidence which is likely to be before the foreign court and the likely findings of fact in the light of discovery procedures which have not yet taken place: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 86.

A Injunction in favour of Elektrim

The judge's conclusion

112. The judge's decision was that the essence of VH1's Amended Complaint in Florida was that Elektrim made fraudulent misrepresentations and non-disclosures, in particular about the circumstances and legality of the transfer of the PTC shares to DT, in the two press releases issued in the name of DT which VH1 alleged (a) were part of a conspiracy between DT and Elektrim to defraud Elektrim's creditors; and (b) were intended to, and did, induce Everest and the other bondholders to believe that DT had lawfully acquired title to 48 per cent of the PTC shares pursuant to the determination of an arbitration tribunal. It was alleged that in reliance on these press releases Everest supported the decision to withdraw the bankruptcy petition, and but for the misrepresentations by Elektrim, Everest would have taken steps to prevent a withdrawal of the petition.

113. The judge considered that the claim was unsustainable because it was now conceded (contrary to Mr Torres' declaration) that Everest in fact saw the full contents of the October 2006 Award at exactly the same time, and that it was in the hands of Bingham McCutchen. It could not therefore be plausibly argued that it relied on and was deceived by the press release. In addition, for the same reasons as he gave in relation to the injunction in favour of the Trustee, the causal link between the allegedly fraudulent statements and the claimed loss was fanciful, and the claim as framed against Elektrim was also bound to fail. Nor was there any juridical advantage in suing Elektrim in Florida of which VH1 would be unjustly deprived if the anti-suit injunction is continued.

VH1's appeal

114. VH1 takes two jurisdictional points which it did not take before the judge. Neither of these points were in its notice of appeal, although the first point was taken in its skeleton argument in support of its application for permission to appeal. The first point is as follows. VH1 accepts the judge had jurisdiction to determine whether the Florida proceedings were in breach of the no-action clause because the Trust Deed and the Bond Conditions were governed by English law contract. But it says that the judge did not have jurisdiction to grant an anti-suit injunction because the English court did not have a

sufficient interest in, or connection with, the matter in question to justify such interference: *Airbus Industrie v Patel* [1999] 1 AC 119, 138.

115. The dispute between VH1 and Elektrim is a dispute between companies neither of which is domiciled in England and which is based on events taking place in the United States and Poland. VH1 could pursue its claim against Elektrim either in the United States or in Poland. England is not only not the natural forum, but it is a not a possible forum at all in that (in the absence of agreement or submission) it has no jurisdiction over VH1's claim or over any claim by Elektrim based on the matters in the Florida Complaint.

116. The second jurisdictional point (taken for the first time on the hearing of this appeal) is that Elektrim obtained permission to serve VH1 out of the jurisdiction on the basis that its claim for an injunction to enforce the no-action clause was a claim within CPR, r. 6.20(5)(c) to enforce a contract governed by English law, and it was not permissible to join a claim for an injunction on the vexation/oppression ground, since it is elementary that it is not possible to join a claim which is not within CPR, r. 6.20 to proceedings in respect of which permission has been granted under CPR, r. 6.20.

117. There is nothing in either of these points. On the first point, it cannot be said that there is no connection with England, or that it could be a breach of international comity for the English court to exercise jurisdiction. Elektrim is being sued by the Trustee for the loss of the equity kicker, which is the same loss which VH1 claims in Florida, under the terms of a bond issue governed by English law, relying on substantially the same facts as the Florida claims, namely asset-stripping by Elektrim. The connection with Florida is only that Everest is said to have received the misrepresentations there.

118. As regards the second point, it is true that the application was made on the basis of CPR, r. 6.20(5)(c) (contract governed by English law), and no separate basis of jurisdiction was identified for the alternative basis of vexation/oppression and collateral attack on the judgment of May 1, 2007. But it is now far too late for VH1 to take the point. It never objected to the English court's exercise of jurisdiction over the claim on the alternative basis, and there has therefore been a clear submission to the jurisdiction by VH1 in respect of this claim.

119. Nor do I see any error of principle in what the judge said would have been his exercise of discretion to grant an injunction on the alternative basis.

120. I accept that, in considering whether a cause of action in a foreign country is vexatious or oppressive on the ground that it is bound to fail, the English judge should not conduct a summary determination under English law principles without regard to the fact that the foreign system of pleadings may be more liberal, or that the foreign system of discovery may yield sufficient material to support allegations which in England should not be made without existing evidence. I also accept that an error or omission in a foreign

pleading should not be considered fatal, if it can be cured by amendment.

121. But the inherent weakness of a claim, taken together with other matters, may be an important factor in the consideration of whether foreign proceedings are vexatious or oppressive. The English court is not exercising a summary jurisdiction. It is entitled to take a view in the round, and it is entitled to be sceptical about attempts to cure by potential amendment claims which on their face are hopeless (and, in this case, in some respects bogus). In my judgment, the judge was entitled to take the view that reliance on the press releases was plainly a cynical device to establish an independent cause of action in Florida, and that it was inherently incredible that Everest could have relied on a press release rather than on the Awards themselves or on the advice of the bondholders' lawyers, Bingham McCutchen. The judge was fully entitled to take into account the weakness, and inherent implausibility, of the claim in the exercise of the discretion.

122. I accept Elektrim's submission that VH1 has not identified any basis for a conclusion that the judge erred in principle in finding that the claims in the Florida proceedings against Elektrim were hopeless. Consequently, I agree with the judge that an injunction would have been appropriate on this ground even if the no-action clause had not applied.

B Injunction in favour of the Trustee

Judge's decision

123. The judge noted that the recitation of the facts in the Amended Complaint was peppered with allegations of fraud against the Trustee. But all those allegations had been withdrawn, and it had not been explained why, and on what material, they had been made.

124. The claims were against an English trustee, concerning the Trustee's duties under an English law Trust Deed, expressly governed by English law and containing a non-exclusive English jurisdiction clause, with the Trustee being in England and the relevant acts having occurred in England. VH1 accepted that England was the natural forum for this claim, and did not suggest that there was any advantage in proceeding in Florida of which VH1 would be deprived if an injunction were granted. The sole substantive question was whether the claim against the Trustee was vexatious or oppressive.

125. The judge considered that the claims were hopeless. The main points he made were as follows.

126. The allegations based on failure to disclose the full contents of the June 2006 Award and the October 2006 Award before withdrawal of the bankruptcy petition were based on factual allegations which were simply wrong.

127. As for the allegations that the Trustee failed to disclose to Everest its knowledge that DT and Elektrim had engaged in a transaction that was contrary to the direction of the Vienna arbitral tribunal, and that the Trustee had failed to exercise adequate due diligence prior to withdrawing the bankruptcy petition by failing to conduct a full investigation of the legality of the transaction, the fact was that the Trustee expressly applied to the Polish bankruptcy court for a determination whether it was entitled to accept the money offered by Elektrim, and the Polish bankruptcy court ruled that it was. The Trustee was both entitled and obliged to act on the instructions of bondholders holding more than 30 per cent in value of the bonds.

128. The allegations based on receipt of "tainted money" from Elektrim were hopeless because they were predicated on Elektrim not being made bankrupt, and in any event the judge had held in a judgment binding on VH1 that they were not tainted.

129. In addition, the allegations of causation of loss flowing from the alleged breaches were themselves fanciful. The Amended Complaint said that had Everest "opposed withdrawal and explained its reasons for doing so, the withdrawal would not have occurred" or that the bankruptcy court "would not have permitted the withdrawal". The Trustee's evidence was that its instructions to withdraw the petition came from holders of more than 30 per cent in value of the bonds and that there was no realistic prospect of showing that bondholders other than Everest would have acted differently had they known about the June 2006 Award. It adduced evidence from the bondholders supporting that position.

130. The possibility that Everest's protests could have dissuaded the Trustee from accepting the money and withdrawing the petition was fanciful. It ignored the Trustee's obligation to act on the instructions of bondholders holding more than 30 per cent in value of the bonds. The suggestion that Everest could have whipped up support from 30 per cent of the bondholders was equally fanciful. The fact was that the bondholders were being offered repayment of the bonds after many years of waiting. If Elektrim were declared bankrupt, it would have been because its liabilities exceeded its assets, which would in itself have prejudiced its ability to repay the bonds.

131. The possibility that Everest might have prevented the withdrawal of the bankruptcy was also fanciful. It had no *locus standi* before the Polish bankruptcy court, because it was not a creditor of Elektrim and had not filed a petition for Elektrim's bankruptcy; the Polish court had made it clear in its ruling of October 27, 2006 that a petitioner was entitled to withdraw his petition if he wanted to. It also ruled that a bankruptcy petition could not be founded on an allegation that a contingent claim, if established, would not be met. So the possibility of the equity kicker becoming payable would not have figured in any decision of the Polish court. The idea that the Polish court would have compelled the Trustee to proceed with its petition when it did not want to was fanciful.

132. Consequently, the Amended Complaint disclosed no arguable cause of action against the

Trustee, and no arguable claim for recoverable loss arising out of the alleged breaches. It was a claim that is bound to fail and was vexatious.

133. In addition the claim in Florida against the Trustee should not be allowed to proceed because it was an attempt to mount a collateral attack on the judge's judgment in the Part 8 proceedings. One of the principal purposes of the Part 8 proceedings was to determine whether there were any meritorious claims against the Trustee concerning the receipt from Elektrim of the €525m and the events of October 2006. In the course of the proceedings the judge made a representation order under which the bondholders (including Everest) were represented by two bondholders. The representative bondholders, through leading counsel instructed on their behalf, argued that the receipt of the monies by the Trustee was lawful and that there was no impediment to distribution. The judge accepted that argument and gave judgment to that effect. VH1 as assignee of the bonds from Everest was bound by that judgment. Its claim against the Trustee in Florida argued precisely the opposite. Its claim in Florida was therefore a collateral attack on that judgment. In addition the claim that VH1 sought to advance in Florida was a claim that could and should have been raised in the course of the Part 8 proceedings in this court. If necessary, Everest could have applied to have been separately represented in those proceedings on the ground that there was a conflict of interest between it and the remaining bondholders. It did not do so, and should not be allowed to do so now.

VH1's application for permission to appeal

134. Mr Malek QC accepted before this court that England was the natural forum, but that was not a sufficient basis for an anti-suit injunction. The motive for the assignment and the withdrawal of the fraud claims did not affect the question whether the remaining claims against the Trustee were viable. Mr Malek QC frankly accepted that if the question was which side had the better case, the answer would be against his clients. But the judge was not entitled, in effect, to decide summarily that the claims were hopeless.

135. The principal points made by VH1 on this application are these. First, VH1 (as distinct from Vivendi) was not bound by Lewison J's judgment in the Part 8 proceedings, and was therefore not making a collateral attack on a judgment by which it was bound. The judge attributed too wide a scope to the Part 8 proceedings. In those proceedings, the judge gave directions for distribution of the money and for that purpose determined the issues which were raised by the Trustee and the other parties. VH1 was bound by the result of the Part 8 proceedings because of the representation order, but it was not a party to them and there was no reason why it should be compelled to bring its claims against Elektrim and the Trustee within those proceedings.

136. The Part 8 judgment was only concerned with whether the Trustee could distribute, and did not relate to the question whether there were any personal claims against the Trustee. VH1's case related not to the possibility that Vivendi or any other third party might

assert a proprietary interest but to the possibility that, the original petition having been withdrawn against payment, the money could be clawed back (either from the Trustee or the bondholders) in *subsequent* bankruptcy proceedings.

137. The extent of the duty of the Trustee to ensure that bondholders were sufficiently informed was fact-sensitive, and the Trustee should have informed bondholders that the transfer to DT of the PTC shares at book value was considerably less than their real value. If Everest had appreciated this, it would have persuaded bondholders to press for bankruptcy, or instruct the Trustee not to withdraw the petition. If the sale had been set aside in the bankruptcy, $3 billion would have been recovered for the bondholders.

138. The judge was wrong to hold that the allegation that the Trustee was in breach of duty by failing to disclose the risks of accepting tainted money was hopeless. Even if a duty to give legal or commercial advice to the bondholders was not expressly pleaded, it was clear that VH1's case was that the Trustee owed a fiduciary duty of care to disclose the risks to Everest. The other points relied on by the judge (viz. it was Bingham McCutchen, and not the Trustee, who had a duty to give advice; Everest was a sophisticated investor, which did not ask the Trustee for advice; and the Trustee had no means of knowing the identities of all of the bondholders, and so could not have assumed a duty to them) were all important factors which would need to be weighed by a court seised of the substantive dispute in deciding the existence and extent of the duty owed. But none of them was in itself decisive. VH1 did not allege that the Trustee undertook to provide general legal or commercial advice about the transaction, but only alleged that it undertook a narrow obligation to disclose what it knew (or should have known) about the transfer of the PTC shares to DT. That was simply an aspect of the Trustee's general fiduciary duty of reasonable care and skill, which was expressly preserved by clause 18 of the Trust Deed.

Conclusion

139. It is plain, and virtually admitted, that the purpose of the assignment was to enable Vivendi to pursue its claim in yet another forum.

140. A fundamental part of the claim against the Trustee was that it was in breach of fiduciary duty in failing to disclose to Everest and General Motors the full contents of the October 2006 Award prior to the withdrawal of the bankruptcy petition and the effect of such withdrawal on the value of the bonds, and in failing to obtain from Elektrim and disclose to VH1 the full content of the June 2006 Award before agreeing to withdraw the bankruptcy petition (Florida Complaint, para 50). The Complaint also specifically pleaded that although the Trustee had access to the October 2006 Award, it failed to disclose it to Everest or General Motors at any time prior to the withdrawal of the bankruptcy petition on October 26, 2006 (para 37);

141. Clause 8(c) of the Assignment Agreement between Everest and VH1 contained a

representation by Everest that it was unaware of any evidence which contradicted the statements in the attached declaration of Mr Richard Torres, who described himself (as I have said) as a senior analyst with Everest Capital Inc.

142. In that declaration (made under penalty of perjury) he said: "At no time prior to the decision to withdraw the bankruptcy petition did Everest have access to either the First or Second Partial Awards of the Vienna Arbitration Panel which I understand were not publicly available and which neither DT, Elektrim Finance BV, or Elektrim SA disclosed to Everest." (para 12). Clause 8(c) also contained a representation that: "In particular [Everest] further represents that it has not seen a copy of either the June 6, 2006 Partial Award or the October 2, 2006 Partial Award. .."

143. The Amended Complaint in Florida alleged (para 51) that if Everest had known the contents of the June 2006 Award and the October 2006 Award, namely that the first award did not permit Elektrim to transfer the PTC shares in August 2006 and that the October 2006 Award did not sanction that transfer, Everest would have opposed the withdrawal of the bankruptcy petition.

144. In his witness statement of July 20, 2007 Mr Davis, of Orrick Herrington & Sutcliffe, in Washington DC, repeated (para 43) the allegation that the Trustee had failed to disclose to Everest and GM the full contents of the October 2006 Award, and failed to obtain and disclose the full content of the June 2006 Award.

145. The claim was bogus.

146. The evidence which emerged was that the Trustee's Polish lawyers obtained a copy of the October 2006 Award at the October 4, 2006 bankruptcy hearing. They arranged for an English translation to be produced and supplied the Award in the original and in translation to Clifford Chance (the lawyers for the bondholders' committee) in Poland. As I have said, on October 4, 2006 Bingham McCutchen sent an e-mail on behalf of (among others) Everest itself authorising the Trustee to seek an adjournment of the bankruptcy hearing because the bondholders "require further time to consider … the implications of the Vienna award."

147. On October 5, 2006 the Trustee sent a notice to all bondholders notifying them of the October 2006 Award and its contents and of the adjournment of the bankruptcy proceedings on October 4, and stating that further information would be available to bondholders on a confidential basis on request. No bondholder made such a request.

148. In his witness statement of September 6, 2007 Mr Torres said merely: "While I accept that the October award was made available to the bondholders, no one drew my attention to the fact that neither of these awards were consistent with the claims made in the press release." (para 7). There was no explanation for the false statement in his earlier

declaration. In reply for VH1 Mr Davis also had no explanation for the misleading way in which the case had been put.

149. Consequently it is now common ground that the bondholders had a copy and that Mr Torres himself had a copy shortly after it was made, and the October 2006 Award recited in full the operative part of the June 2006 Award.

150. I have not been persuaded that there is any prospect of a successful appeal from the exercise of the discretion. There is no suggestion that the judge applied the wrong principles. The main point made by VH1 on this application is that, whatever the weaknesses in VH1's claims in the Florida proceedings, it was wrong in principle for the judge in effect to decide summarily that they were hopeless. I have already dealt with the approach to this aspect in my consideration of the alternative basis for an injunction in favour of Elektrim.

151. It is accepted that England is the appropriate forum for the claims made in the Florida proceedings. The claims are against an English trustee, concerning the Trustee's duties under an English law trust deed, expressly governed by English law, with a non-exclusive English jurisdiction clause, and the relevant acts occurred in England. The alleged victim was the assignor of the bonds, Everest, a Bermuda company. The only Florida connection relied on is that Mr Torres, who managed the investment of the bonds for General Motors, and his employer Everest Capital Inc, are based there. Neither Everest nor Everest Capital Inc was the owner of the bonds. General Motors is a Delaware corporation with its principal place of business in Detroit, Michigan. I accept the submission for the Trustee that there is no real connection with Florida.

152. Once the bogus claims about non-disclosure of the Awards are stripped out, the remaining claims are for breach of fiduciary duty in accepting "tainted funds" from Elektrim without consulting Everest or General Motors, and failing to disclose to Everest and General Motors the risks of accepting tainted money; failing to exercise adequate due diligence prior to withdrawing the bankruptcy petition by failing to conduct a full investigation of the legality of the transaction; acquiescing in delays of the bankruptcy proceedings; and withdrawing the bankruptcy petition and thereby giving up the right to recapture fraudulently transferred assets and thus to maximise the value of the contingent payment/equity kicker. In addition (paras 60 and 62), as a result of those matters, "including actual and constructive knowledge of material information that it did not disclose to Everest or [General Motors]" the Trustee failed to exercise the degree of care and diligence required by the Trust Deed (clause 18), and its conduct constituted a material breach of its obligations.

153. It is surprising to find an allegation that the Trustee of a bond issue (whose main function is administrative and ministerial) has the duties which are pleaded in the Amended Complaint, and I am satisfied that for the reasons given by the judge, there are no such duties in the circumstances of this case under English law, the only possible applicable

law.

154. The Trustee issued the bankruptcy petition under direction from the bondholders. On October 4, 2006 the bondholders directed the Trustee to adjourn the petition to allow time to consider the consequences of the October 2006 Award. Everest was party to that instruction. On October 27, 2006 the Trustee was directed by more than 30% of the bondholders regarding the conditional withdrawal of the petition and Everest later approved that instruction. Consequently, acceptance of the funds and the withdrawal were actions which were undertaken on the instructions of the bondholders' committee. By clause 10.1 of the Trust Deed the Trustee is not required to take any actions unless it is directed or requested to do so either by an extraordinary resolution of bondholders or in writing by 30% in value of the bondholders, and in each case only if indemnified to its satisfaction. If it receives such instructions it has to act (subject to getting satisfactory indemnities). I accept the Trustee's argument that bondholders are expert investors who look after their own interests, and that market practice is that when things go wrong bondholders may organise bondholders' committees.

155. Everest was a member at the material times of the bondholders' committee which pursued the commercial interests of the bondholders assiduously. The bondholders' committee had experienced lawyers, Clifford Chance in Poland, and Bingham McCutchen in London. All of the correspondence with Vivendi, in which Vivendi set out why it considered any receipt of repayment of the bonds from Elektrim would be "tainted", was addressed to the bondholders' committee as well as to the Trustee. Bingham McCutchen took the lead in responding to Vivendi's letters.

156. I also accept the argument for the Trustee that the case was hopeless because, even if it could be argued there was a duty to disclose information to bondholders, it is impossible to argue that the Trustee failed to discharge the duty. The Trustee provided the October 2006 Award to the bondholders' lawyers. Bondholders representing more than 30%, including Everest, then instructed the Trustee to seek an adjournment on the basis that the bondholders required further time to consider the implications of the Vienna award. Consequently the Trustee was being told that the bondholders were being advised on this very point. It is fanciful to suggest that the Trustee should have gone further and second-guessed the advice of the bondholders' own lawyers.

157. It is alleged that (a) if Everest had known the contents of the June 2006 Award and the October 2006 Award, or (b) if the Trustee had warned Everest that the conduct was unlawful, then Everest would have opposed the withdrawal of the bankruptcy petition. While Everest and General Motors wanted to be paid they did not want to receive tainted money and the possible liability which would come with it. Had Everest opposed a withdrawal, it would not have occurred, because the bondholders typically required unanimity before making important decisions and the other bondholders would not have wanted to participate in an unlawful transaction and incur the risk that the funds would have to be disgorged. If Everest had disclosed to the bankruptcy court that the underlying transaction had taken place in violation of both the LCIA and the June 2006 Award, the

bankruptcy court would not have permitted the withdrawal of the petition. General Motors would have been able to use the bankruptcy proceeding to recapture fraudulently transferred assets which would have given significant value to the equity kicker; and it would have been able to recover the principal and interest owed on the bonds without having to accept tainted money.

158. I consider the judge's conclusions on causation are unassailable. As at October 27, 2006, Elektrim, the debtor, had tendered in available funds the full petition debt and the Polish Court had approved the payment. There is no realistic prospect of showing that the Trustee could have gone on with the petition even had it wished to. The bondholders who gave instructions to withdraw the petition have given evidence that they would have given those instructions in any event.

159. I also consider that there is no arguable basis for an appeal from the judge's conclusion that the injunction was justified on the ground of protection of the jurisdiction of the English court. Vivendi chose not to apply to the English court to challenge the Order of May 1, 2007 or seek to restrain distribution of the €525m. Vivendi was served with notice of the May 1, 2007 order and was given the opportunity to apply to set it aside. The Part 8 proceedings were between the Trustee, Elektrim, and all of the bondholders and concerned the circumstances of receipt of the €525m and whether the monies should be distributed, and in particular whether the Trustee might be liable in respect of the events of October 2006. England was plainly the natural forum for any disputes concerning the bonds. Instead Vivendi attacked the decision collaterally by having VH1 acquire bonds and issue the Florida proceedings, a jurisdiction having no substantial connection with the dispute, with the object of preventing the distribution.

160. The allegation that the funds were vulnerable to legal challenge is a necessary element of the Florida claim about the "tainted funds." Vivendi's claims could and should have been brought in the Part 8 proceedings. The court ruled, on May 1, 2007, on the question whether Vivendi's arguments had merit, and decided that there was no proprietary claim and, also, that the Trustee was a bona fide purchaser for value without notice of any claim.

161. VH1 now says that the term "tainted" means something other than being subject to adverse claims, and means sums which may be clawed back in the Polish bankruptcy. I am also wholly unconvinced by the suggestion now made on behalf of VH1 that the reference in the Amended Complaint to "tainted" money is a reference to the possibility of a later clawback in the bankruptcy. It is absolutely plain that when the Complaint speaks of "tainted" monies it is referring to the claims of third parties in respect of the monies.

VII Disposition

162. I would dismiss VH1's appeal against the injunction in favour of Elektrim, and dismiss

VH1's application for permission to appeal against the order in favour of the Trustee. Vivendi may have some genuine grievance about the loss of its investment in PTC (about which I say no more), but the Florida action was a misconceived method of pursuing that grievance.

Lady Justice Hallett:

163. I am indebted to Lawrence Collins LJ for the thoroughness and clarity of his analysis. I respectfully agree with his reasoning and in the result.

Sir Anthony May, P:

164. I also agree.

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10th August 2018

Before :

His Honour Judge Kramer sitting as a judge of the High Court

- -

Between :

Fairhold Securitisation Limited
-and-
(1) Clifden IOM No. 1 Limited
(2) Michael Bowell (in his capacity as purported administrator of Fairhold Securitisation Limited)
(3) Dermot Coakley (in his capacity as purported administrator of Fairhold Securitisation Limited)
(4) John Hedger (in his capacity as purported administrator of Fairhold Securitisation Limited)
(5) Rizwan Hussain

- -
- -

Marcus Haywood (instructed by **Akin Gump**) for the **Claimant**
Adam Goodison (instructed by **Stephenson Harwood)** for the **proposed Second Applicant (GLAS)**
Emma Read for the **1st and 5th Respondents**
Marcia Shekerdemian QC (instructed by **Charles Russell Speechleys LLP**) for the **2nd and 3rd Respondents**
Gunnercooke LLP for the **4th Respondent**

Hearing dates: 8th – 10th August 2018

- -

APPROVED JUDGMENT

HIS HONOUR JUDGE KRAMER Friday, 10th August 2018
(14.02 pm)

1. This is an application by Fairhold Securitisation Limited for declarations that the purported appointments of Michael Bowell and Dermot Coakley, the second and third respondents, and John Hedger, the fourth respondent, as administrators of the company, are void and of no effect and that Clifden Isle of Man No. 1 Limited, who filed the notices of appointment at court, was not the authorised agents of GLAS Corporation Limited ("GLAS"), the second applicant, to appoint administrators or for any other purpose. Other consequential relief is sought, including injunctions in the event that suitable undertakings are not given. These are directed at preventing Clifden, as far as the two applicants are concerned, interfering in the affairs of the company.

   The procedural history

2. The notices of appointment were filed on 12 July 2018 in respect of Mr Bowell and Mr Coakley and 18 July 2018 in respect of Mr Hedger, whose appointment was to be as a joint administrator of the existing administration.
3. On 19 July 2018 the company filed this application. It was sealed on 23 July 201, but on 20 July there was a hearing, firstly before Mr Justice Fancourt. This was an urgent hearing, looking at the documents ex parte on notice in that somebody appeared for Clifden. Looking at the transcript of that hearing it appears that he saw there was a strong case for the grant of the orders that were sought, but he wanted to give an opportunity to those who wished to uphold the appointment the benefit of providing a response.
4. Due to time constraints he was unable to deal with the hearing later in the day when the matter came before a Deputy High Court Judge, Mr John Martin QC, who joined the fifth respondent, Mr Hussain, and accepted undertakings as set out in his order of that day. He granted an injunction against Mr Hedger, who was not present. These undertakings and injunctions were to

hold the ring until this case could be heard. He also gave directions for the filing and service of evidence and directed that the case be listed as urgent business.

5. The hearing started before me on 8 August. It ran for two days. At the beginning of the hearing GLAS, who are represented, made an application to be joined. That was not opposed and an order was made joining GLAS as second applicant.

6. Clifden made an oral application to adjourn the proceedings to further prepare, but for the reasons given in a short judgment on that day I refused the adjournment.

7. The hearing has been conducted on the basis of the written statements. I have been invited, in relation to one particular issue, which is as to whether or not Mr Bowell and Mr Coakley gave consent to act as administrators , to determine that issue of fact on the written statements.

The representation at this hearing

8. The company is represented by Mr Haywood; GLAS by Mr Goodison; Clifden by Miss Read, who is instructed as direct access counsel; Mr Bowell and Mr Coakley by Miss Shekerdemian QC. Mr Hedger has not attended but he has offered undertakings, which are acceptable to the company, and that is the basis on which he has, understandably, not attended. Mr Hussain attended in persona, although it was quite clear during the hearing that he was giving instructions to Miss Read as well, and it will be apparent why that may be when we look at his role in Clifden.

Who are the parties?

9. Fairhold Securitisation Limited is a company registered in the Cayman Islands. It is apparent from the statement of Mr Alan J Carr of Drive Train, which provides corporate services for the company, and is a corporate director of the company, that Fairhold Securitisation Limited issued loan notes. The face values of the notes are in excess of £440 million. There were two issues: the first on 30 March 2006 and the second on 15 May 2007. There are Class A notes and Class B notes, so designated because they have different priorities.

10. The notes oblige the company to pay interest to noteholders and to pay the value of the note on maturity.

11. The notes had a last maturity date of 15 October 2017. The value of the notes were not repaid and, therefore, there has been a payment default.

12. The money raised on the loans was lent to Fairhold Finance Limited, which was obliged to pay interest to the company. They, in turn, made advances to property owners. Apparently these are owners of sheltered housing who have an income stream from ground rents, transfer fees and rentals.

13. In broad terms, the property owners who have had the advances pay interest and repay the loan to Fairhold Finance and Fairhold Finance repay the loans and interest to Fairhold Securitisation, who then pay on the interest to the noteholders of these loans and, on maturity, the loans.

14. The obligations of Fairhold Finance and the property owners are secured by fixed and floating charges over their property, undertakings and assets. The obligations of the company, who are the issuers of the loan notes, are secured in favour of the Note Trustee, who has a floating charge over the undertaking, property and assets of the company.

15. That floating charge is a qualifying floating charge for the purposes of Schedule B1 to the Insolvency Act 1986.

16. GLAS Trust Corporation Limited is the Note Trustee. The statement of Juliette Challenger of that corporation says that it was appointed to act as Note Trustee on 6 October 2015 as a result of an extraordinary resolution, passed on 5 October 2015. As regards the loan notes, in value, there are £413,700,000 worth of Class A notes and £29,800,000 of Class B notes.

17. The original Note Trustee, as shown by the documents in the exhibits, was Deutsche Trustee Company Limited. They became the original trustee by a deed dated 30 March 2006, which is the governing deed as regards GLAS. It is common ground that the qualifying floating charge

upon which the appointment is based is vested in the Note Trustee. I shall deal in more detail with the powers of the noteholders when we look at the arguments between the parties.

18. Michael Bowell and Dermot Coakley are licensed insolvency practitioners and directors of MBI Coakley Limited. John Hedger is a director of Seneca IP Limited, which describes itself as specialists in business recovery and insolvency. Clifden IOM No. 1 Limited is incorporated in the Isle of Man; it describes itself as a principal investor in real estate driven strategies. Then there is Mr Rizwan Hussain; he describes himself as a senior director of Clifden and, on the evidence before me, he clearly is the guiding light in Clifden. The main statements in this case come from him. He has been the principal actor in the events which give rise to the application. Although there are statements from two other individuals, describing themselves as senior directors, Mr Cathersides and Mr Cundy, what those other statements show is that Mr Hussain was leading the discussions with Mr Bowell and other third parties concerning the appointment of the administrators.

What is the stance of the parties? Who is the dispute between?

19. The company, GLAS, and Messrs Bowell, Coakley and Hedger are of one voice. They say that the appointments of Bowell, Coakley and Hedger as administrators are void. The appointments purport to be under paragraph 14(1) of Schedule B1 to the Insolvency Act 1986. That is a process that is available to the holder of a qualifying legal charge. Firstly, they say GLAS, who is the qualifying legal charge holder, did not file notice of appointment, so they did not appoint the administrators; and, as they are the Note Trustee in whom the qualifying floating charge is vested, nobody else could do so on their part.
20. Secondly, as regards Messrs Bowell and Coakley it is said that they did not consent to be appointed as the administrators; and indeed neither did they form the view that the purposes of

the administration were reasonably likely to be achieved. They did not consent to the use of any document in which they had said they consented to act or stated such a view to being used.

21. It is accepted by Messrs Bowell and Coakley that they did give Clifden signed documents containing consents to act and confirmation of their necessary opinion, but they say they were given in escrow and there has never been consent to use those documents.

22. As regards Mr Hedger, it is said his appointment was not valid because he was appointed to be a joint administrator of an existing administration. In that event, there were alternative conditions which had to be met but which were not fulfilled. If there was a valid administration, so there were already two administrators, Messrs Bowell and Coakley, then they had to consent, and they did not consent to Mr Hedger's appointment. Alternatively, there had to be an administration for Mr Hedger to join, if there was no administration he could not be appointed as a joint administrator. So, whichever way one looks at it, Mr Hedger's appointment cannot be valid. Indeed that is not disputed by either Clifden or Mr Hussain. In that they are correct.

23. Next, I will turn to Clifden and Mr Hussain's response to the applicants' case. They say that Clifden did have power to appoint the administrator in the name of GLAS, and they did so, and that Mr Bowell and Mr Coakley did consent to act as administrators and give their necessary opinion.

24. There is a factual dispute as to whether or not Mr Bowell and Mr Coakley consented to be administrators. They deny that. Clifden originally seemed to be saying they were not telling the truth about that, but now that has been modified to simply saying that they are inaccurate in their recollection of events and that they did indeed consent to act and for their written consents to be used.

25. It has been agreed by the parties, as I have indicated, including Mr Hussain, to whom I explained the differences between hearing oral evidence and having cross-examination and

dealing with cases on written statements, that I shall deal with this conflict of fact on the statements without cross-examination.

26. What is said by Clifden and Mr Hussain is that Mr Bowell and Mr Coakley gave permission to use the consents. There is a slight divergence, on one view, on the arguments put forward by Clifden and Mr Hussain. Clifden, through Miss Read, their counsel, accepts that the consents to act were delivered in escrow, but Miss Read argues that these were subject to a permission for these consents to be used on certain conditions which she said were fulfilled.

27. Mr Hussain, when he addressed me, said that he sticks by his statement. He, in short submissions, drew my attention to a few parts of his statement. On the issue of escrow, what his statement says is that there was a meeting on 9 July when a number of documents were handed over. He said that the nature of escrow was not clearly expressed and he understood that there would be some follow-up items to attend to. That is what he says as regards documents handed over on 9 July, which did not include the consent.

28. In his statement, dealing with 10 July, he said when these were handed over, which would have included he consent documents, Mr Bowell told him that once he had seen a draft paper from solicitors called Sidley with advice as to the validity of the appointments, from the point of view of the prospective administrators, that they were "good to go". He says nothing in his statement about that being handed over in escrow.

29. There is, as I say, a slight divergence. Curious in a way, because Mr Hussain is really giving instructions on behalf of the company as well. It does, however, require that I make a finding as to whether not the consent document was provided in escrow in the first place, in addition to making findings relevant to the arguments of Miss Read as to whether it was a conditional escrow where the condition was fulfilled.

The law as to the appointment of administrators

30. The relevant law is to be found in Schedule B1 to the Insolvency Act 1986. Paragraph 2 to the schedule provides that:

"A person may be appointed as administrator of a company-

"(a) by administration order of the court under paragraph 10 [which is not this case]

"(b) by the holder of a floating charge under paragraph 14", [which is directly relevant to this case] It is said that the appointment was under that provision

31. Paragraph 14(1) provides that:

"The holder of a qualifying floating charge in respect of a company's property may appoint an administrator of the company."

32. 14(2) provides that:

"For the purposes of sub-paragraph (1) a floating charge qualifies if created by an instrument which-

(a)states that this paragraph applies to the floating charge..." [I do not need to go further than that because this floating charge did.]

33. And 14(3):

"(3) For the purposes of sub-paragraph (1) a person is the holder of a qualifying floating charge in respect of a company's property if he holds one or more debentures of the company secured—

"(a) by a qualifying floating charge which relates to the whole or substantially the whole of the company's property

"(b) by a number of qualifying floating charges which together relate to the whole or substantially the whole of the company's property" [again, I do not need to go further than that because that is what this floating charge does.]

