BRITISH VIRGIN ISLANDS

IN THE COURT OF APEAL

CIVIL APPEAL NO.9 OF 2003

BETWEEN:

IN THE MATTER OF THE COMPANIES ACT CAP 285

AND

IN THE MATTER OF THE INTERNATIONAL BUSINESS COMPANIES ACT CAP 291

AND

IN THE MATTER OF SINOCAN LIANXING LIMITED

Appellant

and

A PETITION BY RICHARDSON DEVELOPMENTS LTD

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Paul Webster, QC and Mr. Kerry Anderson for the Appellant
Mr. John Carrington for the Respondent

2005: January 10; 11;
May 23.

JUDGMENT

[1] BARROW, J.A. [AG.]: The appeal is against an order of the High Court that Sinocan Lianxing Limited (the Company) be wound up on the grounds that it is insolvent and unable to pay its debt to the Richardson Development Ltd., (the Respondent or the Petitioner), and that it is just and equitable that it be wound up.

The principal basis of the appeal is that the debt which founded the petition is a contingent or future debt; that it is not presently due.[1]

[2] It is common ground that the debt is governed by a document bearing the designation "Shareholders' Agreement", dated August 21, 1996. The debt was assigned to the Petitioner by two former shareholders, Itochu Corporation (Itochu Corp.) and Itochu Hong Kong Limited (Itochu HK).[2] It is also common ground that the terms of the Shareholders' Agreement continue to govern the debt, unaffected by the fact of the assignment.

[3] The Shareholders' Agreement represented the agreement of four shareholders of the Company for the provision of funding for the Company. The relevant terms were as follows:

> "5.02 Each of the Shareholders shall use all reasonable endeavours to arrange borrowings in the form of loans or overdraft facilities from banks or other financial institutions for the Company as required and on terms as determined by the Board from time to time save and except that Itochu's risk exposure and obligation to arrange borrowings for the Company in Clause 5 shall be (sic) in no event exceed the sum of HK$24,975,720, the breakdown of which is as follows:
>
> | | HK$ |
> |---|---|
> | Advance by Itochu in respect of … Phase I development … | 7,135, 920 |
> | Advance by Itochu in respect of … Phase II development … | 17,839,800… |
>
> "5.04 Subject to Clause 5.02, in the event the Company is unable to raise the necessary finance for its activities, the Shareholders shall lend or procure to be lent to the Company in cash or other forms as determined by the Board from time to time, in proportion to their shareholdings in the Company for the time being, all the financial requirements of the Company from time to time as required and determined by the Board at its discretion on the following terms:
>
> (a) they shall be made available to the Company within 14 days of the Company shall have notified the shareholders of the requirement of the Company for such purpose;

[1] From this flow the other bases of the appeal: that a contingent or future creditor does not have standing to petition to wind up a company and that the existence of the debt is genuinely disputed.

[2] The Petitioner was a shareholder of the Company in its own right, before the assignment.

(b) they shall rank pari passu inter se and with all other unsecured obligations of the Company;
(c) they shall be made available to the Company on such terms as the Board shall decide;
(d) they shall be repayable only at such time as determined by the Board at its discretion;
(e) any repayment may only be made to the Shareholders pro rata to the amount lent to the Company by or on behalf of the relevant Shareholder; and
(f) the maximum of all advances made by the Shareholders to the Company shall not exceed HK$252,280,000 or in the event the Company acquires all interests in SJV HK$280,000,000."

[4] The Company contended on appeal that the trial Judge erroneously concluded that repayment of the debt is not subject to the discretion of the Board under clause 5.04, thereby suggesting that the debt is a 5.02 debt. It is the fact that the Judge did not specifically state that the debt is governed by clause 5.02. What he did was to determine the issue that was before him, which was the contention of the Company that the debt was repayable by the Company only at such time as determined by the directors as a matter of their discretion and that no time had been fixed by the directors.

[5] A significant feature of the case is that there was no direct evidence as to the creation of the debt. There was no direct evidence as to when the loans were advanced to the Company; neither was there direct evidence as to the terms of the loan, the source of the funds or who paid over the funds. There is, therefore, no direct evidence as to whether the debt was a 5.02 or a 5.04 debt or a debt of an altogether different category.

[6] The Company, however, argued that there is sufficient other evidence as to the nature of the debt. The Company submitted, having acknowledged the absence of direct evidence on when the loans were advanced, that " … it is clear from Recital B and Clause 4 of the Supplemental Deed … that [the assignors] had by then advanced [the debt now claimed] to the Company <u>as shareholder loans.</u>" This was the whole of their case on the issue of future or present debt.

