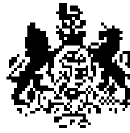
[2009] SC (Bda) 26 Civ (28 May 2009)



IN THE SUPREME COURT OF BERMUDA

Commercial Court
Civil Jurisdiction

2009: No. 7

BETWEEN:

BIO-TREAT TECHNOLOGY LIMITED

Plaintiff

and

HIGHBRIDGE ASIA OPPORTUNITIES MASTER FUND LP

First Defendant

And

HIGHBRIDGE INTERNATIONAL LLC

Second Defendant

RULING

Date of Hearing: 12 and 20 May 2009

Date of Ruling: 28 May 2009

Mr. Narinder Hargun, Conyers Dill & Pearman, for the Plaintiff

Mr. John Riihiluoma, Appleby, for the Defendants

Introduction

1. This ruling follows from the grant of an injunction by Kawaley J on 15 January 2009, restraining the defendants from presenting a petition to this Court seeking to wind up the plaintiff, until further order. I will refer to the plaintiff as "the Company", to the first defendant as "Highbridge Asia", to the second defendant as "Highbridge International" and to the two defendants together as "Highbridge". By application made by summons dated 6 April 2009 Highbridge seeks to set aside Kawaley J's order.

Evidence

2. The application for the injunction was supported by two affirmations of Alan Lau Cheuk Lun dated respectively 14 and 15 January 2009. Pursuant to an order for directions in relation to the set aside summons, Highbridge filed the first affirmation of Shan Ming Chang dated 6 April 2009, and in response to this affirmation there were filed on behalf of the Company an affidavit sworn by Robin Mayor, a partner of Conyers Dill and Pearman, on 20 April 2009, and the third affirmation of Mr. Lau dated 24 April 2009. I should also mention that a statement of claim was filed on 13 February 2009 and a defence on 2 March 2009. Those pleadings essentially took the same positions as are taken in this application.

The Nature of the Dispute

3. The dispute between the parties arises from the issue of certain bonds by the Company in respect of which Highbridge Asia and Highbridge International were investors. But as is apparently the practice in the international bond markets, Highbridge was not a direct investor. The bonds were issued in the form of a global bond, the holder of which was the Bank of New York Depository (Nominees) Limited ("the Bank of New York"). The Bank of New York in fact held the global bond for the account of two international clearing systems, one of which was an entity referred to as Euroclear, which in turn had its contractual relationships with certain financial institutions, and it

was those financial institutions (Goldman Sachs in the case of Highbridge) which had contractual relationships with investors such as Highbridge. Hence there were three links in the chain between the Company as issuer and Highbridge as investor.

4. The bonds were issued on 18 January 2006, in the sum of SGD 206 million, and were zero coupon convertible bonds due 18 January 2013. However, the terms of the bonds provided for the exercise of a put option requiring the Company to redeem the bonds at an appropriate premium on various redemption dates, the first such date being 18 January 2008. At that time, approximately 70% of the aggregate face value of the bonds were put to the Company. This resulted in what the Company described as "an offshore-onshore liquidity mismatch", which arose because the Company conducts its business principally in the People's Republic of China ("PRC"). The Company's cash reserves were onshore in the PRC, and in view of exchange controls regulating the remittance of funds out of the PRC, the Company took the view that it was in its best interests to retain those funds within the PRC and utilise offshore financing to repay the bonds which had been the subject of the exercise of put options. In the event, the Company repaid substantially less than the amount put.

5. Obviously, 70% of SGD 206 million approximates to SGD 144 million. Mr. Lau's evidence was that the Company made a partial payment of approximately SGD 48.9 million in respect of the put bonds on 25 January 2008, which would represent approximately one third of the amount due. The evidence from Highbridge in Ms. Shan's affirmation was that the payments which had been made to Euroclear in respect of its interest in the bonds represented 31.57% of the funds due both to Highbridge Asia and Highbridge International.

