

## IAN FLETCHER INTERNATIONAL INSOLVENCY LAW MOOT 2017

*Problem created pro bono by members of INSOL International and International Insolvency Institute, assisted by QUT Law*

### **In the Matter of Car Part Manufacturing Holdings Ltd**

File reference: SC(M) No 1 of 2017

Appeal from: *Ames/Car Part Manufacturing Holdings Ltd v Group of Senior Noteholders* [2017] Insolvency 1(M)

Judge: Pearson J

Date of decision: 12 January 2017

### **Background**

1. Car Part Manufacturing Holdings Ltd (Car Part Manufacturing) is a company incorporated in Nuzilia for the purpose of controlling a business which manufactures car parts.
2. Its wholly owned subsidiary, Car Part Operations Ltd (Car Part Operations), is the operating company of the business, which built a manufacturing facility. Car Part Operations continues to manufacture car parts and distribute them around the world.
3. To fund these operations, Car Part Manufacturing raised debt capital, which it passed on in whole to Car Part Operations, by issuing \$500 million in senior secured notes. In return for the advance of this debt, Car Part Manufacturing granted security over all of its shares in Car Part Operations to the senior noteholders.
4. The facility documents governing the issuance of the senior debt nominated the laws of Nuzilia in their jurisdiction and choice of law clauses.
5. A downturn in the automotive industry hit Car Part Manufacturing hard. It became apparent that Car Part Manufacturing would not be able to repay the \$500 million to noteholders when due. The directors of Car Part Manufacturing called in restructuring experts led by Kelley Ames from a global accounting firm to come up with a solution to this problem.
6. A solution was proposed and the directors of Car Part Manufacturing implemented the following debt restructuring strategy:
  - a. All of its bank accounts were moved from Nuzilia to the USA, from which all payments of trade debts were made;
  - b. Its registered office was changed to New York;
  - c. Ms Ames was appointed to the board as Chief Restructuring Officer to oversee the strategy;
  - d. Temporary shared office space, in the nature of a serviced office, was leased in New York, with rent being paid only on the limited occasions when meetings needed to be held in that location. The office featured no branding or logos of Car Part Manufacturing.
  - e. Board meetings were held in New York, rather than at the factory of Car Part Manufacturing owned by Car Part Operations, in Nuzilia, although to save money some of the directors simply telephoned in from Nuzilia.



- f. The website of the business carried a message that Head Office had been moved to New York, and letters sent to trade creditors publicised this fact.
  - g. Car Part Operations transferred all of its assets, including the factory, to a newly incorporated US subsidiary, Car Part USA LLC (Car Part USA).
7. Not long after this, Car Part Manufacturing opened a Chapter 11 Proceeding in the US Bankruptcy Court for the Southern District of New York. This constituted an event of default entitling the senior noteholders to be repaid.
  8. The Chapter 11 Reorganization Plan was confirmed by the SDNY Bankruptcy Court and featured the following key terms:
    - a. Senior notes were not repayable for another 3 years, in return for a slightly higher interest rate applying;
    - b. The business assets of Car Part Operations were transferred to Car Part USA; and
    - c. Senior noteholders were not to take enforcement action against any of the Car Part group anywhere in the world.

### **The application at first instance**

9. An application by Ms Ames was brought in the Court of Insolvency of Nuzilia. That action was presided over by Pearson J. Car Part Manufacturing, by its Chief Restructuring Officer Ms Ames, sought recognition of the Chapter 11 bankruptcy proceeding in Nuzilia.
10. In support of her application for recognition, Ms Ames submitted that:
  - a. The Chapter 11 proceeding should be recognized as a foreign main proceeding, because its “centre of main interests” was located in New York; or
  - b. Alternatively, the Chapter 11 proceeding should be recognized as a foreign non-main proceeding, because it had an “establishment” in New York.
11. A group of senior noteholders comprising approximately 25% of all of the Senior Notes were dissatisfied with the Chapter 11 Reorganization Plan and did not participate in the Chapter 11 Proceedings. Rather, they brought a cross-application in Ms Ames’ recognition application before the Court of Insolvency of Nuzilia. They sought an order to wind up Car Part Manufacturing to recover the debt due to each noteholder according to its holding, and, in the face of the shortfall on full recovery, have a local liquidator in Nuzilia investigate the affairs of Car Part Manufacturing with a view to obtaining any available recoveries.
12. Ms Ames opposed the winding up order on the basis that a winding up order would be futile in the face of the Chapter 11 Reorganization Plan having already been confirmed.
13. It was common ground that:
  - a. The Chapter 11 proceeding is a “foreign proceeding” under article 2(a) of the Model Law;
  - b. Ms Ames is a “foreign representative” under article 2(d) of the Model Law;
  - c. There is no question of public policy (e.g. under article 6 of the Model Law) that arises and it is accepted that the Reorganization Plan is not manifestly contrary to Nuzilian law; and
  - d. There is no issue of conflict of laws to consider arising from the Senior Noteholders



