

UPDATE

Eastern Caribbean Supreme Court dismisses application for a stay of the appointment of liquidators over offshore bond issuer

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The Eastern Caribbean Supreme Court of Appeal has dismissed an application to stay the appointment of liquidators pending the outcome of an appeal against a landmark first instance decision by the BVI Commercial Court, in which it was determined that ultimate beneficial interest holders of notes are 'creditors' under the BVI Insolvency Act and so have standing to issue liquidation applications against defaulting note issuers.

Background

On 5 July 2023, the BVI Commercial Court granted the application of Cithara Global Multi Strategy SPC (**Cithara**), to appoint liquidators to offshore bond issuer, Haimen Zhongnan Investment Development (International) Co Ltd (the **Company**). The Company requested a 14-day stay pending the filing of a formal stay application and appeal, which the Court granted.

On 19 July 2023, the Court handed down its considered and thoroughly reasoned judgment, setting out the reasons for its decision to wind up the Company.¹ The Court determined that, following the UK Supreme Court decision of *In re Nortel GmbH; Bloom v Pension Regulator* [2013] UKSC 52, the modern trend is to give an expanded definition of contingent obligation, such that the contingent liability owed to Cithara pursuant to its offshore notes was sufficient to make Cithara a creditor of the Company with standing to issue liquidation proceedings.

We reported on the first instance decision of the BVI Commercial Court in our legal update '[BVI Commercial Court rules that ultimate beneficial interest holders of notes are 'creditors' under the Insolvency Act 2003](#)'.

Stay application

On 24 July 2023, the Company filed its appeal on the grounds that the Commercial Court was wrong in fact and law to find that Cithara had standing to issue a liquidation application. On the same day, the Company applied for a stay of the liquidation order pending the outcome of its appeal, and to permit it time to restructure its debt. The Company's appeal, like the proceedings at first instance, is focused upon Cithara lacking standing to issue liquidation proceedings.

As regards the stay application, the Company argued that the appeal would be rendered nugatory if the stay were not granted and the balance of harm test was tipped in its favour as failing to grant the stay would:

1. Result in the insolvency or financial collapse of the Company's entire group;

¹ *Cithara Global Multi-Strategy SPC v Haimen Zhongnan Investment Development (International) Co Ltd* (BVIHC(COM) 2022/0183, 19 July 2023). A copy of the judgment is linked [here](#).

2. Cause irreparable damage to the reputation of the Company's group, headed by the listed parent company and guarantor of the various bonds, Jiangsu Zhongnan Construction Group Co Ltd (incorporated in the People's Republic of China); and
3. Prejudice the group's restructuring efforts.

The stay application was heard by a panel of three Justices of Appeal (the **Panel**), on 31 July 2023. Judgment was reserved.

On 4 August 2023, the Panel dismissed the stay application.² The Panel found that:

1. There is a general presumption *against* granting a stay of a liquidation order because it impairs a liquidator's ability to investigate the liabilities and assets of a company as at the date of the liquidation order, and to take steps to recover those assets for the benefit of creditors;
2. The Company/its group would suffer no reputational damage as the notes in question had already received the lowest credit ratings available;
3. There was no real prospect of the Company achieving its restructuring goals (as per the finding of the Commercial Court);
4. The Company had failed to provide cogent evidence in support of its submission that the balance of harm tipped in its favour, such that a stay ought to be granted;
5. The appeal, which concentrates on Cithara's standing, does not have strong prospects of success. The Panel was also alive to the fact that the Company had taken contradictory positions on the status (and so standing) of beneficial note holders in the proceedings below; and
6. The liquidators were on notice of the appeal. It was for them to decide how they wish to proceed in the circumstances.

The liquidation of the Company is now underway. It is unclear if the Company will maintain its appeal.

Conclusion

The Court of Appeal's decision shows that successful litigants should not be deprived of the fruits of their labour, particularly in circumstances where the debt outstanding to Cithara, and other note holders in the bond issue, is more than a year overdue. The decision also illustrates the Court's reluctance to impair a liquidator's ability to properly carry out their function of investigating the affairs of a company and recovering assets for the general body of creditors. The result will be welcomed by offshore note holders and insolvency practitioners alike.

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² *Haimen Zhongnan Investment Development (International) Co Ltd v Cithara Global Multi-Strategy SPC* (BVIHMAP2023/0012, 4 August 2023). A copy of the judgment is linked [here](#).

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