6. There are a number of other features of the bonds which are relevant to the dispute between the parties. First, as one might expect, the bonds contained

provision that in the event of default the full amount of the bonds was immediately due and payable. Next, there is provision in the bonds for there to be an exchange from the global bond to definitive bonds, which, unlike the global bond, would be issued in the name of the ultimate investor. One of the bases upon which the global bond was to be so exchangeable for a definitive bond was where a default had been made in the payment of principal in respect of any of the bonds, when and as the same ought to have been paid in accordance with the terms and conditions thereof. It is admitted for the Company that it had only made a partial payment in relation to the redemptions, so that effectively there is an admission of an event of default as defined in the documentation.

7. The failure on the part of the Company to make full payment to Highbridge in respect of its share of funds due pursuant to the exercise of the put option led to the issue of statutory demands on behalf of both Highbridge Asia and Highbridge International, each dated 24 December 2008. These demands were made pursuant to section 162(a) of the Companies Act 1981 ("the Act"), and covered the balance of monies due in respect of the put bonds, as well as monies due in respect of the unput bonds, the latter due by reason of the Company's default in making payment. No doubt it was the service of the statutory demands which led to the application before Kawaley J.

8. There is another issue between the parties which is indirectly related to the exercise of the put option by approximately 70% of the bondholders. Because of the Company's wish to pay the monies due with funds held outside the PRC, it negotiated a borrowing from the Precious Wise Group Limited ("Precious Wise"). There was no security given at the time of this loan, but the terms of the loan provided that Precious Wise would be permitted to take security over certain of the Company's assets in the event of default. On some subsequent date which does not appear in the documents, the Company defaulted on its obligations under the Precious Wise loan. This led Precious Wise to invoke its right to call for security, and such security was given by the

Company to Precious Wise on 9 December 2008. That date is said by Highbridge to lend urgency to Highbridge's application to discharge the injunction, because of the six month period governing fraudulent preferences, which would require the issue of a petition on or before 8 June 2009, if the grant of security were to be challenged.

9. Finally, there was originally an issue raised in the evidence concerning disclosure of relevant material, in relation to the application before Kawaley J, although Mr. Riihiluoma indicated at the outset that this was not being pursued. It arose because of some missing pages in the exhibits to the second affirmation to Mr. Lau, which exhibited the Company's annual report for its 2008 financial year, said to contain the Company's entire financial statements. Due to an administrative error in the preparation of the exhibits, some ten pages were missing. In her affirmation, Ms. Shan referred to the fact that the relevant pages had acknowledged that there had only been a part payment of the bonds, and that there existed an outstanding balance owed by the Company to the bond participants, including Highbridge. In fact, the two paragraphs which Ms. Shan asserted had relevance for the purpose of the application before Kawaley J appeared in substantially the same terms in the auditors' report. In any case it was quite clear from Mr. Lau's first affirmation what the true position was in regard to the partial payment by the Company pursuant to the exercise of the put options.

The Parties' Positions

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

between the Company and Highbridge, which would permit the argument that a liability could arise upon the happening of some future event, and enable Highbridge properly to be classified as a contingent creditor.

11. Highbridge does not dispute that it is not the legal owner of its share of the global bond. However, Highbridge maintains that the term “holder” appearing in the global bond is broad enough to include Highbridge and so give it the right to enforce the terms of the global bond as against the Company as issuer. Mr. Riihiluoma contended that the form of global bond made clear that the word “holder” meant the party with an economic interest in the bond. Next, Highbridge maintains that it has an equitable interest in its share of the bond, and that such equitable interest is sufficient to constitute Highbridge a creditor for the purpose of section 163 (1) of the Act. It also says that because of the Company’s default in failing to make full payment of the sums due upon the exercise of the put options, Highbridge is entitled, through Goldman Sachs, Euroclear and then the Bank of New York, the upward links in the chain, to require the Company to transfer such number of definitive bonds as represent its beneficial interest in the global bond. This is a process which has been put in hand but not completed. Highbridge then argues that upon registration as the holder of the definitive bonds, it will be entitled to received payment to it by the Company in respect of both the put and unput bonds (the latter by reason of the default) and hence, if not presently a current creditor (contrary to Highbridge’s primary contention), it will become a current creditor of the Company, so that it is now a contingent or prospective creditor.

