IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Cause Nos. FSD 130 of 2013 &
FSD 131 of 2013

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF RIGHTWAY CHINA REAL ESTATE LIMITED

&

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF DASH LIMITED

Appearances:	Mr. Richard de Lacy, QC instructed by Mr. William Jones of Ogier for the Petitioners
	Mr. Richard Hacker, QC instructed by Mr. Jayson Wood & Mr. David Butler of Harney Westwood & Riegels for the Opposing Creditors
Observing:	Mr. Michael Mulligan of Conyers Dill & Pearman for Home Fortune Enterprises Limited
	Mr. Peter Kendall of Walkers for PriceWaterHouseCoopers Hong Kong
Before:	Hon. Justice Henderson
Heard:	January 29 & 30, 2014

JUDGMENT

1. The Petitioners, Goldman Sachs (Asia) Finance, Goldman Sachs RE Investments Holdings Limited and Fortunesea (Cayman) Ltd are among a group of lenders in a syndicated loan arrangement. The loan has been in default for some time and the Petitioners now ask for a winding up of the debtors, Rightway China Real Estate Limited ("RCRE") and Dash Limited ("Dash"). A fundamental question in this litigation is whether the Petitioners are permitted under the finance documents to seek the winding up of the borrowers and its guarantor when the majority of the lenders by value are opposed to that course.

Facts

2. RCRE is the ultimate holding company of several operating companies doing business in the Peoples Republic of China and to which I will refer as "the Rightway Group". The group's business is in property development and construction and its primary assets are its interests in companies that own land and development rights.

3. RCRE owns 100% of the shares of Dash and of Million Horses Holdings Ltd. Until December 20, 2011 RCRE also held a 100% shareholding in Allied Treasure Limited; on

that date, RCRE disposed of the shares in Allied Treasure to Home Fortune Enterprises Ltd. at what is alleged to be an undervalue.

4. On December 3, 2007 RCRE entered into a syndicated loan arrangement with a group of lenders which included these Petitioners. In 2009 the loan arrangement was restructured. On March 30th, 2011 a set of new finance documents was executed to implement the restructuring, including a framework agreement, a facility agreement, and an inter-creditor agreement. Confirmatory share mortgages in various group entities and other security over the assets of RCRE were provided. The lenders advanced the sum of US $547.81 million, of which US $63.46 million represents the Petitioners' share. The finance documents provide for the appointment of a security agent and an administrative agent. DB Trustees (Hong Kong) Limited and Deutsche Bank Ag, Hong Kong Branch respectively fulfills those functions. The finance documents require that the lenders act collectively in certain matters and, in others, allow each lender to pursue its own private interests independently.

5. The facility agreement provided for repayment in installments in the amount of US $74.4 million to be repaid on 30th June 2011, 31st December 2011 and 30th June 2012. On the first of those dates RCRE defaulted, triggering an event of default under clause 19.2 of the facility agreement. It made a part payment of US $15.61 million. On the latter two dates for installment payments, RCRE defaulted again. The transfer of the shares in Allied Treasure from RCRE to Home Fortune in December, 2011 without the knowledge

or consent of the lenders is also alleged to be a breach of the facility agreement because it amounts to a "change of control".

6. On August 10, 2011 the administrative agent issued a notice of default to RCRE and to certain guarantors in respect of the failure to pay the June 30, 2011 installment. A second demand was issued on October 10, 2012 requiring payment of all amounts outstanding under the finance documents. At this time PriceWaterhouseCoopers were appointed as receivers and managers over the assets of RCRE and the guarantors.

7. As at June 30, 2013 the total amount outstanding is US $592.98 million, of which the amount due to the Petitioners is US $68.75 million. The Petitioners have nominated Mssrs. Kenneth Krys and Cosimo Borrelli as Joint Official Liquidators.