34. Paragraph 18 deals with the notice of appointment under paragraph (2)(b), appointment. And says that:

"18(1)A person who appoints an administrator of a company under paragraph 14 shall file with the court-

"(a) a notice of appointment, and.

"(b) such other documents as may be prescribed.

"(2) The notice of appointment must include a statutory declaration by or on behalf of the person who makes the appointment-

"(a) that the person is the holder of a qualifying floating charge in respect of the company's property

"(b) that each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment, and

"(c) that the appointment is in accordance with this Schedule."

35. This case is particularly concerned with 18(2)(a) whether the person who sought to appoint was the holder of the qualifying floating charge.

36. Paragraph 18(3) provides:

"The notice of appointment must identify the administrator and must be accompanied by a statement by the administrator-

"(a) that he consents to the appointment

"(b) that in his opinion the purpose of administration is reasonably likely to be achieved".

37. We do not need to look at (c).

38. And I just add paragraph 18(7), although Mr Hussain is not here:

"A person commits an offence if in a statutory declaration under sub-paragraph (2) he makes a statement-

"(a) which is false, and

"(b) which he does not reasonably believe to be true."

39. The sentence for that on indictment is up to two years' imprisonment and/or unlimited fine; and, on summary conviction, six months' imprisonment and a fine to the Magistrates' maximum.

40. Paragraph 19 of the schedule:

"The appointment of an administrator under paragraph 14 takes effect when the requirements of paragraph 18 are satisfied."

41. And paragraph 21:

"(1)This paragraph applies where-

"(a) a person purports to appoint an administrator under paragraph 14, and

"(b) the appointment is discovered to be invalid."

21(2):

"The court may order the person who purported to make the appointment to indemnify the person appointed against liability which arises solely by reason of the appointment's invalidity."

42. Paragraph 103(3) deals with joint appointments:

"Where a company entered administration by virtue of an appointment under paragraph 14, an appointment under sub-paragraph (1) [which is for another joint administrator] must be made by-

"(a) the holder of the floating charge by virtue of which the appointment was made, or

(b)the court on the application of the person or persons acting as the administrator of the company."

43. And 103(6):

"An appointment under sub-paragraph (1) may be made only with the consent of the person or persons acting as the administrator of the company."

44. That, of course, deals with Mr Hedger's situation.

45. As regards the authorities to which I have been referred to, there has not been extensive argument but they appear in counsel's skeletons. It is sufficient to say that there are two authorities to which I have been referred, the Court of Appeal authority of **JCAM Commercial Real Estate Property XV Limited v Davis Haulage [2018] 1 WLR 24,** where, at paragraphs 63 and 64, in the judgment of the court given by David Richards LJ he said:

"There was discussion in argument before us as to whether the filing of the copy of the notice had been an abuse of process and whether it should be removed from the file on that basis. [that was a notice of appointment]. Mr Lopian on behalf of his client was anxious that it should be clearly understood among insolvency professionals that giving and filing a notice when there was not a settled and unconditional intention to appoint an administrator was not permitted. He submitted that this required the filing in this case to be stigmatised as an abuse of process.

"64. The ground for the order to remove the copy of the notice from the court file is, in my judgment, the straightforward ground that the notice was invalidly given, because the statutory pre-requisite of a settled intention to appoint was not satisfied. The notice was not validly given under paragraph 26 nor was a copy of it validly filed with the court under paragraph 27, with the result that the interim moratorium was not validly invoked. To give a notice and file a copy with the court in these circumstances is no doubt, in a technical sense, an abuse of the court's process. But it is not necessary in this case to say more."

46. I was also referred to **Cornercare [2010] BCC 592.** This was a case of successive notices being filed thereby triggering moratoria against enforcement, which could of course be open to abuse. At paragraph 11 is His Honour Judge Purle QC said:

"The contrary argument is that this would give rise" -- this is this repeat notices of intention to appoint -- "to potential abuse because an unscrupulous individual or group of individuals could engineer a continuing moratorium by filing repeated notices of intention to appoint, each giving rise to an interim moratorium under paragraph 44 of Schedule B1. If that did happen I have no

doubt that the court would have adequate power to treat that as an abuse and act accordingly. The court could restrain the lodgement of further notices of intention to appoint unless followed by an actual appointment. It could even, in an extreme case, vacate and remove from the file under its inherent jurisdiction any abusive notice of intention to appoint..."

47. There has not really been any argument to suggest that that is not the case. I have been referred to some law on the issue of escrow. I will deal with that when I come to consider the escrow arguments.

Who is the holder of the qualifying charge?

48. There is no dispute that it is the GLAS Trust Corporation. I say there is no dispute, because not only do everybody who wishes to upset the appointment say that that is the case, but those who sought to appoint Clifden in their notice of appointment say that GLAS is the holder of the qualifying floating charge.

49. I have been referred, very extensively, to the deeds, relevant to these appointments. I am not going to refer to every entry to which my attention has been drawn, but I propose just to deal with the bare essentials, this being an ex tempore judgment.

50. In volume 3, page 522 we have the issuer deed of charge. That is between the issuer of the notes, the company, and the Note Trustee, and various others, but not between them and the noteholders. At page 527, clause 3 relates to security and declaration of trust. There it sets out a number of trusts in favour of the Note Trustee over the property of the issuer.

51. When we come to the floating charge, at 3.5, the deed says that:

"The issuer, by way of security, as continuing security for the payment or discharge in full of the issuer secured obligations, subject to clause 4, release of the issuer charged assets, hereby charges to the Note Trustee, by way of first floating charge, the whole of its undertaking and all of its property and assets whatsoever and wheresoever located at present and future other than"

and then there is a limited carve out, which I have been told is not relevant here and as to which there is no suggestion that is not the case, and:

"(b) the floating charge created by this clause 3.5 is a qualifying floating charge for the purposes of paragraph 14 of Schedule B1 of the Insolvency Act 1986."

52. Hence, it is necessarily a qualifying floating charge under which an appointment can be made by virtue of paragraph 14 of the schedule.

53. At 3.7 of the declaration of trust there is a provision:

"Each of the issuer secured creditors" -- and these are defined as both the Note Trustee and the noteholders, but then it goes on, in brackets- *"(other than the Note Trustee) hereby declares that the Note Trustee, and the Note Trustee hereby declares itself trustee of all the covenants, undertakings, charges, assignments, assignations and other security interests made or given or to be made or given under or pursuant to this deed or any other transaction document to which it is a party for itself and for the benefit of the issuer secured creditors."*

54. So GLAS, who are now Note Trustee, are holding these rights under the deed on their own behalf and for the benefit of the noteholders.

55. It is common ground that GLAS did not file notice of appointment and took no part in that process. There is the unchallenged evidence of Juliette Challenger that GLAS did not appoint. So the starting point in this case is that the qualifying charge holder did not appoint and so the requirements at paragraph 18 or indeed paragraph 14 are not, on the face of them, met.

56. However, the case for Clifden and Mr Hussain is that Clifden had the right to, they say, step over GLAS; in fact, what they are suggesting they could step into the shoes of GLAS, as the Note Trustee, to make an appointment in GLAS's name. They say that is what they did and have, thereby, fulfilled the requirement of paragraph 14 as regards who may make an appointment.

57. Their argument I will come to very shortly, but Mr Hussain referred to background. He said it is important to understand the background. He has set out, in his three statements what he says is quite a bit of the background. My view, however, is that this background is largely irrelevant to the decision I have to make, save that the motive which it evidences can assist in coming to factual conclusions.

58. The background Mr Hussain points to is that he says that the company was insolvent and he alleges it was run to the detriment of the noteholders with the assets declining and excessive professional fees being taken by those who are running the company. He was just trying to redress the balance for the noteholders. And, as the protector of the rights of the various institutions who have invested over £400 million in the company's notes, he says that he was there as a force for good.

59. When one looks at his scheme , which was very simple, he wanted to set up a pre-pack administration, gain control of the assets through the administration and then enter into a sale and purchase agreement to take effect on the administration, under which the company's assets would be sold to Fairhold Investments Limited for £402 million, which, despite having a similar name to the company, is in fact a creature Clifden Isle of Man, having the same registered office and agent.

60. I have to ask myself, if one is assessing whether he was really just trying to sort matters out for other people, why would he buy into a company and attempt to purchase loan notes in this company which was so troubled and, on his view, ill managed? Why would he go to all that expense and trouble? Then I look at what he has proposed, which is that he, or a company which was related to his company, would be able to get hold of the assets for £402 million. That does rather point to the more likely explanation for his involvement in the company is that he saw a profit could be made by gaining control of this company's assets, rather than that he was

stepping in simply to sort out what was essentially, up to his involvement, somebody else's problem.

61. As I say, motive can be of some assistance, albeit limited assistance, because, of course, a profit motive inspires temptation and I bear that in mind.

62. The first respondent's argument, from Miss Read, is that although the Note Trustee is the holder of the qualifying floating charge, if one turns to the note trust deed, which is in volume 2 at page 174, paragraph 7, there is a provision there under the heading "Proceedings" that says:

"The Note Trustee shall not be bound to take any such proceedings, action or steps as referred to in condition 10 'Enforcement of Notes' and clause 6 'Enforcement and subordination of the issuer deed of charge' or any other action..."

63. And then it goes on:

"Unless:

(a) subject to the proviso below, and other than in the case of declaring the notes to be due, it is directed to do so by an extraordinary resolution of the Class A noteholders or the Class B noteholders or in writing by the holders of at least 25% in aggregate of the principal amount outstanding of the Class A notes or the Class B notes then outstanding."

64. What she relies upon is the part of this sub-clause which says that Class A noteholders who have at least 25% can give this direction.

65. The second proviso is that:

"The Note Trustee shall have been indemnified as secured to its satisfaction against all actions, proceedings claims and other losses..."

I do not need to read on.

66. Then she takes me to clause 18 which is headed, "Limited recourse and non-petition", which says:

"No noteholder shall be entitled to proceed directly against the issuer or any other party to the transaction documents or to enforce the issuer security unless the Note Trustee, having become bound to do so, fails to do so within a reasonable period and such failure shall be continuing ..."

Then there is a provision about Class B notes and Class A notes that I do not have to read.

67. Miss Read says the effect of these paragraphs is that there must be an implied term that where the Note Trustee has become bound to act but does not act, a noteholder can, in the name of the trustee, appoint an administrator. She calls this outcome a form of implied agency. She goes on to say that, as a matter of fact, the Note Trustee had become bound to enforce the security against the issuer and had not acted within a reasonable time, having become bound, and therefore had failed to act.

68. As a result, Clifden, who Mr Hussain says holds 67% of the A notes in the company valued at around £276 million, were entitled to and gave the direction that the Note Trustee was to enforce the security. The Note Trustee failed to act within a reasonable tim, and, as a result, it was open to Clifden to act in the name of the holder of the qualifying legal charge to appoint the administrator.

69. The company and the Note Trustee take issue with every part of that argument, both legally and factually.

<u>The evidence upon which the first and fifth respondent's argument is based.</u>

70. Mr Hussain says in paragraph 47 of his first witness statement that Clifden holds £276 million of the notes which he alleges are blocked and held to the company's order. He says that £141 million worth of the notes had been purchased in trades executed with what is called the ad hoc group. I should explain that the ad hoc group are a group of noteholders represented by Freshfields Bruckhaus Deringer solicitors. Two members of the ad hoc group relevant to this case are called, for the benefit of brevity, Hayfin and Avenue.

71. Mr Hussain says that on 5 February 2018 he entered into a trade to purchase Hayfin and Avenue notes, which was to be settled on 20 February 2018. Due to regulatory problems, which he does not specify in his statement, the trade could not be completed, but, by virtue of a contractual term, a copy of which has also not been provided, the settlement date was prolonged and during the extended settlement period Clifden have to be consulted by Hayfin and Avenue about any voting they undertake, which has to be ratified by Clifden.

72. According to Mr Hussein, there is also a reverse ratification procedure under which these two holders of the notes are obliged to ratify anything Clifden does in relation to the notes as regards both what is said in relation to Clifden's ratification of the Hayfin/Avenue actions and vice versa. Although reliance is placed on this term no document has provided which contains any such a term.

73. At the hearing it was said that Mr Hussain and Clifden had had inadequate time to obtain the relevant documentation. That is not what they say in their statements. As I said in my earlier judgment concerning the adjournment, if they needed further time they should have asked for it when directions were given. The fact is that these have not been provided. I am bound to say that, on a transaction with a £141 million trade, which actually is at the centre of the events which gave rise to the purported administration, I would have expected the purchaser and their brokers, to be able to produce relevant documentation as to their rights in relation to the trade with some speed, but they have not done so.

74. So that is one set of notes which Clifden claim to have some power over.

75. A second set are what are called the tender trades. On 19 February 2018 a tender was issued on behalf of Clifden by its tender agents. The tender offer is at page 586 of volume 3. It provides that:

"The commencement date of the tender offer is 19 February 2018; settlement date on or around 23 May 2018. Rationale for the offer: the offeror wishes to establish a holding in respect of each series of notes."

76. Mr Haywood, for the company, has drawn my attention to the tender at page 590 in the bundle which provides that:

"Until the offeror procures the announcement of whether it has decided to accept valid tenders of notes pursuant to the offers, no assurance can be given that any of the offers will be completed."

77. He says there is no evidence that the tenders have indeed been completed. The only document which evidences that there has been some transaction which has involved Clifden in the acquisition of notes, or certainly the only document to which I have been referred and which Mr Hussain, when he was making submissions, conceded was the only document that he can point to within all these documents, was in volume 7at page 561. This is a letter dated 31 May 2018 from Morrow Sodali.

78. The was a letter written to GLAS by Morrow Sodali who introduced themselves as tender agents. They say that they:

"Hold no less than £40 million of Class A notes irrevocably tendered and held to the order of Clifden for a period no sooner than 28 September 2018".

79. They go on:

"The beneficial holders have appointed Clifden as their duly authorised agent for the purposes of any correspondence and discussions with the Note Trustee."

80. Mr Haywood points out -- I think it was Mr Haywood but it may have been Mr Goodison actually -- it does not say anything about voting rights or anything else; it just says they can correspond. When you look at the schedule that is attached to the Morrow Sodali letter, you see

that the beneficial owners are not Clifden or any company associated with Clifden but Royal London Mutual Insurance and other well known financial names.

81. There was another letter written to GLAS for and on behalf of Clifden claiming that Clifden were noteholders and complaining fees and requesting a breakdown. They did include, it is right, with that letter a document which they say is from Credit Suisse and is a confirmation letter directly from the custodian of a noteholder confirming their holdings in the Fairhold notes and requesting a breakdown. When you look at the Credit Suisse custodian confirmation letter, it is impossible to ascertain from the letter who actually holds the notes because the Euroclear/Clearstream account number is blank, as is the settlement date, securities balance, last load date and full description of holding. They all seem to be left blank; and nobody has been able to explain that particular page to me.

82. Perhaps it is worth, at this stage, giving a little further explanation that Euroclear and Clearstream are registers which hold details of who are the holders of the notes on their books. Apparently nobody actually walks round with a Fairhold Securitisation Limited piece of paper saying, "This is a loan note". These are electronic transactions; and they are held on the registers of Euroclear and Clearstream and brokers who subscribe to Euroclear and Clearstream. The relevance here is that if you want to know if, or prove that, you are the owner of a note, you can ask Euroclear or Clearstream or a subscribing broker to produce a screenshot to demonstrate that fact.

83. That is the sum of the evidence as to Clifden's ownership or control of the loan notes. The evidence against this comes principally from Mr Tett, of Freshfields, who act for the ad hoc group. He says that Avenue and Hayfin did, indeed, agree to sell £141,700,000 worth of A notes and £18,500,000 worth of B notes to Clifden but they were not paid for by the settlement date. On 7 March Freshfields wrote to Clifden, telling them that they were in repudiatory breach of contract and that the vendors had elected to accept that breach as discharging them from further

performance under the contract. That they did so is evidenced from the correspondence I have been shown; and nobody drew my attention, so I assume there is not any, to any challenge to that election within the correspondence. That is one piece of evidence.

84. Another piece of evidence is that following the Hayfin and Avenue deal apparently going off and after there had been some further correspondence coming in from Clifden, there were meetings of the Class A and Class B noteholders, at which a resolution was passed to increase the percentage which a noteholder had to have before it could provide a binding directive to the Note Trustee to enforce.

85. The variation was to lift the requisite percentage from 25% to 50.1%. The outcome of that meeting was recorded; and the result, as recorded, was that 76.99% of the Class A noteholders took part in that ballot and 100% of them were in favour of raising the percentage. Mr Haywood then took me to volume 4, page 681, which was the report of tender offer. What this shows is that as at the expiration of the offer, which was 4 June 2018, what was being said by Clifden was:

"As at the expiration date, the principal amount of Class A notes tendered for purchase was insufficient to allow the offeror to establish its required holding of £104 million of the Class A notes."

86. Mr Haywood asks, does that not rather put into doubt the suggestion made by Mr Hussain that, as a result of the 5 February trade, he had £141 million of the Class A notes? It goes on to mention the meeting of noteholders which is to take place on 11 June 2018 and states that where Cifden had a beneficial interest in notes, they will be voting against this proposal. There, again, Mr Haywood points to the fact that nobody voted against the proposal. Therefore, the inference must be that Clifden did not have any beneficial interest in Class A notes to vote with. He goes on to say that since 11 June 2018 there is nothing in the evidence to say that Clifden had been

acquiring notes after that date. So he says, clearly, Clifden are not the owner or in control of 25%, let alone 50.1%, of the loan notes issued by the company.

My conclusion on this particular dispute?

87. I should say the way I am approaching this dispute, since I did not invite the parties to agree whether I should decide the issue as to Clifden's actual holding without there being cross-examination, I am looking at this from the point of view is there a realistically arguable case or a seriously arguable case maintained with sufficient conviction? Which is really a summary judgment test.

88. Mr Haywood has made some telling points which I have just gone through. There we have Mr Tett's clear evidence that there has been a repudiatory breach and that that accepted as discharge which, to some degree, is actually confirmed by the announcement by the company that it does not have the 104 million that it wants. I should say that the 104 million would represent the 25% which it thinks it can use to direct the Note Trustee to act.

89. I do not have to accept something as a fact, just because it appears in Mr Husain's witness statements. I am struck by the lack of documentary support for these very substantial trades and the reliance upon terms, and the need to rely upon terms, which have not been produced, in circumstances where, in my view it is not credible that these could not have produced in time; there is nothing in the statements as to where these documents are to be found and what the problem is for Clifden and Mr Hussain obtaining the relevant documents containing these terms -- which would be unusual terms I am bound to say.

90. In the result, I am not satisfied that it is realistically arguable, on what has been put before me, that Clifden owns, either by way of beneficial ownership or legal ownership or some form of ownership where they havecontrol over the notes to the point at which they can treat themselves as the owner of loan notes, even 25% of the loan notes or that any of the beneficial owners have

transferred to Clifden the right to act in their name. Without that factual basis, of course, they were not in a position to give the direction.

91. That would be an end of their case. But I take the view this has been fully argued and I must go on to look at the matter further, the legal arguments and also the factual issue which I am asked to resolve, which may also resolve the case.

92. I turn now to the notice which was served because to see, if Clifden had sufficient note holding, whether it put the trustee in a position where it was bound to enforce. I will also add, at this stage, that although Clifden, in their report on tender, did not suggest that the meetings of 11 June to discuss the increase in percentage were, in any way, invalid by virtue of being called by the wrong procedure, they are now saying that. I do not take the view, given my conclusion, that makes any difference.

93. Let us look at what Clifden did to seek to bind the trustee. What would they need to do? They would have to serve a direction and provide an indemnity to the reasonable satisfaction of the Note Trustee.

94. The next stage, if you look at the trust deeds and other documents surrounding the trust security, are that, once a notice was served, then the trustee would need to serve an enforcement notice on the issuer. You can find that process in clause 8 of the issuer deed of charge and condition 10 of the conditions of charge.

95. Then, under clause 18, having been served with this direction, the trustee would only become bound to act on it after a reasonable time had passed. That is to say that after a reasonable time the Note Trustee would have to serve the notice of enforcement and then decide how to proceed. <u>When was the direction, if any, given in this case?</u>

96. Remarkably, this is not really dealt with in much detail by Mr Hussain and the other witnesses who are the senior directors of Clifden. In paragraph 107 of his first statement -- and I bear in mind that Mr Hussain, Mr Cundy and Mr Cathersides, who are the directors who have given

evidence on behalf of Clifden, have provided their statements after they have seen the first round of statements from the other parties, Mr Hussain says, in relation to the giving of the notice, that they carried out the enforcement steps. They sent the exhibits 491 to 511 to his statement (included in there was the direction to the Note Trustee). Clifden took the other legal steps. That is all he says about that. He does not say how it was done, when it was done. We shall see that could be crucial. Indeed, it is crucial.

Mr Cathersides at paragraph 20 says the notices were dispatched as required.

Mr Cundy says on 12 July 2018 there was a meeting.

"The notices and other papers were collated and hand delivered or posted as required."

So he has given an alternative there.

97. We then have Mr Proctor, who represents GLAS, at paragraph 40. He says that exhibits 491 to 511 were letters and attachments which were received -- so these are the documents received from Clifden -- after business hours on 12 July 2018. That is in his statement of 2 August 2018. On 6 August 2018 Mr Hussain made a statement and he did not deal with the point being made by Mr Proctor at all as to the date or time at which the notices were received.

98. The timing is crucial because the notice of appointment was filed at court on 12 July at 1.44 pm. Thus, if the direction to enforce was received after that time, on no possible view could it be said that the Note Trustee had failed to act within a reasonable period.

99. In his first statement Mr Hussain records that their advisers, solicitors called Sidley Austin LLP, said that 24 hours had to be allowed to respond to the direction; but in his statement he goes on to say that, as Clifden had made previous complaints to the Note Trustee, the figure he gives, I recall, was three hours would be quite sufficient.

100. Miss Read, very sensibly, does not seek to suggest some particular time frame in which to respond. But the suggestion that the Note Trustee could have any less than 24 hours to consider the direction, to see how they should proceed, to look at the indemnity, well, frankly,

the suggestion that it should be any less than 24 hours unarguable. In fact, 24 hours is unlikely to be long enough for the Note Trustee to weigh up the options, take advice, investigate the indemnity; and, on the facts of this case, investigate whether they were actually dealing with somebody who is entitled to give a direction at all.

101. My conclusion on the question as to whether a binding direction was given to the trustee, is that, on the evidence, the purported direction was probably made after the filing of the notice of appointment. Thus, it could not possibly be said that the trustee was given a reasonable time to respond. He was given, as I said in argument , a negative time to respond. But, even if it was given earlier in the day, it is not realistically arguable that the trustee would be in breach of his obligations to act on the direction and thereby become bound and also be said to have failed to comply thus springing the clause 18 freedoms on the noteholders by virtue of a notice served on the 12th, even if it was before 1.44 pm that day. So Clifden do fail on that point as well.

The legal point that has been argued as to an alleged implied agency .

102. On the facts as found, my conclusion as to there being no reasonable arguable case concerning the level of note holding, one does not need to make a decision on the point of law raised. But Miss Read did make the argument and it seems to me she is entitled to have the argument considered and dealt with.

103. It is a simple argument. She says that there is this implied term in clause 18 which gives rise to an implied agency. I do not need to decide whether it is an agency or actually some form of subrogation because, although Miss Read talks about stepping over the Note Trustee, what Clifden wants to do is stand in the shoes of the Note Trustee so as to say it could do what the Note Trustee can do, which is, in the name of the trustee as qualified floating charge holder, exercise the power of the qualifying floating charge holder. But I do not need to decide that particular point because her main point is that one has to imply a term because, she says,

otherwise the relaxation on the ban on proceedings against the issuer which is to be found in clause 18 is ineffective. Her clients would have a right but no remedy.

104. Mr Goodison, for GLAS, contradicts this view. Firstly, he took me to the various trust instruments, all of which show that it is the trustee who has the discretion whether to bring proceedings and nobody else. He went through the mechanics of that: how there are circumstances where, when called upon to do so, if the trustee does not act, then there are limited circumstances in which a noteholder can act. But he makes the point that if the deeds intended that a noteholder could step into the shoes of the trustee, the deed would have said so.

105. In fact, if you look at clause 18 -- and I compare Mr Goodison argument to what clause 18 says -- there it talks of the issuer proceeding directly. It does not say the issuer proceeding in the name of the trustee.

106. Further he makes a general point that, under the law of trusts, since we are dealing here with a trustee and beneficiary, a trustee is the only person who has the legal title to enforce. It is the holder of the qualifying legal charge. There is a remedy open to the beneficiary. If the trustee is recalcitrant, the beneficiary can go to court and get a direction the trustee get on with performing their duties or, if they are contemptuous of their duties, that they be replaced.

107. Finally on this point that there is a right here without a remedy, this has been put forward on the basis that business efficacy requires that the term be implied on the general Moorcock principles, where one looks to see if it is apparent that there is a complete bargain between the parties but that the contract will not work without this additional term.

108. Mr Goodison points out that if Clifden wants to put the company into administration, if that is how they wish to proceed, they can do so as a creditor. They can make an application to this court. Therefore, the contract works perfectly satisfactorily without the implication of such a term.

109. I agree with Mr Goodison. When you look at clause 18, it prevents the noteholder acting against the issuer unless the trustee wrongfully declines to act. In the ordinary course a creditor, which would be the noteholder, could proceed against the borrower, but this right is restricted. When that restriction is removed, they just fall into the position of the ordinary creditor who can proceed directly against the borrower. But that does not mean that they then are entitled to do so in the name of the trustee; and that is not what clause 18 says. If they, as a creditor, wish there to be an administration, they can make an application to the court under paragraph (2)(a) and paragraph 10 of Schedule B1.

110. Accordingly, on the terms of clause 18 and clause 7, to which I have been taken -- indeed, I have been taken to quite a few terms by Miss Read but they seem to be the relevant ones- on those terms, and in the context in which those terms are set, there is no reason to imply the term contended for by Miss Read.

111. My conclusion is that Clifden's argument that they were entitled to act in the name of GLAS, whether as agent or under some subrogated rights, fails both on its facts and in law.

Did Mr Bowell and Coakley consent to act?

112. Let us now look at part 2 of the argument, that is the appointment of Mr Bowell and Mr Coakley. This is the question which I have been invited to determine on the written evidence. There is an issue here as to whether the consents were handed over in escrow.

113. I have been referred to **Silver Queen Maritime Limited v Persia Petroleum Services plc [2010] EWHC 2867**. The issue there was whether the settlements of a dispute contained in a deed bound the parties.

114. Those relying on the deed argued that if the settlement deed was not unconditionally delivered it was delivered in escrow subject to a condition and that the delivering party could not unilaterally withdraw from the conditional escrow deed whilst the condition remained unfulfilled and, in that case, the party in reliance said that the condition had been fulfilled.

115. But that particular issue was not disputed by the counterparty. They argued that if the deed was in escrow, the condition had not been fulfilled; although their main point was there had never been a binding agreement.

116. In this context of escrow, I was taken to paragraph 111 of the judgment where there is a reference to something that was said by Farwell LJ in **Governors and Guardians of the Foundling Hospital v Crane,** where he says:

"There are two sorts of delivery, and only two known to the law, one absolute, and the other conditional, that is an escrow to be the deed of the party when, and if, certain conditions are performed. If the deed operated as a complete delivery, cadit quaestio; if it did not, then it must be either an escrow or a nullity. The mode in which it in fact operated is a question of intention, primarily of the grantor, and secondly of the grantee; nothing passes out of the grantor against his intention, and no one can be compelled to accept an assignment of any property, onerous or otherwise, without his consent. Now an escrow or script is not a deed at all; it is a document delivered upon a condition on the performance of which it will become a deed, and will take effect as from the delivery, but until such performance it conveys no estate at all..."

117. There was an interesting argument before me as to whether the test for intention as to the delivery of the document was objective or subjective. There was a further argument about whether there was an objective or subjective test relating to compliance with paragraph 18 in relation to confirmation of the administrator's opinion.

118. It does not affect the outcome at all of this case, but my self direction is that in determining whether the party who delivers the document delivered it unconditionally or delivered it in escrow subject to some condition is an objective test. That is the contractual approach which is consistent with the fact that what is being examined is a contractual intention. One has to look at what the other party was entitled to conclude from that which was said and

done by the person who was delivering the document, set in the factual context in which it was done. But, as I say, it makes no difference to the outcome here.

119. Miss Read's argument in relation to this escrow is this: she said on 10 July 2018, when the consents were signed, they were handed to Mr Hussain on the condition that they could be used, subject to one or two matters being attended to. She said this was a conditional delivery and that after these documents were delivered it was not open to Messrs Bowell and Coakley to withdraw them.

120. She relies, in part, upon what Mr Hussain says in his statement at tab 20, paragraph 87.12, where, in fact, he was talking about the events of 9 July, in which he says various documents were handed over to him, signed documents, he said:

"Whilst the nature of any escrow was not expressly clear to myself, it was generally understood that there were some follow up items which needed to be provided/addressed before any enforcement action begins and we aiming to reconvene the next day to complete the signings and enforce on the same day."

121. Then, in relation to the 10th he said at paragraph 93:

"We met later that afternoon and Mr Bowell provided all the Mr Coakley signatures and agreed that once he saw the draft of the Sidley paper covering off the points he wanted we were 'good to go'."

122. She then referred me to Mr Bowell's statement where he said he had wanted to see legal advice to see that his appointment was valid. He was, on the 11th, sent a draft memo by Sidley. There was then a telephone call on 11 July where Mr Hussain indicates that Mr Bowell was content with what he had from Sidley and was essentially saying they should just get on and execute the arrangement the next morning.

123. So she says that these conditions, under which the consent was handed over, were satisfied and accordingly consent was given.

124. Mr Bowell and Mr Coakley have a different account of the telephone call. Most of the evidence is from Mr Bowell because Mr Coakley was not at the meeting on 9 and 10 July; although he was on the telephone on the 11th. They both say that they required the Sidley pre-appointment confirmation to see that their appointment was valid; to confirm the validity of the process; and to do a conflict check. Other matters were discussed and some of it was committed to the e-mail, upon which reliance has been placed by Miss Read as indicating that Mr Hussain's account of this discussion on the phone is correct.

125. So there is a factual question: were the consents provided in escrow? Clifden now accept that they were, but Mr Hussain's evidence is not really that clear on the point. And, if it was in escrow, was it a conditional escrow? And, if so, what was the condition?

126. It is best to start, instead of going over the whole history, on 9 July 2018 when the main meetings started. But it is worth recording that there had been a meeting on 5 July 2018 between Mr Hussain and Mr Bowell and Mr Coakley. Mr Hussain says that at that meeting he told them, "This will not be a walk in the park", which you might think is some indication that they had to proceed with some caution.

127. But, starting on 9 July 2018, there was a meeting at the offices of Dentons solicitors in London. Mr Bowell and Mr Hayter and solicitors for the proposed administrators, Mr Hussain, Mr Cundy and Mr Cathersides, the directors of Clifden, were there in the meetings. Documents were provided to Mr Bowell in the meeting. Documents were signed but not dated. We have a list of those documents at paragraph 24 of his statement. I am not going to read them out. They did not include the consents to act. There was going to be a problem with that anyway because Mr Coakley was not there to sign.

128. Mr Bowell says that, in relation to the documents which were signed on the 9th, not only were they not dated but it was agreed that CMS solicitors would hold them in escrow. Mr Hayter also says that was the position.The next day he e-mailed CMS to say that Mr Hussain had

been given documents which were going to be conveyed to CMS to be held in escrow. CMS replied that they would do so.

129. What is Mr Hayter's evidence of that meeting? And let us then compare it with the evidence from others.

130. Mr Hayter's statement is dated 19 July; thus, it is another statement that Mr Hussain, Mr Cathersides and Mr Cundy would have known about when they came to do their statements. Mr Hayter says that:

"At the meeting on 9 July" -- this is paragraph 8 of his statement -- *"Rizwan informed those present at the meeting as follows:*

"8.1. Clifden owned more than 50% of the loan notes and as part of that process it had made an open tender offer for the loan notes".

131. So there he was saying he owned more than 50% of the loan notes. As I have said, I do not even think that is arguable.

132. He goes on, at paragraph 9:

"The core of discussion in the meetings related to the methodology to make demand, as to a pre-requisite to the appointment of the joint administrators, the validity of the joint prospective administrators' appointment over Securitisation. In answer to these two points, Rizwan stated that GLAS Trust were obliged to comply with a request from the holder of more than 50%. If GLAS did not do so, Clifden could step into their shoes as holders of more than 50% of the loan notes. With regard to the demand on the validity of the joint administrators' appointment, he would obtain two legal opinions. One legal opinion would be obtained from Sidley Austin LLP ('Sidleys') who had previously been involved in the matter and produced a 'legal steps' paper and also had obtained advice from legal counsel as to the centre and main interests of Securitisation. A second legal opinion would be obtained from CMS. Rizwan also stated Clifden held a memo from Sidleys dealing with these issues and said Clifden wanted the comfort

of knowing the appropriate steps had been properly taken to demand repayment and then to appoint the joint administrators."

133. Mr Hayter goes on:

"After this meeting with Mr Peter Voisey [who joined the meeting later] *and against the background of what had been said before it was made perfectly clear, both by me and Mr Bowell, to Rizwan and the others attending the meeting, that the proposed joint administrators were not in a position to move forward prior to the receipt of the two legal opinions from Sidleys and CMS relating to the demand for repayment and the validity of any appointment of joint administrators. Rizwan was also expressly told, both by me and by Mr Bowell, that the following information/documentation would be required as a precursor to any further progression let alone an appointment: due diligence on Fairhold Investments Limited, the prospective purchaser under the proposed pre-pack; due diligence on Clifden Tactical Opportunities II Limited ('Tactical') as a guarantor under the sale and purchase agreement, who was also the counterparty to the Administration Funding Agreement; a statement of net assets of Tactical from its auditors; know your client (KYC) on the Tactical directors; the GLAS appointment document; and the comfort of knowing that all of the rights of the Note Trustee and the charge vested in GLAS. The step over provisions entitling the owner/holder of 50% plus of the loan notes to appoint administrators by stepping over the Note Trustee. Rizwan also confirmed all of the above information/documents would be provided and proposed that, pending the receipt of the two legal opinions and the other requested information/documents, certain documents should be executed but remain undated in anticipation of progression of the matter. This was agreed and the documents executed on the basis of my suggestion that the executed but undated documents would then be held in escrow. It was Rizwan who suggested that these documents be held by CMS and Rizwan said he would arrange for all of these*

documents to be delivered to CMS. I believe I asked Rizwan for the name of the person at CMS who would hold the documents in escrow and he told me the person was Neil Hamilton."

134. That is Mr Hayter's account of that particular meeting. I compare that with Mr Hussain's statement, where he says that it was not really clear whether it was to be in escrow but there were certain things to be done. It is entirely vague and he has not sought to challenge the detail which was set out in Mr Hayter's statement.