The Documentation

12. I have referred in broad terms to the structure of the global bond, and to some of its terms, but given the argument, particularly in relation to the definition of holder of the global bond, it is necessary to look at the different documents governing the structure in more detail. The initial document between the Company and the Bank of New York is referred to as an agency agreement,

and at the outset, the Bank of New York is referred to respectively as fiscal agent, conversion agent, registrar and transfer agent, the different terms being intended to reflect the different services provided by the Bank of New York under the agency agreement. The agency is clearly between the Company as principal and the Bank of New York as agent. Schedule one to the agency agreement sets out the form of both the global bond and the definitive bonds, and schedule two sets out the terms and conditions of the bonds.

13. It is necessary to set out certain clauses from the principal documents, which for the purpose of this case are the agency agreement, the global bond, and the terms and conditions applicable to both forms of bond. I will take these in turn.

The Agency Agreement

14. The duties of the fiscal agent in respect of payments are set out in clause 6, and I would refer in particular to clause 6.4, which is in the following terms:

> "Whilst any Bonds are represented by a Global Bond, all payments due in respect of the Bonds shall be made to, or to the order of, the holder of the Global Bond, subject to and in accordance with the provisions of the Global Bond. On the occasion of each payment, the Fiscal Agent shall cause the appropriate Schedule to the relevant Global Bond to be annotated so as to evidence the amounts and dates of the payments of principal".

15. The next provision to which I need to refer is in relation to meetings of bondholders, which is contained in paragraph 23.1 of the agency agreement, and which is in the following terms:

> "The provisions of Schedule 7 shall apply to meetings of the Bondholders and shall have effect in the same manner as if set out in this Agreement provided that, so long as any of the Bonds are represented by the Global Bond, the expression **Bondholders** shall include the persons for the time being shown in the records of Euroclear Bank S.A./N.V., as operator of the Euroclear System (**Euroclear**) and/or Clearstream Banking, société anonyme (**Clearstream, Luxembourg**), as the holders of a particular principal amount of such Bonds (each an **Accountholder**) (in which

> regard a certificate or other document issued by Euroclear or Clearstream, Luxembourg as to the principal amount of such Bonds standing to the account of any person shall be conclusive and binding) for all purposes other than with respect to the payment of principal and interest on such Bonds, the right to which shall be vested as against the Company solely in the bearer of the Global Bond in accordance with the subject to its terms, and the expressions **holder** and **holders** shall be construed accordingly and the expression Bonds shall mean units of S$1,000 principal amount of Bonds".

The Global Bond

16. The first clause contained in the global bond to which I would refer governs the conversion rights attaching to the bond, and these are in the following terms:

> "Any Conversation Rights attaching herein may be exercised by a person entitled to an interest herein (a **Holder**) depositing at its own expense a duly signed and completed notice (in the form obtainable from the specified office of the Conversion Agent with the Conversion Agent) accompanied by a written authority to the Conversion Agent to procure the debit of the relevant Holder's account with Euroclear or Clearstream, Luxembourg (each as defined under "Notices" below) with the principal amount of the portion hereof to which such Holder is entitled. The Deposit Date (as defined in the Conditions) shall be the first date on which the duly signed and completed notice of exercise and the written authority referred to above shall have been deposited with the Conversion Agent or the date on which all conditions precedent to the exercise hereof are fulfilled, whichever shall be later."

17. Next, I would make reference to the exchange provisions, pursuant to which the global bond may be exchanged for definitive bonds. This is in the following terms:

> "This Global Bond is exchangeable in whole but not in part (free of charge to the holder) for the Definitive Bonds described below (1) on an Event of Default (as described in Condition 10), (2) if this Global Bond is held on behalf of Euroclear or Clearstream, Luxembourg or the Alternative Clearing System (as defined under "Notices" below) and any such clearing system is closed for business for a continuous period of fourteen (14) days (other than by reason of holidays, statutory or otherwise) or announces an intention permanently to cease business or does in fact do so by such holder giving notice to the Fiscal Agent, or (3)

at any time at the option of the Company by giving notice to the Fiscal Agent and the Bondholders, of its intention to exchange this Global Bond for Definitive Bonds on or after the Exchange Date specified in the notice.