declining to participate in the Chapter 11 proceedings.

## Findings

14. At the trial at first instance, Pearson J made the following findings:

- a. the Chapter 11 proceeding is not recognised as a foreign main proceeding;
- b. the Chapter 11 proceeding is recognised as a foreign non-main proceeding;
- c. the continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; and
- d. Car Part Manufacturing is placed into liquidation.

## Grounds for Appeal

15. Special leave has been granted for the parties to appeal on the following matters and grounds only.

16. For the *appellant* (*Group of Senior Noteholders*):

- (i) The Chapter 11 proceeding not be recognised as a foreign non-main proceeding.

17. For the *respondent* (*Ames*):

- (i) The Chapter 11 proceeding be recognised as a foreign main proceeding; and
- (ii) Car Part Manufacturing should not be placed into liquidation.

18. On the appeal, the Supreme Court expects to hear from counsel on:

- (i) what is the test to be applied in determining the location of Car Part Manufacturing's "establishment" and whether Car Part Manufacturing has an establishment in the United States of America.

19. On the cross-appeal, the Supreme Court expects to hear from counsel on:

- (i) what is the test to be applied in determining the location of Car Part Manufacturing's "centre of main interests" and whether the presumption, that the location of Car Part Manufacturing's "centre of main interests" will generally coincide with the place at which the registered office is located, is rebutted;
- (ii) whether it is open for a collective proceeding to continue, notwithstanding the effect of the article 21(1)(a) stay; and
- (iii) whether the terms of the Chapter 11 Reorganization Plan are so inconsistent with the remedy of a liquidation that the order to liquidate ought not to have been made.



**Relevant law:**

The law relevant to the determination of the appeal is the UNCITRAL Model Law on Cross-border Insolvency (1997) as adopted in the jurisdiction of Nuzilia in the *Cross-border Insolvency Act 2016* (Nuzilia).



IN THE COURT OF INSOLVENCY OF NUZILIA  
REGULAR SESSION

Case No. 1/17

UNDER

the Cross-Border Insolvency Act 2016

AND

IN THE MATTER OF

CAR PART MANUFACTURING HOLDINGS LTD

BETWEEN

KELLEY AMES

Applicant

AND

GROUP OF SENIOR NOTEHOLDERS

Respondents

Hearing: 9 January 2017

Judgment: 12 January 2017

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**JUDGMENT OF PEARSON J**

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## **The applications**

[1] Ms Kelley Ames (the Office Holder) is the Chief Restructuring Officer of Car Part Manufacturing Holdings Ltd (Car Part Manufacturing). She applies to this Court for an order under art 15(1) of the Cross-Border Insolvency Act 2016 to recognise a foreign insolvency proceeding under which she was appointed. That proceeding was brought under Chapter 11 of the US Bankruptcy Code (the Chapter 11 proceeding). The US Bankruptcy Court has since confirmed the Chapter 11 plan. The Office Holder's application is opposed by a group of entities that hold notes (the Senior Notes) issued by Car Part Manufacturing to them (the Senior Noteholders).

[2] The Senior Noteholders make a cross-application to put Car Part Manufacturing into liquidation in Nuzilia. They do so in order to enable an independent liquidator to investigate the conduct of the directors of Car Part Manufacturing that led to the Chapter 11 application in the United States. Their application is opposed by the Office Holder on the grounds that it would be futile for such an order to be made.

[3] The Nuzilian Cross-Border Insolvency Act is based on the UNCITRAL Model Law on Cross-Border Insolvency. For convenience, I refer to the Act as "the Model Law".

## **Background**

[4] Car Part Manufacturing is incorporated in Nuzilia. At the time the Senior Notes were issued, it carried on business in this country. Car Part Operations Ltd (Car Part Operations) is its wholly owned subsidiary.

