

UPDATE

Conflating contingent creditor with contingent standing: the standing of an ultimate beneficial holder of Notes to wind up the issuer

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In *Re Shinsun Holdings (Group) Co., Ltd* (unreported, 21 April 2023), the Grand Court of the Cayman Islands dismissed a winding up petition brought against a Chinese real estate developer on grounds that an ultimate beneficial holder of Notes did not have standing or authority to present a petition against the issuer of the Notes. This decision is a timely reminder of the need for a petitioning creditor to check the relevant governing documents and carefully consider whether it has sufficient standing prior to issuing a petition.

Background

Shinsun Holdings (Group) Co., Ltd (the **Issuer**) had issued 12 per cent senior notes due 2023 (the **Notes**) pursuant to a New York law governed indenture dated 18 August 2021 (the **Indenture**). The parties to the Indenture were the Issuer, various entities as subsidiary guarantors and China Construction Bank (Asia) Corporation Limited (the **Trustee**), who also served as the common depository of the Notes. The Notes were registered in the name of CCB Nominees Limited and traded through Euroclear. Shenwan Hongyan Strategic Investments (H.K.) Limited (the **Petitioner**) owned 25 per cent of the aggregate outstanding principal of the Notes through the Hong Kong Monetary Authority (the **HKMA**), a participant of Euroclear. CCB Nominees Limited remained the registered owner of the Notes and the Petitioner was not a party to the Indenture.

The Issuer failed to make payment of the interest due in respect of the Notes and the Petitioner directed the Trustee to issue a notice of acceleration in respect of the Notes.¹ Often in this type of structure, following non-payment, the Trustee would subsequently bring proceedings against the Issuer. However, in this case, the Petitioner made a commercial decision to take action itself to avoid a hefty upfront cost to the Trustee and filed a petition in the Cayman Islands to wind-up the Issuer.

Issues

The main two questions for determination by the Court were:

1. Whether the Petitioner had standing as a contingent creditor to petition;
2. If the Petitioner did not have standing as a contingent creditor, whether the Petitioner was authorised to progress the petition.

Actual standing

The Companies Act (2023 Revision), section 94(1)(b) gives standing to any creditor or creditors (including any contingent or prospective creditor or creditors) to petition for the winding up of a company. Previous authority from England and Caribbean jurisdictions based on the concept of privity of contract and the 'no look through' principle had firmly established that standing as a creditor (even in respect of a debt which

¹ The Court also held that the purported acceleration by the Trustee under the notice of acceleration was not valid as the Indenture required the instruction to accelerate to come from the holder of the note.

only become due on the happening of a future event) requires an existing legal obligation to be owed by the company to the petitioning creditor.²

The Petitioner argued that it had standing as a contingent creditor to present the petition as it had a present right, under the terms of the Indenture, to require the delivery of Certificated Notes, via an instruction to HKMA who could then instruct Euroclear, which would eventually make the Petitioner a holder of the Notes. The Issuer argued that the Petitioner did not have standing as it had no direct contractual relationship with the Issuer and would not have standing unless or until it had received the Certificated Notes.

As the Indenture was governed by New York law, the parties each called expert evidence on the New York law rules of construction of the Indenture. The Court then interpreted the Indenture applying the foreign rules of construction. There was a substantial amount of expert evidence called on the interpretation of the Indenture and how the Petitioner could become a holder of the Notes and crystallise its legal obligation in relation to the Issuer.

The Petitioner was required to show that, on the balance of probabilities, it is a 'contingent creditor' as there was an existing obligation owed by the Issuer to the Petitioner which may or will result in a liability. The Petitioner was not able to refer to any authorities in support of the submission that an investor in the position of the Petitioner had standing to progress a winding up petition against the issuer of a Note. Nor was the Court persuaded by the Petitioner's attempts to apply English cases on schemes of arrangement by way of analogy. Those cases were held to arise in a very different context of contingent creditors exercising voting rights in respect of schemes of arrangements and were not applicable beyond the context of voting rights and schemes of arrangements.

The Court held that the Petitioner's submission confused and conflated the concept of contingent creditor with contingent standing. A petitioning creditor either has actual standing to pursue a winding up petition or it doesn't – '*contingent*' standing is insufficient. In this case, there was no contractual relationship between the Petitioner and the Issuer as the Petitioner was not a party to the Indenture. There was therefore no obligation, whether existing or otherwise, owed by the Issuer to the Petitioner. The reason that the Petitioner needed to follow the procedures in the Indenture was not just for the sake of complying with contractual procedures, but because that was the only way in which it could remedy its lack of standing and effect the delivery of the notes to it in order to establish the necessary direct contractual relationship between it and the Issuer.

The Court agreed with the Issuer that it was wholly inadequate for a party to plead, in effect, that its standing was itself contingent upon the happening of some future event at some future date. Unless or until the Petitioner obtained Certificated Notes in its own name it could not establish that it was a creditor, actual or contingent. Accordingly, the Petitioner did not have the requisite legal standing to progress the petition.

Authority to petition

Alternatively, the Petitioner relied on a statement of account letter issued by Euroclear to HKMA authorising beneficial owners to commence proceedings as providing authority to present the Petition. The Court held that the statement of account letter was insufficient to confer the requisite authority and standing upon the Petitioner as it was not issued pursuant to the terms of the Indenture. The proxy or other appropriate authority to petition was required to come from the registered holder under the express terms of the Indenture. Euroclear was not a registered holder and was therefore not in a position to provide authority to the Petitioner to commence a winding up petition against the Issuer. Any enforcement proceedings must be taken pursuant to the Indenture and the proper procedures must be followed.

Conclusion

The Petitioner did not satisfy the Court, on the balance of probabilities, that it was a creditor or a contingent creditor or some otherwise authorised legal entity with standing to progress the winding up petition. The decision illustrates that the Court will apply the strict legal position on standing, based on established common law authority. The Petitioner was provided the opportunity to arrange a valid

² See for example, *GFN Corporation Limited* 2009 CILR 650 and *Bona Film Group Limited* (unreported, 13 March 2017).

substitution (with another creditor with standing to petition) but did not do so. Accordingly, the winding up petition was dismissed.

This case serves as a timely reminder that, prior to presenting a petition, a petitioning creditor should carefully consider whether it has standing to present the petition and ensure that they are currently owed an existing legal obligation by the company. In the case of an issue of Notes, the terms of the relevant indenture will need to be carefully considered to ensure that any necessary procedures have been followed in order to establish actual standing prior to presenting a winding up petition.

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