On or after the Exchange Date, the holder of this Global Bond may surrender this Global Bond to or to the order of the Fiscal Agent. In exchange for this Global Bond, the Company will deliver, or procure the delivery of, an equal aggregate principal amount of duly executed and authenticated Definitive Bonds."

18. Shortly after that passage in the global bond under the heading "Exchange Date" there is a provision to which both counsel referred, each with a different interpretation. That provision is in the following terms:

> "Except as otherwise described herein, this Global Bond is subject to the Conditions and, until it is exchanged for Definitive Bonds, its holder shall be entitled to the same benefits as if it were the holder of the Definitive Bonds for which it may be exchanged and as if such Definitive Bonds had been issued on the date of this Global Bond".

19. Next, in relation to payments, I would just refer to the start of the relevant paragraph, since only a small extract is needed. This is in the following terms:

> "Principal in respect of this Global Bond shall be paid to its Holder against presentation…."

20. Finally, in relation to the global bond, I would refer to the provisions of the put option which appear in that document, and these are in the following terms:

> "For so long as all of the Bonds are represented by this Global Bond and such Global Bond is held on behalf of a clearing system, the option of the Bondholders provided for in Condition 7(E) may be exercised by the holder of the relevant account at such clearing system giving a notice of exercise in relation to the principal amount of the Bonds in respect of which such options is exercised within the time limits set forth in that Condition and/or as required by the relevant clearing system and at the same time presenting or procuring the presentation of this Global Bond to the Fiscal Agent for notation accordingly. Whilst all of the Bonds are represented by this Global Bond and such Global Bond is held on behalf

> of a clearing system, notices of exercise shall be given in accordance with the standard procedures of Euroclear and/or Clearstream, Luxembourg (which may include notice being given on the instruction of the relevant holder by the relevant clearing system or any common depositary therefore to the Fiscal Agent by electronic means) in a form acceptable to the relevant clearing system from time to time."

Terms and Conditions

21. As previously indicated, these are contained in schedule 2 to the agency agreement, and I would refer only to a portion of the section dealing with the exercise of the put option by the bond holders, which passage is in the following terms:

> "The Company shall procure that the Fiscal Agent shall issue to the relevant Bondholder a non-transferable receipt of deposit (a Receipt), in which shall be stated the serial number of each Bond so deposited, the date of such deposit and other required information".

Arguments on the Construction of the Document

22. In a nutshell, Mr. Riihiluoma's argument was that many of the references to "a holder" which appeared in the global bond could not sensibly be said to be references to the Bank of New York, which was identified at the outset of the document as being the holder. In relation to the conversion rights appearing at paragraph 16 above, Mr. Riihiluoma referred to the exercise of the conversion rights, which under the clause were afforded to a person entitled to an interest in the global bond, such person being defined as "a Holder". Mr. Riihiluoma submitted that that could not sensibly be a reference to the Bank of New York, because of the subsequent reference to "the relevant Holder's account with Euroclear or Clearstream".

23. Mr. Riihiluoma made much the same contention in relation to the provision which followed shortly after the conversion rights, for the exchange of the global bond to definitive bonds, the terms of which are set out in paragraph 17 above. Again, Mr. Riihiluoma contended that this clause only made sense if

the holder or bondholder meant the holder of the underlying economic interest.

24. Mr. Riihiluoma then referred to the terms of the extract appearing in paragraph 18 above, dealing with the benefits afforded to the holder of the global bond until such time as that may have been exchanged for definitive bonds. Again, Mr. Riihiluoma maintained that this clause made it clear that the word "holder" was a reference to the party having the underlying interest in the bond.

25. In relation to the terms of the put option, there are provisions in the global bond which appear at paragraph 20 hereof, and in the terms and conditions, which appear at paragraph 21. Again, Mr. Riihiluoma relied upon the distinction between the fiscal agent and the relevant bondholder, maintaining that the Bank of New York merely did the paperwork, and the references to the bondholder had to be references to the party with the underlying economic interest.