[7] The reference to the Supplemental Deed is to a document so designated, dated 21st February 2002, by which the Itochu companies sold and transferred the debts owed to them by the Company, and their shareholdings in the Company, to the Petitioner. The parties to that deed were the same as the parties to the Shareholders' Agreement. Recital B of the Supplemental Deed reads:

> "(B) Itochu Corp and Itochu HK have, by a Sale and Purchase Agreement of even date hereof, transferred all of their respective interests in the Company ("the Share Transfer") … and by a Deed of Assignment of Sale Debts assigned the total amount of the entire shareholder's loan owing by the Company to Itochu Corp and Itochu HK to Richardson."

Clause 4 repeats the reference to "shareholder's loan" contained in recital B.

[8] The view of the Company to the contrary notwithstanding, I find no clarity produced by the contents of those two provisions from the Supplemental Deed. The Company emphasized the reference to the debt as 'shareholder's loans'. The Company argued that as shareholder's loans they clearly fall under 5.04 and not 5.02. But there is no definition of the term 'shareholder's loan'. There is nothing that shows that the term was used with any precision or particularity. The expression 'shareholder's loan' as conveniently refers to a loan to the Company procured by a shareholder from a bank, which the shareholder bears the liability to repay (or indeed may have already repaid), as to a loan advanced to the Company by a shareholder from its own funds. The essence of the term is that there is a debt owed by the Company to a shareholder. It was common ground that the Company owes a debt to the shareholder. It was common ground that the Company is liable to repay the amount of the loan, by whoever it was advanced, to the shareholder. The dispute is as to the present enforceability of the obligation to repay the loan. Nothing ties the term 'shareholder's loan' to clause 5.02 or to clause 5.04 of the Shareholders Agreement. When, therefore, the parties used that term in the Supplemental Deed in February 2002 it took the matter no further.

[9] That view gains depth by the recognition that there were not two, as the Company submitted, but three methods for providing loans or financing that were

contemplated by the provisions of clauses 5.02 and 5.04 of the Shareholders Agreement. Clause 5.02, as the Company submitted, provided for shareholders to arrange for banks or other financial institutions to provide loans to the Company. Clause 5.04 provided, as the Company submitted, for shareholders themselves to provide loans to the Company. But clause 5.04 also provided, as the Judge appreciated, for shareholders to "procure to be lent to the Company" cash or other forms of financing. It is not sufficient, even on the civil standard of proof, that the term 'shareholder's loan', used in the Supplemental Deed, on one view, more accurately refers to a loan made by a shareholder as opposed to a loan arranged by a shareholder. Whatever the source of the loan it was not disputed that this was money that the Company was liable to repay to its shareholder. It was a debt owed by the Company to the shareholder. The synonymity of loan and debt needs no expatiation.

[10] The danger of choosing an arguably likelier meaning of an expression without any evidence of the sense in which it was used is demonstrated by the definition given in the Supplemental Deed to the term "Shareholders' Agreement". Definition apart, it would be thought fairly obvious that this term referred to the Shareholders' Agreement dated August 21st, 1996, designated as such.[3] Instead, this is how it is defined in the Supplemental Deed:

> "1.1 References to the Shareholders' Agreement herein, unless the content otherwise requires, shall be read and construed as and shall be deemed to include all agreement(s), contract(s) and/or correspondence(s) made by Itochu Corp and/or Itochu HK and/or to which Itochu Corp and /or Itochu HK is a party (written or oral) in relation to the ownership, management, operation, affairs and/or activities of the Company."

[11] Thus, rather than being used to refer to the definite document that actually carries that appellation, the term is used to refer to any agreement in any document and even to any agreement made orally. This demonstrates that without any evidence of the sense in which the term 'shareholder's loan' was used in the Supplemental

[3] See paragraph [2], above.

Deed it would be pure guesswork to conclude that it referred to one type of debt owed by the Company to a shareholder as opposed to another.

[12] A further example of the loose way in which terms were used is in clause 5.2 of the Shareholders' Agreement. That clause provides for each of the shareholders to arrange borrowings from banks or other financial institutions for the Company. It then fixes the limit of that obligation by referring to such loans from third parties as "Advance[s] by Itochu".[4] Strictly speaking a loan to the Company, from a bank, that is arranged by a shareholder is not an advance by the shareholder. It is an advance by the bank. But here it is that such a loan is being described, no doubt as a matter of convenience of expression, as an advance by the shareholder.

[13] The two examples of how terms are used, extracted from the language of the parties themselves, confirm that an undefined[5] reference to 'shareholder's loan' does not prove that the loan to which it refers is to money lent, as opposed to money procured to be lent, or arranged to be borrowed, by the shareholder. Accordingly, I find no basis for holding that the trial Judge was wrong. This determination makes it unnecessary to consider the issue whether the holder of a debt that is not presently repayable has standing to petition. I would dismiss the appeal with costs to the Respondent.

Denys Barrow, SC
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

[4] See paragraph [3], above for clause 5.02.
[5] Whether by context or by a definition section.