135. You then add that the following day Mr Hayter did e-mail CMS to report that documents which they had signed in escrow were going to be sent to them by Mr Hussain; and CMS confirmed that they would hold them pending permission to release them. Of course that was just between CMS and Mr Hayter, but that does rather confirm that there was a discussion about escrow and that it was agreed that the documents be provided to CMS because why else would Mr Hayter have sent such an e-mail?

136. On 9 July at 19.19 pm Mr Hussain sent to Mr Bowell an e-mail to which a Sidley e-mail was attached. Mr Bowell deals with this in paragraph 29 of his statement. It was an e-mail from Philip Taylor at Sidley. In summary it stated that Sidley could provide advice to the administrators regarding the ability of the Note Trustee to enforce the transaction security by an appointment of an administrator over the issuer and a receiver over the shares in the borrower.

137. He goes on:

"The e-mail confirmed that Sidley would need to clear conflicts once the identity of the proposed administrators was known."

138. The e-mail also attached a letter from CMS to Clifton bearing the e-mail address of Neil Hamilton in which CMS provided advice regarding the rights of the noteholders of FSL to enforce issuer securities where the Note Trustee has failed to serve an enforcement notice.

139. There were some further e-mails the following day. So that is on the 9th. On the 10th Mr Bowell, at 9.40, e-mailed Mr Hussain. He said, having received this limited information from Sidley and from CMS:

"What you have provided is not what I understood you would be obtaining. So we can be clear, I need written advice from lawyers, addressed to myself and Dermot as proposed administrators, and to Clifden:

"1. Confirming the validity of the issuer deed of charge.

"2. That the issuer deed of charge is a QFC for the purpose of appointing administrators out of court.

"3. That under the valid QFC there is a right to appoint the administrators out of court.

"4. That GLAS has the requisite authority to make the appointment.

"5. If GLAS does not have the requisite authority to make the appoint who does? And with unequivocal advice that the appointer has the requisite authority.

"6. Confirmation of the demand process and time lines."

And he goes on:

"This is the very least any prospective administrator would expect prior to accepting an appointment. I cannot believe that the two sets of lawyers, who have had such in-depth involvement with the matter, will not have given these matters very careful consideration as part of their instructions and [and he puts this in capitals] MUST surely be able to provide the necessary comfort for you and I. Needless to say, it is in everyone's best interest to start off on the correct footing.

Regards Mike."

140. That does rather set out his view as to what he required before he would commit. The response to this from Mr Hussain does not provide the lawyers opinions. He says:

"Mike.

"We have no concerns and are comfortable with the fact that Sidley and CMS will provide appropriate legal opinions in due course. Hence our comfort in being able to provide the indemnity to the insolvency practitioners. Sidley have confirmed in the e-mail they can provide the relevant comfort to the insolvency practitioners after the appointment. They will not be able to provide any opinions to the IPs prior to the appointment because they do not want to find themselves conflicted if the appointment does not go ahead with you for any reason. We also do not want that as they will no longer be able to work with any placement we also do not want that as they will no longer be able to work with any replacement IPs for us. CMS have provided a short memo, which will be supplemented with a full legal opinion in due course, on the ability for us to step into the shoes of GLAS as an agent if they do not make an appointment as directed by us."

141. I am not going to read the whole of that, but it is perfectly clear from that that Mr Bowell did not get, on this occasion, what he was asking for.

142. The next event is that on 10 July at 2.45 pm there was a meeting. Mr Hayter was at that meeting. He gives evidence about what happened there in paragraphs 15 and 18 of his statement. He says there was this further meeting at 2.30. He says how they got the e-mail, that the e-mail with Sidley and CMS response had been provided.

He goes on:

"These did not constitute the promised legal opinions. The meeting started at 2.45. It was initially attended by the same attendees at the meeting on the 9th although then various people from Dentons joined" -- incidentally none of whom have given evidence for Clifden in this particular hearing -- "at this meeting the signed proposed administrator statements and consents to act, along with the written acceptance of appointment by receiver and the signatory page of the Administration Funding Agreement were handed to Mr Rizwan by Mr Bowell who

said that they would be held with the other documents in escrow by CMS. This was agreed by Rizwan.

On this occasion, after accepting that the two promised legal opinions had not been produced, Rizwan agreed that he would speak with Philip Taylor or Sidleys and obtain the promised legal opinions stating whilst Sidleys had declined to provide it because of a perceived conflict of interest, he acknowledged they had been intimately involved in the process and prepared the legal steps paper and obtained leading counsel's opinion and ought to be able to produce the required legal opinion.

At no time during either of these meetings was any indication given, whether expressly or by implication, that Messrs Bowell and Coakley were agreeing to their appointment as joint administrators of Securitisation and absolutely no authority was given for the release of any of the signed documents which, so far as I was concerned, and based upon Rizwan's statements, were either held by or were being delivered to CMS to be held in escrow."

143. Mr Bowell gives a slightly less detailed account, but, a nevertheless not inconsistent account, at paragraphs 32 to 34. In paragraph 34 he says that:

"The meeting on 10 June concluded within an hour and matters were left on the basis that I and DC [that is Coakley] *could not possibly accept the appointment as administrators without, amongst other things, obtaining pre-appointment clear legal advice that the whole proposed course of action was legal and valid", which, of course, is entirely consistent with the e-mail that he had sent that morning.*

144. How does Mr Hussain deal with this? His evidence is very sketchy. He does not really -- to use the expression -- engage with the detailed account that has been given by Mr Hayter. He deals with the whole of this in three very short paragraphs. At paragraph 92 her refers to the e-mail timed at 9.40. At paragraph 93 he says:

"We met later that afternoon and Mr Bowell provided all the Mr Coakley signatures and agreed that once he saw the draft of the Sidley paper covering off the points he wanted we were 'good to go'. Mr Bowell was also made aware that he had all the know your client information he needed. He agreed and stated if there was anything missing he can get it after appointment."

145. So that is a very different account, but it also does not deal with the detail as to what had been requested in the e-mail at 9.40 or indeed what was said by Mr Hayter.

146. As regards his other directors, Mr Cathersides says that the consents were signed but not dated. He makes no reference in his statement to the word "escrow"; but he gives no explanation as to why the documents were not dated when they were signed. He thought the appointment was agreed at that stage, according to his statement.

147. Mr Cundy says the consents were signed and handed over. He does not remember anything being said about escrow. He also says that they were not dated but he does not give any explanation for that.

148. After the meeting there is another e-mail from Mr Bowell to Mr Hussain, in which he said:

"I think today's meeting clearly showed the level of comfort the administrators could expect from Dentons. I say this without any suggestion of lack of professionalism or unwillingness to assist on their part in the process, but I think you can appreciate they see themselves coming in very much after the key action had been taken. Accordingly, the Sidley draft letter of advice addressed to the administrators dealing with the validity of the QFC, the demand process, the step in rights and the appointment itself is a key document that the administrators and of course Clifden will need to rely upon going forward. We have never questioned the strength of the indemnities on offer. I think we are still awaiting something on the guarantor company, but, to us, as prospective administrators, indemnities in themselves do not offer the real protection we look for should it ever be the case that our conduct is seriously questioned by a licensing body.

We fully believe that the proposal for taking control and selling the assets as per the SPA is in the best interest of the creditors, but we clearly wish to eliminate or minimise, as far as possible, challenges to the validity of the appointment."

That is, of course, consistent with what Mr Hayter says, that they are still looking for these legal opinions.

149. On 11 July 2018 the draft Sidley memorandum was produced. This was referred to by Miss Shekerdemian. She pointed out that it was not addressed to Mr Bowell and Mr Coakley, which is what he had been asking for. It does not confirm the validity of the issuer deed of charge, that GLAS had the authority to appoint and, if not GLAS, someone else. Furthermore, she points to the legal steps plan within that document which provided that there was to be 24 hours' notice to the Note Trustee and she said there was no compliance with that.

150. Following the receipt of the Sidley draft memo there was a telephone call. Mr Bowell made a handwritten note that was shown to me. There seem to be headings with some entries put in as he went along. There is a dispute as to what was said but, looking at the notes, it does not appear that there was confirmation that the draft Sidley memo was satisfactory for the administrators' purposes as to advising them as to their legal position and whether this was going to be a valid appointment.

151. This was followed by an e-mail at 16.46 to which I have been referred. It is set out in the witness statement of Mr Hussain at paragraph 100. I should indicate Mr Hussain's outcome of this discussion on the phone: he says it was agreed that the Sidley memo was in good shape and in the form that they required. Of course that is completely contrary to what they had been saying up to that point. In the email he said:

"Given the above we are to proceed to execution and once we have completed all the steps we will let MB know", MB being Michael Bowell.

If one was to take that on face value it would appear that, in that conversation, Mr Bowell had expressly said: "yes, we can now proceed with the administration."

152. We then see the at 16.46 a futher email from Mr Bowell. He said:

"Dear Rizwan referring to the conversation:

I thought it would be useful to write down the points made. The draft Sidley memo to be finalised and issued to the joint administrators" -- he is clearly saying that has yet to be done He went on:

"On the day of appointment Sidley to provide the joint administrator with the written confirmation of the validity of their appointment in terms of the process of their appointment, ie confirming that the relevant notices and filings were served in accordance with documents as defined in the memo". Then he indicated he wanted to speak to Philip Taylor at Sidleys *"once you have confirmed all the ducks are in a row…Once points 1 and 2 have been achieved the sale and purchase agreements can be released or resigned."*

So, again, he is suggesting that they are held until this question of legal advice has been completed. There are one or two other matters he dealt with to which I do not need to refer. He added in paragraph 7:

"I would like to be able to have a brief chat with the JAL contact once all ducks are in a row."

He referred to other information that he was looking for and ended:

"I look forward to hearing from you."

153. That e-mail would not be consistent with the earlier discussion on the telephone during which it had been agreed that the Sidley memo was sufficient and that Clifden were to proceed to execution.

154. Mr Hussain makes the point that at midday Mr Bowell suggested alterations to the sale and purchase agreement and they were done. I think Mr Bowell says he did not get that back.

But it is common ground that, without further reference to Mr Bowell and Mr Coakley, at 1.44 pm the notice of appointment was filed at court.

155. Let us look at the response. Mr Bowell did not become aware of the appointment until he was notified. He was sent notification by e-mail late on the 12th, at about 11 pm, but he did not open it until 13 July. His responses in e-mails after that, save for one which I will come to, were to say he did not consent to act as administrators and there had been a breach of the escrow undertaking.

156. Miss Shekerdemian took me to the response to his e-mail on 13 July, which I have down as tab 25, page 25, when he was saying:

"We spoke to you briefly. You are going to telephone us at 14.30. Under no circumstances is the SPA agreement is to be dated or released. The SPA and all other documents remain in escrow."

157. The response from Mr Hussain, about 30 minutes later, is:

"All documents have been dated. Court filing has been filed. We will send across final versions of all the signed documents. Savills and CBRE have added the insolvency practitioners to the reports. They are signing them. We shall send across final versions when received. Sidley are checking conflicts and, when free, they will send across a signed copy of the legal opinion and confirmation of steps. Talk at 2.30. Please do not write any e-mails or speak to Akin."

Akin are the solicitors for the company.

158. There Mr Hussain is behaving as if nothing had happened; as if he was just getting on with it. Even though Mr Bowell had just emailed him referring to the documents being in escrow. That is some indication that Mr Hussain was seeking to proceed with the administration whatever Mr Bowell said.

159. The overall picture, up to that point, is that prior to 1.44 on 12 July you have the evidence of Mr Hayter concerning documents on the 9th and 10th being in escrow. We have the

CMS e-mail, which is some support for Mr Hayter's evidence. Then we have the evidence of Mr Bowell. The claimants' directors, in relation to the 9th, don't give evidence that this was some sort of conditional escrow because they do not evidence a discussion about any talk of escrow. I think one of them mentions that some documents might have been in escrow.

160. But what is said about the 9 July meeting and indeed the 10 July meeting by the claimants' directors, including Mr Hussain, is not a sound basis for making a factual finding that there was (a) a conditional escrow agreement from which those handing over documents could not resile and, once the conditions were met, those to whom the documents were handed could use them to make the appointment.

161. Similar considerations apply to the meeting on the 10th. The evidence on the Clifden side is extremely vague as to what happened on the 10th, apart from the "good to go" comment, which is actually not consistent with the e-mails either before or after that particular meeting or with what Mr Hayter has to say.

162. So, looking at the parties' positions against the overall picture, and seeing what picture does this paint, one would expect the administrators and their legal advisers to want to be sure that the appointment was valid and that Clifden could do as they intended. As I have said, Mr Hussain, himself, in his written evidence said that he had told the administrators this "was not going to be a walk in the park". That is likely to have led to a degree of caution. The fact they took their solicitor with them is some indication that they were exercising due caution -- not overcautiousness, but due caution. The e-mail of 11 July 2018 calling for more information, more to be done; and what is said about legal advice. That all points away from the suggestion that Mr Bowell said it was good to go or he gave his permission for use of any documents. Then the position after the appointment, immediately once they became aware of the appointment, Mr Bowell was making the point that documents were held in escrow. So that is the overall picture

which points to acceptance of the evidence given on behalf of applicants, Mr Bowell and Mr Coakley in preference to that of the witnesses for the first and fifth respondents on this issue.

163. There is only one fly in the ointment, which I am going to have to deal with, which is possibly Clifden's best point, which was actually left until last, but the best points often are. It is at p 649. This was the e-mail of 15 July 2018. It is here to be read. The judgment has gone on long enough and I do not need to read out what it says. But the terms of this e-mail clearly suggest that Mr Bowell is seeking to pursue the appointment and he is asking, for instance, for £1 million to be put in the administrators account.

164. The significance of the contents of this e-mail is that it could be seen as evidence that what Mr Bowell and Mr Coakley are saying about their consent being given in escrow is not correct and that this is evidence that there is a counter narrative which needs to be given serious consideration. It could be an indication that they, as prospective administrators, saw this as a very attractive administration to be running because there seemed to be a lot of money about - not the sort of administration, for instance, where you have to chase errant directors or employ lots of people and worry about losing money. But when they realised that the company was saying that their appointment was not lawful they got cold feet and now see it as convenient to deny that they gave consent.

165. Miss Read says another relevance is that it shows is that, even if consent to use the forms of consent had not been forthcoming before the appointment, it clearly was after the appointment and so this was some sort of retrospective consent. As to that second argument, the e-mail does not actually say it is to be regarded as retrospective consent. Further, the paragraph 18 notice has to be valid when it is served and if there is no consent to act, frankly, I cannot see how that can be cured by saying although it is not a consent at the time, I have made it a consent after the event.

166. The first point is of more concern. This has been explained by Mr Bowell in his statement. He says that he was leading Clifden on. He was doing this on legal advice. He did not genuinely want the administration to proceed, but he wanted to see how far Clifden were prepared to take it. He did not think that they were going to do any of this because he thought the whole thing, essentially, to use a colloquialism, was a bluff, and there was no money there.

167. Looking at this e-mail in isolation, I can why importance has been placed upon it by Miss Read. But when you look at it with all the other e-mails, it is contrary to the approach of all the e-mails before the appointment and the other e-mails post appointment and either side of it.

168. The terms of this e-mail are not sufficient to change the overall picture. I am sufficiently satisfied that there is a credible explanation for this e-mail which is that given by Mr Bowell.

169. I conclude that Messrs Bowell and Coakley were approaching the appointment with care. They wanted advice before any step was taken in the appointment. They wanted advice directed to them upon which they could rely and therefore complain if it was not given competently.

170. I conclude, looking at their behaviour and caution that it is more likely than not that they did ask for the documents to be held in escrow in relation to all documents they signed. And, insofar as the escrow was conditional, it was conditional upon them giving express agreement to the document being used. They did not intimate, by word or deed, in such a way that Clifden could have concluded that they could use those documents if certain events happened outside of the control of Mr Bowell and Mr Coakley.

171. Accordingly, on the balance of probabilities, I find that the consents were handed to Mr Hussain in escrow. They were not be used without the express consent of their authors. Such express consent was not given. Neither was any implicit consent given. We therefore have an appointment by somebody who had no power to appoint and administrators who did not consent

to act. So the appointment was totally flawed and therefore the appointment is void and of no effect.

Approved

HHJ Kramer

17th October 2018

[redacted] 549

[16 NE3d 1165, 992 NYS2d 687]

QUADRANT STRUCTURED PRODUCTS CO., LTD., Individually and Derivatively on Behalf of ATHILON CAPITAL CORP., Appellant, v VINCENT VERTIN et al., Respondents.

Argued May 7, 2014; decided June 10, 2014

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

POINTS OF COUNSEL

Bingham McCutchen LLP (*Sabin Willett*, of the Massachusetts bar, admitted pro hac vice, and *Samuel Rowley*, of the Massachusetts bar, admitted pro hac vice, of counsel), and *Richards, Layton & Finger, P.A.*, Wilmington, Delaware (*Lisa A. Schmidt, Catherine G. Dearlove* and *Russell C. Silberglied* of counsel), for appellant. I. Under New York law, as a matter of plain language, the absence of the phrase "or the securities" from the no-action clause renders it inapplicable to Quadrant Structured Products Company, Ltd.'s claims. (*Racepoint Partners, LLC v JPMorgan Chase Bank, N.A.*, 14 NY3d 419; *Greenfield v Philles Records*, 98 NY2d 562; *Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64; *Suffolk County Water Auth. v Village of Greenport*, 21 AD3d 947; *Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413; *Maurice Goldman & Sons v Hanover Ins. Co.*, 80 NY2d 986; *Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71, 13 NY3d 270.) II. New York law shows that, by its plain language, the no-action clause does not bar Quadrant Structured Products Company, Ltd.'s claims. (*General Inv. Co. v Interborough R.T. Co.*, 200 App Div 794, 235 NY 133; *Deutsch v Gutehoffnungshutte, Aktienverein Fur Bergbau und Huttenbetrieb*, 168 Misc 872; *Lidgerwood v Hale & Kilburn Corp.*, 47 F2d 318; *Rudick v Ulster & Delaware R.R.*, 147 Misc 637; *Cruden v Bank of N.Y.*, 957 F2d 961; *Walnut Place LLC v Countrywide Home Loans, Inc.*, 96 AD3d 684, 35 Misc 3d 1207[A], 2012 NY Slip Op 50601[U]; *Elliott Assoc. v J. Henry Schroder Bank & Trust Co.*, 838 F2d 66; *AMBAC Indem. Corp. v Bankers Trust Co.*, 151 Misc 2d 334; *Emmet & Co., Inc. v Catholic Health E.*, 37 Misc 3d 854.) III. Neither New York law nor the indenture has conferred upon the indenture trustee the power to bring Quadrant Structured Products Company, Ltd.'s claims. (*Navarro Savings Assn. v Lee*, 446 US 458; *Meckel v Continental Resources Co.*, 758 F2d 811.) IV. Allowing Quadrant Structured Products Company, Ltd.'s claims to proceed would not subvert the purpose of the no-action clause.

Quinn Emanuel Urquhart & Sullivan, LLP, New York City (*Kathleen M. Sullivan, Philippe Z. Selendy, Nicholas F. Joseph, Sean P. Baldwin* and *Alicia K. Cobb* of counsel), *Potter Anderson*

& Corroon LLP, Wilmington, Delaware (*Philip A. Rovner* of counsel), and *Seitz Ross Aronstam & Moritz LLP* (*Garrett B. Moritz* of counsel) for respondents. I. The parties' failure to use the particular words "the securities" does not, in and of itself, restrict coverage of a no-action clause. (*Wood v Duff-Gordon*, 222 NY 88; *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398; *Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352; *Batchelder v Council Grove Water Co.*, 131 NY 42; *Campbell v Hudson & Manhattan R.R. Co.*, 277 App Div 731; *Emmet & Co., Inc. v Catholic Health E.*, 114 AD3d 605; *Walnut Place LLC v Countrywide Home Loans, Inc.*, 96 AD3d 684; *Bank of N.Y. v Battery Park City Auth.*, 251 AD2d 211; *Greene v New York United Hotels, Inc.*, 236 App Div 647, 261 NY 698; *Akanthos Capital Mgt., LLC v CompuCredit Holdings Corp.*, 677 F3d 1286.) II. The Athilon Capital Corp. no-action clause covers all claims a noteholder has based on its status as a noteholder. (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584; *Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d 583; *Suffolk County Water Auth. v Village of Greenport*, 21 AD3d 947; *Akanthos Capital Mgt., LLC v CompuCredit Holdings Corp.*, 677 F3d 1286; *Allan v Moline Plow Co.*, 14 F2d 912; *Beal Sav. Bank v Sommer*, 8 NY3d 318; *Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71; *Greene v New York United Hotels, Inc.*, 236 App Div 647, 261 NY 698; *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208; *Walnut Place LLC v Countrywide Home Loans, Inc.*, 96 AD3d 684.)

OPINION OF THE COURT

RIVERA, J.

In response to the first certified question from the Supreme Court of the State of Delaware, we conclude that a trust indenture's "no-action" clause that specifically precludes enforcement of contractual claims arising under the indenture, but omits reference to "the Securities," does not bar a security-holder's independent common-law or statutory claims. Accordingly, we answer the second question in the affirmative.

I.

The Delaware litigation underlying the certified questions is a reminder of the continued effects of the 2008 financial crisis and the economic fallout associated with the utilization of complex financial instruments that mask investment risk levels (*see generally* Kristin N. Johnson, *Things Fall Apart: Regulating*

the Credit Default Swap Commons, 82 U Colo L Rev 167 [2011]; Brendan Sapien, *Financial Weapons of Mass Destruction: From Bucket Shops to Credit Default Swaps*, 19 S Cal Interdisc LJ 411 [2010]). Against this backdrop of high-stakes securities transactions and downward spiraling financial fortunes, the certified questions present for our consideration familiar efforts to prohibit individual lawsuits of securityholders, by the use of a contractual provision referred to as a "no-action" clause.

II.

Quadrant Structured Products Company, Ltd. (Quadrant)[1] sued several defendants in the Delaware Court of Chancery for alleged wrongdoing related to notes purchased by Quadrant and issued by defendant Athilon Capital Corp. (Athilon),[2] a business which plaintiff alleges is now insolvent. Defendant EBF & Associates, LP (EBF) acquired Athilon in 2010, installed and now controls its Board. Like Quadrant, EBF holds certain Athilon issued securities. Defendants moved to dismiss the suit as barred by a no-action clause contained in the indenture agreement governing Quadrant's notes. The notes and indenture were a necessary part of Athilon's financing scheme, which has its roots in Athilon's initial formation. Athilon was founded in 2004 with $100 million in equity and, along with its wholly owned subsidiary Athilon Asset Acceptance Corp., sold credit derivative products in the form of "credit default swaps" which afforded credit protection for large financial institutions.[3] These credit default swaps provided that Athilon would pay the

---

1. Quadrant is a Cayman Islands limited liability company with its principal place of business in Connecticut.

2. Athilon is a Delaware corporation with its principal place of business in New York.

3. A credit default swap is a financial instrument that serves as "a promise by one party to pay another party in the event that a third party defaults on its debt" (Jeremy C. Kress, *Credit Default Swaps, Clearinghouses, and Systemic Risk: Why Centralized Counterparties Must Have Access to Central Bank Liquidity*, 48 Harv J on Legis 49, 52 [2011] [citation omitted]). A credit default swap contract "obligates a protection buyer to make periodic premium payments to a protection seller, who in turn must pay the buyer if one or more underlying reference entities experiences a credit event [such as default, bankruptcy or credit rating downgrade]" (*id.* [citation omitted]). Such financial instruments were viewed with skepticism and concern by some critics who feared "that a spike in interest rates could trigger a 'derivatives tsunami' that would bring all of the major banks to their knees and cause a 'blowup' in world credit markets" (Robert F. Schwartz, *Risk Distribution in* [redacted]

purchaser in the case of a default on the debt that was the subject of the swap. As a risk containment measure, Athilon's operating guidelines mandated that it invest conservatively, and that when certain "suspension events" occurred, enter "runoff mode"—a period during which it could not issue new credit swaps and was required to pay off existing swaps as claims arose.

As part of its capital raising strategy, Athilon incurred debt through the issuance of a series of securities,[4] as relevant here, consisting of $350 million in senior subordinated notes, $200 million in three series of subordinated notes and $50 million in junior notes.[5] Athilon raised $600 million in capital through this debt structure. Debt subordination is common in commercial finance, and as the name of these different classes of notes implies, payment of senior subordinated notes takes priority over payment of junior notes.[6] Quadrant owns certain classes of

---

the Capital Markets: Credit Default Swaps, Insurance and a Theory of Demarcation, 12 Fordham J Corp & Fin L 167, 170 [2007] [citation omitted]).

4. A security is

> "any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited" (15 USC § 78c [a] [10]).

5. A "note" is defined as "A written promise by one party (the *maker*) to pay money to another party (the *payee*) or to bearer" (Black's Law Dictionary [9th ed 2009]).

6. "[T]he basic concept of a subordination agreement is simple: It is the subordination of the right to receive payment of certain indebtedness . . . prior [to] payment of certain other indebtedness (the senior debt) of the same debtor. Put another way—in the circumstances specified in the subordination agreement, the senior debt must be paid in full before payment may be made on the subordinated debt and retained by the subordinating credi-[redacted]

these subordinated notes, including senior subordinated notes, while EBF owns junior notes.

As part of this debt financing, Athilon entered agreements, referred to as trust indentures (indentures), with two separate Trustees, who serve as third-party administrators of the issuance of the securities.[7] An indenture is essentially a written agreement that bestows legal title of the securities in a single Trustee to protect the interests of individual investors who may be numerous or unknown to each other (*see generally* George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 250 at 280 [2d ed rev 1992]). As is typical of these agreements, the Athilon indentures set forth Athilon's obligations as the issuer of the securities, the securityholders' rights and remedies in the case of Athilon's default on the provisions of the indenture, and the duties and obligations of the Trustee (*see* Thomas Lee Hazen, The Law of Securities Regulation § 19.1 at 467 [6th ed], citing 15 USC § 77ccc [7] ["'The contract, or 'indenture,' identifies the rights of all parties concerned, as well as the duties of the trustee (a third-party administrator), the obligations of the borrower, and the remedies available to the investors'"]).

By 2008, Athilon had undertaken $50 billion in nominal credit default risk, far exceeding its $700 million in capital reserves, which consisted of the $100 million in equity and $600 million in security debt. Quadrant contends that at this rate a mere 0.2% loss on the collateralized debt obligations covered by Athilon's credit default swaps would strip Athilon of its equity and render it insolvent.[8] Indeed, in the aftermath of the 2008 financial crisis, in early 2009, Athilon and its subsidiary

---

tor" (Dee Martin Calligar, *Subordination Agreements*, 70 Yale LJ 376, 376 [1961]).

7. Deutsche Bank Trust Company serves as Trustee under the indenture governing subordinated notes, and The Bank of New York serves as Trustee pursuant to the indenture governing senior subordinated notes (*see Quadrant Structured Prods. Co., Ltd. v Vertin*, — A3d —, —, 2013 WL 5962813, *2, 2013 Del LEXIS 570, *5 [Nov. 7, 2013, No. 338, 2012]).

8. A collateralized debt obligation is a type of asset-backed security (*see* Neal Deckant, *X. Reforms of Collateralized Debt Obligations: Enforcement, Accounting and Regulatory Proposals*, 29 Rev Banking & Fin L 79, 80 [2009]). The underlying assets are "pooled together, split into subordinated repayment rights ('tranches'), rated by a credit rating agency and sold to investors" (*see* Neal Deckant, *Criticisms of Collateralized Debt Obligations in the Wake of the Goldman Sachs Scandal*, 30 Rev Banking & Fin L 407, 410 [2010] [citation omitted]).

sustained several suspension events and entered into runoff mode as per its operating guidelines.

In October 2011, Quadrant sued Athilon, Athilon's officers and directors, EBF, and EBF affiliate Athilon Structured Investment Advisors LLC (ASIA), asserting various counts directly and derivatively as a creditor of Athilon. Quadrant asserted claims for breaches of fiduciary duty, seeking damages and injunctive relief, and also asserted fraudulent transfer claims against EBF and ASIA. According to Quadrant, EBF acquired Athilon in 2010, and controls the Athilon Board by virtue of having installed its board members. Quadrant claimed that the Board failed to preserve Athilon's value in anticipation of liquidation in 2014 when the last credit swap was set to expire, and instead took actions in direct contravention of its duties, but which favored EBF and its affiliate. Specifically, Quadrant alleged that the EBF-controlled Board paid interest on the junior notes, notwithstanding that Athilon agreed to defer interest payments on these notes and that junior notes would not receive a return during liquidation. As a consequence, EBF received payment on its junior notes, to the detriment of senior subordinated securities, including Quadrant's subordinated notes. Quadrant also alleged the Board paid ASIA above-market-rate service fees to manage Athilon's day-to-day operations.

The Court of Chancery characterized Athilon's investment strategy as "high risk" and "contrary to the terms of Athilon's governing documents," which was designed to ensure EBF benefitted financially, regardless of the risk associated with the investment, and regardless of the status of the EBF junior notes (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 2013 WL 3233130, *2, 2013 Del Ch LEXIS 152, *7 [June 20, 2013, CA No. 6990-VCL]). All the while, the owners of the senior notes suffered the loss of the failed high-risk investment.[9]

Defendants moved to dismiss, asserting that Quadrant's claims were barred by a no-action clause (Athilon clause) contained in article 7, § 7.06 of the indenture governing the subordinated notes. The Athilon clause provides:

> "*Limitations on Suits by Securityholder*. No holder of any Security shall have any right by virtue or by

---

9. The Court of Chancery described a strategy "that amounts to a 'heads EBF wins, tails everyone else loses' bet. If the high-risk investments succeed, then the underwater Junior Notes and equity will benefit. If the investments fail, then the more senior tranches of Notes will bear the loss" (*Quadrant*, 2013 WL 3233130, *2, 2013 Del Ch LEXIS 152, *7).

availing of any provision of this Indenture to institute any action or proceeding at law or in equity or in bankruptcy or otherwise upon or under or with respect to this Indenture, or for the appointment of a trustee, receiver, liquidator, custodian or other similar official or for any other remedy hereunder, unless such holder previously shall have given to the Trustee written notice of default in respect of the series of Securities held by such Securityholder and of the continuance thereof, as hereinbefore provided, and unless also the holders of not less than 50% of the aggregate principal amount of the relevant series of Securities at the time Outstanding shall have made written request upon the Trustee to institute such action or proceedings in its own name as trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby and the Trustee for 60 days after its receipt of such notice, request and offer of indemnity shall have failed to institute any such action or proceedings and no direction inconsistent with such written request shall have been given to the Trustee pursuant to Section 7.08 hereof within such 60 days."

Defendants argued that the clause permitted only Trustee-initiated suits upon request of a majority of securityholders, and prohibited individual securityholder actions. In support of this argument defendants relied on *Feldbaum v McCrory Corp.* (1992 WL 119095, 1992 Del Ch LEXIS 113, 18 Del J Corp L 630 [June 1, 1992]) and *Lange v Citibank, N.A.* (2002 WL 2005728, *1, 2002 Del Ch LEXIS 101, *1-2 [Aug. 13, 2002, CA No. 19245-NC]), Delaware Court of Chancery cases applying New York law, wherein the court dismissed the respective plaintiffs' claims based on a no-action clause. The clauses at issue in those cases barred a securityholder's action "with respect to this Indenture *or the Securities* unless [specified conditions are met]" (*Feldbaum*, 1992 WL 119095 at *5, 1992 Del Ch LEXIS 113 at *17, 18 Del J Corp L at 641; *Lange*, 2002 WL 2005728 at *5, 2002 Del Ch LEXIS 101 at *16 [emphasis added]).

The Delaware Chancery Court dismissed Quadrant's complaint, citing *Feldbaum* and *Lange* (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 2012 WL 2051753, 2012 Del Ch LEXIS

300 [June 5, 2012, CA No. 6990-VCL]). On appeal to the Delaware Supreme Court, Quadrant asserted for the first time that the *Feldbaum* and *Lange* clauses were distinguishable because the clauses in those cases specifically mentioned claims arising under both the indenture *and* "the Securities," whereas the Athilon clause only applies to claims under the indenture. Therefore, the clause did not bar common-law or statutory claims arising under the securities. The Delaware Supreme Court remanded the case back to the Court of Chancery, ordering it "to issue an opinion analyzing the significance (if any) under New York law of the differences between the no-action clauses in the *Lange* and *Feldbaum* indentures and the Athilon Indenture" (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 2013 WL 8858605, *2, 2013 Del LEXIS 380, *5-6 [Feb. 12, 2013, No. 338, 2012]; *see* — A3d at —, 2013 WL 5962813 at *8, 2013 Del LEXIS 570 at *23).

Thereafter, the Court of Chancery issued a Report on Remand in which the court concluded that the no-action clause applies only to contractual claims arising under the indenture. After a thorough analysis of New York cases and *Feldbaum* and *Lange*, the court found the Athilon clause differed from a *Feldbaum* and *Lange*-type clause, and only extended to actions or proceedings where a securityholder claims a right by virtue or by availing of any provision of the indenture. The court, therefore, concluded that the majority of Quadrant's claims were not barred under the clause, and that dismissal was warranted with respect to two claims and partial dismissal with respect to a third because only those claims arose under the Athilon indenture.[10]

Upon receipt of the Report, the Delaware Supreme Court certified the following questions to us:

> "(1) A trust indenture no-action clause expressly precludes a security holder[,] who fails to comply with that clause's preconditions, from initiating any action or proceeding upon or under or with respect to 'this Indenture,' but makes no reference to actions or proceedings pertaining to 'the Securities.'

---

10. Specifically, the court identified as subject to dismissal count VII, which alleged breach of the implied covenant of good faith and fair dealing; count VIII, which alleged tortious interference with the implied covenant referenced in count VII; and part of count X, which alleged civil conspiracy relating to all other counts in Quadrant's complaint (*see Quadrant Structured Prods. Co., Ltd. v Vertin*, 2013 WL 3233130, *23, 2013 Del Ch LEXIS 152, *84-85 [June 20, 2013, CA No. 6990-VCL]).

> "The question is whether, under New York law, the absence of any reference in the no-action clause to 'the Securities' precludes enforcement only of contractual claims arising under the Indenture, or whether the clause also precludes enforcement of all common law and statutory claims that security holders as a group may have.
>
> "(2) In its Report on Remand . . . , the Court of Chancery found that the Athilon no-action clause, which refers only to 'this Indenture,' precludes enforcement only of contractual claims arising under the Indenture. The question is whether that finding is a correct application of New York law to the Athilon no-action clause" (— A3d at —, 2013 WL 5962813 at *5, 2013 Del LEXIS 570 at *14-15).

Pursuant to section 500.27 of the Rules of Practice of the Court of Appeals (22 NYCRR), we accepted both certified questions (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 22 NY3d 1008 [2013]).

III.

A.