26. In his argument in reply, Mr. Hargun laid particular emphasis on the payment provisions, starting with the short extract which I have referred to and which is set out at paragraph 19 hereof. He then relied upon the provisions of paragraph 6.4 of the agency agreement, which I have set out at paragraph 14 above. However, Mr. Hargun put the contents of this clause in context by referring to the preceding clauses, and then relied upon the provision in the agency agreement dealing with meetings of bondholders (which I have set out in paragraph 15 above) and relying particularly on the last part thereof dealing with the issue of payment. Mr. Hargun maintained that this provision made it abundantly clear that only the Bank of New York was entitled to the payment of principal and interest, in its position as bearer of the global bond. As to the reference to the persons shown in the records of Euroclear and Clearstream as the holder of a particular principal amount, this does not appear to advance the issue, because it is clear (and, I think, common ground) that this would be the

particular financial institution, such as Goldman Sachs, rather than an end investor such as Highbridge.

Finding in Relation to the Holder of the Global Bond

27. With respect to Mr. Riihiluoma's arguments, I am unable to accept that the global bond makes it clear that the holder of the global bond is the party with the underlying economic interest. I recognise that the position would no doubt be different if the definitive bonds had been issued, but that of course is not the factual position in this case. I start with the position in relation to the clause referred to in paragraph 18 above. In my view the words "its holder" are clearly intended to refer to the holder of the global bond, as submitted by Mr. Hargun, and I do not accept that this part of the bond gives any rights to Highbridge. Mr. Riihiluoma seemed to suggest that because the Bank of New York would never be a definitive bondholder, the words "its holder" must refer to the holder of the underlying economic interest. I am unable to accept that argument; it is important to look at the words "its holder" in the context in which they appear, and which I now set out with emphasis added. The meaning as I see it is that the holder of the global bond should be entitled to the same benefits "**as if it were** the holder of the Definitive Bonds". I do not believe that the clause can have the interpretation for which Mr. Riihiluoma contended.

28. I turn next to the conversion provisions, and in regard to these, I think it is important to stress that the conversion provisions apply to the holder for the time being of any of the bonds, i.e. the holder of the global bond or the holders of the definitive bonds. However, and this does seem unfortunate, the same wording is not used in both documents; the wording in the form of definitive bonds is relatively short, and quite different from that in the global bond , and it was the language of the global bond which was referred to by both counsel. In fact, the real detail in relation to conversion rights appears in the terms and conditions applicable to both bonds, but in relation to the wording appearing in the global bond, it does seem that the defined term "Holder" is not a

reference to the Bank of New York, but must be a reference to the party having the underlying economic interest. I am, therefore, bound to conclude that the global bond does afford rights to the end investor, but the fact that the end investor is afforded conversion rights under the global bond does not mean that the end investor has an entitlement to payment (which it clearly does not).

29. I turn next to the provisions of the global bond whereby the global bond is exchangeable for definitive bonds. Here, there is nothing to suggest that the investor with the underlying economic interest has rights under this part of the global bond. The clause sets out three circumstances or events giving rise to an entitlement to exchange the global bond for definitive bonds. The third of these is at the option of the Company, and in relation to this event there is a reference to the Company giving notice to "the Fiscal Agent and the Bondholders". The fiscal agent is of course the Bank of New York, so that the bondholders must presumably be the party with the underlying economic interest. Nowhere in the global bond is the word "Bondholder" defined (though it appears elsewhere), and neither is the word defined in the agency agreement. However, it is defined in the terms and conditions of the bonds, in the section relating to conversion, simply as being "the holder for the time being of any of the Bonds". Bearing in mind that the Bank of New York is therefore both the fiscal agent and the bondholder, the drafting is at best confusing, and the same may be said of the wording which appears immediately thereafter.

30. The position is no doubt the same in relation to the provisions of the put option, which appear both in the global bond, and in the terms and conditions. It seems to me that the reference to "Bondholders" and to "all of the bonds" which appear in these clauses must refer to the interest of the underlying investors.