8. On October 25, 2012 the lenders jointly instructed Deutsche Bank to begin legal proceedings against the founder of the Rightway Group, Mr. Fu Ya Bin and against Home Fortune to challenge the purported transfer of the ATL shares. Deutsche Bank did so immediately. It also sought an interim injunction against Home Fortune freezing the Allied Treasure shares in its hands. That injunction was granted. The proceedings have not progressed beyond the pleadings stage at this time. There are other proceedings in Hong Kong which have been commenced by Deutsche Bank and by the receivers, none of which have progressed very far.

9. On June 21, 2013 Deutsche Bank received a letter of instruction ("the June Instruction") from a group of the lenders whose interests constitute 80.19% percent by value of the amount loaned. This group (to which I will refer as the "New Majority") consists of eight entities under the control of Mr. James Cui and Ms. Wei Cong. The New Majority did not participate in any way in the original loan or in the restructuring; they acquired their interests at distressed asset prices after the first event of default. The June Instruction told Deutsche Bank to withdraw the various proceedings it had started in Hong Kong, to instruct the receivers to withdraw all of the lawsuits commenced by them, and to unwind the actions already taken by the receivers to safeguard the assets. In the view of Goldman Sachs, the June Instruction "does not make any practical or commercial sense". Goldman Sachs alleges that the New Majority are entities acting under the instruction or influence of Mr. Fu. The allegation is denied, and there is no body of evidence which contradicts that denial convincingly.

10. Deutsche Bank has conducted its own due diligence and has confirmed that the New Majority is properly constituted as an "instructing group" under the inter-creditor agreement. On September 26, 2013 Deutsche Bank delivered a letter to the lenders stating that it "intends to commence implementation of the action set out in the instruction letter [i.e., the June Instruction] on 11 October, 2013".

11. The Petitioners commenced an action in Hong Kong against Deutsche Bank and the New Majority on October 8, 2013 seeking a declaration that the June Instruction is not valid

and binding on the ground that it was not given in good faith for the benefit of the lenders as a whole. Deutsche Bank's attorneys (Hogan Lovells) responded on the same day by advising Goldman Sachs (through its attorneys, Linklaters) that Deutsche Bank intended to commence its own action in the High Court of Hong Kong seeking directions as to how it should act.

12. Linklaters asked Deutsche Bank for an undertaking that it would take no steps to implement the June Instruction and that it would notify the Petitioners' attorneys of any further instruction given to it by the New Majority. Deutsche Bank did offer such an undertaking and Linklaters advised Hogan Lovells that the scope of the undertaking was acceptable. However, there was disagreement over the duration of the undertaking. Linklaters asked that it remain in effect until the conclusion of the proceedings commenced by Goldman Sachs in Hong Kong but Hogan Lovells wanted it to expire once the action started by Deutsche Bank was concluded. By the time of the *ex parte* application described below, Goldman Sachs and its attorneys, Linklaters, understood clearly that Deutsche Bank was prepared to undertake to refrain from implementing the June Instruction. The only remaining question was how long that undertaking would remain in effect.

13. At 9:30 a.m. on October 10, 2013 the Petitioners applied to me on an *ex parte* basis for the appointment of provisional liquidators. I was persuaded to make the appointment.

Mr. de Lacy, who appeared for the Petitioners on that occasion, said (according to a note taken by a member of his firm):

> *"My Lord, the crisis of this week is that new lenders have turned up in the list of those entitled to the debt. Those new lenders constitute a new majority and they have given the security agent instructions to reverse the enforcement process which has ensued thus far with respect to the loan obligations.*
>
> *Our clients have brought an action in Hong Kong to seek a declaration that the reversal instructions were not valid because the New Majority were acting for a collateral purpose or under the influence of Mr. Fu. It is clear the Hong Kong action will not reach a conclusion for quite some time.*
>
> *DB Trustees (as security agent) have received an indemnity and are going to act on the instructions of the New Majority. There is no doubt it will be more difficult to persuade the security agent to withdraw from the reversal of enforcement than to continue it."*

14. At no time was I told on the *ex parte* application of Deutsche Bank's offer of an undertaking; on the contrary, the situation was portrayed as one requiring an immediate order to prevent the imminent unwinding by Deutsche Bank of whatever the receivers had accomplished.