In response to the first question, for the reasons discussed in detail below, we conclude that a no-action clause which by its language applies to rights and remedies under the provisions of the indenture agreement, but makes no mention of individual suits on the securities, does not preclude enforcement of a securityholder's independent common-law or statutory rights. We reach this conclusion based on the legal standards applicable to indenture agreements, as well as the analyses of no-action clauses in *Feldbaum* and *Lange*, and cases from New York.

A trust indenture is a contract, and under New York law "[i]nterpretation of indenture provisions is a matter of basic contract law" (*Sharon Steel Corp. v Chase Manhattan Bank, N.A.*, 691 F2d 1039, 1049 [2d Cir 1982]; *see also* Thomas Lee Hazen, The Law of Securities Regulation § 19.1 at 467 [6th ed] [referring to indenture as a contract]; *Racepoint Partners, LLC v JPMorgan Chase Bank, N.A.*, 14 NY3d 419 [2010] [same]; *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146 [2008] [same]).

In construing a contract we 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" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *accord J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 118 [2012]; *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Nichols v Nichols*, 306 NY 490, 496 [1954]). As the case law further establishes, we read a no-action clause to give effect to the precise words and language used, for the clause must be "strictly construed" (*Cruden v Bank of N.Y.*, 957 F2d 961, 968 [2d Cir 1992] [citation omitted]; *cf. Feldbaum*, 1992 WL 119095, *7-8, 1992 Del Ch LEXIS 113, *25, 18 Del J Corp L at 645; *Lange*, 2002 WL 2005728 at *7, 2002 Del Ch LEXIS 101 at *20-22; *Cruden v Bank of N.Y.*, 1990 WL 131350, *12, 1990 US Dist LEXIS 11564, *35 [SD NY, Sept. 4, 1990, Nos. 85 Civ. 4170 (JFK), 85 Civ. 4219 (JFK), 85 Civ. 4570 (JFK), 87 Civ. 5493 (JFK)]; *Victor v Riklis*, 1992 WL 122911, *6 n 7, 1992 US Dist LEXIS 7025, *20 n 7 [SD NY, May 15, 1992, No. 91 Civ. 2897 (LJF)]; *McMahan & Co. v Wherehouse Entertainment, Inc.*, 859 F Supp 743 [SD NY 1994]).

Even where there is ambiguity, if parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission. The maxim *expressio unius est exclusio alterius*, as used in the interpretation of contracts, supports precisely this conclusion (*see generally* Glen Banks, New York Contract Law § 10.13 [West's NY Prac Series 2006]; *see also In re Ore Cargo, Inc.*, 544 F2d 80, 82 [2d Cir 1976] [where sophisticated drafter omits a term, *expressio unius* precludes the court from implying it from the general language of the agreement]).

Applying these well established principles of contract interpretation, and with the understanding that no-action clauses are to be construed strictly and thus read narrowly, we turn to the language of the no-action clause presented by the certified question. The no-action clause here states that no securityholder "shall have any right *by virtue or by availing of any provision of this Indenture* to institute any action or proceeding at law or in equity or in bankruptcy or otherwise *upon or under or with respect to this Indenture* . . . ." The clear and unambiguous text of this no-action clause, with its specific reference to the indenture, on its face limits the clause to the contract rights recognized by the indenture agreement itself. Further supporting this construction of the clause is the sole textual reference to securities, which is contained in the clause's provision for a

Trustee-initiated suit for a continuing "default in respect of the series of Securities."[11] This part of the no-action clause permits the trustee to sue in its name, after notice by a securityholder of a continuing default and upon approval of the suit by a majority of securityholders. Thus, the clear import of the no-action clause is to leave a securityholder free to pursue independent claims involving rights not arising from the indenture agreement.

This no-action clause, with its specific limit on the enforcement of indenture contract rights, is in contrast to no-action clauses which extend beyond the four corners of the indenture agreement to cover securities-based claims. As the cases illustrate, where the no-action clause refers to both the indenture and the securities the securityholder's claims are subject to the terms of the clause, whether those claims be contractual in nature and based on the indenture agreement, or arise from common law and statute.

Thus, in *Feldbaum*, where the no-action clause stated, in pertinent part, that "[a] Securityholder may not pursue *any remedy with respect to this Indenture or the Securities* unless [specified conditions are met]" (1992 WL 119095, *5, 1992 Del Ch LEXIS 113, *17, 18 Del J Corp L at 641), the court held that the clause barred the securityholders' fraud and breach of contract claims against the issuers of the securities (1992 WL 119095 at *2-3, 1992 Del Ch LEXIS 113 at *7-10, 18 Del J Corp L at 636-638). The court concluded that by its language the no-action clause barred not only contractual claims arising from the indenture itself, but also any claims individuals may have based on their status as securityholders (1992 WL 119095 at *7-8, 1992 Del Ch LEXIS 113 at *26-27, 18 Del J Corp L at 645).

---

11. Specifically, section 7.06 of the indenture provides that no action may be commenced

> "unless such holder previously shall have given to the Trustee written notice of default in respect of the series of Securities held by such Securityholder . . . , and unless also the holders of not less than 50% of the aggregate principal amount of the relevant series of Securities at the time Outstanding shall have made written request upon the Trustee to institute such action or proceedings in its own name as trustee hereunder . . . and the Trustee [after 60 days] . . . shall have failed to institute any such action or proceedings and no direction inconsistent with such written request shall have been given to the Trustee pursuant to [the indenture] within such 60 days . . . ."

Similarly, in *Lange*, the court dismissed plaintiffs' claims as barred by a trust indenture no-action clause that provided "[a] Securityholder may not pursue a remedy with respect to this Indenture or the Securities unless [specified conditions are met]" (2002 WL 2005728 at *5, 2002 Del Ch LEXIS 101 at *16). Plaintiffs in *Lange* were a group of securityholders who sued the issuer for having sold off its subsidiaries for an unfair value (2002 WL 2005728 at *1, 2002 Del Ch LEXIS 101 at *1-2). Plaintiffs sought to rescind the sales or disgorge the proceeds arguing, inter alia, breach of the issuer's fiduciary duty. The court applied the reasoning in *Feldbaum* to find that the no-action clause barred all claims "with respect to the Indenture or the Debentures themselves" (2002 WL 2005728 at *7, 2002 Del Ch LEXIS 101 at *21).

The decisions in *Feldbaum* and *Lange* relied on the language of the clause, which was broad enough to encompass conditions on enforcement of indenture and securities-based claims (*Feldbaum*, 1992 WL 119095 at *6, 1992 Del Ch LEXIS 113 at *17-18, 18 Del J Corp L at 641; *Lange*, 2002 WL 2005728 at *7, 2002 Del Ch LEXIS 101 at *20-22). Here, unlike the *Feldbaum* and *Lange* clauses, the Athilon no-action clause omits the phrase "or the Securities," indicating its coverage is limited to the indenture and rights thereunder.

Decisions from New York further support this interpretation of the words contained in the no-action clause. For example, in *General Inv. Co. v Interborough R.T. Co.* (200 App Div 794 [1st Dept 1922]), plaintiff sought to recover payment on five promissory notes. Defendant argued the no-action clause barred recovery, relying on language in the clause that provided:

> "No holder of any note hereby secured shall have any right to institute any suit, action or proceeding in equity or at law for the enforcement of this indenture, or for the execution of any trust hereof, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder [meets specified requirements]" (*id.* at 796 [emphasis omitted]).

The Appellate Division held that the no-action clause did not bar plaintiff's suit because the clause applied to proceedings arising from the enforcement of the indenture and plaintiff's action "is not to affect, disturb or prejudice the lien of the

collateral indenture or to enforce any right thereunder" (*id.* at 801).[12]

In *Cruden*, plaintiffs sought to assert fraud and civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) against the issuer. Defendants argued a no-action clause barred their claims. The clause therein provided:

> "No holder of any Debenture shall have any right by virtue of or by availing himself of any provision of this Indenture to institute any action or proceedings at law or in equity or in bankruptcy or otherwise, upon or under or with respect to this Indenture, or for the appointment of a receiver or trustee, or for any other remedy hereunder . . . ." (1990 WL 131350, *12, 1990 US Dist LEXIS 11564, *35-36.)

Although reversing in part, the Second Circuit agreed with the District Court's conclusion that plaintiffs' fraud and RICO claims were not made under the indenture and, thus, could not be barred by the no-action clause (*Cruden*, 957 F2d at 968).[13]

In contrast, in *Victor*, the District Court dismissed plaintiff's RICO claims as barred by a no-action clause (1992 WL 122911 at *1, 1992 US Dist LEXIS 7025 at *2). The clause at issue, similar to the clause in *Feldbaum*, prohibited "any remedy with respect to [the] Indenture or the Securities" unless specified conditions were met (1992 WL 122911 at *6, 1992 US Dist LEXIS 7025 at *19 [emphasis omitted]). The District Court distinguished the clause from the no-action clause in *Cruden* because the former was "not as broad as the one [here]" (1992 WL 122911, *6 n 7, 1992 US Dist LEXIS 7025, *20 n 7).

In *McMahan*, a no-action clause barred actions seeking "any remedy with respect to [the] Indenture or the Securities" (859 F Supp at 747). Plaintiffs brought federal securities claims arguing, inter alia, that they were entitled to immediate tender of their securities as a consequence of the issuer's merger with two other entities. The District Court held federal securities laws preclude application of a no-action clause to plaintiffs' federal securities claims, allowing those claims to proceed, but

---

12. This Court affirmed without discussion of the no-action clause (*see General Inv. Co. v Interborough R.T. Co.*, 235 NY 133 [1923]).

13. The Second Circuit reversed the District Court's ruling that some of plaintiffs' claims against the Trustees were time-barred (*Cruden*, 957 F2d at 978).

concluded the state law claims were properly barred by the no-action clause (*id.* at 749).[14]

As these cases illustrate, a no-action clause, like the Athilon clause, that refers only to actions under the indenture, is limited by its language to indenture-based contract claims. However, a no-action clause similar to the clauses in *Feldbaum* and *Lange*, that refers specifically to claims and remedies arising under the indenture and the securities, applies to all claims, except those excluded from coverage as a matter of law. Here, the Athilon no-action clause when strictly construed and afforded its plain meaning, makes no reference to the securities, and therefore does not apply to claims arising outside the scope of the indenture. Accordingly, we agree with the Delaware Chancery Court's Report on Remand that *Feldbaum* and *Lange* are distinguishable, and the Athilon no-action clause applies only to contract claims under the indenture, not to Quadrant's common-law and statutory claims.

Defendants argue that under New York law, what matters is the parties' intent, not any "legal talismans," and that the parties' intent was for the no-action clause to apply to all individual securityholder suits. This is no argument at all, for under our law where the language of the contract is clear we rely on the terms of the document to give effect to the parties' intent (*see J. D'Addario & Co.*, 20 NY3d at 118; *Vermont Teddy Bear Co.*, 1 NY3d at 475; *Nichols*, 306 NY at 496). As we have discussed, the no-action clause is clear on its face and applies to indenture contract claims only. The New York cases upon which defendants rely fail to persuade us otherwise, for they involve rights under the indenture, or securityholder rights which a no-action clause may not abridge as a matter of law (*see e.g. Greene v New York United Hotels, Inc.*, 236 App Div 647, 648 [1st Dept 1932] [petition for receivership dismissed as defective; debentureholder failed to plead compliance with no-action clause for claims of past-due payment]; *Emmet & Co., Inc. v Catholic Health E.*, 37 Misc 3d 854, 856 [Sup Ct, NY County 2012] [claim arising under indenture]; *Walnut Place LLC v Countrywide Home Loans, Inc.*, 35 Misc 3d 1207[A], 2012 NY Slip Op 50601[U] [Sup Ct, NY County 2012] [claim against Trustee]). The reasoning in these cases provides no basis to alter our

14. The Second Circuit affirmed, but remanded back to the District Court for a recalculation of damages under the Securities Act of 1933 (*McMahan & Co. v Wherehouse Entertainment, Inc.*, 65 F3d 1044, 1051 [2d Cir 1995]).

conclusion that a no-action clause that omits language specifically referencing the securities does not extend to a securityholder's common-law and statutory claims.

Nevertheless, defendants argue that, regardless of the actual words used, the language of the no-action clause includes all securityholder actions. Defendants essentially argue that references to the indenture should be interpreted to include the securities, and that to do otherwise will upset the parties' expectations. These arguments are unsupported by the no-action clause itself.

In support of their argument that indenture also means securities, defendants point to the purpose of the no-action clause, which they argue is to prevent unpopular duplicative suits, by channeling all securityholder claims through the Trustee. They contend that a no-action clause prohibits what they call the "lone ranger" lawsuit: individuals asserting claims that foster the interests of minority securityholders at the potential expense of the majority's interest. Quadrant's suit, defendants argue, is exactly the type of litigation the no-action clause is intended to prevent. Given this understanding of the intent of the no-action clause, the omission of the words "the Securities" is logical because they would be superfluous, adding nothing to the already expansive coverage of the clause.

Defendants are correct that generally a no-action clause prevents minority securityholders from pursuing litigation against the issuer, in favor of a single action initiated by a Trustee upon request of a majority of the securityholders (*see* American Bar Foundation, Commentaries on Indentures § 5.7 at 232 [1971] [discussing proposed no-action clause in model indenture, finding "(t)he major purpose of this (proposed no-action clause) is to deter individual debentureholders from bringing independent law suits for unworthy or unjustifiable reasons, causing expense to the Company and diminishing its assets"]).

As the court in *Feldbaum* noted, limitations on individual securityholder suits serve the primary purpose of a no-action clause, which is "to protect issuers from the expense involved in defending [individual] lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors" (1992 WL 119095 at *6, 1992 Del Ch LEXIS 113 at *20, 18 Del J Corp L at 642). These limitations further "protect[ ] against the risk of strike suits" (*id.*). Indeed, a no-action

clause "make[s] it more difficult for individual bondholders to bring suits that are unpopular with their fellow bondholders" (1992 WL 119095, *5, 1992 Del Ch LEXIS 113, *19, 18 Del J Corp L at 642). The no-action clause achieves these goals

> "by delegating the right to bring a suit enforcing rights of bondholders to the trustee, or to the holders of a substantial amount of bonds, and by delegating to the trustee the right to prosecute such a suit in the first instance. These clauses also ensure that the proceeds of any litigation actually prosecuted will be shared ratably by all bondholders" (1992 WL 119095 at *6, 1992 Del Ch LEXIS 113 at *21, 18 Del J Corp L at 643 [citation omitted]).

However, even defendants admit that the Athilon clause is not a complete bar to any and all securityholder suits. There are claims which, by law, cannot be prohibited by a no-action clause, most notably claims against the trustee (*see e.g.* 15 USC § 77*ooo* [d] ["The indenture . . . shall not contain any provisions relieving the indenture trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct"]; *see also Cruden*, 957 F2d at 968 [no-action clause will not bar securityholder suit against Trustee because "it would be absurd to require the debenture holders to ask the Trustee to sue itself"]).

Defendants appear to argue that the enactment of the Trust Indenture Act of 1939 (TIA) eliminated the need to reference the securities in a no-action clause because the TIA prohibits the clause from barring a securityholder's action against the Trustee for breach of duties recognized by the TIA, or for past-due interest or principal on the securities (*see* 15 USC § 77ppp [b]). Of course, as Quadrant's case illustrates, a securityholder may have claims apart from claims against the Trustee, or for past-due payments. Moreover, as long as the indenture does not violate or conflict with the TIA, the parties may structure the indenture agreement to address their respective interests and obligations, including placing limits on certain claims of right.

Most significant here is that the no-action clause, by its own terms, is concerned with minority holders' actions in the case of a default by the issuer of the securities. The no-action clause requires a written request for the Trustee to commence an action or proceeding *regarding a default* with respect to the series of securities held by the noteholder and approval by a majority

of securityholders.[15] Logically then, the no-action clause applies when the Trustee is authorized to decide whether to act; it cannot serve as an outright prohibition on a suit filed by a securityholder in the case where the Trustee is without authorization to act. Otherwise, the purpose of the no-action clause—to avoid duplicative suits and protect the majority interests by mandating that actions be channeled through the Trustee—would be subverted (*Feldbaum*, 1992 WL 119095 at *6, 1992 Del Ch LEXIS 113 at *19, 18 Del J Corp L at 642). This is what the parties intended. Of course, they were free to not limit the no-action clause in this way. Here, therefore, the purpose of the Athilon no-action clause is not frustrated where the Trustee is without authority to act.

Defendants' argument that interpreting the no-action clause to exclude certain claims would upset the contracting parties' expectations is unpersuasive. The indenture itself defines "indenture" and "securities" separately, recognizing them as distinct.[16] Therefore, defendants' functional equivalency argument is merely another version of the argument we have already rejected on the law: that the parties intended other than what the words in the document mean. As our law makes clear, we rely on the unambiguous terms of the agreement when construing contract provisions like the indenture no-action clause (*see J. D'Addario & Co.*, 20 NY3d at 118; *Vermont Teddy Bear Co.*, 1 NY3d at 475; *Nichols*, 306 NY at 496). Quadrant's claims are based not on the indenture agreement—under which the Trustee administers the debt issuance by Athilon—but rather arise from Quadrant's status as a securityholder. The parties could not have expected otherwise, given the plain language of the clause. If the parties sought to prohibit these types of suits, they were free to include them within the Athilon no-action clause.

We also note that in 2000, the Ad Hoc Committee for Revision of the 1983 Model Simplified Indenture produced a model no-action clause which provides "[a] Securityholder may pursue a remedy with respect to this Indenture or the Securities only if

---

15. The requirement of notice to the Trustee and majority securityholder approval makes sense because litigation by a minority securityholder upon a default is an attempt to secure payment, and resolution of the matter is of interest to the entire class of securityholders.

16. Section 1.01 defines "Indenture" as "this instrument as originally executed," and "Securities" as the "Series A Notes and the Series B Notes," i.e., the notes purchased by plaintiff securityholder.

[the holder complies with the terms of the clause]" (55 Bus Law 1115, 1137-1138 [2000]). By its terms, the no-action clause references the indenture and the securities. Even this broad model clause is not without limits. In its commentary to this provision, the Committee states: "[t]he clause applies, however, only to suits brought to enforce contract rights under the Indenture or the Securities, not to suits asserting rights arising under other laws" (*id.* at 1191). The Committee intended the model no-action clause to limit only contract rights, not to encompass all securityholder suits. We express no opinion on whether no-action clauses should be so narrowly construed, but note only that parties sophisticated and well versed in this area of the law—like the parties here—are well aware of these commentaries and, thus, we find unsupportable defendants' argument that a construction of the no-action clause that permits Quadrant's claims to proceed would be unsettling to the parties' expectations.

B.

[redacted] The second certified question asks whether the Vice Chancellor's Report on Remand correctly interpreted New York law. We answer this question in the affirmative. In its complaint, Quadrant asserts individual and derivative claims seeking damages and injunctive relief for breaches of fiduciary duty, fraudulent transfer, breach of covenant of good faith and fair dealing, intentional interference with contractual relations, and conspiracy. Essentially, Quadrant claims that Athilon's Board, installed and controlled by EBF, acted pursuant to a scheme which ensures that the junior securityholders are paid, despite their inferior status vis-à-vis Quadrant's senior notes, and, as a consequence, payment of the junior securities imperils payment of the senior securities. As described by Quadrant, Athilon's actions are an effort to siphon off as much capital as possible, as quickly as possible, for the benefit of EBF. Thus understood, the Trustee cannot address these claims because the Trustee's duties, as per the indenture, are only triggered upon an event of default—exactly what Quadrant seeks to avoid, at least with respect to the senior securities.

Accordingly, the Vice Chancellor correctly concluded that, with the exception of two claims and part of a third, the no-action clause did not bar plaintiff's action. The claims the Vice Chancellor found viable are those that the Trustee cannot assert, as they are not based on any default on the securities.

Specifically, the Vice Chancellor correctly found that those claims sounding in breach of contract and arising from the indenture are barred—requiring the majority securityholders to bring those actions through the Trustee.

IV.

Accordingly, the certified questions should be answered in accordance with this opinion.

Chief Judge LIPPMAN and Judges GRAFFEO, READ, SMITH, PIGOTT and ABDUS-SALAAM concur.

Following certification of questions by the Supreme Court of the State of Delaware and acceptance of the questions by this Court pursuant to section 500.27 of this Court's Rules of Practice, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions answered in accordance with the opinion herein.

[redacted]

HCCW 45/2020
[2020] HKCFI 2212

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) PROCEEDINGS NO 45 OF 2020

IN THE MATTER of REXLot Holdings Limited (御泰中彩控股有限公司)

and

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32

Before: Deputy High Court Judge Maurellet SC in Court
Date of Hearing: 20 August 2020
Date of Judgment: 20 August 2020

J U D G M E N T

INTRODUCTION

1. There is before me a creditors' winding-up petition ("the Petition") which is presented pursuant to section 327 of the Companies (Winding-Up) Ordinance ("the Ordinance").

2. The original petitioners were BFAM Asian Opportunities Master Fund LP ("BFAM" or "the 1st Petitioner"), Discovery Global Opportunity Master Fund Ltd, Discovery Global Focus Master Fund Ltd, and Quantum Partners LP (collectively "the Petitioners").

3. The Petition was filed on 9 March 2020.

4. REXLot Holdings Limited ("the Company"), formerly known as OSK Asia Corporation Limited, was incorporated in Bermuda on 8 August 1997, and was registered on 11 July 2000 as a non-Hong Kong company under Part 11 of the then Companies Ordinance. It has a principal place of business in Hong Kong, in Kowloon Bay.

5. The Company is listed on the stock exchange of Hong Kong, although the trading of its shares has been suspended since 1 April last year.

6. The Petitioners hold bonds which are divided in two categories. They are known as the 2017 bonds, which were convertible bonds originally due on 28 September 2016, but later extended to 2017; and the 2019 bonds, which were also convertible bonds and due on 17 April 2019.

7. Both bonds were constituted by trust deeds ("Trust Deed(s)") executed by the Company as issuer and the Bank of New York Mellon, London branch, as its trustee ("the Trustee").

8. Between 11 May 2017 and early in 2020, the Company published a number of announcements on its website indicating that it had

devised various plans to repay outstanding amounts on the said bonds and was taking certain steps to deal with the matter.

INSOLVENCY PROCESS

9. On 26 September 2019, the 1st Petitioner served a statutory demand relying on section 327(4)(a) of the Ordinance by leaving the said statutory demand at the Company's principal place of business in Hong Kong. As explained above, the Petition was then filed on 9 March 2020.

10. As the Company is not a Hong Kong incorporated company, it is trite that the Petitioners need to establish that it is appropriate to exercise the court's jurisdiction to wind up an overseas company and, therefore, the "three core requirements" have to be satisfied[1].

11. The Petitioners have in their Petition pleaded a number of factors which they say justifies the Court exercising its jurisdiction to wind up an overseas company. I do not understand the Company to be suggesting that the Petitioners have failed to satisfy the Court that it was a proper case to wind up this Company on the said jurisdictional grounds.

12. Mr How-chung Chan (also known as Victor Chan) is a significant shareholder of the Company and also one of its executive directors. He controls a company called Kingly Profits Limited which is also a creditor of the Company to the tune of HK$80 million-plus.

---

[1] See the recent Court of Appeal's decision in *Shandong Chenming Paper v. Arjowiggins HKK2 Ltd* (unreported judgment dated 5 August 2020)

13. The Petition first came before Harris J on 8 June of this year who gave directions for the filing of evidence and adjourned the substantive hearing to 20 August, which is today's hearing.

LOCUS OF PETITIONERS AND TRUSTEE / SUBSTITUTION

14. The Company disputes the locus of the Petitioners to present the petition by reason of the wording in the Trust Deed. In particular, they point to clause 10.1 of the Trust Deed which provides that:

> "The trustee may at any time at its discretion without further notice institute such proceedings against the issuers it may think to recover any amounts due in respect of the bonds which are unpaid or to enforce any of its rights under this trust deed or the conditions, but it shall not be bound to take any such proceedings unless... (certain conditions)."
>
> "...only the trustee may enforce the provisions of the bonds or this trust deed and no bond holder shall be entitled to proceed directly against the issuer unless the trustee, having become bound to do so, to proceed, fails to do so within a reasonable time and such failure is continuing."

15. What is quite clear is that this gives rise to fairly complicated legal arguments as to whether or not, in such a situation, a bond holder has locus to commence winding-up proceedings or whether only the Trustee can do so. This goes both to the question of the construction of the relevant trust deed and also other legal arguments including whether or not such a term, assuming it has the effect contended for by the Company, would amount to a 'statutory fetter'[2].

---

[2] See for example *Elektrim SA v Vivendi Holdings* [2009] 2 AER (Comm) 213 per Lawrence Collins LJ; *Casurina Ltd Partnership v. Rio Algom Ltd* 40 BLR (3d) 112; *Elliott International & Anon v Law Debenture Trustees* (unrep. Judgment dated 23 November 2006, per Warren J); the Law of Company Liquidation (4th ed.) at paragraph 3-017.

16. I understood from the written submissions filed by Mr Hew Yang-wahn who ably represented the Petitioners that they were seeking a winding-up order forthwith and were against the notion of any adjournment, no matter how short.

17. In the course of argument, I pointed out that if the question of locus had to be dealt with *now* this was not a matter which was straight forward and therefore was likely to result in some adjournment. Upon taking instructions, he confirmed that the Petitioners would be content for the Trustee to apply and substitute itself instead as petitioner.

18. I should point out that on 3 June 2020, the Trustee had applied by summons pursuant to Rule 33 to substitute the Petitioners.

19. Rule 33 of the Winding-up Rules provides that:

> "When a petitioner is not entitled to present a petition or whether so entitled or not, where he:
>
> (a) Fails to advertise his petition within the time by these rules prescribed or such extended time as the Registrar may allow or
>
> (b) Consents to withdraw his petition, or to allow it to be dismissed, or the hearing adjourned, or fails to appear in support of his petition when it is called on in court on the day originally fixed for the hearing thereof, or on any day to which the hearing has been adjourned, or
>
> (c) If appearing, does not apply for an order in the terms of the prayer of his petition, the court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who in the opinion of the court would have a right to present a petition, and who is desirous of prosecuting the petition. An order to substitute a petitioner may, where a petitioner fails to advertise his petition within the time prescribed by these rules or consents to withdraw his petition, be made in chambers at any time."

20. The application to substitute was not opposed and given the Petitioners' indication, I made an order in terms of the Trustee's summons[3]. There was no dispute, and there could be no dispute, that the Trustee has locus to present and prosecute the present Petition before me.

ADJOURNMENT OF THE PETITION

21. The Trustee, therefore, submits that a winding-up order can and should be made forthwith subject to any application for an adjournment to be made by the Company.

22. Mr Bernard Man, leading counsel for the Company[4], sought an adjournment on its behalf for a period of at least six weeks or so.

23. He persuasively submitted, in effect, that there was something to be gained (potentially a lot) and very little to be lost by adjourning the Petition for a very short while.

24. He very fairly accepted that in situations such as the present, adjournments were not usually granted against the opposition of petitioning creditors given the right *ex debito justiciae* to a winding-up order.

see *HSBC v SMI Holdings Group* [2019] HKCFI 1948, and *Re X 10 Ltd* (1989) 2 HKLR 306 at 309I to J.

---

3 See *Re Titanium Technology Ltd* [2011] 3 HKLRD 134.

4 Who was assisted by Ms Natalie So for the preparation of the Company's written skeleton submissions

25. In support of the adjournment application, he highlighted a number of features.

(1) That since a substantial part of the Company's underlying assets were in the mainland and that the operations themselves consisted of a lottery business operation through mainland Chinese subsidiaries, it would take liquidators, assuming the company were liquidated, some time to realise the value of the business, which is further complicated by certain foreign exchange control restrictions. Further, if the Company were to be liquidated, the mainland Chinese lottery authorities may or may not award new lottery contracts to the said mainland Chinese subsidiaries. The authorities there, having maintained stringent requirements on the financial position of the lottery operators and, therefore there was a significant risk that the mainland authorities would either revoke or otherwise end the licences to operate the said lottery businesses if the holding Company were to be wound up.

(2) He highlighted the considerable upside for all the creditors (presumably including the shareholders) if an adjournment were granted given the significant commitment which Mr Victor Chan was willing to make. Notwithstanding that I can see the force in the arguments of Ms Rachel Lam, SC who appeared for the Trustee, and Mr Hew, in that not a lot is known is about Mr Victor Chan's personal financial situation, I accept that on the evidence it would appear that he is making a genuine attempt by putting his money where his mouth lies. On 18 September 2019, Mr Chan sought to file his third affirmation (for which leave was sought and leave was granted) to update the Court on the latest position and also, as it were, to

sweeten the offer made to the creditors in an attempt to sway them in support of an adjournment of the Petition.

26. In the latest iteration of the repayment plan, six payments were anticipated to be made, the first on 30 September 2020, and the last on 30 September 2021.

27. The first payment to be made on 30 September 2020 would be for approximately HK$100 million in order to pay overdue interest on the 2017 bonds and the 2019 bonds. The second partial repayment on 31 December 2020 would be for an amount it is anticipated of HK$50 million and would seek to repay some of the interest but also some of the principal amount.

28. Pursuant to this plan, therefore, which involves repaying approximately HK$800 million or so, the creditors' indebtedness would be satisfied by September next year.

29. In the course of his address Mr Man SC on behalf of the Company and, in particular, Mr Victor Chan, sought to go further to assuage the creditors' doubts and concerns by personally undertaking to pay the first partial repayment and the second partial repayment if the Company was not able to pay and *if* the Company had not been wound up at the date of the said proposed repayments.

30. All in all, I agree that the offer made and the proposal for an adjournment is not one which the Court would consider to be obviously unattractive given the alternative possibilities. As the sword of Damocles

got closer, it is natural that the Company and those behind it who have an economic interest would be willing to give concessions which they previously would not.

31. Those later concessions which are now made cannot automatically be viewed with cynicism, although, given the history of the many failed proposals, one can see why some creditors would not be enthusiastic or confident about them.

32. Obviously, if there is no viable plan, restructuring or benefits to be had, then that would be an end of the matter and the Company would be wound up immediately.

33. However, the fact that there is such a viable plan does not lead necessarily to the converse conclusion that an adjournment ought to be granted.

34. In situations such as the present where the Company is obviously insolvent at least in the sense of cash-flow insolvency, is unable to pay its debts as they fall due, the interest of unsecured creditors is paramount.

35. It is not for the Court to substitute the views of the creditors and, in particular, the views of the unsecured creditors with its own judgment as to the economic viability or attractiveness of various options and it is easy to see why.

(i) It is obviously in the creditors' own interest to choose the option which economically and financially makes the most sense to them based on the evidence and material before them.

(ii) In many situations, including the present one, one can see that there are obvious pros and cons in either allowing a short adjournment or seeking an immediate winding-up order. This involves different competing considerations. Often it would involve choosing between two undesirable options and picking the least undesirable of the two. It is for these reasons that the Court looks to the creditors and their views, both in terms of quantity (i.e., the amount owed to them) and the quality.

36. The views of the 'related' creditors are taken into account although, of course, the Court is aware that this may or may not colour their support one way or the other.

37. In the present case, all the creditors[5] save those associated with Mr Chan support an immediate winding-up order. Whether the support amongst bond holders is 58% as suggested by the Company or whether it is more than that does not quite matter given the present circumstances, there is simply no independent creditor supporting an adjournment.

38. I also bear in mind that in the present case before me there is bound to be a number of creditors who have not expressed a view or who have not appeared in the Petition.

[5] Of those who have expressed a view

39. Whether this is due to apathy or other reasons, one cannot tell. However, I have borne in mind that of those who have supported an immediate winding-up order these included independent and financial institutions such as BlackRock and Value Partners and, of course, one of the original Petitioners, BFAM.

40. The fact that the independent creditors (if I may call them that) have all supported an immediate winding-up order is a powerful factor militating in favour of an immediate winding-up order.

DISPOSITION AND COSTS

41. For those reasons, balancing the above considerations I refuse to grant an adjournment of the Petition and it follows that an immediate winding-up order is made.

42. I shall now hear the parties as to costs.

(submissions on costs)

43. I will make a costs order *nisi* that (1) the Trustee's costs be paid out of the assets of the Company and (2) the costs as between the original Petitioners and the Company be costs reserved, with liberty to restore.

44. It remains for me to thank Mr Hew for the Petitioners, Ms Lam, SC for the Trustee, and Mr Man, SC for the Company for their able submissions.

(José Maurellet SC)
Deputy High Court Judge

Mr Hew Yang-Wahn, instructed by Latham & Watkins LLP, for the 1st to 4th Petitioners

Mr Bernard Man, SC, instructed by Baker & McKenzie, for the company (with Ms Natalie So for written submissions only)

Ms Rachel Lam, SC, instructed by Clifford Chance, for the trustee

Attendance of the Official Receiver was excused

HCCW 343/2022
[2023] HKCFI 1770

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

COMPANIES (WINDING-UP) PROCEEDINGS NO 343 OF 2022

IN THE MATTER OF the Companies (Winding Up and Miscellaneous Proceedings Provisions) Ordinance (Cap. 32) (the "**Ordinance**")

and

IN THE MATTER OF LEADING HOLDINGS GROUP LIMITED (領地控股集團有限公司) (the "**Company**")

Before: Deputy High Court Judge Suen SC in Court
Date of Hearing: 13 April 2023
Date of Further Submissions: 2 and 17 May 2023
Date of Judgment: 18 July 2023

J U D G M E N T

A. INTRODUCTION

1. This is the hearing of the Summons issued by the Company ("**Summons**") seeking an order to strike out the winding-up petition ("**Petition**") presented by the petitioner ("**P**") together with the substantive hearing of the Petition.

2. By the Petition dated 27 September 2022, P asks that the Company be wound up on the ground that it is indebted to P in the sum of US$1.3 million plus interest at the rate of 12% per annum totalling US$1,397,500 ("**Debt**"), which arises out of the 12% Senior Notes Due 2022 ("**Notes**") issued by the Company on 28 June 2021.

3. According to the Petition:- P is the beneficial/equitable holder/owner of the Notes in the sum of US$1.3 million; the Company acted in breach of the Indenture governing the Notes ("**Indenture**") by failing to make payment of the principal sum and interest of the Notes on 22 June 2022; the Company is insolvent as it is unable to pay its debts; and further or alternatively, P is entitled to present the Petition as a contingent and prospective creditor of the Company.

4. By the Summons dated 19 October 2022, the Company has applied for an order that the Petition be struck out or dismissed for abuse of process as P had no standing to present the Petition. In particular, it is denied that P is a contingent or prospective creditor of the Company.

5. By an order dated 6 January 2023 made by Peter Ng J, the substantive hearing of the Petition was adjourned for substantive argument to be heard together with the Summons.