31. So it does seem to me that when Mr. Riihiluoma referred to Highbridge as having "a host of rights", it must be the case that Highbridge was afforded conversion rights and the right to exercise the put option, under the global bond, and it also has to be said that the language in relation to the exchangeability of the global bond for definitive bonds suggest rights on the part of Highbridge. Whether Highbridge would be in a position to enforce such rights as against the Company is another question, although not one for me to decide.

32. The one thing that is clear is that Highbridge does not have a right to call for any balance due pursuant to the exercise of the put options. The payment provisions of the documentation, in particular clauses 6.4 and 23.1 of the agency agreement, and the provisions in relation to payments appearing on the second page of the global bond itself, clearly provide that the right to payment under the global bond is a right granted to the Bank of New York, and not to Highbridge, and I so find.

33. Hence I reject Mr. Riihiluoma's argument that Highbridge as the party with the underlying economic interest in the global bond can properly be regarded as being a creditor of the Company. I find that it is the Bank of New York which has the contractual relationship and rights in relation to any payment obligation imposed on the Company as issuer of the global bond.

34. I should make reference to the three cases upon which Mr. Riihiluoma relied, *Re Uruguay Central and Hygueritas Railway Company of Monte Video* [1879] 11 ChD 372, *Re Dunderland Iron Ore Company, Limited* [1909] 1 Ch 446, and *Re Olathe Silver Mining Company* [1884] 27 ChD 278. I do think it is important to emphasise that the rights of the party with the underlying economic interest will depend on the particular terms of the contractual document. In this regard I accept Mr. Hargun's submission that the cases of *Uruguay Central* and *Dunderland Iron Ore* are against Mr. Riihiluoma, and that the *Olathe Silver Mining* case can be distinguished on its facts.

35. Mr. Hargun also relied upon the case of *Re Jinro (HK) International Limited* [2003] HKCU 523. Mr. Hargun went through the facts of this case in detail, on the basis that the case was concerned with precisely the same sort of structure as exists in the instant case, with much the same chain between issuer and account holder, and with the same structure of global note and definitive notes. However, there were important factual differences, as Mr. Riihiluoma emphasised in reply. The structure in *Jinro* involved a deed of covenant, which accorded to each account holder direct rights against the issuing company. There had been assignments which led the learned judge to conclude that the petitioners were creditors within the meaning of the relevant section and had locus to present the petition.

36. Whilst it is perhaps difficult to place too much reliance upon *Jinro* in view of its different factual basis, I do accept that it is consistent with Mr. Hargun's argument.

37. I do therefore find that Highbridge does not have the necessary locus to present a winding-up petition against the Company by reason of being a creditor. Before moving on to Mr. Riihiluoma's alternative arguments, I should make reference to Mr. Hargun's argument that in relation to the issue of locus, it was sufficient for him to establish that locus was substantially disputed, and in this regard he relied upon the cases concerning a debt which was bona fide disputed on substantial grounds, so that the alleged creditor had no locus standi to present a winding-up petition - see *Mann –v- Goldstein* [1968] 1 WLR 1091. I am by no means convinced that those authorities which relate to a disputed debt are relevant where the issue on locus is not on the basis of whether the debt was bona fide disputed on substantial grounds, but on the basis that the debt was owed to a different party than the alleged creditor, the position in the case before me. Mr. Riihiluoma's argument approached matters from a different position. He submitted that even if the Court were not satisfied that Highbridge is an undisputed creditor of the

Company, it nonetheless has the discretion to allow Highbridge to present a petition. Mr. Hargun contested this, submitting that there are only very limited circumstance in which a court will allow a person whose standing as a creditor is disputed to have the benefit of a winding-up order, and so leave the dispute about the debt to be resolved by the liquidator.

38. Mr. Riihiluoma's submissions require the Court's discretion to be exercised in the interest of fairness and justice. This argument is essentially the same as that made in relation to the Precious Wise pledge, which is dealt with below, and I will deal with the issue of discretion under that heading. So far as Mr. Hargun's argument is concerned, the point is academic given the view I have taken of Highbridge's status. My reaction is that it is incumbent upon the Court to take a view on locus, and not allow a petition to proceed on the basis of arguability on locus. This appears to be the position taken in French on Applications to Wind Up Companies.