[5] Car Part Manufacturing issued \$500 million worth of Senior Notes and granted a security in favour of the Senior Noteholders over all the shares that it holds in Car Part Operations. When Car Part Manufacturing received the money, it advanced the same amount to Car Part Operations, to enable the latter to build a new manufacturing facility in Nuzilia. That factory makes car parts that are sold around



the world. The day-to-day operation of the factory continues. Whether the factory continues to operate notwithstanding the Chapter 11 plan (as contended by the Senior Noteholders) or pursuant to its terms (as asserted by the Office Holder) is not something I need to decide on the present applications.

[6] The Senior Notes contain a clause stating that the law of Nuzilia governs the contract. As a matter of Nuzilian law, Car Part Manufacturing fell into default of payment obligations owed under the Senior Notes. As time went on, it became clear to its board that Car Part Manufacturing would not be able to repay the \$500 million owing to all noteholders. After taking advice, a plan was devised to preserve value in the business operated by Car Part Manufacturing, for the benefit of its shareholders.

[7] Over a period of about three weeks before the date on which the Chapter 11 proceeding was filed, Car Part Manufacturing took the following steps to implement the scheme:

- [a] Moved all of its bank accounts from Nuzilia to the United States. From that time on, all debts payable by Car Part Manufacturing (including those incurred from its operations in Nuzilia) were settled by payments made from the United States.
- [b] Hired Ms Ames. She was appointed to the Board of Directors of Car Part Manufacturing. Ms Ames was authorised by the board to undertake a restructuring process out of New York.
- [c] Leased temporary shared office space in New York, for which Car Part Manufacturing paid rent only on the limited occasions on which it was necessary to transact particular business from that location. Car Part Manufacturing's name was not shown on the door to the office. Rather, that carried the name of the building owner, Brass Plate Realty.



- [d] Started holding board meetings in the United States. Before that time, all board meetings had been held at the Head Office of Car Part Manufacturing, situated in Nuzilia.
- [e] Took steps to change the registered office of Car Part Manufacturing to New York.
- [f] Sent letters to creditors notifying them that the Head Office had been moved to New York. A message to this effect was also posted on Car Part Manufacturing's website.
- [g] Created a wholly owned US subsidiary, known as Car Part USA LLC (Car Part USA).
- [h] Arranged for Car Part Operations to transfer all of its trading assets to Car Part USA. Car Part Manufacturing continued to own all shares in Car Part Operations.

### **The US restructuring proceedings**

[8] After giving effect to those transactions, Car Part Manufacturing filed a voluntary Chapter 11 petition in the US Bankruptcy Court for the Southern District of New York. Applying Nuzilian law, the right of the Senior Noteholders to demand payment of the amounts owing under the Senior Notes was triggered by Car Part Manufacturing filing its Chapter 11 proceeding.

[9] If approved, the effect of Car Part Manufacturing's proposed plan of reorganisation was to cure its default of payment obligations under the Senior Notes and to extend the term of all of the Senior Notes for a period of three years, with a slightly higher interest rate applying during the three-year extension. Separately, an injunction was sought to prevent all Senior Noteholders from taking any enforcement action against Car Part Manufacturing, Car Part Operations or Car Part USA, anywhere in the world.



[10] The plan was accepted by significantly more than two-thirds of the Senior Noteholders who cast votes on it. Under US bankruptcy law, that was sufficient to constitute approval of the plan by all Senior Noteholders, as a class. As a result, the Bankruptcy Court entered an order confirming the plan and issued an injunction in the terms sought. The effect of confirmation was to bind all Senior Noteholders to the plan.

[11] As a result, all Senior Noteholders lost their immediate ability to recover debts owed to each by enforcing the security over the shares that Car Part Manufacturing continued to hold in Car Part Operations.

[12] The Senior Noteholders who oppose the recognition application made a deliberate decision not to appear in the US proceeding, and not to cast votes on the plan. Collectively, they own or manage some 25% of all of the Senior Notes. Instead of participating in the Chapter 11 proceedings, they made an application to this Court to put Car Part Manufacturing into liquidation. The Senior Noteholders seek that order so that a liquidator may investigate the circumstances in which the restructuring arrangement came to be devised, and to pursue any available remedies to recover losses suffered by the Senior Noteholders.