15. I was not told of the offer by Deutsche Bank of an undertaking because neither Mr. de Lacy nor anyone assisting him at his firm in Cayman was aware of it. Mr. Sng Keng Yeow Melvin, a partner at Linklaters in Hong Kong having the day to day care and conduct of this matter on behalf of Goldman Sachs, was of course fully aware of

Deutsche Bank's offer but decided to withhold this information from the Cayman attorneys because the undertaking has not been accepted. He observes in his affidavit (correctly) that "there was nothing preventing DB from proceeding to give effect to the June Instruction as it indicated that it would in its letter of 26 September 2013". For the same reason, Mr. Sng did not communicate the information to the attorneys in Cayman prior to their subsequent appearance before me on October 18, 2013. The Petitioners were the only parties to appear on that date.

Material Nondisclosure

16. The rule that an applicant for an *ex parte* order must make full and accurate disclosure of all material facts is too well known to require extensive comment. On an *ex parte* application the court receives evidence and argument from just the one party requesting the relief. Nevertheless, the court is obliged to consider evidence and arguments which militate against granting that relief. This imposes a heavy and solemn obligation on the applicant to disclose evidence and mention arguments which work against its own interests but might be material. Where an attorney is in doubt about the potential materiality of a fact he must disclose it so that the court may make its own determination of materiality. Only those facts which are clearly not material may be withheld. The obligation to disclose is a continuing one, at least until the date of the review hearing.

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17. The usual result of a proven failure to comply with the obligation to disclose is that the *ex parte* order will be discharged and the applicant ordered to pay the costs of the review hearing on the indemnity basis. These consequences are not automatic as the court has a discretion, to be exercised after weighing the severity of the consequences against the importance and causes of the failure to disclose. In general, the court will seek to ensure that an applicant who obtains an *ex parte* order in disregard of his obligation to the court is deprived of the benefit of it. If authority is needed for these principles it may be found in: *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1356 ff.; *Re City Vintners Ltd* (unreported, LTL 21/2/2002); and *Speedier Logistics v Aardvark Digital* [2012] EWHC 2276 (Comm.).

18. I have no doubt that the fact that Deutsche Bank was prepared to give its undertaking to refrain from implementing the June Instruction was a material fact. It should have been disclosed. Mr. de Lacy has conceded as much in argument. Whether or not it would have had a significant effect on my decision, it was, at the very least, something I would have been obliged to consider. Orders are granted *ex parte* only where there is some urgency, such as a risk of imminent dissipation of assets. Deutsche Bank's apparent willingness to stay its hand had a bearing on that issue.

19. This failure to disclose a material fact was not accidental. Mr. Sng made a deliberate decision to withhold the information from the Cayman attorneys. He says that he did not

consider the proffered undertaking to be material as it had not (yet) been accepted. The evidence does not provide me with any additional explanation.

20. This is not a case where a relaxation of the usual result would be appropriate. The installation of provisional liquidators is a grave interference with the affairs of a company. The deliberate failure by Linklaters to disclose this material fact to the Cayman attorneys cannot be described as an innocent mistake. My *ex parte* order appointing the Joint Provisional Liquidators is set aside. The Petitioners, jointly and severally, are ordered to pay the costs of the provisional liquidation to date. I award to the Respondents 25% of the costs of this hearing, to be paid forthwith on the indemnity basis.

Are the Petitioners Creditors?