Highbridge's Equitable Interest

39. Mr. Riihiluoma's argument here was that Highbridge had an equitable interest by virtue of the structure of the holding, which he said was confirmed by Euroclear's statements of account for each of Highbridge Asia and Highbridge International, which were exhibited to Ms. Chan's affirmation. Those communications referred to Euroclear's relationship with Goldman Sachs, and the fact that Goldman Sachs had advised Euroclear that in its books the holdings were allocated to Highbridge Asia and Highbridge International. Mr. Riihiluoma also contended that in his first affirmation on behalf of the Company, Mr. Lau had accepted that Highbridge held an interest in the global bond through participants in the clearing system operated in its case by Euroclear. Mr. Riihiluoma did concede that a creditor with an equitable interest could not rely upon a statutory demand as the grounds for a petition, but he maintained that such a creditor could petition on the grounds of a company's inability to pay its debts, leaving that issue as a matter for the

petitioning creditor to prove, as opposed to placing reliance upon section 162 (a) of the Act.

40. Mr. Riihiluoma then moved on to the standing of a creditor in equity of a company to petition for its winding up, citing *Re Steel Wing Company, Limited* [1921] 1 Ch 349 and *Tele-Art Inc v Nam Tai Electronics Inc* [1999] 57 WIR 76. But with respect to Mr. Riihiluoma, it did seem to me that he took Highbridge's status as an equitable creditor as a given, on the basis of its underlying economic interest. I accept Mr. Hargun's submission that it is important to consider the underlying facts in the two cases relied upon by Mr. Riihiluoma, and to compare them with the factual situation in the instant case.

41. Mr. Hargun accepted that a creditor in equity has standing to present a petition, but did not accept that Highbridge was in such a position, relying upon the statement in McPherson's Law of Company Liquidation (paragraph 3.07) to the following effect:

> "In order to establish the position of creditor in equity, there:
>
> > "must be the relationship existing between the person who says he is the creditor and the alleged debtor, under which the debtor could be compelled in equity to pay to the alleged creditor the equitable debt."
>
> This description is capable of being applied to at least three classes of persons: (a) creditors by assignment in equity; (b) cestuis que trust; and (c) creditors by subrogation."

42. Mr. Hargun submitted that Highbridge did not fall within any of the three categories, noting that the cases of *Steel Wing* and *Tele-Art* were both cases which were concerned with assignments.

43. Mr. Hargun also pointed out that Highbridge's contention that it is a creditor in equity is inconsistent with the case it had put forward in Ms. Chan's

affirmation, to the effect that Highbridge would only have direct rights against the Company after its contingent interest had been perfected.

Finding on Creditor in Equity Issue

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

Highbridge's Status as a Contingent or Prospective Creditor

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

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

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

47. The critical words are of course "under an existing obligation". I indicated when dealing with the primary issue that in relation to those other rights which Highbridge might have against the Company, those were not issues for me to decide. However, in relation to the argument that Highbridge is a contingent or prospective creditor, the starting point is whether there is an existing obligation, with particular reference to its entitlement to definitive bonds. In this regard, it does seem to me that there is a distinction to be drawn between an existing obligation which may give rise to a liability, and an obligation which will lead to a contractual relationship between different parties, which once established may give rise to a liability.

Finding on Highbridge's Status as Contingent or Prospective Creditor

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

49. Indeed, as Mr. Hargun pointed out, this appears to have been Highbridge's understanding; when Highbridge wished to take advantage of the Company's default and convert its interest in the global bond to definitive bonds, it wrote

not to the Company, but to the Bank of New York, by letter dated 25 February 2009, and it directed its notices towards the Bank of New York as opposed to the Company, in the following terms:

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

50. I do therefore accept 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.

The Precious Wise Pledge

51. I have referred to this in paragraph 8 above only in the most general terms, but there is no need for further detail. The question is whether the prejudice which Highbridge says it will suffer if it is not permitted to issue its petition before 9 June 2009 is a factor to be taken into account in the exercise of the Court's discretion. Mr. Riihiluoma submits that even if the Court is not satisfied that Highbridge is an undisputed creditor of the Company it should nevertheless exercise its discretion so as to allow Highbridge to present a petition in the interest of fairness and justice, taking into account the potential loss of remedy in relation to the Precious Wise pledge.