### **Agreed positions**

[13] The parties agree that:

- [a] The Chapter 11 proceeding is a “foreign proceeding”, as defined in art 2(a) of the Model Law.
- [b] The Office Holder is a “foreign representative”, as defined by art 2(d) of the Model Law.
- [c] No question of public policy arises. As a result it is unnecessary to consider whether the way that the confirmed plan is structured is manifestly contrary to the laws of Nuzilia.



- [d] No questions of conflict of laws arise out of the decision of the Senior Noteholders not to participate in the Chapter 11 proceeding in New York.

### **The competing contentions**

- [14] On the Office Holder’s application for recognition, she contends:

[a] Car Part Manufacturing has its “centre of main interests” in New York. Accordingly, the Chapter 11 proceeding should be recognised as a foreign main proceeding under the Model Law. If the proceeding were recognised as such, relief should be granted in a form that gives effect to the confirmed Chapter 11 plan, and the associated injunctions. Alternatively, it is submitted that Car Part Manufacturing has an “establishment” in the United States that permits recognition as a foreign non-main proceeding.

[b] This Court should not grant the Senior Noteholders’ liquidation application because to do so would be futile. As a result of the confirmation of the Chapter 11 plan, the arrangements between Car Part Manufacturing and the Senior Noteholders have been varied.

- [15] The Senior Noteholders contend:

[a] Car Part Manufacturing’s “centre of main interests” remains in Nuzilia. The attempt to change the centre of main interests of Car Part Manufacturing from Nuzilia to the United States was ineffective because it amounted to illegitimate “forum-shopping”. It is asserted that Car Part Manufacturing sought out a friendly jurisdiction so that its restructuring plan could be implemented under Court supervision, even though the effect of confirmation of the plan was to deprive secured creditors of immediate (and effective) rights of enforcement of their securities under Nuzilian law.



- [b] Car Part Manufacturing does not, and never did, have, an “establishment” in the United States, as that term is defined by art 2(f) of the Model Law. As a result the Chapter 11 proceeding cannot be recognised as a foreign non-main proceeding.
- [c] Whether recognition is granted or refused, an order putting Car Part Manufacturing into liquidation should be made. That would enable a liquidator to investigate the possibility of issuing proceedings against those responsible for restructuring Car Part Manufacturing if they were found to have acted fraudulently, or could otherwise be liable under Nuzilian law.

### **The issues**

[16] Four substantive issues arise for determination:

- [a] Is the centre of main interests of Car Part Manufacturing Nuzilia or the United States of America?
- [b] If the centre of main interests is not in the United States, does Car Part Manufacturing have an “establishment” in that country?
- [c] If recognition were granted, either as a foreign main proceeding or a foreign non-main proceeding, what relief (if any) should be ordered?
- [d] Whether or not recognition is granted, are the Senior Noteholders entitled to an order putting Car Part Manufacturing into liquidation?

[17] I deal with the first two issues under the same heading. The question in respect of each is whether the Chapter 11 proceeding should be recognised in Nuzilia. The first question is directed to whether recognition should be granted as a foreign main proceeding. The second requires a determination on whether the Chapter 11 proceeding should be recognised as a foreign non-main proceeding.



## Analysis

(a) *Should a recognition order be made?*

[18] Article 15(1) of the Model Law enables a foreign representative to apply to this Court for recognition of a foreign proceeding, either as a foreign main proceeding or a foreign non-main proceeding. I have received certified documents from the Bankruptcy Court that satisfy me that the Chapter 11 proceeding is a “foreign proceeding” to which the Model Law applies. It is agreed that the Office Holder is a “foreign representative”.

[19] The term “foreign main proceeding” is defined by art 2(b) of the Model Law:

**foreign main proceeding** means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

[20] To determine whether the Chapter 11 proceeding is a foreign main proceeding it is necessary to decide the location of Car Part Manufacturing’s centre of its main interests.

[21] The term “foreign non-main proceeding” is defined by art 2(c) of the Model Law:

**foreign non-main proceeding** means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

[22] To determine whether a foreign proceeding qualifies for recognition as a “foreign non-main proceeding”, the question is whether Car Part Manufacturing had, at the relevant time, an “establishment” in the United States.

[23] The term “establishment” is defined by art 2(f) of the Model Law:

**establishment** means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;



[24] Article 17(1) and (2) of the Model Law provide that this Court must recognise a foreign proceeding if it qualifies either as a foreign main proceeding or a foreign non-main proceeding.