6. The central issue in this hearing therefore hinges on P's *locus* to present the Petition against the Company, particularly the question whether P is a contingent or prospective creditor of the Company. In this regard, it is perhaps unfortunate that the Petition contains little particulars of the facts relied upon in support of the contention that P is a contingent and prospective creditor. Instead, these are set out in the legal submissions lodged on behalf of P. This would appear objectionable, and the Court may take the view that it is not open to P to rely on any fact or grounds not fairly stated in the Petition: see *Re China Oceanwide Group Limited* [2023] HKCFI 455, Linda Chan J, §§20-32. Nevertheless, since the Company has not taken any pleadings point, I proceed to deal with such contention by P. As it transpires, ultimately I do not find favour with P's contention and in light of such findings, the deficiency in the pleadings in the Petition is thus immaterial, but I fully endorse Linda Chan J's remark in *Re China Oceanwide* at §32 that the Court expects practitioners and parties to abide by the principles on pleading the material facts in a petition in future.

B. BACKGROUND

B1. The Company

7. The Company is a company with limited liability incorporated in Cayman Islands on 15 July 2019 and was registered in Hong Kong on 23 October 2019 under Part 16 of the Companies Ordinance (Cap. 622) as a registered non-Hong Kong company. The registered office of the Company is in Cayman Islands and the principal place of business of the Company is in Hong Kong. The shares of the Company are listed on the Hong Kong Stock Exchange under stock code 6999.

B2. The Notes

8. On 28 June 2021, the Company issued the Notes. As submitted by Mr Ho on behalf of the Company (which is not seriously disputed by P), the pertinent legal structure and features of the Notes may be summarised as follows:

(1) The Notes were constituted by the Indenture between the Company, The Bank of New York Mellon, London Branch ("**BNYM**" or "**Trustee**"), and various guarantors.

(2) The Indenture is governed by New York law. It governs all contractual rights and obligations under the Notes.

(3) The Company, as the Notes issuer, has no direct contractual relationship with the ultimate beneficial investors in the Notes. Instead, the Company's books show only one registered global note ("**Global Note**"), and only one registered holder of the Global Note ("**Holder**").

(4) The Global Note was executed by the Company and delivered to the Trustee which also served as the common depositary ("**Common Depositary**") (Section 2.04(c) and (d) of the Indenture).

(5) The Global Note was registered in the name of the Common Depositary for the accounts of Euroclear and Clearstream (Section 2.04(c) of the Indenture).

(6) The Holder of the Global Note is the Person in whose name the Global Note is registered in the Note register maintained

by the Company (Sections 1.01 and 2.04(c) of the Indenture**)**. The Holder is the owner of the Global Note for all purposes (Section 2.05(c) of the Indenture).

(7) On the facts, BNYM is the sole Holder (as well as the Trustee and the Common Depositary) of the Global Note. In contrast, P is neither a party to the Debenture nor the Holder of the Global Note.

(8) Investors (such as P) do not acquire the Global Note. Instead, each investor purchases a portion of the indirect beneficial interest in the Global Note *via* their intermediaries, such as banks and brokers who have accounts with Euroclear or Clearstream (Section 2.06 of the Indenture). Transfers of beneficial interests in the Global Note may be effected only through a book-entry system maintained by Euroclear and Clearstream (or their respective agents) (Sections 2.05(g) and 2.06 of the Indenture).

9. Further, the following provisions of the Indenture are of particular relevance (and hence quoted here for ease of reference):

> "Section 2.06. *Book-entry Provisions for Global Notes.*
> … *So long as the Notes are held in global form, the Common Depositary (or its nominee) will be considered the sole holder of the Global Notes for all purposes under this Indenture and "holders" of book-entry interests will not be considered the owners or "Holders" of Notes for any purpose.* As such, participants must rely on the procedures of Euroclear and Clearstream and *indirect participants must rely on the procedures of the participants through which they own book-entry interests in order to transfer their interests in the Notes or to exercise any rights of Holders under this Indenture* …

> Section 6.06. *Limitation on Suits.*
> *A Holder of Notes may not institute any proceeding, judicial or otherwise*, with respect to this Indenture or the Notes, or for the appointment of a receiver or trustee, or for any other remedy under this Indenture or the Notes, *unless*:
>
> (a) the Holder has previously given the Trustee written notice of a continuing Event of Default;
>
> (b) the Holders of at least 25% in aggregate principal amount of outstanding Notes make a written request to the Trustee to pursue the remedy;
>
> (c) such Holder or Holders offer the Trustee indemnity and/or security and/or prefunding satisfactory to the Trustee against any costs, liability or expense to be incurred in compliance with such written request;
>
> (d) the Trustee does not comply with the request within (i) 60 days after receipt of the written request pursuant to clause (b) above or (ii) 60 days after the receipt of the offer of indemnity and/or security and/or prefunding satisfactory to it pursuant to clause (c) above, whichever occurs later; and
>
> (e) during such 60-day period, the Holders of a majority in aggregate principal amount of the outstanding Notes do not give the Trustee a written direction that is inconsistent with the written request.
>
> Section 6.07. *Rights of Holders to Receive Payment.*
> Notwithstanding anything to the contrary, the right of any Holder to receive payment of the principal of, premium, if any, or interest on, such Note, or to bring suit for the enforcement of any such payment, on or after the due date expressed in the Notes, which right shall not be impaired or affected without the consent of the Holder." [Emphasis added]

10. Section 2.06 is of fundamental importance because it reflects the common features of the global note structure (which I will explain further below) under which only the holder (and the trustee) of the global note is recognized and can exercise any rights under the global note, whereas "holders" of book-entry interests will not be considered the owners or holders of the global note for any purpose. As such, participants

(such as DBS Bank in the present case) must rely on the procedures of Euroclear and Clearstream and indirect participants (such as P in the present case) must rely on the procedures of the participants through which they own book-entry interests in order to transfer their interests in the global note or to exercise any rights of the holder under the same.

11. Echoing the above, the Indenture also contains provisions in Sections 6.06 and 6.07 which are commonly referred to as the "No Action Clause" and the "Right to Payment Clause" respectively. These provisions reinforce the position that only the holder of the global note (but not "holders" of book-entry interests) may institute any judicial proceedings, subject however to express limitations (although such limitations do not apply to an action to enforce payment). As a result, indirect participants such as P simply do not have any directly enforceable rights against the Company under the terms of the Indenture.

B3. P's beneficial interest in loan

12. On its pleaded case, P is the beneficial/equitable holder/owner of the Notes in the sum of US$1.3 Million. In particular, as pleaded by P:

(1) According to a Statement of Account for the Purpose of Liquidation/Bankruptcy Claim dated 17 February 2023 ("**Statement of Account**") issued by Euroclear Bank SA/NV ("**Euroclear**"") to DBS Bank Ltd ("**DBS Bank**"), it was certified that (a) as of 15 February 2023, DBS Bank had a holding of US$1.3 Million of the Notes in a Euroclear account and (b) such holding is allocated in the books of DBS Bank

to P. P therefore avers that its beneficial interest is held through DBS Bank Ltd *via* Euroclear.

(2) P's beneficial interest is also evidenced by a securities holding report issued by the DBS Bank, showing that P held and holds US$1.3 Million of the Notes.

(3) The Notes are held by DBS Bank on behalf of P pursuant to the Custody Agreement dated 15 June 2021 between P (as client) and the DBS Bank (as custodian) ("**Custody Agreement**"). Pursuant to clause 2.3.1 of the Custody Agreement, the custody account is established in the name of P to reflect the fact that securities do not belong to DBS Bank and to segregate the securities from the assets of DBS Bank and from the assets of the other clients of DBS Bank. Accordingly, P's holding of the Notes is entered in P's securities account and the Notes held therein do not belong to DBS Bank but to P.

(4) All rights attaching to the Notes, including rights of enforcement, have been transferred to P, albeit held *indirectly* through DBS Bank and by book-entry. P, being the person to whose account the Notes have been credited, is the beneficial/equitable holder/owner of the Notes.

(5) Under the Indenture, the Company promised to (1) repay the principal sum of the Notes on 27 June 2022 and (2) pay interest on the interest payment dates on 28 December 2021 and 27 June 2022. Yet, no repayment of the principal sum

and no payment of interest were made by the Company on 27 June 2022. It is thus P's case that the Company is unable to pay its debt.

(6) Further or alternatively, P is entitled to present the Petition as a contingent and prospective creditor of the Company.

(7) In the further alternative, P relies on the statutory demand served by P on the Company on 11 August 2022 demanding the Company to pay or secure or compound for the Debt to P's satisfaction, but the Company has failed or neglected to pay or secure or compound for the Debt or any part thereof despite the lapse of over 3 weeks.

13. In my view, there should be little dispute on the evidence that P is the *indirect* owner of sub-interest in US$1.3 Million of the Notes *via* the DBS Bank and, in turn, Euroclear and ultimately BNYM as the Holder of the Notes. On the other hand, it is also beyond dispute that P cannot directly enforce and sue the Company on the Debt, and hence the statutory demand does not really assist P. Rather, the real issue is whether P, as the *indirect* owner of such sub-interest, has *locus* to present the Petition as contingent creditor of the Company.

C. ISSUES AND PARTIES' POSITION

C1. Key issue

14. The key issue is whether P has *locus* to present the Petition against the Company, and in particular: (i) whether P as owner of beneficial interest in the loan in question has standing to present the Petition; and

(ii) whether P is a contingent creditor of the Company in that P would have a direct claim against the Company in the event of issuance of definitive notes.

15. Depending on the Court's decision on standing, it may be necessary to consider further issues such as whether the Company is insolvent.

C2. Petitioner's case

16. P does not dispute that it has no directly enforceable right against the Company under the Indenture of the Note. Nevertheless, P argues that it has standing to present the Petition mainly on two grounds.

17. First, P contends that, as equitable/beneficial owner of the debt under the Note, P is entitled to present the Petition. P relies on cases on equitable assignees and in particular Harris J's decision in *Re China Cultural City Limited* [2020] 4 HKLRD 1 for the proposition that a beneficiary of a trust of a debt is entitled to present a winding-up petition.

18. Second, P contends that it is a contingent creditor because under certain specified events, P may be entitled to request for the issuance of definitive notes whereupon P could directly enforce its claims against the Company. In this regard, P relies on a number of authorities in the context of schemes of arrangement where the Courts treat the beneficial owners of interests in loans of similar notes as contingent creditors.

C3. Company's case

19. The Company contends that P is not a creditor.

20. First, whilst the Company accepts that an equitable assignee of a debt may petition for winding-up, it contends that the position of a beneficial owner of a trust of debt is different. The Company relies on a number of authorities in support. Further, the Company contends that *Re China Cultural* should not be followed as Harris J only relied on cases concerning equitable assignees, and it appears that cases on beneficiaries of a trust were not cited to him.

21. Second, the Company contends that P is not a contingent or prospective creditor. In particular: (a) the Notes have already matured and the Company already owes money to the Holder of the Notes, and therefore any liability could not be said to be contingent or prospective; and (b) the cases relied upon by P are distinguishable as they were decided for the specific purpose and context of schemes of arrangement only. During oral submissions, Mr Ho further argues on behalf of the Company that P could not be a contingent or prospective creditor of the Company because no debtor-creditor relationship exists between them at present, and there is no existing obligation which may give rise to contingent liability. Indeed, this argument has been heavily relied upon by the Grand Court of the Cayman Islands in a decision which was handed down after the hearing.

D. SUPPLEMENTAL SUBMISSIONS

22. After the hearing, the Company has lodged supplemental submissions on 2 May 2023 ("**Company's Supp Skel**") to bring to the attention of this Court a decision on point handed down by the Grand Court of the Cayman Islands, namely *Re Shinsun Holdings (Group) Co., Ltd* (21 April 2023). At §3 of the Company's Supp Skel, the Company seeks this Court's permission in doing so.

23. As the Company has not sought leave from the Court before lodging the Company's Supp Skel, I gave directions on 3 May 2023 for P to lodge supplemental submissions, to deal with the question whether leave should be given for the filing of the Company's Supp Skel and also to set out substantive response to the same.

24. On 17 May 2023, P has lodged supplemental submissions. P criticises the Company for failing to seek any prior leave from the Court or consent from P, contrary to the recommended practice in *Wong Chun Kit v Cheng Kwong Fat* [2020] 2 HKLRD 307, §§38-44. P further submits that no leave should be granted to the Company as *Re Shinsun* arose in a factual setting which is markedly different from the present case.

25. Having considered the decision of *Re Shinsun*, I take the view that it is relevant to the key dispute in the present case, and I therefore grant retrospective leave to the Company to lodge the Company's Supp Skel. In particular, David Doyle J sitting in the Grant Court of the Cayman Islands has conducted a helpful examination of the authorities on the meaning of contingent and prospective creditors as well as authorities explaining the context of similar global notes, and provided a well-reasoned analysis as to why a holder of an ultimate beneficial interest of such notes (as distinct from the holder of the notes), having no direct contractual relationship with the issuer of the notes, is not a creditor of the issuer (whether contingent or prospective) and hence has no standing to present a winding-up petition. I would have more to say on this in the analysis below.

26. Nevertheless, I agree with P that, before lodging the Company's Supp Skel, the Company should, as a matter of courtesy and proper practice, approach P first to see whether P agrees to the lodging of

further submissions; and even if there is a consensus between the parties, they should apply for leave from the Court *before* such further submissions are lodged. For such reason and to mark the Court's disapproval of the Company's conduct (but giving credit to the fact that the decision of *Re Shinsun* is relevant), I order on a *nisi* basis that the Company do pay 50% of the costs of the supplemental submissions to P, to be taxed if not agreed.

E. APPLICABLE TEST FOR STRIKING OUT ON LOCUS

27. P submits that, in a striking out application, it is assumed that the particulars and allegations in the petition and the supporting affidavits would be established and the conflicts resolved in favour of the petitioner, and the burden is on the applicant to show that it is plain and obvious that the winding-up petition would fail: *Re Harsen (China) Limited* [2022] HKCFI 3806, §16.

28. On the other hand, the Company submits that since the striking out application hinges on P's *locus* or standing, the applicable test is whether such standing is *bona fide* disputed on substantial grounds. By analogy, the Company relies on *Re Jackin Total Fulfilment Services Ltd* [2008] 3 HKLRD 475, §4 for the proposition that, if an alleged debt is *bona fide* disputed on substantial grounds by a company, the creditor does not have *locus* to present a winding-up petition – this should be *a fortiori* the case where the petitioner's standing is disputed on substantial grounds.

29. In my view, it is incumbent on P to demonstrate that it has standing to present the winding-up petition. This is a burden which P has to discharge up to the substantive hearing of the Petition. In *Re Guy Kwok-Hung Lam* [2022] HKCA 1297, G Lam JA said at §77:

> "… although a principal question on a winding-up petition is the solvency of the company since a company may be wound up if it is unable to pay its debts, *there is a separate question whether the petitioner is a creditor because "until the creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court"* ..." [Emphasis added]

30. Echoing the above, in *Tallington Lakes Ltd v Ancasta International Boat Sales Ltd* [2012] EWCA Civ 1712; [2014] BCC 327, the English Court of Appeal confirmed (at §§4-5) that the Court would strike out a winding-up petition if there was a *bona fide* dispute about the petitioner's standing. One way of demonstrating such *bona fide* substantial dispute is to show that there is a *bona fide* substantial dispute about the petition debt. In principle, there is no reason why the same approach should not apply to the present case where there is a direct challenge of the petitioner's standing as creditor.

31. In the premises, I do not consider it right to say that the Petition should not be struck out unless it is plain and obvious that P has no *locus*, because this would be sidestepping the issue of *locus* which is an essential element of P's case.

F. OVERVIEW

32. This Judgment is of considerable length, as this is the first occasion where the Hong Kong Court has to decide the issue of the *locus* of an investor of a global note to present a winding-up petition as a contingent creditor. In view of the length of the Judgment, I consider it helpful to give an overview of my reasoning.

33. As mentioned above, the Company's arguments are that:-

(1) beneficiaries of a trust or sub-trust has no standing to sue or petition

for winding up; and (2) the debt has matured and hence cannot be contingent.

34. On the first argument, Mr Ho seeks to draw a distinction between the position of a beneficiary of a trust and that of an equitable assignee of part of the debt. There are well-established authorities that the former cannot sue in general, whereas the latter may sue on the debt, albeit subject to the procedural requirement to join the equitable assignor when suing. More fundamentally, there are authorities that an equitable assignee of a debt may petition for winding-up without joining the equitable assignor, having regard to the nature of winding-up process as a collective remedy. As explained later, such authorities do not apply to the scenario of a beneficiary of a trust.

35. As to the second argument, as I have pointed out to Mr Ho during the hearing, it does not really assist because (1) it begs the rhetorical question whether, had the debt not matured, P could then be a contingent creditor (hence having *locus* to petition for winding up) – if so it seems absurd to suggest that somehow because the debt has matured, P is in worse-off position by losing the *locus* to petition for winding up; and (2) it fails to engage directly with P's central argument that P can sue the Company *contingent* on the issuance of definitive notes in P's favour.

36. During oral submissions, Mr Ho seeks to overcome the above by saying that there is no existing debtor-creditor relationship between the Company and P, even though he has not developed the argument fully. Subsequently, with the benefit of the Cayman decision in *Re Shinsun*, Mr Ho has adopted the reasoning there to pursue a more structured

argument as to why P does not qualify as a contingent creditor. This is ultimately the analysis which I find favour with, as explained further below.

37. Significantly, my conclusion is borne out by the context of the global note structure. There are numerous authorities which examine the features of such structure, including in particular that under such structure, only the trustee is entitled to take enforcement action against the issuer of the note, the purpose of the regime was to ensure that the class of bondholders all act through the trustee as the exclusive channel of enforcement, bondholders cannot proceed directly against the issuer unless the trustee fails to take action in accordance with the bond documentation, and should it be otherwise there was potential for multiplicity of actions.

38. On the other hand, P's main arguments are that:- (1) beneficiaries of a debt can petition for winding up; and (2) P is a contingent director as it can acquire direct right to sue the Company in the event definitive notes are issued to P. P also relies on cases on schemes of arrangement in support. Further, P argues that New York law (being the governing law of the Indenture) is irrelevant to the question of P's *locus* under Hong Kong insolvency law.

39. Since I accept the Company's first argument, I also reject P's first argument as explained further below. In gist, I am of the view that P's position is different from that of an equitable assignee of debt.

40. On the other hand, there is some superficial attraction in P's second argument because (1) on the face of it one can say that P is a person who is owed a liability that will become due in future only on the happening of some future event which may or may not occur, namely the

issuance of the definitive notes in P's favour; and (2) there is some force in Mr Chen's argument that P's economic interest would be affected in a winding-up even though P cannot immediately enforce the debt.

41. Upon closer analysis (as detailed further below), however, I am unable to accept such argument of P.

42. First of all, there are authorities on the need for an existing obligation to qualify as a contingent creditor. This is the key reasoning in the Cayman decision of *Re Shinsun*. In the present case, and as a matter of construction of the Notes and the Indenture (whether under Hong Kong law or New York law), P has neither existing contractual relationship with, nor directly enforceable rights against, the Company. This is admitted by P. As such, not until definitive notes are issued, P is not yet a creditor of the Company (whether contingent or otherwise).

43. Second, this is consistent with the framework of the global note structure which is premised on class action to be pursued by the trustee exclusively. Individual bondholders such as P cannot act on their own. If P cannot sue the Company to enforce the debt, it would appear anomalous if P can sidestep such constraint by petitioning for winding up instead.

44. Third, should the position be otherwise, it would lead to duplicity of actions, in that both the Trustee/Holder and individual bondholders (such as P) could pursue winding up relief against the Company at the same time. In contrast, under my decision, there is no duplicity in actions. Prior to the issuance of the definitive notes, only the Trustee/Holder can sue and petition for winding up against the Company. Upon the issuance of the definitive notes in place of the global note,

individual bondholders would have acquired direct rights to sue and petition for winding up against the Company. This is a seamless regime.

45. Fourth, the policy objectives of including contingent and prospective creditors in the meaning of a creditor is to enable the Court to take into account a company's contingent or prospective liabilities in future. Such policy objectives would not be frustrated if P is not recognised as a contingent creditor, because the same amount of debt would have been recognised as liability owed by P to the Holder/Trustee anyway.

46. Fifth, there could be potential of abuse on P's case. Applying P's logic, even before the Notes have matured, every individual bondholder (including P) is already a contingent creditor and can petition for winding up, despite (i) the fact that the debt under the Notes are not yet due and (ii) the lack of directly enforceable rights against the Company. It might lead to floodgates and defeat the purpose of the global note structure.

47. Sixth, insofar as P says this renders the concept of contingent creditor meaningless, this is not the case. Before maturity of the Notes, the Holder can petition as contingent creditor. After maturity, the Holder can petition as actual creditor or, upon issuance of definitive notes, individual accounts holders can petition as actual creditor.

48. Seventh, before P acquires directly enforceable rights, its economic interest is taken care of by the Holder, whether as actual creditor (if the debt is due) or contingent creditor (if the Notes have not matured).

49. Last but not least, cases on schemes of arrangement are different. In any event they concern voting rights on schemes which may

affect economic interests, as distinct from *locus* to present petition which is a more draconian right than a mere voting right for schemes.

50. Having set out an overview of my reasoning, I would now go into the analysis in more details.

G. ANALYSIS

G1. Context of intermediated, dematerialised securities in the international capital markets

51. Before addressing the relevant arguments, I consider it helpful to refer to authorities which examine the salient features of intermediated, dematerialised securities in the international capital markets. As elucidated by these authorities (mostly relied upon by the Company), international bond issuances often use the global note structure, coupled with intermediation and dematerialised securities. Under such structure, the investors have only an indirect beneficial interest in the bonds. This provides a crucial context in considering the status of P in the present case.

52. On behalf of the Company, Mr Ho has cited a number of English authorities to illustrate the features of the global note structure. I would, however, start with some relevant Hong Kong authorities which have considered such features.

53. In *Re Jinro (HK) International Ltd (No 2)* [2003] 4 HKC 637, the Court was concerned with a challenge of the *locus* of the petitioners who claimed to be holder of rights acquired through the Euroclear trading system of a global note called "Guaranteed Floating Rate Notes". The facts are materially different because in that case, the definitive notes were due

to be issued and there were contractual provisions providing that, if the definitive notes were not issued within 45 days as contractually required, the global note will become void such that individual account holders would acquire direct rights. There is little dispute that such individual account holders have standing to petition for winding-up as creditors, and the issue in *Re Jinro* concerned whether the petitioners were successors and assigns of account holders, or otherwise equitable assignees of the direct rights, such that they have *locus* to petition for winding-up. Such issue was answered in the affirmative by Kwan J (as she then was). Whilst the issue is not directly relevant to this case, Kwan J (as she then was) has provided a helpful summary of the global note structure at §§31-40:

> "*The Euroclear system*
>
> …
>
> 31. The Euroclear system is the world's largest clearance and settlement system for internationally traded securities. It also provides a custodian service for securities and is an international central securities depositary (ICSD). The majority of participants in the system are banks, brokers, dealers, custodians, and other institutions professionally engaged in managing new issues of securities, market making, trading or holding the wide variety of securities accepted in the system. The participants trade in the system as principals, notwithstanding that they may trade on their own behalf or on behalf of an underlying investor. GSI was, at all relevant times, a participant in Euroclear and had operated three Euroclear securities clearance accounts. GSAF had its own Euroclear securities account since October 1999.
>
> 32. Prior to the acceptance of a new issue of securities for trading in the system, various criteria would have to be met. The important ones for present purpose, as set out in the 'Guide to acceptance of securities in the Euroclear system' (the User Guide), are as follows.
>
> *(1) Immobilization of securities*
>
> 33. To be accepted for trading in the system, securities must be deposited with one of the Euroclear depositaries and a depositary

is appointed by the Euroclear Operations Centre ('EOC') for each issue accepted in the system. Securities designed for the ICSD are generally issued in the form of a temporary global note which is subsequently exchanged for a permanent global note. Where securities are represented by a global note, these are lodged with a common depositary authorised by Euroclear. Where securities are represented by definitive notes or other certificates, these are lodged with a specialised depositary, generally located in the country in whose currency the notes or certificates are denominated, or where the issuer is located. In this way, *the physical documents which represent the securities traded in the system are 'immobilized' in the Euroclear depositary network. The immobilization of securities enables a high volume settlement to take place without the movement of the underlying physical certificates. The settlement of transfers is done electronically, sales and purchases of such securities are recorded by book entries in the accounts of participants who are recognised as accountholders in respect of the securities*. Payments due in respect of the securities are made by the issuer *via* the paying agents to the common depositary and thence into the Euroclear system. *There is no registry maintained by or under the control of the issuer which records the legal ownership of the securities.*

…

(2) Fungibility

35. *For securities to be accepted in the system, it must be possible to hold them on a fungible basis. Amongst other things, this means that all securities of a same issue must be treated as equivalent.* It is provided in cl 4(a) of the 'Terms and conditions governing use of Euroclear' (the Euroclear Terms) that *no accountholder has entitlement to any specific securities but each will be entitled to transfer (by book entry)*, to deliver or to repossess from Euroclear an amount of securities of any issue equivalent to the amount credited to any securities clearance account in its name. It is further provided in the Euroclear Terms that a security 'shall be deemed to be held in the Euroclear System' if it is standing to the credit of a securities clearance account (cl 4(d)(i)(v)) and that a security held in the Euroclear system 'shall be deemed to be held by the holder of the Securities Clearance Account' to which it is standing to the credit (cl 4(d)(ii)(v)). Hence, *accountholders have a co-ownership right in the notional pool of securities of each category held on their behalf by Euroclear and this intangible right is represented solely by a book-entry record in the securities*

clearance account of the participant, see 'Operating procedures of the Euroclear System' (the Euroclear Operating Procedures) cl 3.2.

(3) Transferability

36. *Securities deposited in the system must be freely transferable between participants, without further reference to or communication with the issuer.* Transfer restrictions are acceptable only if they require the standard certification procedures described in the User Guide. As a general rule, EOC handles certifications only in relation to the exchange of temporary global securities, the payment of income or redemption proceeds, or the exercise of certain custodian operations. Other restrictions on the transfer of beneficial ownership or registered title can only be enforced *outside* the Euroclear system and participants are *solely* responsible for complying with such restrictions. It is also provided in cl 10.3.1(c)(ii) of the Euroclear Operating Procedures that each participant is solely responsible 'for informing itself of the characteristics of the securities it holds, or it intends to hold, or to be recorded on any Account through the Euroclear System including without limitation ... holding or transfer restrictions ...'.

(4) Disclosure

37. EOC does not accept securities of which the terms and conditions require EOC to disclose information about the participants' holdings of the issue. EOC is generally prevented, without a participant's authorization, from disclosing ownership of securities held in the system by applicable law. Moreover, *EOC has no knowledge of the beneficial ownership of securities held by participants, which often hold securities of their own clients in the system*.

…

(5) Enforcement of holders' rights

39. Neither EOC nor its depositaries will enforce the terms of securities against an issuer or guarantor on behalf of persons holding such securities through the Euroclear system. The beneficial owners of the securities must be able to enforce their rights under the terms of the securities against the issuer and/or the guarantor and specific arrangements may be necessary to achieve this when the securities are represented by permanent global certificates. *If there is no trustee for the issue (who will be responsible for enforcing beneficial owners' rights against the*

> *issuer in the case of default) and the issue is evidenced by a global certificate, there should be a 'clearly documented procedure' in place whereby either*: * *Euroclear participants or the beneficial owners can appoint a trustee*; or
> * *the issuer exchanges the global certificate into individual certificates* that can be delivered out of the Euroclear system; or
> * if the issuer cannot issue definitive certificates, a Deed of Covenant or similar provision included in the terms and conditions should state that *the issuer will recognise statements of account, issued by EOC to participants, as evidence of beneficial ownership*.
>
> 40. A full description of an event of default should also be included in the terms and conditions of the securities, for example a declaration of default on the request of a beneficial owner to a fiscal agent or other agent, or as to an automatic default. Euroclear requires that in a default situation the issuer must recognise the beneficial owner's rights in the securities. It is expressly provided in the User Guide at p 27 that 'securities in default' can be held in the Euroclear system."

54. The above is a helpful summary of the global note structure, although it has not addressed specifically the position of an ultimate account holder (commonly referred to as the "UAH") where there is a holder/trustee appointed under the note who will be enforcing beneficial owners' rights on their behalf.

55. More recently, in *Re China Oceanwide*, Linda Chan J held that even if the petitioner has book-entry interests in the specified amount of a global note, the petitioner is not a holder of the note and has no direct right against the bond issuer or guarantor (at §§38-42):

> "38. The combined effect of Sections 2.04, 2.05 and 2.06 is that:
> (1) Only the following persons are Holders of the Notes: (a) Citivic Nominees Limited as nominee of the Common Depositary for Euroclear and Clearstream (Section 2.04(c)); and (b) the Holder whose name and address have been recorded in the Register (Section 2.05(a)); and
> (2) Until final acceptance and registration of the transfer by the Registrar in the Register, a transferee of the Note will not

> become and does not have the rights of a Holder (Section 2.05(c)).
>
> 39. *There is no evidence whatsoever to show that the Petitioner's name and address have been recorded in the Register. It follows that the Petitioner is not a Holder of the Notes.*
>
> 40. *No reliance can be placed by the Petitioner on Section 6.06 or Section 6.07 of the Indenture as both sections expressly provide that only a Holder has the right to institute proceedings* with respect to the Indenture or the Notes or to bring suit for enforcement of payment …
>
> 42. For the above reasons, *I hold that the Petitioner is not a Holder of the Notes and, therefore, does not have the right to commence proceedings with respect to the Indenture or the Notes or to bring suit for enforcement of payment under the Notes. The Petition must be dismissed for this reason alone.*" [Emphasis added]

56. Based on the construction of terms of the global note, Linda Chan J concluded that the petitioner in *Re China Oceanwide* is not a holder of the global note and does not have the right to commence proceedings with respect to the indenture or the notes. It may be noted that the indenture in that case also contains the "No Action Clause" and the "Right to Payment Clause" (also under Sections 6.06 and 6.07), but the Court pointed out that such provisions do not assist the petitioner as they expressly provide that only a holder has the right to institute proceedings with respect to the indenture or the notes or to bring suit for enforcement of payment. Moreover, whilst the petitioner in that case seeks to rely on the "Downstream Purchaser point" in *Re Jinro*, Linda Chan J explained (among others) at §50(5) that *Re Jinro* concerned situation where neither Euroclear nor its depositaries will enforce the terms of the securities whereas *Re China Oceanwide* concerned an indenture with provisions stipulating who have the right to enforce the indenture and the notes and how it should be done. Such analysis should apply equally to the position

of P under the Notes and the Indenture (which similarly make provision that only the Holder has the right to enforce the Indenture and the Notes), although Linda Chan J did not go further to consider whether the petitioner may be regarded as a contingent or prospective creditor.

57. Turning to the English authorities relied on by the Company, I would start with *Elektrim SA v Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178; [2009] 2 All ER (Comm) 213, where the English Court of Appeal explained in a similar vein that only the holder of a note has the right to take enforcement action against the issuer, with particular reference to the "No Action Clause", at §§1-3 and 91:

> "**[1]** The principal question on this appeal relates to the construction of a 'no-action' clause in a bond issue, whereby *only the trustee of the issue is entitled to take enforcement action against the issuer*, and *bondholders cannot proceed directly against the issuer unless the trustee fails to take action in accordance with the bond documentation*. Such clauses have been common in bond issues governed by English law since the nineteenth century, and in bond issues in other common law countries.
>
> **[2]** The use of a trustee is an effective way of centralising the administration and enforcement of bonds. *Bondholders act through the trustee, and share pari passu in the fortunes of the investment, and do not compete with each other. The trustee represents and protects the bondholders, who are treated as forming a class*, and who give instructions to the trustee through a specified percentage of bondholders. Such a scheme promotes liquidity. *Individual bondholders rely on the trustee as the exclusive channel of enforcement* and can be confident that on enforcement principal and interest will be distributed pari passu.
>
> **[3]** No-action clauses are the subject of many decisions in the United States and Canada. They include the recent decision of the Ontario Court of Appeal in *Casurina Ltd Partnership v Rio Algom Ltd* (2004) 40 BLR (3d) 112, in which it upheld the lower court's approval of the approach in the United States (citing *Feldbaum v McCrory Corp* 1992 Del Ch LEXIS 113) that *in consenting to no-action clauses by purchasing bonds, bondholders waive their*

> *rights to bring claims that are common to all bondholders, and thus can be prosecuted by the trustee*, unless they first comply with the procedures in the instrument constituting the bonds. As I said in *Highberry Ltd v Colt Telecom Group plc* [2002] EWHC 2503 (Ch) at [12], [2003] 1 BCLC 290 at [12], no-action clauses have even been the subject of discussion in the International Court of Justice (although not the subject of decision) in relation to insolvency proceedings brought directly by bondholders: see *Re Barcelona Traction, Light and Power Co Ltd* (*Belgium v Spain*) (*second phase*) [1970] ICJ Rep 3 at 104–105 *per* Judge Sir Gerald Fitzmaurice QC.
>
> **[91]** *The purpose of the regime was to ensure that the class of bondholders all acted through the Trustee.* That ensured that they all shared equally in the fortunes of the investment and that there was no competition between the bondholders. *If an individual bondholder were free to pursue a claim based on a loss caused to the bondholders as a class, then either there was the potential for multiplicity of actions or for duplication of actions brought by the Trustee on the one hand and individual bondholders on the other.*" [Emphasis added]

58. As explained in the above passages, in a typical structure of a global note with a "No Action Clause", the trustee represents and protects the bondholders, who are treated as forming a class, and the bondholders rely on the trustee as the exclusive channel of enforcement because, in consenting to the "No Action Clause" by purchasing bonds, bondholders waive their rights to bring claims that are common to all bondholders, and thus can be prosecuted by the trustee. The purpose of the regime was to ensure that the class of bondholders all acted through the trustee, such that there was neither competition between the bondholders, nor the potential for multiplicity of actions or for duplication of actions brought by the trustee on the one hand and individual bondholders on the other.