52. The authorities cited by Mr. Riihiluoma certainly support the proposition that it is a rule of practice rather than one of law that a creditor's winding-up petition should not be allowed to proceed where a debt is disputed, and the general rule may be departed from, particularly where the petitioner would be without any other remedy. Mr. Riihiluoma referred to a passage in the case of

Alipour –v- Ary and Another [1997] 1 WLR 534, where the court referred to a case where a creditor's petition to wind up a company was allowed to proceed, notwithstanding that the debt was disputed, and where a fact which weighed with the court was the possibility that a liquidator might seek to set aside a floating charge granted by the company which was prima facie insolvent. Mr. Riihiluoma submits that the Precious Wise pledge was granted at a time when the Company was clearly insolvent.

53. No doubt it is appropriate at this juncture to consider the financial position of the Company in a little more detail. Mr. Riihiluoma referred to the Company as being "clearly insolvent." In fact, Mr. Lau's evidence was that although the Company had made a loss in financial year 2008, its balance sheet showed that its assets were in the order of RMB 3.3 billion against liabilities of RMB 1.8 billion. That, as I understand it, is a sum substantially in excess of the bond offering. Essentially, as I understood Mr. Riihiluoma, he was relying upon the fact that the Company had made a substantial default in respect of the monies due pursuant to the exercise of the put options, and had then fallen into default in relation to the Precious Wise loan. In practical terms, Mr. Riihiluoma was relying upon the quotation in *Cornhill Insurance –v- Improvement Services* [1986] 1WLR 114, where Harman J. referred to the words of Vaisey J. in *In re A Company* [1950] 94 SJ 369 that "Rich man and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them".

54. It is also to be noted that the Company relies upon what is essentially a technical defence, failing which it would be in a very different position, and one of extreme vulnerability to Highbridge. Indeed, that will no doubt become the position when Highbridge becomes the holder of its definitive bonds. But the attractiveness or otherwise of the Company's position is not the issue before me, and it seems to me that there is a distinction to be drawn between the position of a creditor whose debt is disputed and that of a party in the position of Highbridge, which has an underlying economic interest in a

debt, but no standing whatsoever as a creditor, the position as I have found it to be.

55. Further, it does seem to be that the urgency in terms of the 9 June 2009 date is overstated. There are two reasons for my saying this. First, as Mr. Hargun submitted, it is a fundamental in establishing a fraudulent preference that there must have been an intention to prefer, and there is no evidence of such an intention before me. But secondly, in the case of the Precious Wise pledge, one is looking at a situation where Precious Wise exercised rights which it had secured almost a year before, when it entered into its agreement with the Company on 18 January 2008. It seems to me that this is likely to be the applicable date, if indeed there was an intention to prefer, and all that happened on 9 December 2008 was that Precious Wise exercised legal rights to which it was already entitled.

56. In those circumstances, it does not seem to me appropriate for the position in relation to the Precious Wise pledge to cause me to take any different position in relation to Highbridge's ability to issue a winding-up petition against the Company.

Summary

57. It follows from all that is set out above that I am bound to accept the Company's argument that Highbridge is not a creditor of the Company, nor an equitable, contingent or prospective creditor. I therefore find that Highbridge is not entitled to petition to wind up the Company, and accordingly dismiss its summons in which it sought to set aside the order of Kawaley J. dated 15 January 2009.

Costs

58. At the close of argument, counsel agreed that I should deal with the matter of costs in this ruling on a nisi basis. In my view costs should follow the event, and I therefore make a nisi order that the Company is entitled to its costs of

the set aside summons as against Highbridge, to be taxed on the standard basis if not agreed. In the event that either side wishes to be heard on costs, application must be made within 14 days, failing which the order nisi will become absolute.

Dated this day of May 2009.

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Hon. Geoffrey R. Bell
Puisne Judge