IN THE SUPREME COURT OF NUZILIA

Between

BEATRICE BALADE, Appellant

And

GROUP OF SENIOR NOTEHOLDERS, Respondents

SUBMISSION FOR RESPONDENT

REPRESENTED BY TEAM 6

1 Ross J was correct in not recognising the Chapter 11 proceeding as a foreign main proceeding under art 17(2)(a) of the *Cross-Border Insolvency Act 2016* (Nuzilia).

1.1 A 'foreign main proceeding' is a foreign proceeding taking place in the State where the debtor has its centre of main interests ('**COMI**').[1] There is a rebuttable presumption, pursuant to art 16(3), that a debtor corporation has its COMI in the State of its registered office. Hence, the COMI of Electric Bike Holdings Ltd ('**EBH**') is presumed to be in the United States. However, this presumption cannot be maintained on the present facts.

1.2 A corporate debtor's COMI should correspond to a location where it conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.[2] This broad standard has been likened to the concept of 'principal place of business' in United States law, for which the test is the location of the debtor's 'nerve centre'[3] — as considered by the judge at first instance. In other jurisdictions, however, the nerve centre concept or its equivalent may simply be *a* factor to be considered, among other indicia.[4] Under either approach, Ross J was correct in concluding that EBH's COMI is in Nuzilia, not the United States.

[1] *Cross-Border Insolvency Act 2016* (Nuzilia) art 2(b) ('*CBIA*').
[2] See *Re Eurofood IFSC Ltd* (C-341/04) [2006] ECR I-3813, I-3868 [32]; *Re Probe Resources Ltd* [2011] BCSC 552 [21]; *Re Fairfield Sentry Ltd*, 714 F 3d 127, 138 (2nd Cir, 2013).
[3] *Hertz Corp v Friend*, 559 US 77, 92–3 (2010) ('*Hertz*').
[4] See, eg, *Re Massachusetts Elephant & Castle Group Inc* [2011] ONSC 4201 [30].

1.3 A corporation's nerve centre is its 'centre of direction, control, and coordination … and not simply an office where the corporation holds its board meetings'.[5] All management decisions affecting the day-to-day business of EBH are made in Nuzilia, and the majority of EBH's directors operate from headquarters in that State. Board meetings held in New York have only been physically attended by a majority of members on two of six occasions. Accordingly, while accounts may be managed from New York and board meetings are hosted there, EBH's direction and control, and therefore nerve centre, are located in Nuzilia.

1.4 In the alternative, if the Court considers the location of EBH's nerve centre to be a factor, rather than the test, the following additional, objective indicia may be considered as rebutting the art 16(3) presumption:

1.4.1 The Senior Notes are governed by the law of Nuzilia, such that all creditors affected by this proceeding are tied to that State.[6] The assets securing EBH's outstanding debt — the shares in Electric Bike Operations Ltd and the real property — are also located in Nuzilia.[7]

1.4.2 For a corporate debtor's COMI to be ascertainable by third parties, it must have 'an element of permanence'.[8] EBH's New York office is merely a serviced office, rented on occasion and bearing no outward sign of EBH's presence. This casts significant doubt on EBH's assertion, communicated through its website and by letter, that its head office has been relocated to New York.

1.5 EBH operated exclusively in Nuzilia until the commencement of the restructuring process, after which it transferred various interests to the United States over a period of three weeks and declared its head office to be in that jurisdiction. Such a rapid change, coinciding with the threat of insolvency, suggests that the relocation was self-serving — amounting to forum-shopping. While not itself sufficient to defeat the presumption, suspicion of a bad-faith manipulation of COMI requires the Court to carefully scrutinise the factors submitted to substantiate the claim of a new COMI.[9] Viewed critically, the evidence raised by the Appellant cannot outweigh the above

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[5] *Hertz* at 93.
[6] See *Re SPhinX Ltd*, 351 BR 103, 117 (Bankr SDNY, 2006); *UNCITRAL Model Law on Cross-Border Insolvency Guide to Enactment and Interpretation* (UNCITRAL, 2013) [147].
[7] Ibid.
[8] *Moore v Australian Equity Investors* [2012] FCA 1002 [19].
[9] *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966, 3986.

considerations. Consistent with the conclusion of Ross J, the art 16(3) presumption must therefore be rebutted.

2 Ross J erred in recognising the Chapter 11 proceeding as a foreign non-main proceeding under art 17(2)(b) of the *Cross-Border Insolvency Act 2016* (Nuzilia).

2.1 A 'foreign non-main proceeding' is a foreign proceeding taking place in a State where the debtor has an establishment.[10] An 'establishment', in this context, is any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.[11] EBH's registered office in New York does not meet this definition.

2.2 Model Law jurisprudence likens 'establishment' to a 'local place of business', or 'seat for local business activity'.[12] The location must be one from which activities of a commercial, industrial or professional nature are exercised on the market, having some external effect perceptible by third parties.[13] The concept of transitoriness, in the context of art 2(f), is location-oriented in that it 'focuses on the place of operations in which the activity occurs'.[14] Similarly, the requirement of human means and goods or services demands some stability and a minimum level of organisation.[15]

2.3 EBH's New York office cannot be an establishment as the location is, on an assessment of its external appearance, temporary. A serviced office bearing only the branding of the building owner, which has been used only to host board meetings on isolated occasions, and for which rent is paid on an infrequent and inconsistent basis, does not reflect the stability and organisation required for a 'local place of business'.

2.4 In any event, assuming *arguendo* that transitoriness is not in issue, EBH does not exercise any economic activities with human means and goods or services on the local marketplace from the New York location. Holding companies, by their very nature, do not ordinarily engage in activities having external effect — their business is generally referrable entirely to the supervision of subsidiaries.