[25] Article 16(3) of the Model Law makes it clear that, in the absence of proof to the contrary, the place of a corporate debtor's registered office is presumed to be its centre of main interests. Although Car Part Manufacturing remains registered in Nuzilia, it has (in accordance with Nuzilian law) changed the location of its registered office to New York. The question becomes whether the presumption that its centre of main interests is now in New York is rebutted by plausible evidence to the contrary.

[26] Although the registered office of Car Part Manufacturing had been moved to New York before the Chapter 11 proceeding was filed, the Senior Noteholders produced evidence that, prior to the Office Holder's appointment as Chief Restructuring Officer, all board meetings had been held in Nuzilia, and all significant operational decisions had been made out of its headquarters in this country.

[27] There was also evidence that one of the Senior Noteholders, while on holiday in New York, attended at the office from which Car Part Manufacturing claims that it was operating and asked to meet with its Chief Executive Officer. The receptionist said that the office was used as a temporary location for companies that required a room for a short period of time. She did not know where the Chief Executive Officer was located. There was nothing in the building to suggest that Car Part Manufacturing operated out of it.

[28] In general terms, the "centre of main interests" of a company will be treated as the place at which its "nerve centre" is based. In my view, that means the place from which all significant operating decisions are made. In this case, while the registered office is now in New York and limited operational functions are carried out from a leased room in that city, all management (as opposed to governance) decisions affecting the day-to-day business of Car Part Manufacturing are made in Nuzilia. I consider that the preponderance of evidence points to Car Part



Manufacturing's centre of main interests being in Nuzilia. For that reason, I decline to recognise the Chapter 11 proceeding as a foreign main proceeding.

[29] The next question is whether, notwithstanding that conclusion, I can recognise the Chapter 11 proceeding as a foreign non-main proceeding. This turns on whether Car Part Manufacturing can be said to have an "establishment" in the United States.

[30] Albeit on a small scale, there were staff of Car Part Manufacturing operating in the United States, and some functions were undertaken of a business nature; in particular the payment of accounts and the holding of board meetings. By a fine margin, I am satisfied that the functions undertaken in the United States amount to a "place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services". Economic activity was undertaken through the payment of accounts by staff employed by Car Part Manufacturing, who were based in New York. Board members also attended meetings in New York to undertake their governance functions. In those circumstances, I hold that "non-transitory economic activity" was carried out through human means from New York. In particular, the payment of accounts constituted relevant "services" for the purposes of the definition of "establishment" in art 2(f) of the Model Law. I hold that Car Part Manufacturing did have an "establishment" in New York. I make an order recognising the Chapter 11 proceeding as a foreign non-main proceeding.

*(b) Relief*

[31] Having recognised the proceeding as a foreign non-main proceeding, I am only entitled to grant relief of a type that falls within art 21 of the Model Law. Relief may be crafted "to protect the assets of the debtor or the interests of the creditors". Reflecting that emphasis on the need to protect the interests of creditors, art 22(1) provides that, in determining whether to grant or deny relief under art 21, a Court "must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected".



[32] Notwithstanding the interests of the Senior Noteholders, the restructuring that has occurred has had the effect of preserving thousands of jobs in Nuzilia that might otherwise have been lost; and, Car Part USA is generating taxable revenue for the benefit of the Nuzilian economy.

[33] In those circumstances, I am prepared to make an order staying the continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities. That order is made under art 21(1)(a) of the Model Law. This order has the effect of staying actions that could be brought individually by Senior Noteholders against Car Part Manufacturing. To that extent, the Senior Noteholders are bound by the confirmed Chapter 11 plan.

(c) *Should liquidation be ordered?*

[34] In my view, despite the orders I have made, the Senior Noteholders are entitled to an order putting Car Part Manufacturing into liquidation. The prerequisites for a liquidation order under the Insolvency Act 2014 are met. The question is whether I should exercise my discretion to put Car Part Manufacturing into liquidation having regard to the terms of the Chapter 11 plan and the provisions and objectives of the Model Law.

[35] A liquidation order does not impact on the confirmed Chapter 11 plan. The business operated in Nuzilia continues, through Car Part USA. In that situation, the interests of employees and trade creditors in Nuzilia are protected.