59. That the bondholders have the right to sue only their own direct intermediaries (but not the issuer) has been confirmed by the English

Court of Appeal in *Secure Capital SA v Credit Suisse AG* [2017] EWCA Civ 1486; [2018] 1 BCLC 325 (at §§9-11, 46-50, 52):

> "**[9]** *Typically, as in this case, the securities are represented by a bearer note that is physically held on a permanent basis by a custodian. In this way, the note is said to be 'immobilised'. It is not the bearer note, but interests in the note, that are traded through the Clearstream system. This is achieved through a descending succession of interests. The custodian holds the note for the Clearstream system. Clearstream maintains accounts for members (banks and others) which hold and deal in interests in securities as account holders.* Each account holder's interests in securities at any time are recorded by Clearstream. The interests are fungible and are traded between account holders through electronic book entries. *Account holders may hold interests for themselves as principal or to the order of their customers (account owners).*
>
> **[10]** *The system operates on the basis of a 'no look through' principle, whereby each party has rights only against their own counterparty.* Payments of sums due on the securities are 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.
>
> **[11]** *Typically, as in the present case, account holders will become entitled to a direct interest in notes only if there has been default in the payment of principal due on the notes* or if Clearstream were closed permanently or for a continuous period of 14 days.
>
> **[46]** The rights of parties to sue Credit Suisse on the contract constituted by the Notes and the relevant documents are clearly set out in those documents.
>
> **[47]** *The only party entitled to sue is the holder of the Notes represented by the PGS, ie BNYM, unless one of a limited number of specified events has occurred.* The obligations of Credit Suisse are owed to the bearer for the time being of the PGS. The Programme Memorandum provides that the holder would 'be deemed to be and may be treated as its absolute owner *for all purposes*' (my emphasis). *The persons shown in the records of Clearstream (ie the account holders, not account owners) must look solely to Clearstream 'for his share of each payment made by the Bank and in relation to all other rights arising under the Global Securities'* (my emphasis). This is, as Secure Capital

> accepts, the 'no look through' provision which is fundamental to the workings of the settlement systems in interests in immobilised securities. Secure Capital's submission that it is limited in its effect to payment obligations is incompatible with the emphasised words. This provision is concerned with the rights of an account holder, which in the present case was RBSL. It would be eccentric to suggest that account holders, who may hold interests on their own account, must look only to Clearstream or other settlement system but account owners, who are even more removed from the underlying Notes, are not so constrained.
>
> **[48]** The general position, that only the holder of the Notes enjoys enforceable rights against Credit Suisse, is further made clear by the provisions that, in limited circumstances, enable parties to proceed directly against Credit Suisse.
>
> **[49]** If principal in respect of any Notes was not paid when due, the PGS could be exchanged for definitive securities which could then be distributed among those with interests in the Notes, creating a direct relationship with Credit Suisse and enabling the holders to sue Credit Suisse directly.
>
> **[50]** Additionally, cl 2.1 of the Deed of Covenant provided that, on the giving of notice in the event of default in the payment of principal, each account holder with interests in the Notes would 'acquire against the Bank all rights ("Direct Rights") that it would have had if, immediately before each such Acquisition Time, it had been the holder of the Original Securities'. This is expressed to include 'without limitation' the right to receive all payments due at any time on the Notes. The effect is again to create rights in favour of account holders (but not account owners) that are directly enforceable against Credit Suisse. This latter point is made expressly clear by cl 4.2 of the Deed which provides that each relevant account holder 'is entitled to receive payment of the amount due in respect of each of its Entries and of all other sums referable to its Direct Rights to the exclusion of any other person'.
>
> **[52]** The overall effect of these express provisions is clear. *The only party with a right to sue Credit Suisse is BNYM as holder of the Notes, unless there is default in the payment of principal on the Notes, in which event account holders may acquire directly enforceable rights against Credit Suisse.*" [Emphasis added]

60. The above makes it clear that, before an account holder becomes entitled to a direct interest in the notes, the only party with a right

to sue the issuer is the holder of the notes. The system operates on the basis of a 'no look through' principle, whereby each party has rights only against their own counterparty. As such, account holders must look solely to Clearstream or Euroclear (as the case may be) for their share of each payment and in relation to all other rights arising under the global note.

61. Against such backdrop, investors with "book-entry interests" have often been said to be holding the notes indirectly, or that they have only "sub-interests" in the notes. For instance, in *Deutsche Trustee Company Ltd v Bangkok Land (Cayman Islands) Ltd* [2019] EWHC 657 (Comm), Knowles J explained that the investors of such bond issuance have only "sub-interests" in the bonds (at §§8, 22, 44):

> "8. The Bonds were issued in global form. *Tradeable interests in the Bonds are held by underlying investors ('Persons with Sub-Interests') through holders of accounts at clearing systems ('Accountholders')*. A global certificate (the 'Global Certificate') is registered in the name of The Bank of New York Depositary (Nominees) Limited ('BNY Nominees'), as a nominee for a common depositary for the clearing systems ...
>
> 22. The Court finds as follows:
>
> (1) The Bonds were issued in global form with the Global Certificate ... The Bonds are held in the name of BNY Nominees, as a nominee for a common depositary for the Clearing Systems.
>
> (2) The Bonds were listed on the London Stock Exchange and were traded through the Clearing Systems, which provide electronic book entry trading systems for interests in securities and act as clearing houses for trades in those interests.
>
> (3) *The Clearing Systems maintain accounts for Accountholders, who hold interests in securities such as the Bonds on behalf of themselves or Persons with Sub-Interests* ...
>
> 44. The Trustee argues, in the Court's view correctly, that *Persons with Sub-Interests have been trading not in the Bonds but in interests in the Bonds, which are held through Accountholders and the Clearing Systems* …" [Emphasis added]

62. In *Winterbrook Global Opportunities Fund v NB Finance Ltd* [2019] EWHC 737 (Ch), Marcus Smith J explained that the claimant, being an investor of such bond issuance, had only an indirect beneficial interest in the bonds (at §8):

> "8. The Claimant … is the beneficial owner of some of the Notes. As is common in note issues such as these, the Notes were issued in global note form, and held by a common depositary on behalf of the relevant clearing systems, Euroclear and Clearstream. *Under this structure, the securities are issued in global form and held by the depositary for the clearing system.* Investors hold their interests through accounts at the clearing systems or indirectly through custodians who have accounts at the clearing systems. *[The Claimant] holds its Notes indirectly.*" [Emphasis added]

63. In *Madison Pacific Trust Ltd v Shakoor Capital Ltd* [2020] EWHC 610 (Ch), Zacaroli J explained that the underlying investors of such bond issuance are only beneficiaries under sub-trusts (at §§14-17):

> "14. In relation to the 2010 Notes only one Note has been issued, a permanent global note which is deposited with a common depositary who holds it on behalf of Euroclear and Clearstream (the 'Clearing Systems'). The Clearing Systems facilitate trading in the Notes by crediting interests in the global note to account holders, or 'participants' in the Clearing Systems.
>
> 15. *The participants hold such interests on behalf of persons in the market who wish to acquire beneficial interests in the global note, the ultimate account holders ('UAHs'). The UAHs may hold their interest directly with a participant in the Clearing System or through one or more intermediaries.* All dealings in interests in the notes take place by way of book entries, in the books either of the Clearing Systems, the participants or intermediaries.
>
> 16. *As a matter of English law, there is a chain of contractual and proprietary relationships between the Issuer and each UAH*, as follows (see, for example, Gullifer and Payne, *Corporate Finance Law* (2nd ed) at 389-390). The common depositary has contractual rights (set out in the global note, which incorporates the terms of the Trust Deed). The Clearing System has contractual rights against the common depositary; the participants have contractual

> rights against the Clearing Systems; and *where there are no further intermediaries the UAH has contractual rights against the participant*. *If there are further intermediaries between the participant and the UAH, then each intermediary has contractual rights against the entity next above it (i.e. closer to the Issuer) in the chain.*
>
> 17. In addition, *the contractual rights of each entity against the entity next above it in the chain are typically held on trust for the entity next below it in the chain*. For example, a participant's contractual rights against the Clearing System are held by it for the benefit of the intermediary next below it in the chain. *The common depositary's contractual rights under the global note against the Issuer are thus held via a trust and series of sub-trusts for each UAH*." [Emphasis added]

64. In *Galapagos Bidco SARL v Kebekus* [2021] EWHC 68 (Ch), Zacaroli J explained that under the global note structure the underlying investors have only indirect beneficial interests in the note (at §§68-70):

> "68. … the [high-yield notes ('HYN')] were held in global form, so that the only Holder was the Common Depository. Beneficial interests in the HYN were held through a series of sub-participations: the Holder held its interest for the benefit of the clearing systems, who held for the benefit of account holders, who in turn held for the benefit of the ultimate beneficial holders, either directly or through one or more intermediaries ... *Under English law, this is analysed as a series of sub-trusts* ...
>
> 69. The HYN Trustee is appointed under the Indenture as trustee for the benefit of the Holders of the HYN ...
>
> 70. *Since ... the only direct beneficiary of the trust constituted by the Indenture was the Common Depository (as the only 'Holder' of HYN ...), all those who held beneficial interests in the HYN were indirect beneficiaries as a result of the sub-participation arrangement described above*." [Emphasis added]

65. In the premises, I accept Mr Ho's submissions that, whilst the global note structure and intermediation increase liquidity and make investing and trading simpler for investors, they do not confer any direct

right on them to sue the bond issuer for payment. I further accept that the enforcement mechanism under a global note is designed to achieve the collectivity of proceedings, so that bondholders as a class would all act through the trustee as the exclusive channel of enforcement. It seems plain to me that, having regard to the purpose and context of a global note (as reflected in the terms of the Notes and the Indenture set out in Section B2 above), it would be anomalous and contrary to commercial common sense to suggest that, whilst an ultimate account holder cannot exercise any direct rights under the Notes against the Company, such ultimate account holder can somehow petition for winding-up and thereby bypass the limitations otherwise imposed under the design of the global note structure.

G2. Beneficial owner of a debt

66. The first argument relied upon by Mr Chen on behalf of P is that, as a beneficial owner of part of the underlying debt of the Note, P has standing to petition for winding up of the Company.

67. On behalf of the Company, Mr Ho contends that a bond investor such as P who is a mere trust beneficiary, *qua* beneficiary alone, has no standing to present a winding-up petition against the bond issuer. I agree.

68. Mr Ho has cited a few authorities in support.

69. In *Re Uruguay Central and Hygueritas Railway Co of Monte Video* (1879) 11 ChD 372, Jessel MR held at pp. 380-383 as follows:

> "There can be no question that upon that deed the holders of the bonds are not creditors: *they are merely cestuis que trust of a charge, having a right, no doubt, to put their trustees in motion to*

> *compel payment under the covenant, but not having any independent right to sue the company either at law or in equity.*
>
> … *it was not intended to be a bond enforceable by any one for his own benefit*; because, if one of the bondholders could sue, he could only get judgment on behalf of all. *They are pari passu bonds*. Of course, it never could have been meant that one should be able to get judgment for himself. Even in cases where it has been held that debts are created by these instruments, *one bondholder cannot, by getting a judgment, get paid in priority to the other bondholders*.
>
> … When you look at the provisions of the deed, *the mode of payment is, for the company to pay to the trustees who are to pay to the bearers of the coupons. So that it is not a covenant to pay to the bearers direct, but to pay through the trustees under the provisions of the deed.* Now, *I cannot imagine that this document can give either the bearer of the coupons as regards interest, or the bearer of the bond as regards principal, an immediate right of action for money lent or for money due.* It is not the meaning of the transaction. The whole transaction means this, that both the share and the bond are issued as a mode of securing to the person advancing the money for making the line certain benefits, and he takes the benefits as they are given to him. That does not appear to me, as I said before, to create any direct debt from the company. In fact it is hardly possible it can be so, because *the company is liable to pay the trustees under the deed, and they cannot be sued twice over*. *Are they to have two actions brought, one by the trustees, and the other by the holder of the coupon; and are they to be liable to every person who cuts a coupon off a bond to an action, simply because he is the holder of a coupon? It does not appear to me that was the intention of the parties, which, after all, is the governing rule in deciding questions of equitable debt, to create a debt for which the holder of the coupon could sue directly.* I think, therefore, that *the holder of the coupon, who claims now for interest unpaid, is not a creditor either at law or in equity* within the meaning of the Companies Acts." [Emphasis added]

70. Significantly, the bond structure in *Re Uruguay* resembled that of a global note in international capital markets practice, under which a bondholder typically could not sue the issuer of the bond directly and can only act through the trustee. In finding that a bondholder is not a creditor either at law or in equity, Jessel MR noted that bondholders do not have any independent right to sue the issuer, the bondholder cannot get a

judgment in priority to other bondholders, and there should not be duplicity of actions by the trustee and bondholders. Such considerations resonate with the design of the global note structure examined above. The lack of a direct debt owed by the issuer to the bondholder is thus critical.

71. In this regard, Mr Chen for P seeks to rely on Harris J's decision in *Re China Cultural* which I will address below. Mr Chen also argues that *Re Uruguay* was decided at a time when English law did not confer any standing on a contingent creditor to petition for winding-up. Nevertheless, this is beside the point because, for the purpose of P's first argument, the focus is whether a beneficial owner of a debt under a trust (or sub-trust) has standing to present a winding-up petition as creditor. In any case, the reasoning of *Re Uruguay* would militate against P's second argument on contingent creditor because it emphasizes the need for a direct debt (or direct debtor-creditor relationship) in order to qualify as a creditor. This is logically speaking a *prior* question to be decided *before* moving on to consider, if there is indeed a direct debt and hence the status of creditor is established, whether the debt is (i) immediately payable (i.e. actual liability), (ii) payable in future upon certain event (i.e. contingent liability), or (iii) definitely payable at certain time in future (i.e. prospective liability). As I will explain later, such approach is amply supported by authorities. For present purposes, it suffices to say that *Re Uruguay* is an authority in support of the proposition that a trust beneficiary is not a creditor and does not have standing to petition for winding-up.

72. In *Re Dunderland Iron Ore Co Ltd* [1909] 1 Ch 446, a conclusion similar to *Re Uruguay* was reached by Swinfen Eady J at pp. 452-453 as follows:

> "*In these circumstances are the petitioners, the debenture stockholders, creditors? There is no covenant by the company with them. The covenant in the trust deed is between the company and the trustees.* There is no covenant in the stock certificate, and there is no statement therein beyond a copy of the conditions contained in schedule 1 of the trust deed. 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.* It is not a case in which there is any negotiable security or any coupons issued. The petitioners are merely the registered holders of debenture stock, and the only covenant to pay the principal and interest to the stockholders is a covenant made between the company and the trustees.
>
> On that state of facts, the stockholders as such are not creditors of the company. *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* ... I therefore determine that the petitioners are not in respect of their holdings of stock creditors of the company." [Emphasis added]

73. The emphasis of the Court is, again, on the lack of any direct contract or covenant between the debenture holder and the company, as a result of which the debenture holder is not entitled to (i) sue the company as direct creditor and (ii) present a winding-up petition as creditor.

74. More recently, in *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240, Lord Collins held at §§62-68 as follows:

> "**62** Consequently it has been the consistent practice … for almost 300 years that, where a beneficiary brings an action in his own name to recover trust property, the trustees should be joined as defendants. … The purpose of joinder has been said to ensure that they are bound by any judgment and to avoid the risk of multiplicity of actions: *Lewin on Trusts*, 18th ed (2008), para 43-05. *But joinder also has a substantive basis, since the beneficiary*

> *has no personal right to sue, and is suing on behalf of the estate, or more accurately, the trustee.*
>
> **63** The conclusion that in a beneficiary's derivative action the trustee must be a party is not undermined by those cases in which it has been held, or assumed, that an action by an equitable assignee of property (such as a debt, or intellectual property) can proceed, or is properly constituted, without the joinder of the assignor at the outset of proceedings.
>
> **64** The starting point is that if an equitable assignee sues a third party, the assignor must be joined as a defendant …
>
> **65** But it is not an invariable rule …
>
> **67** In more modern times it has been held that, although the practice was to join the assignor, the requirement is a procedural one, the absence of which can be cured. The assignor must be joined before a final judgment can be obtained by the assignee, but the action is validly constituted without joinder, so that if the assignee sues without joining the assignor, the action is in time for the purposes of limitation: …
>
> **68** *What distinguishes these cases from the present one is that in the case of an equitable assignment the assignee is the true owner and the assignor is a bare trustee.* I agree with Lord Walker of Gestingthorpe JSC that there is no real analogy between an equitable assignee and a beneficiary interested in an unadministered estate." [Emphasis added]

75. The general position, therefore, is that the beneficiary of a trust property has no personal right to sue. This is echoed by cases like *Re Canberra Babington Pty Ltd* [2021] NSWSC 552, where Emmett AJA stated at §27 that, "Save in special or exceptional circumstances, a beneficiary under a trust has no cause of action against a third party in relation to injury to trust property"; and *McEneaney v Stevens* [2017] EWHC 993 (Ch), where Deputy Judge Edward Murray held at §17 that "The general rule is that since trustees administer the trust fund as principals and not as agent for the beneficiaries, the trustees are normally the proper claimants in proceedings against third parties in actions based

on breach of contract or tort and other causes of action arising in the course of administration of the trust". Of course, these cases are to be distinguished from cases where the bond documentation expressly confers a direct right of enforcement on the trust beneficiaries, such that the beneficiaries would have standing to present a winding-up petition: see e.g. *Re Olathe Silver Mining Co* (1884) 27 ChD 278, *per* Pearson J at p.283.

76. Significantly, as noted in *Roberts v Gill & Co*, the position of a beneficiary of a trust property is different from that of an equitable assignee of property. As explained by Emmett AJA, an equitable assignee is the true owner of the property and the assignor is a bare trustee, and hence the practice or requirement to join the assignor is a procedural one. Indeed, it is well-established that, unlike the position of a trust beneficiary, an equitable assignee of a debt is a creditor and has standing to present a winding-up petition: see e.g. *Re Steel Wing Co Ltd* [1921] 1 Ch 349, *per* P O Lawrence J at p. 357; *Re Mitchell McFarlane & Partners Ltd* [2002] EWHC 3203 (Ch), *per* N Strauss QC at §10; *Kapoor v National Westminster Bank* [2011] EWCA Civ 1083; [2012] 1 All ER 1201, *per* Etherton LJ at § 30. Such distinction is pertinent when it comes to the analysis of *Re China Cultural*.

77. As mentioned above, Mr Chen relies heavily on *Re China Cultural* because, on the facts of that case, the petitioner's interests in the debt arose by way of *both* equitable assignment and a declaration of trust: see the third issue set out at §8 of the decision (referring to both equitable assignment and a declaration of trust), and also §20 of the decision where Harris J said the issue is whether it is necessary for a beneficiary under a trust to join the trustee as a party to a petition to wind up a company

(without differentiating between the position of a trust beneficiary and an equitable assignee). With due respect, it would appear that Harris J has conflated the position of a beneficiary of trust with an equitable assignee of debt, probably because his attention was not drawn to authorities on the position of a trust beneficiary. Instead, Harris J relied on authorities on equitable assignment of debts such as *Re Steel Wing* to arrive at his conclusion at §§24-28.

78. Specifically, in §§25-26 of *Re China Cultural*, Harris J relied on the reasoning in *Re Steel Wing* and the Privy Council's decision approving the same in *Parmalat Capital Finance Ltd v Food Holding Ltd* [2008] BCC 371, [2009] 1 BCLC 274, §§6-8. In gist, as held by those decisions, an assignee of part of a debt is required to join all parties interested in the debt in an action to recover the part assigned to him because the Court cannot adjudicate completely and finally without having such persons before it; but this does not apply to a winding-up petition which only puts into effect a process of collective execution for the benefit of all creditors and in the course of that process, the rights of creditors may have to be determined but such determination is not necessary at the stage of making winding-up order, and thus an equitable assignor (or assignee) has a sufficient interest to present a winding-up petition without joining the other. In my view, such reasoning does not apply equally to a trust beneficiary because (i) whilst a trust beneficiary cannot petition for winding-up, a trustee (who can represent all beneficiaries) can petition for winding-up alone, and (ii) unlike the case of equitable assignee, the joinder of the trustee is a substantive as opposed to mere procedural requirement.

79. Therefore, I do not accept Mr Chen's argument that one could rely on *Re China Cultural* and thereby ignore well-established authorities that, unlike an equitable assignee, a trust beneficiary is not entitled to present a winding-up petition. It follows that I reject P's first argument.

G3. "Contingent" and "prospective" creditor

G3.1 Introduction

80. On behalf of P, Mr Chen argues in the alternative that P is a contingent or prospective creditor of the Company under section 179(1) of the Ordinance. In short, Mr Chen argues that, since P may be entitled to request for issuance of definitive notes in certain specified circumstances whereupon P can directly enforce its rights against the Company, P is a contingent creditor as the Company's liability is contingent on the event of the issuance of definitive notes.

81. In response, Mr Ho on behalf of the Company initially argues that because the Notes have already matured and the underlying debt is already due, the same debt cannot at the same time be owing and contingent. During oral submissions and in the Company's Supp Skel in reliance of the Cayman decision of *Re Shinsun*, Mr Ho's further argument is that, since there is no existing obligation or debtor-creditor relationship between P and the Company, P does not qualify as a contingent creditor.

82. As mentioned above, Mr Ho's initial argument on contingent debt does not address the point because (1) it begs the rhetorical question whether, had the debt not matured (and hence could at best be contingent), P could then be a contingent creditor (hence having *locus* to petition for winding up) – if so it seems absurd to suggest that somehow because the

debt has matured, P is in worse-off position; and (2) it fails to engage directly with the argument of P that it can sue the Company *contingent* on the event of issuance of definitive notes in its favour. Moreover, it may be conceptually open to P to argue that the debt is not contingent for the Holder but it may still be contingent for P who has no immediate right to payment. Hence, one still has to go back to the question whether the event of issuance of definitive notes renders P a contingent creditor. That said, Mr Ho's initial argument does highlight a problem of P's case, namely that there will be more than 1 creditor of the same debt which results in duplicity and is one of the reasons relied on by the Cayman Court in rejecting the petitioner's argument (see *Re Shinsun* at §155).

G3.2 Meaning of "contingent creditor" and "prospective creditor"

83. Before dealing with the parties' arguments, I accept Mr Ho's submissions that, as section 179(1) of the Ordinance is derived from English insolvency legislation, the meaning of "contingent creditor" and "prospective creditor" in equivalent English legislation is also pertinent.

84. In Mr Ho's written submissions, he has included a helpful Appendix which traces the evolution of English insolvency legislation concerning "contingent creditor" and "prospective creditor". For present purposes, I do not think it is necessary to go into such evolution in details, although it would be illuminating to highlight some key developments and relevant case law.

85. The winding-up regime under the Companies Act 1862 did not have the concept of "contingent creditor" and "prospective creditor".

86. In 1870, the winding-up regime in respect of insurance companies introduced the concept of "contingent creditor" and "prospective creditor". Section 21 of the Life Assurance Companies Act 1870 provided as follows:

> "The Court may order the winding up of any company, in accordance with The Companies Act, 1862, on the application of one or more policy holders or shareholders, upon its being proved to the satisfaction of the Court that the company is insolvent, and *in determining whether or not the company is insolvent the Court shall take into account its contingent or prospective liability under policies and annuity and other existing contracts*; but the Court shall not give a hearing to the petition until security for costs for such amount as the judge shall think reasonable shall be given, and until a prima facie case shall also be established to the satisfaction of the judge ..." [Emphasis added]

87. It is noteworthy that at this stage, the English legislation only made an extension to cover contingent or prospective liability under policies and annuity and other existing contracts with insurance companies, and there should be no question that there was existing contract or legal relationship between the policy holders and the insurance companies. As can be seen, this in fact tallies with the meaning of contingent creditor under English case law which requires an "existing obligation".

88. In 1907, the 1870 winding-up regime in respect of insurance companies was extended to all companies. As provided in Section 28 of the Companies Act 1907:

> "In determining whether a company is unable to pay its debts within the meaning of section eighty of the Companies Act, 1862, *the court shall take into account the contingent and prospective liabilities of the company*, and *any contingent or prospective creditor shall be a creditor entitled to present a petition for winding up the company* under section eighty-two of that Act:

> Provided that the court shall not give a hearing to a petition for winding up the company by such a creditor, until such security for costs has been given as, the court thinks reasonable, and until a prima facie case for winding up has been established to the satisfaction of the court." [Emphasis added]

89. As submitted by Mr Ho, the rationale for extending the regime for insurance companies to all companies and thus allowing contingent and prospective creditors to petition for a winding-up is explained in the *Report of the Company Law Amendment Committee* (1906) (Cd 3052) at §43:-

> "Greater facilities are also wanted, we think, for winding up insolvent companies at the instance of creditors whose debts are not immediately payable. As things stand, a creditor must, in order to obtain a winding-up order, be in a position to prove that there is a debt presently payable to him from the company. *If his debt is due on a current bill, bond or debenture, the time for the payment of which has not yet arrived, he has no remedy by a winding-up petition, and this although the company may be notoriously insolvent. In the meanwhile the company may be disposing of its assets to his prejudice or contracting new liabilities, and when at last his debt matures and he obtains a winding-up order, he may find that the interim transactions, having been completed three months before the winding-up, cannot be impeached.* In the case of life assurance companies the Life Assurance Companies Act, 1870, enables the Court to order a winding-up on the application of any one or more policy holders, upon giving proof to the satisfaction of the Court that the company is insolvent; and, in determining whether or not the company is insolvent the Court is to take into account the company's contingent or prospective liability under policies and annuity and other existing contracts. *We think that the principle of this section should be extended to the case of other companies, and that a creditor, whose debt is not yet payable, should be at liberty to present a petition for winding-up*, and the Court be empowered to make an order, where insolvency is proved, taking into account the debts due and to become due ... *These amendments if adopted would, we think; make it possible to put an end by winding-up proceedings to many objectionable companies.*" [Emphasis added]

90. The mischief sought to be redressed by the legislative amendment is the potential lacuna and abuse whereby a company may be

able to dispose of its assets or contract new liabilities even though the company is plainly insolvent upon taking into account not only its current but also contingent or prospective liabilities, and on such basis a contingent or prospective creditor should be afforded standing to present a winding-up petition to protect such creditor's interests. This is particularly the case where, without such standing, *no person* would be in a position to present a winding-up petition on account of such contingent or prospective liability.

91. Pausing here, whilst there is some superficial attraction in Mr Chen's argument that the economic interests of ultimate account holders of the Notes (such as P) would be affected in a winding-up and hence they should similarly be afforded standing to present winding-up petition, their position is in fact different. It must be borne in mind that the purpose of the regime of the global note structure is to ensure that the class of bondholders would all act through the trustee as an exclusive channel. Therefore, it does not accord with such design to allow individual bondholders to be at liberty to petition for winding-up when it is accepted that they could not bring any action to directly enforce their debt. More importantly, the position of such bondholders is already safeguarded under the global note structure. Indeed, even in the event where the Notes have not yet matured, their position would be safeguarded by the holder/trustee who may present a winding up petition (whether as actual or contingent creditor) on their behalf. Thus it does not follow from the rationale of the aforesaid Report that bondholders such as P must be afforded standing to present a winding-up petition.

92. After 1907, there were further amendments to the English insolvency legislation in 1908, 1929, 1948, 1985 and 1986, but the position

on contingent and prospective creditors has remained more or less the same for all practical purposes.

93. Insofar as the position in Hong Kong is concerned, the Ordinance was enacted in 1933 and modelled on the Companies Act 1929. Specifically, section 179 of the Ordinance is taken from section 170 of the Companies Act 1929. It is common ground that the English and Hong Kong statutes do not provide a definition of "contingent creditor" and "prospective creditors". It is therefore necessary to consider English and Hong Kong case law as to the meaning of the same.

94. In *Re William Hockley Ltd* [1962] 1 WLR 555, Pennycuick J held at p. 558 as follows:

> "Section 224 (1) of the Act of 1948, provides, that a winding-up petition may be presented either by the company or by any creditor, including any contingent or prospective creditor or contributory. The list of persons who may present a petition appears to be exhaustive ... Indeed, it is difficult to imagine circumstances in which a stranger to the company could have any locus standi to present a petition in any capacity other than that of a creditor, nor does Mr. Bickford Smith suggest the contrary. His contention is that on February 7, 1962, the petitioning creditor was a contingent creditor of the company.
>
> *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*. … It is necessary, therefore, to consider the nature of the petitioning creditor's rights as they stood at February 7, 1962 [i.e. the date on which the petitioner presented the petition]" [Emphasis added]

95. What is important is that, under such formulation, a contingent creditor denotes a person towards whom *under an existing obligation*, the company may become subject to a present liability upon the

happening of some future event. Such formulation requires an existing obligation, even though the liability to pay may only be triggered upon the happening of some future event.

96. In *Stonegate Securities Ltd v Gregory* [1980] Ch 576, Buckley LJ held at p. 579 as follows:

> "In that context [of section 224(1) of the Companies Act 1948] ... 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; and a 'prospective creditor' is a creditor in respect of a debt which will certainly become due in the future, either on some date which has been already determined or on some date determinable by reference to future events."

97. Therefore, the key difference between a contingent creditor and a prospective creditor is that the debt of the former will only become due in an event which may or may not occur, whereas the debt of the latter will certainly become due in future. It is true though that Buckley LJ did not focus on the need for an existing obligation, although arguably this may be implied as he was considering a debt owed by the company (presumably under existing obligation) which has not yet become due.

98. Turning to the authorities in Hong Kong, in *Re Universal Dockyard Ltd* [2004] 1 HKLRD 935, Kwan J (as she then was) held at §25 that:

> "… As for a contingent claim, a "contingent creditor" in s.124(1) of the Insolvency Act 1986 (equivalent to s.179(1) of Cap.32 and provides that a contingent or prospective creditor may petition to wind up a company) has been held to denote "a person towards whom, under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date" (*Re Williams Hockley Ltd* [1962] 1 WLR 555 at p.558). So the expression of a contingent claim is of equally wide import."

99. It is significant that Kwan J (as she then was) adopted the formulation of Pennycuick J in *Re Williams Hockley* which requires an existing obligation in order for a person to qualify as a contingent creditor (even though she regarded the expression as being of wide import).

100. In *Re Jackin Total Fulfilment Services Ltd* [2008] 3 HKLRD 475, DHCJ Harris SC (as he then was) held at §22 as follows:

> "It is clear that a person to whom a company has a liability to pay a debt contingent on the occurrence of a future event has *locus* to issue a winding-up petition: section 179(1). This is because although he is not entitled to immediate payment he will still be affected if the company is insolvent. He cannot, however, serve a statutory demand. …"

101. The formulation in *Re Jackin Total* is wider, as it is not predicated upon an existing obligation, and on the face of it P's argument can fit into such formulation. Further, Mr Chen also emphasises that although P is not entitled to immediate payment, P will still be affected if the Company is insolvent. Whilst there is attraction in such argument, it appears to me that the matter ultimately turns on whether, as a matter of law, P does qualify as a contingent creditor. In this regard, it would appear that in *Re Jackin Total*, the point concerning the need for an existing obligation was not argued and, on the facts, there was plainly an existing contractual relationship and obligation between JSM and the company question, even though the precise amount which will be payable would only be known upon the event of completion of taxation.

102. Based on the relevant authorities including in particular *Re Williams Hockley* and *Re Universal Dockyard*, I am of the view that, on balance, there has to be an existing legal relationship or obligation between

a person and a company before such person may qualify as a creditor of the company. In the case where a liability may become due in future under such existing relationship or obligation, then the person would be a contingent creditor of the company. Under such formulation, P would not qualify as a contingent creditor because there is, at present, no existing contractual relationship and obligation as between P and the Company.

G3.3 Cayman decision of Re Shinsun

103. My analysis is borne out by the recent Cayman decision of *Re Shinsun*. In that case, issues as to standing and authority have arisen, and the petitioner says that it is a contingent creditor with standing and is otherwise authorised to proceed with winding-up (at §2). David Doyle J, sitting in the Grand Court of the Cayman Islands, found against the petitioner on both issues (at §3). The position of the petitioner is analogous to P, in that the petitioner (i) was not a party to the indenture, (ii) was not the holder of the note, and (iii) was an indirect investor through the Hong Kong Monetary Authority as a participant with Euroclear (at §4). The indenture in that case also contains various provisions similar to those of the Indenture here (at §5).

104. Although the facts in that case are different, the issue on standing is plainly on point and relevant to the present case. Like the present case, the petitioner there has no direct rights against the company in question and, 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 therein. This is analogous to P's position here.

105. Like English and Hong Kong statutes, the Cayman insolvency legislation does not provide a definition of a "contingent creditor" and therefore it is necessary to resort to relevant case law (at §62). At §64, David Boyle J cited the dicta of Pennycuick J in *Re William Hockley* at p. 555. He went on to consider that it remains good law, at §§65-68:

> "**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 <u>there must be an existing obligation</u> 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, <u>under a contractual obligation</u> 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, <u>under an existing obligation</u>, 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'."

106. At §§70-76, David Boyle J went on to consider a number of other English authorities which support the above analysis. In particular:

(1) In *Re SBA Properties Ltd* [1967] 1 WLR 799, on the hearing of a winding-up petition, a bank claimed to be entitled to be heard as a contingent creditor in respect of the costs of an action brought by the Board of Trade in the name of the company if that action was adopted by the liquidator. It was held by Pennycuick J 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. This reinforces the analysis above that there must be an existing obligation as at the date of the hearing.

(2) In *In Re Sutherland, deceased* [1963] AC 235, Lord Reid said at pp. 247-248 as follows:

> "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." [Emphasis added]

Pausing here, whilst it may be said that P has committed to certain obligations, those are obligations existing as between P and DBS Bank, not the Company, unless and until definitive notes are issued.

(3) In *Re Nortel GmbH* [2014] AC 209, 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). Lord Neuberger adopted the reasoning of Lord Reid in *In Re Sutherland* and held that there has to be an obligation from which a contingent liability may arise (at §81):

> "**81** … 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)." [Emphasis added]

(4) In a similar vein, Lord Sumption emphasized the need for an existing legal relationship, and said at §131 as follows:

> "**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. … 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, deed* [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 …" [Emphasis added]

(5) David Boyle J also considered *Re Dunderland* which are among the authorities examined above on the lack of standing by a trust beneficiary to commence winding-up proceedings.

107. At §§78-82, David Boyle J further referred to the decision of 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). In that case, Bell J similarly rejected the argument of the petitioner that it has status as a contingent or prospective creditor from the premise that, consequent upon the company's default, the petitioner is entitled to require the Holder to exchange the global bond for definitive bonds and to transfer such number of definitive bonds as representing its beneficial interest. Bell J's reasoning is that the petitioner cannot establish itself as a contingent creditor in the absence of an existing obligation. As he had explained at §§47-50, after referring to the English case of *Re William Hockley* and the Australian case of *Community Development Pty Ltd v Engwirda Construction* (1969) 120 CLR 455:

> "**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.* …
>
> **48.** I have referred to the pertinent provisions of the exchange provisions. … 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*. …
>
> **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." [Emphasis added]

108. I agree with the above analysis, which is amply supported by case law. In particular, as explained by the High Court of Australia in *Community Development*, 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 (i.e. prospective liability) or only an event that may happen (i.e. contingent liability). In my view, this makes perfect legal sense because the existing obligation would provide a legal nexus between a person and a company, such that any liability which will or may arise in a future event under such legal nexus could be taken into account as prospective or contingent liability. Without the requirement of a legal nexus, the matter would be at large. The test would become unduly wide and far-fetched. For instance, if a company is negotiating a loan with a bank and if there is no need for an existing obligation, it would be open to the bank to claim that it is a contingent creditor in the event of the bank agreeing to advance a loan and

the company failing to repay, even though there is at present no legal nexus between the two. That simply cannot be right.