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[10] *CBIA* art 2(c).
[11] Ibid art 2(f).
[12] *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd*, 374 BR 122, 131 (Bankr SDNY, 2007) ('*Bear Stearns*').
[13] See *Williams v Simpson (No 5)* [2011] 2 NZLR 380, 393 [52]–[53], quoting Miguel Virgos & Etienne Schmit, *Report on the Convention on Insolvency Proceedings* (EU Council Doc 6500/96, 1996) [71] ('*Virgos-Schmit Report*').
[14] *Re British American Insurance Co Ltd*, 425 BR 884, 916 (Bankr SDFla, 2010); *Virgos-Schmit Report* at [71].
[15] *Virgos-Schmit Report* at [71].

2.4.1 While EBH may undertake corporate governance functions and manage its accounts from New York, these activities are isolated from the local market — they affect only EBH itself and its two subsidiaries, and are not ascertainable by external third parties.[16]

2.4.2 Furthermore, contrary to the finding of the trial judge, the maintenance of bank accounts and payment of debts are not 'services' for the purpose of art 2(f). Absent any definition in the Model Law jurisprudence, 'services' should take its ordinary meaning, as it appears in the phrase 'goods or services'. Neither activity identified by Ross J is a service according to that meaning: the maintenance of bank accounts confers no benefit on any external party, and the payment of debts is merely the fulfilment of an obligation, not a service.

3 Ross J was correct in ordering that a Judicial Monitor be appointed, and in declining to grant a stay under the *Cross-Border Insolvency Act 2016* (Nuzilia).

3.1 Whether recognition is granted or refused, a Judicial Monitor ('**JM**') should be appointed on the facts. Ross J was correct in finding that the present circumstances satisfy s101 of the Companies Ordinance 2012 (Nuzilia).

3.1.1 Under s101(3)(a), EBH operated fraudulently and recklessly within the meaning provided by s101(4).

3.1.1.1 The actions taken by EBH demonstrated an 'intent to defraud' creditors according to para (c) of that subsection. Cases considering the same phrase in the legislation of other States indicate that the intent may be established inferentially.[17] Intentionally delaying the repayment of even a single creditor is sufficient, even where the debtor has a good-faith belief that the delay may ultimately allow it to repay all of its debts.[18] The inference may be disproved only where the debtor shows that some other intent was the *only* reason for its conduct.[19]

3.1.1.2 The restructuring scheme commenced by EBH following the onset of financial difficulty involved the transfer of title to assets from EBH's

[16] *Olympic Airlines Pension Trustees v Olympic Airlines SA* [2015] 1 WLR 2399, 2405 [13].
[17] See *Cannane v J Cannane Pty Ltd* (1998) 192 CLR 557, 566 [12] ('*Cannane*'); *Re Soza*, 542 F 3d 1060, 1067 (5th Cir, 2008).
[18] *Re MarketXT Holdings Corp*, 376 BR 390, 408–9 (Bankr SDNY, 2007).
[19] See *Cannane* at [92].

Nuzilian subsidiary to a newly-created American subsidiary, stripping value from the shares in the former over which the Senior Noteholders maintained a security interest. The Senior Noteholders' rights to repayment were also delayed under the Chapter 11 Reorganisation Plan. These circumstances are sufficient to support an inference of intention to defraud creditors, which EBH cannot rebut — it has no proof that a fraudulent design was not at least *a* reason for its actions.

3.1.2 Under s101(3)(b), it is in the collective interests of EBH's creditors for any suspicion of fraud, no matter how remote, to be investigated and remedied. The appointment of a JM assures this.

3.1.3 Under s101(3)(c), there are no relevant countervailing circumstances. To the contrary, the investigation of fraud by a JM ensures the fair and efficient administration of EBH's insolvency proceedings, in line with policy objectives underlying the Model Law.[20]

3.2 If the Court decides that a JM is necessary, a stay should not be granted under art 21(1)(a); the two are inconsistent insofar as the latter acts to bar all individual actions, which would encompass an application for the former. Although the Court has the discretionary power to tailor the stay, granting the stay sought by the Office Holder ('**OH**') would frustrate the policy objectives underlying s101.

3.2.1 Ross J was correct in finding no distinction between management and supervision: exercise of supervisory control falls within the ambit of management.[21] Under s101(6)(a), the JM has the power to supervise EBH's management. Similarly, the OH possesses broad powers of oversight, inherent to her management of EBH's restructuring. Thus, management in this context encompasses supervision of the restructuring. The powers of the OH and the JM therefore overlap.

3.2.2 The purpose of the JM is to conduct an investigation into claims of fraudulent operation levelled against EBH, the outcome of which may determine whether the Chapter 11 Reorganisation Plan is to be given force. In contrast, the purpose of the OH is to implement any Reorganisation Plan that is given force. Granting

[20] See *CBIA* Preamble paras (c).
[21] *Re Racal Communications Ltd* [1980] Ch 138, 144.

the OH's request for a stay would prematurely give legitimacy to the Plan. Accordingly, if the Court finds that there are sufficient grounds to appoint a JM, until the conclusion of their investigation, a stay should be refused.

3.3 If the Court finds that the roles of JM and OH are compatible, a stay should nonetheless be refused. The grant of post-recognition relief under art 21 is largely discretionary,[22] and must conform to the requirement under art 22 that the interests of both creditors and debtors are adequately protected.

3.3.1 The interests of creditors would not be adequately protected if a stay were granted. Under the Chapter 11 Plan, the Senior Noteholders were deprived of their right to enforce their security. The Chapter 11 proceeding, as illustrated above, should not be recognised under the Model Law. In order to allow the Senior Noteholders to exercise their immediate right, a stay should be refused.

Word count: 1966

[22] *Bear Stearns* at 126.