21. To have standing to seek a winding up, the Petitioners must show that they are creditors. Section 94(1)(b) of *the Companies Law (2013 Revision)* ("the *Law*") provides that a petition may be presented by "any creditor or creditors (including any contingent or prospective creditor or creditors)". Section 95(2) reads:

> *"The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company".*

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22. The New Majority says that the petitioners lack standing because they cannot show they are creditors. Although the company may be indebted to them, it is not a debt which can

be recovered through the courts at this time; the inter-creditor agreement prohibits that. The principal authority relied upon for this proposition is an oral judgment of Bannister, J in a companion case: *Goldman Sachs (Asia) Finance et al. v Allied Treasure Limited* (unreported), Nov. 20, 2013 (High Court of Justice, BVI). Bannister, J began by noting that under the BVI Insolvency Act a creditor is an entity which would be entitled to make a claim in the liquidation if the company in question is wound up. He made reference to some aspects of the finance documents and then, after reminding himself once more of the relevant definition of a creditor, held that he was "sufficiently unsure" whether the petitioners were creditors that he should, in the exercise of his discretion, refuse to wind up the company. Mr. Hacker has argued that this decision creates an issue estoppel and compels me to reach the same conclusion for the same reason.

23. The question of whether a petitioner is a creditor under the law of the Cayman Islands is a question of jurisdiction; absent proof of a debtor-creditor relationship (and assuming the petitioner cannot fit within one of the other enumerated categories) the Court is without jurisdiction to entertain the petition. Every court must decide upon its own jurisdiction according to its own domestic law. That is a fundamental principle. I entertain some doubt about whether the judgment of a foreign court can ever create an issue estoppel on a question of jurisdiction.

24. In any event, the definition of a creditor in the law of BVI is significantly different from the definition in our own Law. Moreover, Justice Bannister came to no settled

conclusion. Evidently, he intended the issue to be settled in Hong Kong. The Court in Hong Kong is given exclusive jurisdiction, by the finance documents to decide questions of law arising from those documents and to do so according to the law of Hong Kong. For these reasons, I do not consider that the decision of Bannister, J gives rise to an issue estoppel on the question of the Petitioners' status.

25. I am satisfied that the word "creditor" in section 94(1)(b) of the *Law* presents no ambiguity. It should be given its ordinary everyday meaning: a creditor is a person to whom a debt is owed. The fact that a petitioning creditor is bound by contract to refrain from recovering the debt through legal action is a critical factor (see s. 95(2) quoted above) but not one which negates standing. It enters the analysis at a later stage. These petitioners are owed money by RCRE and Dash and therefore have standing to advance their petitions.

Is There a Bona Fide and Substantial Dispute as to the Existence of the Debt?

26. Much the same argument was advanced by Mr. Hacker for the New Majority on the question of whether there is a bona fide and substantial dispute as to the existence of the debt upon which the petition is based. If there is, the normal rule of practice is that the Court will stay or dismiss the petition: see the summary of the applicable principles in the judgment of Vos, JA in our Court of Appeal in *Re GFN Corporation Limited* [2009] CILR 650.

27. My answer is essentially the same. The decision of Bannister, J does not give rise to an issue estoppel. Justice Vos' formulation of the rule depends upon whether the *existence* of the debt is in dispute, not upon whether the creditor has the present right and ability to recover payment by taking action in the courts. I am satisfied that the existence of the debt owed by RCRE and Dash to the Petitioners is not the subject of any bona fide and substantial dispute.

What Are the Wishes of the Creditors?

28. When a petitioner seeks a winding up it does so on behalf of the general class of creditors of which it is a part. It is seeking a class remedy. Naturally, the court will have regard to the wishes of all of the creditors and, in the absence of special circumstances, is likely to give greater weight to the views of the majority in interest. The wishes of the creditors are not considered in the abstract but in conjunction with their reasons for preferring one course or another. A creditor expressing opposition to a winding up order can be taken to have decided that its chances of repayment are greater if the company remains in existence. The Court will ordinarily wish to be told what has led the creditor to that conclusion; is there a concrete proposal which presents a realistic prospect of repayment? The wishes of a majority, even a large majority, of creditors may not prevail if there is no air of reality to their proposals and expectations. I take these principles from the cited authorities, including: *Re Crigglestone Coal Co.* [1906] 2 Ch 327; *Re P & J Macrae*

[1961] 1 All E R 302; *Re J D Swain Ltd* [1965] 2 All E R 761 at 915; *Re Television Parlour plc* (1988) 4 BCC 95; *McPherson on Company Liquidations* 3rd Edition, para. 3-104.