109. Moreover, I agree with the analysis by David Boyle J, after surveying the relevant authorities, that the petitioning bondholder is not a contingent creditor. As held by him in §§90-91, 143-144, 151-155:

> "**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.
>
> **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.
>
> **151.** … *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. … *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. … 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." [Emphasis added]

110. On behalf of P, Mr Chen seeks to distinguish *Re Shinsun* on the facts. However, whilst the facts are different, the reasoning on standing applies equally to the present case as analysed above. Further, it is not entirely correct or accurate for Mr Chen to suggest that the Cayman Court recognized in *Re Shinsun* at §151 that the situation would be different if there was an event of default. Rather, the situation referred to there is where there was an event of default and Certificated Notes were delivered or transferred to the petitioner such that the petition had an enforceable debt against the company. This could not assist P in the present case because, as admitted by P, no definitive notes have been issued to P and there is, at present, no direct contractual relationship and enforceable rights by P against the Company.

111. Mr Chen also seeks to attack the rationale of *Re Shinsun*. However, he has not dealt with the authorities relied on by David Boyle J in arriving at his conclusion. As I have sought to demonstrate above, the conclusion of David Boyle J is amply supported by case law.

112. Instead, Mr Chen merely argues that, if the Cayman Court was right, it would render the "definition" of contingent creditor or prospective creditor superfluous because, if the Certificated Notes had been obtained, the petitioner could petition as a "creditor" rather than a "contingent creditor". With respect, this is misconceived. In the event that the Certificated Notes are issued, whether the debt is immediately payable would turn on the terms of the Certificated Notes. If those terms provide that the debt is payable at a future date or future event, then the debt would be a contingent one. If the terms provide that the debt is immediately payable, then the petitioner would be an actual creditor. It does not follow

that simply because the terms in a particular case provide for immediate payment that the concept of contingent creditor is rendered superfluous.

113. Mr Chen further argues that the extension of the statute to cover not only actual creditors but also contingent or prospective creditors represents the legislature's intention to cast the net wide to cover a petitioner who does not (at the time of the petition) have a direct contractual relationship with the company, but still had an economic interest in the solvency of the company. With respect, Mr Chen has provided no authority on point in support of such proposition. It would also appear from the history of the legislative amendments in England that the law was first amended in 1870 to cover contingent or prospective liabilities of insurance companies to policy holders, for which there were existing contractual obligations and relationships.

114. Moreover, whilst Mr Chen prays in aid the dicta of DHCJ Harris SC (as he then was) in *Re Jackin Total* and emphasises that beneficial owners of the debt will be affected if the Company is insolvent, I do not think that this can override the case law examined above. It would also be too far-fetched to confer on any person who does not have any existing legal relationship with the company a standing to present a winding-up petition, on the premise of a mere contingency that a legal relationship may exist between such person and the company in future. In any event, the rationale of *Re Jackin Total* is very much watered down here because, even if individual account holders may be affected, they can (and should) act through the trustee, all the more so if the debt has not matured (bearing in mind that on P's case, P could petition as contingent creditor even if the debt has not matured. Equally, even where the debt has matured

(which is the case here), there are defined contractual circumstances for issuance of definitive notes and there is no reason why P should not resort to that to be able to sue individually.

115. Mr Chen further relies on cases concerning schemes of arrangement. In my view and as explained further below, they are decided in different context and do not assist P.

116. For all these reasons, *Re Shinsun* is directly on point and its reasoning is sound. In the present case, and as a matter of construction of the Notes and the Indenture (whether under Hong Kong law or New York law), P plainly has no existing contractual relationship with the Company, and it has no directly enforceable rights against the same. Unless or until P obtains definitive notes in its name, it cannot establish that it is a creditor, either actual or contingent, because there is no existing contractual relationship and obligation between P and the Company. It follows that P does not have standing to commence the Petition against the Company.

G3.4 Further considerations

117. My conclusion above is supported by further considerations.

118. *First and foremost*, my view is borne out by the context of the global note structure, which I have examined in details under Section G1 above. It is plain from both Hong Kong and English jurisprudence examined above that the very design of the global note structure is to ensure that the class of bondholders all act through the holder or the trustee of the note as the exclusive channel of enforcement. The regime operates on the basis of a 'no look through' principle, whereby each party has rights only against their own *immediate* counterparty. For instance, in the present case,

P only has rights against DBS Bank; DBS Bank only has rights against Euroclear; so on and so forth. In line with the practice and purpose of such regime, typical notes and indentures would contain terms (including the "No Action Clause") to the effect that only the holder/trustee can take enforcement action against the issuer of the notes, and that bondholders cannot proceed directly against the issuer unless the trustee fails to take action in accordance with the bond documentation. In other words, the framework of the global note structure is premised on class action to be pursued by the trustee exclusively. As such, given that ultimate account holders cannot sue the company to enforce the debt, it would appear anomalous (if not repugnant to the design of the global note structure) to allow them to bypass such constraint by petitioning for winding up instead.

119. *Second*, it is of paramount importance under the global note structure that ultimate account holders such as P could not enforce its rights against the Company directly. Should the position be otherwise, it would lead to competition with other account holders, and also duplicity of actions in that both the Trustee/Holder and individual account holders (such as P) could pursue winding up relief against the Company at the same time. Apart from duplicity of actions, as observed by David Boyle J in *Re Shinsun* at §155, it would be difficult conceptually to have two creditors in respect of the same debt. That would happen in the present case if the Debt owed to P is recognized as contingent liability owed by the Company, because the Company would at the same time be owing such debt to the Trustee/Holder. This is not to mention the potential of double counting if both the Debt owed to P and the same amount of debt owed to the Holder/Trustee are to be taken into account in considering the solvency or otherwise of the Company.

120. In contrast, if P is not a contingent creditor, there will be no duplicity in actions. Prior to the issuance of the definitive notes, only the Trustee/Holder can sue and petition for winding up against the Company. Depending on whether the Notes have matured, the Trustee/Holder would be actual or contingent creditor. On the other hand, upon the issuance of the definitive notes in place of global notes, individual bondholders (such as P) would have acquired direct rights to sue and petition for winding up against the Company and insofar as the definitive notes provide for immediate payment, they would be actual creditors.

121. Of course, if the definitive notes only provide for payment after certain timeframe, then after acquiring definitive notes P will become a true contingent creditor in that sense. There will also be no duplicity of debts or actions given that definitive notes are issued in place of the global note. Either way, this is a seamless regime without any lacuna or gap.

122. *Third*, the policy objectives of including contingent and prospective creditors in the meaning of a creditor is to enable the Court to take into account a company's contingent or prospective liabilities in future in deciding whether the company is insolvent and liable to be wound up. However, even if the debt owed to an ultimate account holder of a global note is not taken into account as contingent liability, this would not frustrate the policy objectives or result in any unfairness or lacuna because the debt in the same amount owed by the issuer to the holder/trustee could still be taken into account. Moreover, in this way, there would not be two creditors for the same debt; nor would there be duplicity of debts.

123. It should be noted that this is not only relevant to the issue of standing. In winding-up petitions presented by other creditors, the Court

has to consider whether a company is insolvent by taking into account the company's contingent or prospective liabilities, and the liability owed to P would have already been taken into account by reference to the same amount of debt owed by the Company to the Holder of the Notes. In contrast, on P's argument, there is a risk of double counting because one has to take into account the debt owed by the Company to the Holder as actual creditor, as well as the "contingent" debt owed by the Company to P, which duplicate with each other. This reinforces my decision that P is not a contingent creditor, and P could only become a creditor when definitive notes are issued in its favour.

124. *Fourth*, there could be potential of abuse on P's case. Applying P's logic, even before the Notes have matured, every individual bondholder (including P) is already a contingent creditor and can petition for winding up, despite the fact that (1) the debt under the Notes are not yet due and (2) individual bondholders (such as P) do not have any directly enforceable rights against the Company. On P's argument, this could lead to floodgates because, in theory, every individual account holder may petition for winding-up against the Company. Such outcome would defeat the rationale and design of the global note structure, under which an individual account holder is not supposed to act and take enforcement action on his own. Instead, any action has to be pursued through the collective decision of the holder or the trustee of the global note.

125. If, as contended by P, a beneficial owner of a book-entry debt can petition for winding-up, such beneficial owner can in effect bypass the collective enforcement regime. Indeed, the threat of winding-up petition may pressurise the issuer to pay off an individual beneficial owner of the

debt, thereby defeating the very purpose of the structure of such debentures. In this regard, whilst it is true that winding-up petitions are different from ordinary actions in that they seek a class remedy, and winding-up petitions are not proceedings to enforce a debt *per se*, in most cases they are nevertheless proceedings by which a petitioner seeks to recover his debt because the petitioner regards it to be the most efficacious method of obtaining payment: *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449, §§12, 25; *Re Guy Kwok-Hung Lam* [2022] HKCA 1297, §§75-76. As such, it would be anomalous if P were unable to bring an ordinary action in Hong Kong (or indeed any other jurisdiction) against the Company for the recovery of the Debt, but able to resort to the more draconian measure of presenting a winding-up petition in Hong Kong on the basis of the Debt and expecting the Hong Kong Court to treat it as a contingent creditor of the Company such that P can, in effect, seek to recover its debt. Similar consideration was relied upon by G Lam JA in *Re Guy Kwok-Hung Lam* at §84 in support of his view that the approach in ordinary actions in granting a stay where there is an exclusive jurisdiction clause in favour of foreign Court should be applied to insolvency petitions.

126. *Fifth*, insofar as P says that my conclusion renders the concept of contingent creditor meaningless or superfluous, this is not the case. Before maturity of the Notes, the Holder can petition as contingent creditor. After maturity, the Holder can petition as actual creditor or, upon issuance of definitive notes, individual accounts holders can petition as actual creditor. Of course, if the terms of the definitive notes are such that account holders can only be entitled to payment upon a future date or future event, then the account holders would become true contingent creditors upon being issued such definitive notes.

127. *Sixth*, before P acquires directly enforceable rights, its economic interest is taken care of by the Holder or the Trustee, whether as actual creditor (if the debt is due) or contingent creditor (if the Notes have not matured). This is again in line with the design of the global note structure, under which the trustee represents and protects the bondholders, who are treated as forming a class, and who give instructions to the trustee through a specified percentage of bondholders.

128. At the end of the day, one may say that P knowingly traded in interests, not in the underlying securities, and hence should be taken to know and accept the consequence of the global bond structure as a result. As David Richards LJ put it in *Secure Capital* at §§55 and 57:

> "**[55]** I have struggled, unsuccessfully, to understand the principle that could justify this approach. In the case of immobilised securities, Clearstream and other settlement systems exist to facilitate efficient trading in interests in securities, not in the securities themselves. *The fact that security issues are organised in this way so as to facilitate such trading is nothing to the point. Participants in the market know that they are trading in interests, not in the underlying securities.* They are interests in contractual arrangements constituted by the Notes and ancillary documents. *The documents expressly provide for English law to be the proper law and expressly identify the parties who may either generally or in limited circumstances sue for breach of the terms of the Notes. Those provisions are as much part of the package of rights as the payment terms and any other terms of the Notes. Market participants trade in interests in that total package of rights.*
>
> **[57]** *A lacuna cannot in any relevant sense be said to exist if it is precisely the consequence of the express terms of the Notes and ancillary documents.* There is no reason to suppose that this was an unintended consequence and, indeed, the clear and detailed provisions make clear that this consequence was intended. If it had been intended that account holders or account owners or others with even more remote interests should be entitled to sue Credit Suisse in contract for breach of the misleading statements term, the documents could and would surely have so provided. It was a matter for Secure Capital whether it traded in interests in securities having these features." [Emphasis added]

G3.5 Schemes of arrangement cases

129. On behalf of P, Mr Chen has relied on various authorities which recognise a bondholder of a global note as "contingent creditor" for the purpose of voting in schemes of arrangement, such as *Re Mongolian Mining Corp* [2018] 5 HKLRD 48, *Enice Holding Co* [2018] 4 HKLRD 736, *Re Castle Holdco 4 Ltd* [2009] EWHC 3919 (Ch) and *Re Haya HoldCo 2 plc* [2022] EWHC 1079 (Ch).

130. In my view, these cases are decided in different context and cannot assist P. In particular, I agree with the observations made by Mr Ho in response.

131. *First and foremost*, the Courts in those cases recognise that the matter is context-specific, and they emphasise that their decisions are made in the context of the meaning of "creditor" in the scheme legislation, rather than "contingent creditor" in the winding-up legislation. For instance, in *Re Haya Holdco* at §30, Marcus Smith J noted that "[i]t has been held in numerous cases that a beneficial owner who may obtain definitive notes is a contingent creditor *for the purposes of the CA 2006*" (see similarly *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch); [2015] 1 BCLC 418 at §5; *Re KCA Deutag UK Finance Plc* [2020] EWHC 2779 (Ch) at §53).

132. Indeed, there are authorities suggesting that the word "creditor" in the scheme legislation has a wider meaning than in the winding-up legislation: see *Re T & N Ltd* [2005] EWHC 2870 (Ch); [2006] 1 WLR 1728 at §40.

133. In this regard, I accept Mr Ho's submissions that the expression "contingent creditor" can have different interpretations in different contexts, as alluded to by Arden LJ (as she then was) in *R (Steele) v Birmingham City Council* [2005] EWCA Civ 1824; [2006] 1 WLR 2380 at §21.

134. *Second*, in *Re Castle Holdco* at §23, Norris J took the view that, 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 (see also *Re GW Pharmaceuticals Plc* [2021] EWHC 716 (Ch); [2021] BCC 696 at §§24-26). As Mr Ho put it, the above authorities reflect a mischief targeted by the English Court to enfranchise *economic* owners of intermediated securities to vote at scheme meetings. In contrast, there is no authority to the effect that a person with economic interest in a debt is thereby entitled to present a winding-up petition.

135. At the end of the day, it has often been said that context is everything in the exercise of legal interpretation. In this regard, I note that a similar view was taken by David Boyle J in *Re Shinsun*. Upon examining various authorities in the context of schemes of arrangement at §§92-97, he registered a word of caution at §98 as follows:

> "**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.*" [Emphasis added]

136. At the end of the day, cases on schemes of arrangement are a far cry from the present case. In those cases, what is at stake concerns voting rights on schemes which may affect economic interests, as distinct from *locus* to present winding-up petition which is a more draconian right than a mere voting right for schemes. It is therefore, in my view, inappropriate to attach any undue weight to such authorities decided in a rather different context.

H. OTHER MATTERS

137. Given my view on P's lack of *locus standi* to present the winding-up Petition herein, I do not consider it necessary to consider other issues such as the solvency of the Company and the need for an adjournment (had I found in favour of P on the issue of *locus standi*).

I. DISPOSITION

138. In the premises, I accede to the Company's application for striking out of the Petition against P.

139. I further order on a *nisi* basis that, subject to paragraph 26 above, the costs of the Petition including the Summons be paid by P to the Company, to be taxed if not agreed.

140. It remains for this Court to thank Mr Chen for P and Mr Ho for the Company for their helpful submissions and assistance rendered to the Court.

(Jenkin Suen SC)
Deputy High Court Judge

Mr Vincent Chen, instructed by Stevenson, Wong & Co, for the Petitioner

Mr Look Chan Ho, instructed by Sidley Austin, for the Company

【法宝引证码】CLI.C.567479764

兴业财富资产管理有限公司与中安科股份有限公司公司债券交易纠纷一审民事判决书

兴业财富资产管理有限公司与中安科股份有限公司公司债券交易纠纷一审民事判决书

上海市浦东新区人民法院

民事判决书

(2018)沪 0115 民初 38946 号

原告：兴业财富资产管理有限公司，住所地中国(上海)自由贸易试验区浦东南路 XXX 号 XXX 幢三层 370 室。

法定代表人：卓新章，执行董事。

委托诉讼代理人：钱前，上海虹桥正瀚律师事务所律师。

委托诉讼代理人：朱思衡，上海虹桥正瀚律师事务所律师。

被告：中安科股份有限公司(原中安消股份有限公司)，住所地上海市普陀区。

法定代表人：涂国身，董事长。

委托诉讼代理人：张惠琳，上海市锦天城律师事务所律师。

原告兴业财富资产管理有限公司与被告中安科股份有限公司(以下至判决主文前简称中安科公司)公司债券交易纠纷一案，本院于 2018 年 6 月 7 日立案后，依法适用普通程序，于 2018 年 9 月 25 日公开开庭进行了审理。原告的委托诉讼代理人钱前、朱思衡，被告中安科公司的委托诉讼代理人张惠琳到庭参加诉讼。本案现已审理终结。

原告兴业财富资产管理有限公司向本院提出诉讼请求，判令：1.被告中安科公司向原告支付债券本金人民币2,850万元、利息489,926.71元(以2,850万元为基数，按年利率4.45%，自2017年11月12日起计算至2018年3月31日)；2.被告中安科公司向原告支付逾期利息(以28,989,926.71元为基数，按年利率4.45%，自2018年4月1日起计算至实际清偿之日止，暂计至2018年5月3日为118,254.74元)；3.被告中安科公司向原告支付罚息(以28,989,926.71元为基数，按每日0.5‰，自2018年4月1日起计算至实际清偿之日止，暂计至2018年5月3日为478,333.79元)；4.被告中安科公司承担原告律师费损失20万元、保全担保费损失29,786元；5.本案诉讼费、财产保全费由被告中安科公司承担。审理中，原告调整第1项诉讼请求中利息的起算点为2017年11月11日，利息金额不变；同时，因被告中安科公司于2018年11月12日归还欠款1,268,250元，故原告抵扣后调整第2、3项诉讼请求为判令："2.被告中安科公司向原告支付逾期利息(以28,989,926.71元为基数，按年利率4.45%，自2018年4月1日起计算至实际清偿之日止，暂计至2018年6月30日为326,096.41元)；3.被告中安科公司向原告支付罚息(以28,989,926.71元为基数，按每日0.5‰，自2018年4月1日起暂计至2018年6月30日为1,319,041.67元，扣除已支付的1,268,250元，为50,791.67元，自2018年7月1日起以28,989,926.71元为基数，按每日0.5‰计算至实际清偿之日止)"。

事实和理由：2016年11月1日，被告中安科公司签署《2016年公开发行公司债券募集说明书》(以下简称《募集说明书》)，并在上海证券交易平台发布，约定"中安消股份有限公司2016年公开发行公司债券"(以下简称"16中安消")发行首日为2016年11月10日，起息日为2016年11月11日，单利按年计息，不计复利；债券付息日为存续期内每年的11月11日(如遇法定节假日或休息日延

至其后的第 1 个工作日；每次付息款项不另计利息)；本金兑付日为 2019 年 11 月 11 日；如遇投资者行使回售选择权，则回售部分债券的兑付日为 2018 年 11 月 11 日(如遇法定节假日或休息日延至其后的第 1 个工作日；顺延期间兑付款项不另计利息)；被告中安科公司未按时支付本次债券的本金和/或利息，或发生其他违约情况时，债券受托管理人(即案外人天风证券股份有限公司，以下简称天风证券公司)将依据《债券受托管理协议》代表债券持有人向被告中安科公司进行追索，包括采取要求被告中安科公司追加担保或其他可行的救济措施；如果债券受托管理人未按《债券受托管理协议》履行其职责，债券持有人有权直接依法向被告中安科公司进行追索，并追究债券受托管理人的违约责任；若被告中安科公司因其过失、恶意、故意不当行为或违反《债券受托管理协议》《募集说明书》或者任何适用法律的任何行为(包括不作为)导致债券持有人及其股东、董事、监事、管理人员、员工或关联方产生任何诉讼、权利要求、损害、债务、判决、损失、成本、支出和费用(包括合理的律师费用和执行费用)，被告中安科公司应负责赔偿并使其免受损失。

2017 年 12 月 21 日，被告中安科公司公开《关于变更“16 中安消”募集说明书的补充公告》，并在 2018 年 1 月 24 日召开的持有人会议上通过关于变更《募集说明书》内容的议案，具体包括：1.约定违约情形为：……在本次债券存续期间，被告中安科公司没有清偿到期应付的任何金融机构贷款、承兑汇票或直接债务融资工具(包括债务融资工具、企业债券、公司债券等)，且单独或最近半年内累计的应偿未偿总金额达到或超过 2 亿元，则上述情况即视为其对本次债券的违约。2.约定违约责任及解决措施为：(1)上述违约情形第 7 条发生后，被告中安科公司需在发生上述事项三个月内完成本期债券本息的提前偿付；(2)上述违约事件发生时，被告中安科公司应当承担相应的违约责任，包括但不限于按照《募集说

明书》的约定向债券持有人及时、足额支付本金及/或利息以及迟延支付本金及/或利息产生的罚息、违约金等，并就债券受托管理人因其违约事件承担相关责任造成的损失予以赔偿。3.约定逾期利息及罚息为：(1)被告中安科公司承诺按照本次《募集说明书》约定的还本付息安排向债券持有人支付本次债券利息及兑付本次债券本金，若被告中安科公司不能按时支付本次债券利息或本次债券到期不能兑付本金，对于逾期未付的利息或本金，被告中安科公司将根据逾期天数及逾期利率(逾期利率为债券票面利率)向债券持有人支付逾期利息：按照该未付利息×逾期利率×逾期天数÷360 另计利息(单利)；偿还本金发生逾期的，逾期未付的本金金额自本金支付日起，按照该未付本金×逾期利率×逾期天数÷360 计算利息(单利)；(2)除上述逾期利息外，对于逾期未付的利息或本金，被告中安科公司将根据逾期天数及罚息利率(日罚息利率为 0.5‰)向债券持有人支付罚息：偿付利息发生逾期的，按照该未付利息×罚息利率×逾期天数另计罚息(单利)；偿还本金发生逾期的，逾期未付的本金金额自本金支付日起，按照该未付本金×罚息利率×逾期天数计算罚息(单利)。

2018 年 4 月 28 日，被告中安科公司发布《中安消股份有限公司出具带解释性说明无保留意见涉及事项的专项说明》及“大华审字[2018]007030 号”《审计报告》，截至 2017 年 12 月 31 日，被告中安科公司逾期未还金融贷款已达 612,710,400 元。2018 年 4 月 24 日，被告中安科公司发布《累计涉及诉讼(仲裁)的公告》，截至公告日，被告中安科公司累计被金融机构诉讼应付未付款已达 548,487,016.84 元。2018 年 5 月 7 日，被告中安科公司出具《关于“15 中安消”债券违约的公告》，截至 2018 年 4 月 30 日，被告中安科公司发行的“15 中安消”债券已逾期未付本金 9,135 万元及利息 3,060,225 元。原告认为，其持有“16 中安消”(136821.SH)券面金额 2,850 万元，被告中安科公司在 2017 年 12 月

31 日应付未付款已逾 2 亿元，被告中安科公司需在发生上述违约事项的三个月内完成本期债券本息的提前偿付，但被告中安科公司始终未支付债券本息，故原告主张以 2018 年 3 月 31 日为涉案债券的提前到期日，并据此提起本案诉讼。

被告中安科公司辩称：第一，原告主体不适格，“16 中安消”债券纠纷的原告适格主体应为债券受托管理人天风证券公司，故本案中应裁定驳回原告的起诉。理由在于：首先，“16 中安消”债券《募集说明书》规定，债券发生违约情形后，债券受托管理人为第一顺位的追索权人，代表债券持有人向被告中安科公司进行追索；其次，在“16 中安消”债券违约情形发生前后，受托管理人天风证券公司都积极履行了其于《债券受托管理协议》项下的职责，积极代表债券持有人向被告中安科公司进行了追索，要求追加担保或其他可行的救济措施，不存在怠于行使职责的情形；再次，经“16 中安消”债券 2018 年第二次债券持有人会议通过决议，天风证券公司被授权有权代表“16 中安消”债券持有人向法院提起财产保全申请、提起民事诉讼等法律程序；综上，在原告未有任何理由和证据证明债券受托管理人怠于履行其职责的前提下，原告作为债券持有人无权直接向被告中安科公司进行追索。同时，“16 中安消”债券是公募债，实行同债同权，若其中任何一个债券持有人先行实现债权，则将损害其他债权人的利益，故应由天风证券公司统一起诉后，按比例分配实现债权。第二，对原告主张的本金金额无异议，利息利率无异议。第三，对原告主张的逾期利息有异议，原告提供的《审计报告》中深圳前海金鹰资产管理有限公司的借款是民间借贷，扣除该 4 亿元左右金额后，不符合 2 亿元交叉违约的条件，直到 2018 年 4 月 30 日“15 中安消”债券违约，才符合交叉违约的条件，因此根据约定该情形发生三个月后即 2018 年 7 月 31 日被告中安科公司才发生逾期，逾期利息应自 2018 年 8 月 1 日起算。第四，对原告主张的律师费和保全担保费无异议。

原告为证明其诉称，提供以下证据：

证据 1、《2016 年公开发行公司债券募集说明书》，证明被告中安科公司公开发行“16 中安消”债券，就债券本金、利息、违约责任等进行约定；

证据 2、《2016 年公开发行公司债券票面利率公告》，证明“16 中安消”债券票面利率为 4.45%；

证据 3、《关于变更“16 中安消”募集说明书的补充公告》；

证据 4、《2016 年公开发行公司债券 2018 年第一次债券持有人会议决议公告》；

证据 3、4 共同证明债券持有人与被告中安科公司补充约定违约情形及违约后的逾期利息、罚息等内容；

证据 5、中国证券登记结算有限责任公司投资者证券持有信息(沪市)，证明原告持有“16 中安消”债券 2,850 万元；

证据 6、《审计报告》(大华审字[2018]007030 号)节选；

证据 7、《出具带解释性说明无保留意见涉及事项的专项说明》；

证据 6、7 共同证明截至 2017 年 12 月 31 日，被告中安科公司对外已逾期未还金融借款逾 6 亿余元；

证据 8、《累计涉及诉讼(仲裁)的公告》，证明截至 2018 年 4 月 24 日，被告中安科公司累计金融机构被诉逾 5 亿余元；

证据 9、《关于“15 中安消”债券违约的公告》，证明截至 2018 年 4 月 30 日，“15 中安消”债券违约金额已达 9,441 万元；

证据 10、“16 中安消”本息、逾期利息及罚息计算表，证明截至 2018 年 5 月 3 日，被告中安科公司应向原告支付债券本息、逾期利息及罚息共计 29,586,515.25 元；

证据 11、法律服务委托协议、律师费发票、律师费付款凭证，证明原告产生律师费损失 20 万元；

证据 12、诉讼财产保全责任保险保险单、保全担保费发票，证明原告产生保全担保费损失 29,786 元。

经质证，被告中安科公司对原告提供的上述证据均无异议。

被告中安科公司为证明其辩称，提供以下证据：

证据 1、《募集说明书》，证明“16 中安消”债券发生违约时，债券受托管理人天风证券公司是第一顺位追索权人，只有受托管理人怠于行使其职责时，债券持有人才能直接追索；

证据 2、《关于中安消股份有限公司 2016 年公开发行公司债券之债券受托管理协议》，证明天风证券公司作为“16 中安消”债券受托管理人处理与债券有关的谈判与诉讼事宜；

证据 3、《中安消股份有限公司 2016 年公开发行公司债券之债券持有人会议规则》，证明除了证监会颁布的《公司债券发行与交易管理办法》第五十四条第二款的规定，“16 中安消”债券持有人会议规则也规定了债券持有人会议决议自通过之日起生效并对全体债券持有人具有同等约束力，债券持有人单独行使债权及担保权利，不得与债券持有人会议通过的有效决议相抵触；

证据 4、《关于为“16 中安消”公司债券追加担保的公告》，证明天风证券公司积极履职，不存在怠于行使职责的情形；

证据 5、《中安消股份有限公司 2016 年公开发行公司债券 2018 年第二次债券持有人会议决议公告》，证明天风证券公司经债券持有人会议授权，代表“16 中安消”债券持有人向法院提起财产保全申请、提起民事诉讼等法律程序，且其积极履职，不存在怠于行使职责的情形；

证据 6、《中安消股份有限公司 2016 年公开发行公司债券 2018 年第三次债券持有人会议决议公告》，证明天风证券公司积极履职，不存在怠于行使职责的情形。

经质证，原告对被告中安科公司提供的上述证据的真实性、合法性均无异议，但不认可其证明目的，认为原告作为债权人提起本诉是原告固有的权利，原告虽将诉权授权给了受托管理人，但并未剥夺原告自身诉权，且《募集说明书》也约定了原告的诉权；《债券持有人会议规则》第七条规定“债券持有人单独行使权利的，不适用本规则的相关规定”，这条肯定了债券持有人拥有单独起诉的权利；目前没有看到被告中安科公司与天风证券公司签订担保协议的公告，也未查询到天风证券公司代债券持有人起诉的公告，若原告不提起本诉，损失将持续扩大。

经审查当事人提供的证据，并结合双方质证意见，本院对当事人无异议的证据予以确认并在卷佐证。又因原告提供的证据与其陈述相互印证，故本院对原告所述事实予以确认。

另查明，《募集说明书》第九节“债券受托管理人”第三条“发行人的权利和义务”第八款第 2 项约定：“当发行人未按时支付本次债券的本金、利息和/或逾期利息，或发生其他违约情况时，债券持有人有权直接依法向发行人进行追索。受托管理人将依据《债券受托管理协议》在必要时根据债券持有人会议的授权，参与整顿、和解、重组或者破产的法律程序……”《中安消股份有限公司 2016 年公开发行公司债券 2018 年第二次债券持有人会议决议公告》通过议案三：“关于授权天风证券代表债券持有人向法院提起财产保全申请、提起民事诉讼等法律程序的议案。”

又查明，根据被告中安科公司发布的《中安消股份有限公司出具带解释性说

明无保留意见涉及事项的专项说明》及大华会计师事务所出具的《审计报告》，截至 2017 年 12 月 31 日，被告中安科公司已逾期未偿还的借款总额为 612,710,439.75 元，其中包括北京银行股份有限公司双榆树支行的 6 笔借款和深圳前海金鹰资产管理有限公司的 2 笔借款。同时，根据被告中安科公司发布的《关于“15 中安消”债券违约的公告》，深圳前海金鹰资产管理有限公司提供的授信被列入“银行”一栏。

再查明，被告中安科公司于 2018 年 11 月 12 日还款 1,268,250 元，原告主张以该款抵扣截至 2018 年 6 月 30 日的欠款。截至 2018 年 6 月 30 日，被告中安科公司尚欠原告债券本金 2,850 万元、利息 489,926.71 元；同时，自 2018 年 4 月 1 日起、以本金 2,850 万元为基数、按年利率 4.45%、以实际欠款天数 91 天计算，产生逾期利息 320,585.42 元；自 2018 年 4 月 1 日起、以本金 2,850 万元为基数、按每日万分之五、以实际欠款天数 91 天计算，产生罚息 1,296,750 元。

本院认为，涉案《2016 年公开发行公司债券募集说明书》及《关于变更“16 中安消”募集说明书的补充公告》系被告中安科公司作为发行人对涉案“16 中安消”债券的募集所作的承诺及说明，原告作为债券持有人购买涉案债券并支付对价，均系双方当事人的真实意思表示，依法成立有效，故双方当事人理应恪守。本案的争议焦点在于：第一，本案原告主体是否适格？第二，涉案债券的提前到期日应如何认定？第三，被告中安科公司的具体欠款金额应如何认定？

关于第一项争议焦点，被告中安科公司认为因债券持有人会议已授权天风证券公司提起诉讼，原告作为债券持有人之一已丧失单独起诉的权利，故本案中应驳回原告的起诉。对此本院认为，首先，涉案《募集说明书》明确约定在发行人(即被告中安科公司)未按时支付债券本息或发生其他违约情形时，债券持有人(即原告)有权直接依法向发行人进行追索，因此债券持有人具有在发行人违约时进行

直接追索的权利；其次，涉案债券的债券持有人会议虽通过由天风证券公司代表债券持有人向法院提起民事诉讼的议案，但该议案并未排除债券持有人单独起诉的权利；再次，虽然《募集说明书》约定“被告中安科公司未按时支付本次债券的本金和/或利息，或发生其他违约情况时，债券受托管理人将依据《债券受托管理协议》代表债券持有人向被告中安科公司进行追索……如果债券受托管理人未按《债券受托管理协议》履行其职责，债券持有人有权直接依法向被告中安科公司进行追索”，但该条款仅系赋予天风证券公司作为受托管理人在发行人违约时进行追索的权利，同时明确在受托管理人不履行职责时，债券持有人亦可进行追索，从该条款并不能反推出，在受托管理人履行其职责的同时，债券持有人直接追索的权利即被排除的结论，因此，且不论天风证券公司作为受托管理人是否履行了其职责，原告作为债券持有人进行单独起诉的权利始终存在。综上，被告中安科公司关于原告主体不适格的辩称缺乏事实与法律依据，本院不予采信。

关于第二项争议焦点，被告中安科公司认为，因原告主张的 2017 年 12 月 31 日逾期未还借款中涉及“深圳前海金鹰资产管理有限公司”的借款不属于金融借款，故扣除相应金额后的逾期未还金融借款总额不足 2 亿元，不符合约定的违约条件，应以 2018 年 4 月 30 日“15 中安消”债券违约的时点为准。对此本院认为，因被告中安科公司在其发布的公告中将“深圳前海金鹰资产管理有限公司”列为“银行”主体，系其自认该公司所涉借款属于金融借款的范围，在此情况下，本院对原告关于被告中安科公司因 2017 年 12 月 31 日已逾期未偿还的金融借款总金额超过 2 亿元故已构成违约的主张予以支持，被告中安科公司应依约在三个月内(即 2018 年 3 月 31 日之前)完成涉案债券本息的提前偿付。现被告中安科公司未能按期履行，故原告有权要求其立即支付债券本金、利息，并自 2018 年 4 月 1 日起支付相应的逾期利息和罚息。对被告中安科公司关于以 2018 年 4 月 30

日为违约之日的辩称，本院不予采信。

关于第三项争议焦点，首先，关于原告主张的债券本金 2,850 万元和利息 489,926.71 元，因被告中安科公司对本金金额和计息利率无异议，原告主张的利息计算方式亦具有合同依据，故本院对该两项金额予以确认；其次，关于原告主张的逾期利息，其起止日期及按年利率 4.45%计算的标准不违反法律和行政法规的强制性规定，本院予以确认，但对于原告以利息 489,926.71 元为基数计收逾期利息的部分，因缺乏相应法律依据，本院不予支持，故对截至 2018 年 6 月 30 日的逾期利息金额，本院相应调整为 320,585.42 元，自 2018 年 7 月 1 日起至实际清偿之日止的逾期利息亦应以本金为基数计收；关于原告主张的罚息，其起止日期及按每日万分之五计算的标准不违反法律和行政法规的强制性规定，本院予以确认，但对于原告以利息 489,926.71 元为基数计收罚息的部分，因缺乏相应法律依据，本院不予支持，故对截至 2018 年 6 月 30 日的罚息金额，本院相应调整为 1,296,750 元，自 2018 年 7 月 1 日起至实际清偿之日止的罚息亦应以本金为基数计收；再次，关于原告主张的律师费损失 20 万元和保全担保费损失 29,786 元，因确系原告为本案诉讼实际支出的费用，被告中安科公司亦表示认可，故本院予以支持；最后，被告中安科公司于 2018 年 11 月 12 日还款 1,268,250 元，原告主张以该款抵扣截至 2018 年 6 月 30 日的欠款，于法无悖，本院予以确认；又因双方未约定还款金额的具体抵充顺序，故原告主张按优先抵充罚息的顺序清偿，亦于法无悖，本院予以支持；依此方式抵充后，被告中安科公司尚欠原告的罚息金额截至 2018 年 6 月 30 日应为 28,500 元。