[36] Under the Insolvency Act 2014, a liquidator has power to investigate the conduct of directors of a company incorporated in Nuzilia and, where appropriate, to issue proceedings against them if, for example, they have breached duties owed by them under Nuzilian law. One of those duties is not to make decisions in the interests of its shareholders in circumstances where the company is either insolvent or of doubtful solvency and the effect of the decision adversely affects the rights of its creditors.



[37] The stay I have ordered prevents individual action being taken by particular Senior Noteholders. It does not prevent a Senior Noteholder from commencing a proceeding to initiate a collective insolvency regime to enable an independent insolvency representative to investigate the circumstances in which the scheme came to be devised and to determine what remedies might be available against the directors of Car Part Manufacturing to recover any losses suffered by the Senior Noteholders. A liquidation is a collective proceeding which does not fall within the ambit of the art 21(1)(a) stay.

[38] Notwithstanding the fact that a Nuzilian liquidation order is antithetical to the approved Chapter 11 plan, I am satisfied that a liquidation order should be made. I consider that the Senior Noteholders' right to initiate and continue a collective insolvency procedure and the need for an independent person to investigate whether the conduct of the directors of Car Part Manufacturing breached the duty to which I have referred outweigh countervailing considerations. Although it is by no means certain that an investigation will reveal misconduct on the part of the directors, I consider that the Senior Noteholders are entitled to have the issue explored.

[39] For those reasons, I make an order that Car Part Manufacturing be put into liquidation.



IN THE SUPREME COURT OF NUZILIA

SC Case No. 1/17

UNDER the Cross-Border Insolvency Act 2016

AND

IN THE MATTER OF CAR PART MANUFACTURING HOLDINGS LTD

BETWEEN GROUPOF SENIOR NOTEHOLDERS

Appellants

AND KELLEY AMES

Respondent

Hearing: 13 January 2017

Judgment: 13 January 2017

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**JUDGMENT OF THE COURT**

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[1] The appellants seek leave to appeal against a judgment given by Pearson J in the Court of Insolvency on 12 January 2017. The respondent also seeks leave, to bring a cross- appeal against a different aspect of the judgment. The circumstances require an urgent appeal hearing.

[2] We have considered the proposed grounds of appeal. We are satisfied that permission to appeal should be given on Model Law issues raised by Pearson J's judgment, but do not consider any arguable questions of Nuzilian domestic law arise.

[3] We grant leave. The following points are approved for argument:

- [a] On the appeal, the approved ground is whether Pearson J was right to recognise the Chapter 11 proceeding as a foreign non-main proceeding.
- [b] On the cross-appeal, the approved ground is whether Pearson J was right not to recognise the Chapter 11 proceeding as a foreign main proceeding and to order that Car Part Manufacturing Holdings Ltd be put into liquidation.

[4] On the appeal we expect to hear from counsel on the test to be applied in determining the location of Car Part Manufacturing Holding Ltd's establishment and whether Car Part Manufacturing has an establishment in the United States of America.

[5] On the cross-appeal, there are two points on which the Court expects to hear argument from counsel. The first is whether Car Part Manufacturing has its centre of main interests in the United States of America and whether the presumption, that it will generally coincide with the place at which the registered office is located, was rebutted. The second is whether it is open for a collective proceeding to continue, notwithstanding the effect of the art 21(1)(a) stay and whether the terms of the Chapter 11 plan are so inconsistent with the remedy of liquidation that the Judge ought not to have made the order.

[6] The appeal is set down for hearing on 16 January 2017.



## The inaugural Ian Fletcher International Insolvency Law Moot (2017) CLARIFICATIONS

*Identification of teams for these questions has been removed and the questions renumbered and occasionally small changes made.*

### Grounds for Appeal

Several teams have queries regarding the wording of the Background paragraphs [16] to [19] and the Leave to Appeal paragraphs [3] to [5]. For clarity, a revised document has been posted to the website. A version with paragraphs adjusted by means of tracked changes will be emailed to all registered teams.

All parties agree the statements in Pearson J page 9 paragraph [13]. The Appellants' position is that while the Chapter 11 proceeding is a "foreign proceeding", the Chapter 11 proceeding should not be recognised as a foreign main proceeding or a foreign non-main proceeding.

The Supreme Court does not expect to hear from counsel on art 22(1).

### Procedural

We received some queries regarding the format of the written submissions.