29. The amount owed to the Petitioners amounts to 11.59% of the total indebtedness. Another creditor, Indus Partners, supports the petition; the amount owed to Indus represents a further 5% of the total amount. In contrast, 80.19% of the indebtedness is owed to the New Majority.

30. Mr. Cui, the beneficial owner of creditor entities whose interest in the total indebtedness is 68.45% of the total, has said in evidence that the Rightway Group has planned projects which will likely permit repayment within three years. His affidavit is couched in general and conclusory terms; the skepticism expressed by the Petitioners is not unwarranted. Ms. Cong (the beneficial owner of entities whose share of the indebtedness is roughly equal to that of Goldman Sachs) contents herself with stating her opposition to the petition without saying why.

31. The real force of the New Majority's opposition is derived from the terms of the finance documents. This was a syndicated loan arrangement. The inter-creditor agreement, in particular, provides for a high degree of collective and joint responsibility between the creditors. For example, after an insolvency event (which has already occurred) each

creditor in the group must direct that its share is to be repaid to the security agent, Deutsche Bank: clause 8.1(a). Any creditor which benefits from a setoff must pay an amount equal to the benefit to the security agent: cl. 8.1(b). After an insolvency event each creditor must authorize the security agent to take any enforcement action on its behalf: cl. 8.4. The security agent is to "file claims, take proceedings and do all other things [it] considers reasonably necessary to recover that member of the Group's Liabilities": cl. 8.4(d). For this purpose, the security agent must act in accordance with the instructions of the group of "Primary Creditors" (i.e., the Lenders and Bondholders): cl. 8.6(a). If instructions are not forthcoming, the security agent may act as it sees fit: cl. 8.6(b). When the transaction security becomes enforceable the security agent is to enforce it (or to refrain from doing so) at the instructions of the creditors: cl. 11.1. The creditors have no independent power to enforce their security: cl. 14.2. By clause 11.3(a) each creditor agreed that it would "cast its vote in any proposal put to the vote by or under the supervision of any judicial or supervisory authority in respect of any insolvency, pre-insolvency or rehabilitation or similar proceedings relating to any member of the Group as instructed by the Security Agent". In this context, "the Group" includes RCRE and Dash: see the definition of "Group" in clause 1.1 and, in particular, in clause 1.1 of the credit facility agreement.

32. Thus, in general, the finance documents contemplate a high degree of collaboration and cooperation among the creditors. The documents evidence an obvious preference for joint action over unilateral action by individual creditors. While it is true, as Mr. de Lacy

argues, that there is no express provision in the finance documents to prevent a creditor from petitioning for a winding up of a debtor company, it is at least arguable that such a prohibition is implied by the nature of the relationship. That is the conclusion reached by the New York Supreme Court in an analogous case in *Beal Savings Bank v Sommer*, 8 NY 3rd 318 (2007). (Counsel have advised that there are no British or Cayman Islands authorities on point.) There is a good arguable case for the proposition that a debtor company can be wound up only at the instance of the creditors acting jointly through the security agent. If that proposition can be established, my duty is to dismiss the petition pursuant to s. 95(2) of the *Law*.

33. I have said only that there is a "good arguable case" because I am satisfied that the Hong Kong Court should have the last word on the subject. The creditors have agreed that the Hong Kong Court is to have exclusive jurisdiction to decide questions of law arising from the finance documents according to the law of Hong Kong. It is right that they should obtain a ruling from that Court as to whether their agreement permits a minority to seek a winding up of a debtor over the objections of the majority.

Order

34. For these reasons, the petition is adjourned generally, with liberty to restore after the Court in Hong Kong has ruled upon the right of individual creditors to pursue a winding up.

35. In addition to the costs order I have made above, I award to the Respondents 75% of their costs on the standard basis.

Dated this 3rd day of February, 2014

Henderson, J.

Henderson, J.
Judge of the Grand Court