综上，依照《中华人民共和国合同法》第六十条第一款、第一百零七条、第一百一十四条、第二百零五条、第二百零六条、第二百零七条、《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第九十条的规定，判决如下：

一、被告中安科股份有限公司应于本判决生效之日起十日内支付原告兴业财富资产管理有限公司债券本金 2,850 万元；

二、被告中安科股份有限公司应于本判决生效之日起十日内支付原告兴业财富资产管理有限公司债券利息 489,926.71 元；

三、被告中安科股份有限公司应于本判决生效之日起十日内支付原告兴业财富资产管理有限公司截至 2018 年 6 月 30 日的逾期利息 320,585.42 元，以及自 2018 年 7 月 1 日起至实际清偿之日止的逾期利息(以债券本金 2,850 万元为基数，按年利率 4.45%的标准计算)；

四、被告中安科股份有限公司应于本判决生效之日起十日内支付原告兴业财富资产管理有限公司截至 2018 年 6 月 30 日的罚息 28,500 元，以及自 2018 年 7 月 1 日起至实际清偿之日止的罚息(以债券本金 2,850 万元为基数，按每日万分之五的标准计算)；

五、被告中安科股份有限公司应于本判决生效之日起十日内支付原告兴业财富资产管理有限公司律师费损失 20 万元和保全担保费损失 29,786 元。

如果未按本判决指定的期间履行给付金钱义务，应当依照《中华人民共和国民事诉讼法》第二百五十三条规定，加倍支付延迟履行期间的债务利息。

案件受理费 195,881 元，财产保全费 5,000 元，共计 200,881 元，由原告兴业财富资产管理有限公司负担 123 元，被告中安科股份有限公司负担 200,758 元。

如不服本判决，可在判决书送达之日起十五日内，向本院递交上诉状，并按对方当事人的人数提出副本，上诉于上海金融法院。

审　　判　　长　　顾　　权

审　　判　　员　　黄　　婧

人民陪审员　　华文东

书　　记　　员　　王朝辉

二〇一八年十二月二十九日

【法宝引证码】CLI.C.414903632

中信信托有限责任公司与新华联控股有限公司债券交易纠纷一审民事判决书

中信信托有限责任公司与新华联控股有限公司债券交易纠纷一审民事判决书

北京市通州区人民法院

民事判决书

(2021)京0112民初4886号

原告：中信信托有限责任公司，住所地北京市朝阳区新源南路6号京城大厦。

法定代表人：李子民，副董事长。

委托诉讼代理人：李娟，国浩律师(北京)事务所律师。

委托诉讼代理人：宋少源，国浩律师(北京)事务所实习律师。

被告：新华联控股有限公司，住所地北京市通州区外郎营村北2号院2号楼10层。

法定代表人：傅军，董事长。

委托诉讼代理人：李文华。

委托诉讼代理人：张凯强。

原告中信信托有限责任公司(以下简称信托公司)与被告新华联控股有限公司(以下简称新华联公司)公司债券交易纠纷一案，本院于2021年1月15日立案后，依法适用简易程序审理。本案于2021年11月19日公开开庭进行了审理。信托公司的委托诉讼代理人李娟、宗少源，新华联公司的委托诉讼代理人李文华到庭参加诉讼。本案现已审理终结。

信托公司向本院提出诉讼请求：1.新华联公司向信托公司兑付16新华债的全部本金人民币2000万元；2.判令新华联公司向信托公司支付债券利息及逾期利息，计算标准为：利息以2000万元为基数，按照年化7.5%的利率，自2019年3月24日起计算至2021年3月23日止，共计300万元；因本金逾期产生的逾期利息，以逾期未付的本金2000万元为基数，按照年化7.5%的利率，自2021年3月24日起计算至本金全部清偿完毕之日止；因利息逾期产生的逾期利息(每年的利息为2000万元×7.5%=150万元，以150万元为基数，自2020年3月24日起至实际付清之日止，按照年化7.5%的利率；以150万元为基数，自2021年3月24日起至实际付清之日止，按照年化7.5%的利率计算)；3.判令新华联公司承担信托公司为实现债权支出的费用(包括律师费2万元)；4.本案的案件受理费、财产保全费等诉讼费用由新华联公司承担。事实和理由：新华联公司于2016年3月24日面向合格投资者公开发行无担保债券新华联控股有限公司2016年公司债券(以下简称“16新华债”)，并于2016年4月12日在上海证券交易所上市交易(证券代码：136183)。16新华债募集说明书(以下称作“募集说明书”)约定：16新华债票面金额100元；债券期限5年期，含第3年末发行人上调票面利率选择权和投资者回售选择权。债券还本付息方式：采用单利按年计息，不计复利，每年付息一次，到期一次还本，最后一期利息随本金的兑付一起支付；债券起息日：2016年3月24日；债券付息日：2017年至2021年每年的3月24日。募集说明书约定：若新华联公司未按时支付本次债券的本金和/或利息，或发生其他违约情况时，债券受托管理人将依据《债券受托管理协议》代表债券持有人向新华联公司进行追索。如果债券受托管理人未按《债券受托管理协议》履行其职责，债券持有人有权直接依法向新华联公司进行追索，并追究债券受托管理人的违约责任。若新华联公司不能按时支付本次债券利息或本次债券到期不能兑付本金，对于逾

期未付的利息或本金，新华联公司将根据逾期天数按债券票面利率向债券持有人支付逾期利息：按照该未付利息对应本次债券的票面利率另计利息(单利)；偿还本金发生逾期的，逾期未付的本金金额自本金支付日起，按照该未付本金对应本次债券的票面利率计算利息(单利)。

债券存续期前三年(2016 年 3 月 24 日至 2019 年 3 月 23 日)的票面利率为固定年利率 6.5%。新华联公司于 2019 年将债券后续(2019 年 3 月 24 日起)的票面利率调整为固定年利率 7.5%。申万宏源证券有限公司为债券受托管理人。根据《债券受托管理协议》，当发行人无法按时偿付债券本息时，如发行人未按受托管理人的要求追加担保，受托管理人有权要求发行人提前兑付债券本息。募集说明书列举了《债券受托管理协议》的主要内容，《债券受托管理协议》亦约定，如发行人未按时支付本次债券的本金和/或利息，或发生其他违约情况，受托管理人将依据《债券受托管理协议》代表债券持有人向发行人进行追索。如果受托管理人未按《债券受托管理协议》履行其职责，债券持有人有权直接依法向发行人进行追索，并追究受托管理人的违约责任。

信托公司作为中信信托信赢 13 期分层型证券投资集合资金信托计划的受托人，代表该信托计划持有 16 新华债 20 万份，对应债券票面金额人民币 2000 万元。

2020 年 3 月 24 日，新华联公司未按期兑付债券利息。该情况已构成募集说明书约定的债券违约。2020 年债券受托管理人申万宏源证券有限公司召集召开 2020 年第一次债券持有人会议表决通过以下议案：1)要求发行人及其关联方等为“16 新华债”债券提供增信措施的议案；2)要求发行人确定定期沟通机制和联系人员的议案。前述议案均已获债券持有人会议通过，但截至目前，发行人仍未能提供增信措施。现 16 新华债已于 2021 年 3 月 23 日到期，新华联公司未按照《募集说

明书》的约定向信托公司支付本金及利息。最高人民法院《全国法院审理债券纠纷案件座谈会纪要》第 7 条规定：“通过各类资产管理产品投资债券的，资产管理产品的管理人根据相关规定或者资产管理文件的约定以自己的名义提起诉讼的，人民法院应当依法予以受理。”综上，新华联公司上述债券违约行为已经严重损害了信托公司作为债券持有人的权益。鉴于目前债券受托管理人未依照《债券受托管理协议》履行其后续职责，为有效维护自身权益，信托公司起诉至法院。

新华联公司发表答辩意见称：一、信托公司为实现债权支付的费用(包括但不限于律师费、差旅费、公告费等)在募集说明书中没有约定，不应当支付。上述费用也不属于合理、必要支出。信托公司作为一个庞大的金融机构，设置有具有众多法律专业人士、庞大的风控法务部门，完全有能力通过自己公司法务职员进行诉讼，因此律师费不属于必要的支出。二、信托公司不是适格的诉讼主体。1.依据《募集说明书》的约定受托管理人应先追索，受托管理人不追索/不履行职责的，债券持有人才可以直接起诉。2.受托管理人已经履行职责。受托管理人在《受托管理协议》中的职责是进行追索，但不包括进行诉讼。受托管理人一直在积极的履行职责。申请追加受托管理人作为无独立请求权的第三人。3.起诉顺位的约定未限制信托公司的权利。信托公司共持有 2.13 亿债券，占比约 12.53%。完全可以提请受托管理人召开债券持有人大会。4.信托产品不属于资产管理产品，因此信托公司不是适格的诉讼主体。三、不可抗力。1.疫情是一种不可抗力，不可抗拒、不能避免、不可克服；2.疫情与新华联公司的还款后期完全重合，而且整个疫情最严重的时期就在新华联公司还款的前一两个月。而且在遭遇不可抗力之前，新华联公司并未违约，没有过错。这种情况下，至少应当对 2020 年 1 月-3 月 24 日前这段时间的利息进行减免。四、新华联及新华联文旅因为生产疫情相关

产品(次氯酸钠)被列为疫情防控重点企业，同时也在北京市的疫情防控重点名单中，但并未得到金融机构任何贷款，也没有享受到任何优惠。五、新华联公司已经设立债委会，信托公司作为银监会批准设立的金融机构应加入债委会，对新华联公司采取展期续贷、降低利率等债务化解措施。六、新华联公司及下属企业已被列为疫情防控重点保障企业，且已列入银行系统内金融扶持企业名单。请求法院及信托公司给予新华联公司展期、续贷等金融支持，以化解新华联公司的债务风险。七、本案为债券交易纠纷，应以集中审理为原则，而以债券持有人的个别诉讼作为补充。

经审理查明，2016 年 3 月 22 日，新华联公司作为发行人，公开发行 2016 年公司债券募集说明书(面向合格投资者)。

募集说明书载明如下事项：第一节发行概况 1、发行人：新华联公司；2、债券名称：新华联控股有限公司 2016 年公司债券；3、发行规模：本次公司债券基础发行规模为 10 亿元，可超额配售不超过 20 亿元(含 20 亿元)，采用一次发行方式。5、票面金额及发行价格：本次债券票面金额为 100 元，按面值平价发行。6、债券期限：5 年期，含第 3 年末发行人上调票面利率选择权和投资者回售选择权。7、债券利率及其确定方式：本次债券票面年利率将通过询价方式，由发行人与主承销商协商确定利率区间，以薄记建档方式确定最终发行利率。本次债券票面利率在存续期内前 3 年固定不变，在存续期的第 3 年末，发行人可选择上调票面利率，存续期后 2 年票面年利率为本期债券存续期前 3 年票面年利率加公司提升的基点，在存续期后 2 年固定不变。本次债券票面利率采取单利按年计息，不计复利。8、上调票面利率选择权：本公司有权决定在存续期限的第 3 年末上调本次债券后 2 年的票面利率。本公司将于第 3 个计息年度付息日前的第 20 个交易日，在中国证监会指定的信息披露媒体上发布关于是否上调票面利率以及上调幅

度的公告。若本公司未行使利率上调权，未被回售部分债券存续期后 2 年票面利率仍维持原有票面利率不变。11、债券形式：实名制记账式公司债券。投资者认购的本次债券在登记机构开立的托管账户托管记载。本次债券发行结束后，债券持有人可按照有关主管机构的规定进行债券的转让、质押等操作。12、还本付息方式：本次债券采用单利按年计息，不计复利，每年付息一次，到期一次还本，最后一期利息随本金的兑付一起支付。13、利息登记日：本次债券的利息登记日按登记机构相关规定处理。在利息登记日当日收市后登记在册的本次债券持有人，均有权就所持本次债券获得该利息登记日所在计息年度的利息。14、起息日：2016 年 3 月 24 日。付息日：2017 年至 2021 年每年的 3 月 24 日。若投资者行使回售选择权，则其回售部分债券的付息日为 2017 年至 2019 年每年的 3 月 24 日。如遇法定节假日或休息日，则顺延至其后的第 1 个工作日：每次付息款项不另计利息。16、本金兑付日：2021 年 3 月 24 日。若投资者行使回售选择权，则其回售部分债券的本金兑付日为 2019 年 3 月 24 日。如遇法定节假日或休息日，则顺延至其后的第 1 个工作日：顺延期间兑付款项不另计利息。17、利息、兑付方式：本次债券本息支付将按照本次债券登记机构的有关规定统计债券持有人名单，本息支付方式及其他具体安排按照债券登记机构的相关业务规则办理。18、支付金额：本次债券于每年的付息日向投资者支付的利息金额为投资者截至利息登记日收市时所持有的本次债券票面总额与对应的票面年利率的乘积；于兑付日向投资者支付的本息金额为投资者截至兑付债权登记日收市时所持有的本次债券最后一期利息及所持有的债券票面总额的本金。27、债券受托管理人：申万宏源证券有限公司。28、募集资金用途：本次债券募集资金扣除发行费用后，公司拟将募集资金用于偿还借款及补充公司营运资金。本次债券发行公告刊登日期：2016 年 3 月 22 日；公司债券登记机构：中国证券登记结算有限责任公司上海分公

司。第四节增信机制、偿债计划及其他保障措施四、偿债保障措施中载明：为了充分、有效地维护债券持有人的利益，公司为本次债券的按时、足额偿付做出了一系列安排，包括确定专门部门与人员、安排偿债资金、制定并严格执行资金管理计划、做好组织协调、充分发挥债券受托管理人的作用和严格履行信息披露义务等，形成一套确保债券安全付息、兑付的保障措施。(一)设立募集资金专户和专项偿债账户；(二)制定《债券持有人会议规则》；(三)设立专门的偿付工作小组；(四)制定并严格执行资金管理计划；(五)充分发挥债券受托管理人的作用；(六)严格履行信息披露义务；(七)其他偿债保障措施。五、违约的相关处理(一)构成债券违约的情形以下事件构成债券违约：(1)在本期债券到期时，发行人未能按时偿付到期应付本金；(2)发行人未能偿付本期债券的到期利息；(3)发行人不履行或违反《债券受托管理协议》项下的任何承诺(上述违约情形除外)且将实质影响发行人对本期债券的还本付息义务，且经债券受托管理人书面通知，或经单独或合并持有本期未偿还债券本金总额 20%以上的债券持有人书面通知，该违约持续 90 天仍未得到纠正；(4)在债券存续期间内，发行人发生解散、注销、吊销、停业、清算、丧失清偿能力、被法院指定接管人或已开始相关的诉讼程序；(5)任何适用的现行或将来的法律法规、规则、规章、判决、或政府、监管、立法或司法机构或权力部门的指令、法令或命令，或上述规定的解释的变更导致发行人在《债券受托管理协议》或本次债券项下义务的履行变得不合法。(二)违约责任及其承担方式若本公司未按时支付本次债券的本金和/或利息，或发生其他违约情况时，债券受托管理人将依据《债券受托管理协议》代表债券持有人向本公司进行追索。如果债券受托管理人未按《债券受托管理协议》履行其职责，债券持有人有权直接依法向本公司进行追索，并追究债券受托管理人的违约责任。公司承诺按照本次债券募集说明书约定的还本付息安排向债券持有人支付本次债券利息及

兑付本次债券本金，若公司不能按时支付本次债券利息或本次债券到期不能兑付本金，对于逾期未付的利息或本金，公司将根据逾期天数按债券票面利率向债券持有人支付逾期利息：按照该未付利息对应本次债券的票面利率另计利息(单利)；偿还本金发生逾期的，逾期未付的本金金额自本金支付日起，按照该未付本金对应本次债券的票面利率计算利息(单利)。(三)争议解决方式发行人和投资者因上述情况引起的任何争议，首先应在争议各方之间协商解决。如果协商解决不成，任何一方均有权向发行人所在地的有管辖权的人民法院予以诉讼解决。

2015 年 9 月 28 日，新华联公司与申万宏源证券有限公司(以下简称宏源证券公司)签订《债券受托管理协议》，聘任宏源证券公司担任本次债券的债券受托管理人。发行人不能偿还债务时，受托管理人应当督促发行人、增信机构和其他具有偿付义务的机构等落实相应的偿债措施，并可以接受全部或部分债券持有人的委托，以自己名义代表债券持有人提起民事诉讼、参与重组或者破产的法律程序。若发行人未按时支付本次债券的本金和/或利息，或发生其他违约情况时，受托管理人将依据《债券受托管理协议》代表债券持有人向发行人进行追索。如果受托管理人未按《债券受托管理协议》履行其职责，债券持有人有权直接依法向发行人进行追索，并追究受托管理人的违约责任。

发行人承诺按照本次债券募集说明书约定的还本付息安排向债券持有人支付本次债券利息及兑付本次债券本金，若发行人不能按时支付本次债券利息或本次债券到期不能兑付本金，对于逾期未付的利息或本金，发行人将根据逾期天数按债券票面利率向债券持有人支付逾期利息：按照该未付利息对应本次债券的票面利率另计利息(单利)；偿还本金发生逾期的，逾期未付的本金金额自本金支付日起，按照该未付本金对应本次债券的票面利率计算利息(单利)。

2019 年 2 月 25 日，新华联公司发布《关于“16 新华债”公司债券票面利率

调整的公告》，内容为：根据《新华联控股有限公司公开发行 2016 年公司债券募集说明书(面向合格投资者)》中所设定的利率调整选择权，发行人有权决定在存续期限的第 3 年末上调本次债券后 2 年的票面利率。发行人将于第 3 个计息年度付息日前的第 20 个交易日，在中国证监会指定的信息披露媒体上发布关于是否上调票面利率以及上调幅度的公告。若发行人未行使利率上调权，未被回售部分债券在债券存续期后 2 年票面利率仍维持原有票面利率不变。根据当前的市场环境，发行人决定上调本期债券后续期限的票面利率 100 个基点，即在债券存续期后 2 年票面年利率为 7.5%并固定不变(注：本期债券采用单利按年计息，不计复利，逾期不另计利息，债券存续期内前 3 年票面利率为 6.5%并固定不变)。为保证发行人利率调整选择权有关工作的顺利进行，现将有关事宜公告如下：一、本期债券利率调整情况本期债券在存续期内前 3 年(2016 年 3 月 24 日至 2019 年 3 月 23 日)票面年利率为 6.5%，在债券存续期内前 3 年固定不变；在本期债券存续期的第 3 年末，发行人选择上调票面利率 100 个基点，即在本期债券存续期后 2 年(2019 年 3 月 24 日至 2021 年 3 月 23 日)票面利率为 7.5%并固定不变。

2019 年 4 月 15 日，信托公司发布《中信信托信赢 13 期分层型证券投资集合资金信托计划成立公告》，内容为：尊敬的委托人/受益人：我公司作为受托人发起设立的“中信信托信赢 13 期分层型证券投资集合资金信托计划”(以下简称“本信托”)于 2019 年 4 月 15 日依法成立。本信托预定募集信托本金为人民币 21852 万元，本次募集信托本金为人民币 21852 万元。信托期限不超过 20 个月。后续增发募集情况，以受托人届时公告为准。其中本期优先级 1 类信托本金为 620 万元，优先级 2 类信托本金为 4732 万元，优先级 3 类信托本金为 11000 万元，次级信托本金为人民币 5500 万元。本信托的信托专户情况：开户名称：中信信托有限责任公司，开户银行：中国银行北京分行中银大厦支行，银行账号：×××。

信托资金用途与本信托的信托文件约定相同。本计划的投资顾问为国盛证券资产管理有限公司，保管银行为中国银行股份有限公司北京市分行。我公司作为本信托的受托人，将以受益人利益最大化为目标，严格按照信托文件约定，审慎处理本信托计划的各项事务。特此公告。

2019 年 4 月 23 日中信信赢 13 期账户购入票面金额为 2000 万元的“16 新华债”。国盛证券有限责任公司于 2021 年 11 月 10 日出具的对账单显示：中信信托信赢 13 期持有 16 新华债 200000 份。

2020 年 3 月 11 日，宏源证券公司出具《申万宏源证券有限公司关于新华联控股有限公司重大事项之临时受托管理事务报告》，内容：……二、本期债券的基本情况 10、利息登记日：本期债券的利息登记日按登记机构相关规定处理。在利息登记日当日收市后登记在册的本期债券持有人，均有权就所持本期债券获得该利息登记日所在计息年度的利息。15、发行时信用级别及资信评级机构：经大公国际资信评估有限公司综合评定，发行人主体信用等级为 AA+，本次债券信用等级为 AA+，评级展望维持稳定。16、跟踪评级及评级机构：大公国际资信评估有限公司于 2020 年 3 月 9 日出具《大公关于将新华联控股有限公司主体信用评级下调至 C 的公告》，大公将新华联控股主体信用等级调整为 C，“16 新华债”信用等级调整为 CC。17、上市情况：2016 年 4 月 12 日，本期债券于上海证券交易所上市，债券简称“16 新华债”。三、本期债券的重大事项 1、2020 年 3 月 6 日，新华联控股有限公司(以下简称“发行人”或“公司”)发布了《新华联控股有限公司 2015 年度第一期中期票据未能按期足额兑付本息的公告》。发行人 2015 年度第一期中期票据(债券简称：15 新华联控 MTN001，债券代码：101558006)应于 2020 年 3 月 6 日兑付本息。截至到期兑付日终，公司未能按照约定筹措足额兑付资金，“15 新华联控 MTN001”不能按期足额兑付本息约 10.7 亿元，已构成实质性违

约。受新型冠状病毒肺炎疫情不可抗力因素的严重影响，公司所属文化旅游、商业零售、景区景点、酒店餐饮、石油贸易等业务遭受重创，1-2 月减少经营回款超过 60 亿元，加之持续受到“降杠杆、民营企业融资难发债难”的影响，偿付贷款和债券导致现金持续流出，流动资金极为紧张。对于 2015 年度第一期中期票据后续工作安排，公司正在积极与持有人协调达成展期，具体方案将于双方签署相关协议后另行公告。公司正通过多种途径积极筹措资金，同时加快引入战略投资者，缓解资金压力，努力保障后续债务融资工具到期偿付。2、根据《东方金诚国际信用评估有限公司关于下调新华联控股有限公司主体信用等级的公告》，鉴于新华联控股有限公司账面资金紧张，近期面临较大债务集中偿付压力；且新华联控股有限公司盈利能力和经营回款有所下滑；东方金诚于 2020 年 3 月 5 日将新华联控股有限公司主体信用等级下调至 A+，评级展望为负面。3、2020 年 3 月 9 日，大公国际资信评估有限公司(以下简称“大公评级”)发布了《大公关于将新华联控股有限公司主体信用评级下调至 C 的公告》。……大公评级决定将发行人主体信用等级调整为 C，“16 新华债”信用等级调整为 CC。宏源证券公司作为“16 新华债”受托管理人，将密切关注新华联控股有限公司后续经营、相关债务偿还情况以及其他对债券持有人利益有重大影响的事项，并及时向投资者披露。

2020 年 3 月 18 日，新华联公司发布《新华联控股有限公司 2016 年公司债券 2020 年付息公告》，内容为：由新华联公司于 2016 年 3 月 24 日发行的新华联公司 2016 年公司债券，将于 2020 年 3 月 24 日开始支付自 2019 年 3 月 24 日至 2020 年 3 月 23 日期间的利息。为保证本次付息工作的顺利进行，方便投资者及时领取利息，现将有关事宜公告如下：……二、本期债券本年度付息和兑付情况 1.本年度计息期限：2019 年 3 月 24 日至 2020 年 3 月 23 日。2.利率：本期债券票面利率(计息年利率)为 7.5%。3.债权登记日：本期债券在上海证券交易所上市部分本年

度的债权登记日为2020年3月23日。截至上述债券登记日下午收市后，本期债券投资者对托管账户所记载的债券余额享有本年度利息。4.付息时间：2020年3月24日。

2020年4月1日，宏源公司发布《关于新华联控股有限公司2016年公司债券2020年第一次债券持有人会议决议的公告》，内容为：新华联公司2016年公司债2020年度第一次债券持有人会议由宏源公司召集，本次持有人会议于2020年3月31日通过非现场形式召开。持有人审议了3项议案，形成会议决议。现公告如下：……二、本次持有人会议审议的议案及表决结果如下：议案一：关于豁免本次债券持有人会议通知期限的议案。表决结果：同意。议案二：关于要求发行人及其关联方等为“16新华债”债券提供增信措施的议案。本议案表决结果：通过。议案三：关于要求发行人确定定期沟通机制和联系人员的议案，表决结果：通过。四、债券持有人的权利。债券持有人对发行人享有如下权利：1.债券持有人有权要求发行人立刻支付本期债券到期未偿还的债权利息。2.债权持有人有权要求发行人追加担保。3.违约事件发生且一直持续30个连续工作日仍未解除，经本次未偿还债权持有人(包括债券持有人代理人)所持表决权的二分之一以上通过，债券持有人有权书面通知发行人，宣布所有本次未偿还债券的本金和相应利息，立刻到期应付。4.债券持有人有权通过任何可行的法律救济方式收回本次未偿还债券的本金和利息。5.债券持有人有权要求发行人告知公司生产经营情况以及有关“16新华债”后续兑付计划最近进展情况。6.其他根据相关法律法规以及《受托管理协议》投资者享有权利。

2020年12月1日，信托公司(甲方)与国浩律师(北京)事务所(乙方)签订《委托代理协议》，约定：乙方接受甲方委托，由专项服务团队成员在甲方(代表信赢13期信托计划)与新华联公司债券违约纠纷案诉讼、执行及破产程序(如有)中担任

甲方的委托代理人。五、本案律师代理费分为固定费用和风险费用两部分。案件一审立案成功后，甲方于立案成功后 10 个工作日内向乙方指定账户支付 2 万元。……

2021 年 3 月 1 日，信托公司向国浩律师(北京)事务所转款 2 万元，附言为信赢 13 期支付律师费。国浩律师(北京)事务所向信托公司出具 2 万元增值税普通发票。

北京市通州区发展和改革委员会《通州区关于上报请求纳入疫情防控重点保障企业名单的请示(第五批)》(通发改[2020]5 号)后附《通州区疫情防控重点保障企业名单及信贷资金需求表(第 5 批)》中载明，新华联公司的贷款需求为 20000 万元，贷款拟使用项目包括：扩大防疫物资及原材料生产规模；开展抗疫生物医药制品研发；物业公司所管理居民小区疫情期间生活服务和防疫保障；集团旗下 17 家酒店疫情防控保障；集团旗下景区防疫物资、设备采购等。

上述事实，有《募集说明书》《中信信托信赢 13 期分层型证券投资集合资金信托计划成立公告》《关于新华联控股有限公司 2016 年公司债券 2020 年第一次债券持有人会议决议的公告》《申万宏源证券有限公司关于新华联控股有限公司重大事项之临时受托管理事务报告》《关于“16 新华债”公司债券票面利率调整的公告》《通州区关于上报请求纳入疫情防控重点保障企业名单的请示(第五批)》、对账单及当事人陈述等在案佐证。

本院认为：新华联公司为募集资金，依照相关法定程序发行案涉公司债券。涉案《募集说明书》系新华联公司为发行公司债券而设立，其内容不违反法律、法规的强制性规定，合法有效，该《募集说明书》约定了募集资金过程中的各方当事人的权利、义务，信托公司作为“信赢 13 期信托计划”的受托人认购涉案债券的行为系对《募集说明书》中设定的权利、义务的认可，因此，各方当事人均

应遵守《募集说明书》中相关规定。

关于信托公司的原告主体资格问题。首先，根据信托公司发布的《中信信托信赢 13 期分层型证券投资集合资金信托计划成立公告》内容，信托公司以其发起设立的“信赢 13 期信托计划”项下的资金购买了新华联公司发行的“16 新华债”2000 万元，故与涉案债券相关的权利应由信托计划享有。信托公司作为“信赢 13 期信托计划”的受托人，有权以自己的名义提起诉讼。其次，依据募集说明书约定，“若本公司未按时支付本次债券的本金和/或利息，或发生其他违约情况时，债券受托管理人将依据《债券受托管理协议》代表债券持有人向本公司进行追索。如果债券受托管理人未按《债券受托管理协议》履行其职责，债券持有人有权直接依法向本公司进行追索”，《债券受托管理协议》约定“若发行人未按时支付本次债券的本金和/或利息，或发生其他违约情况时，受托管理人将依据《债券受托管理协议》代表债券持有人向发行人进行追索。如果受托管理人未按《债券受托管理协议》履行其职责，债券持有人有权直接依法向发行人进行追索”。依据上述约定，新华联公司发生上述违约行为时受托管理人应向新华联公司进行追索。现涉案债券已于 2021 年 3 月 24 日到期，新华联公司无法兑付本金并按期支付利息，已经构成违约，自债券到期至今受托管理人虽召开债券持有人会议，但新华联公司至今并未提供增信措施或追加担保，亦未就涉诉“16 新华债”履行兑付义务，且 2020 年债券持有人会议决议明确债券持有人有权通过任何可行的法律救济方式收回本次未偿还债券的本金和利息，故信托公司有权直接以诉讼方式向新华联公司追索。故对新华联公司申请追加受托管理人作为无独立请求权的第三人的意见，本院不予准许。

因涉案债券已经到期，故新华联公司应向信托公司偿还债券本金 2000 万元。因信托公司以“信赢 13 期信托计划”项下的资金于 2019 年 8 月 9 日购入涉案债

券 2000 万元并持有至今，故新华联公司应向信托公司给付自 2019 年 3 月 24 日至 2021 年 3 月 23 日的利息，因 2019 年 2 月 25 日新华联公司发布的《关于“16 新华债”公司债券票面利率调整的公告》中上调 2019 年 3 月 24 日至 2021 年 3 月 23 日的票面利率为 7.5%并固定不变，故自 2019 年 3 月 24 日至 2021 年 3 月 23 日的利息应按照年 7.5%计算，经核算为 300 万元。

因募集说明书约定：“若公司不能按时支付本次债券利息或本次债券到期不能兑付本金，对于逾期未付的利息或本金，公司将根据逾期天数按债券票面利率向债券持有人支付逾期利息：按照该未付利息对应本次债券的票面利率另计利息(单利)；偿还本金发生逾期的，逾期未付的本金金额自本金支付日起，按照该未付本金对应本次债券的票面利率计算利息(单利)。”因新华联公司未能兑付到期债券本金，故信托公司有权要求新华联公司给付自 2021 年 3 月 24 日起至本金全部清偿完毕之日止的逾期利息(以 2000 万元为基数，按年利率 7.5%计算)；因新华联公司未能履行 2019 年 3 月 24 日至 2021 年 3 月 23 日利息的给付义务，故信托公司有权要求其分段给付自应付利息日起至实际付清之日止，以应支付的利息金额为基数，按年利率 7.5%计算的逾期利息。

关于律师费用，《募集说明书》中关于违约责任条款载明，新华联公司作为发行人到期未能偿还本期债券本息，投资者可依法提起诉讼。现新华联公司未能按照约定兑付债券本息，构成违约。信托公司为此提起诉讼并就本案已支付律师费 2 万元，此费用系采取诉讼方式实现权益而发生的费用，属于合理支出，新华联公司对此应予以赔偿。关于新华联公司不同意支付律师费的抗辩意见，本院不予采信。

关于新华联公司以遭遇新冠疫情为由要求延长履行期限、减免利息的抗辩意见，本院认为，本案所涉债券系新华联公司发行的 5 年期债券，自 2020 年 3 月 24

日即未能支付该期利息，2020 年 2 月虽发生疫情，但距新华联公司支付利息的期限仅一个月，疫情的发生不足以影响新华联公司履行给付义务，且根据案涉《募集说明书》募集资金拟用于偿还借款及补充公司营运资金，亦非疫情明显相关事项。加之，截至债券到期日新华联公司亦未能履行到期债券的兑付义务，故新华联公司以疫情为由抗辩延长履行期限、减免利息，不成立。本院对于新华联公司未能按期足额偿付涉案债券构成不可抗力的主张不予采信。关于新华联公司抗辩信托公司应加入债委会并通过债委会对新华联公司采取展期续贷、减低利率等债务化解措施的意见，因是否加入新华联集团债委会应以信托公司的自主意愿为准，信托公司对于加入债委会或通过诉讼主张权利应具有自主选择权，现信托公司选择通过诉讼的方式主张权利，有事实及法律依据，亦应获得支持。

综上所述，依照《中华人民共和国合同法》第一百零七条，《最高人民法院关于适用<中华人民共和国民法典>时间效力的若干规定》第一条，《中华人民共和国民事诉讼法》第六十七条之规定，判决如下：

一、被告新华联控股有限公司偿还原告中信信托有限责任公司债券本金 2000 万元，于本判决生效之日起七日内给付；

二、被告新华联控股有限公司给付原告中信信托有限责任公司自 2019 年 3 月 24 日起至 2021 年 3 月 23 日止的利息 300 万元，于本判决生效之日起七日内给付；

三、被告新华联控股有限公司给付原告中信信托有限责任公司逾期利息(以 2000 万元为基数，自 2021 年 3 月 24 日起至本金全部清偿完毕之日止，按年利率 7.5%计算)，于本判决生效之日起七日内给付；

四、被告新华联控股有限公司给付原告中信信托有限责任公司逾期利息(以 150 万元为基数，自 2020 年 3 月 24 日起至实际付清之日止，按照年利率 7.5%计

算，以150万元为基数，自2021年3月24日起至实际付清之日止，按照年利率7.5%计算)，于本判决生效之日起七日内给付；

五、被告新华联控股有限公司给付原告中信信托有限责任公司律师费2万元，于本判决生效之日起七日内给付。

如未按本判决指定的期间履行给付金钱义务的，应当依据《中华人民共和国民事诉讼法》第二百六十条之规定加倍支付迟延履行期间的债务利息。

保全费5000元，由被告新华联控股有限公司负担，于判决生效之日起七日内交纳。

案件受理费77958元，由被告新华联控股有限公司负担，于判决生效之日起七日内交纳。

如不服本判决，可在判决书送达之日起十五日内，向本院递交上诉状，并按对方当事人的人数提出副本，交纳上诉案件受理费，上诉于北京金融法院。如在上诉期满后七日内未交纳上诉案件受理费的，按自动撤回上诉处理。

审判员 张 博

二〇二二年一月十日

书记员 孙桂祖