- 1) The term 'memorial' is used interchangeably with 'written submission'. It is not intended as a term of art.
- 2) The Appellants' 2,000 word written submission is to contain the Appellants' submissions on the Appeal and in response to the Cross-Appeal. For such response, teams are to anticipate the issues they consider may be raised on Cross-Appeal. This approach also applies to the Respondent's 2,000 word written submission. The process differs from the Oral Arguments hearings round where there will be an exchange of outlines (Rule F.2-4). Note Rule E.4 states that the scope of the oral arguments is not limited by the written submissions.
- 3) No examples of written submissions are available.
- 4) It is anticipated that teams will provide:
  - a) a heading for each particular argument;
  - b) then argue that particular point, applying legal principles to the problem (Background, Insolvency Court judgment by Pearson J and the Supreme Court order on the Leave to Appeal; read in light of clarifications) and substantiating argument as relevant by reference to:
    - i) the Cross-border Insolvency Act 2016 (Nuzilia)
    - ii) case law on the UNCITRAL Model Law for Cross-border Insolvency (1997) as adopted in jurisdictions other than Nuzilia; and
    - iii) secondary materials, such as the UNCITRAL texts relevant to the Model Law on Cross-border Insolvency (1997).



- 5) For suggested headings and setting out, see the Annexure at the end of this document. To the extent of any inconsistency with Attachment D of the Rules, this Annexure replaces such part of the Rules.

**Facts**

<b>Question 1</b>	What operations does Car Part Manufacturing Holdings Ltd undertake, as opposed to its subsidiaries?
<b>Clarification</b>	<i>The operations of Car Part Manufacturing Holdings Ltd are controlling a business which manufactures car parts. [Background page 1 paragraph [1]]</i>
<b>Question 2</b>	As Chief Restructuring Officer, what rights (voting rights) and obligations does Ames have with Car Part Manufacturing?
<b>Clarification</b>	<i>Ms Ames is a member of the Board of Directors with the same rights (voting rights) and obligations as other members of the Board (except the Chair who has the right to a casting vote in a deadlock). She is authorised by the Board to undertake a restructuring process out of New York. [Pearson J page 7 paragraph [7(b)]]</i>
<b>Question 3</b>	How many directors were in New York and Nuzilia respectively when the board meetings and other operations were conducted?
<b>Clarification</b>	<i>This varied from meeting to meeting. There were 6 members of the Board, including Ms Ames. The Chair and Ms Ames were always in New York for Board Meetings and occasionally they were joined by 1-2 other Directors. The Directors who were not in New York telephoned in from Nuzilia. [Background page 1 paragraph [6(e)]]</i>
<b>Question 4</b>	Were the noteholders notified of the letters sent to the trade creditors regarding the move of the Head Office to New York?
<b>Clarification</b>	<i>Car Part Manufacturing sent letters to all creditors notifying them that the Head Office had been moved to New York. [Pearson J page 8 [paragraph [7(f)]]</i>
<b>Question 5</b>	Is Car Part US LLC wholly owned by Car Part Operations?
<b>Clarification</b>	<i>No. it is a wholly owned subsidiary of Car Part Manufacturing Holdings Ltd. [Pearson J page 8 paragraph [7 (g)]]</i>





<b>Question 6</b>	What are the requirements for an entity to be deemed insolvent under the Insolvency Act 2014?
<b>Clarification</b>	<i>This is not relevant to the points on which the Court expects to hear. The prerequisites for a liquidation order under the Insolvency Act 2014 are met. [Pearson J page 15 paragraph [34]]</i>
<b>Question 7</b>	What is the scope of a liquidation order under the Insolvency Act 2014? a) Is there a strict legal meaning pertaining to what a liquidation order entails under the Insolvency Act 2014 or is “liquidation” being used in the broad sense which could effectively allow for a sale and winding up of the company?
<b>Clarification</b>	<i>A Nuzilian liquidation order under Insolvency Act 2014 has the same broad meaning as “liquidation” in the UNCITRAL Legislative Guide (2004) at paragraph [12 (w)] “proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law.”</i>
<b>Question 7</b>	b) Is the liquidation order and the corresponding powers of the liquidator strictly limited to those described in paragraph 36 of the Judgment of Pearson J?
<b>Clarification</b>	<i>The relevant aspects of the liquidation order under the domestic Nuzilian insolvency law are the powers of the liquidator described by Pearson J page 15 in paragraph [36].</i>
<b>Question 7</b>	c) Could a copy of the Insolvency Act 2014 be provided?
<b>Clarification</b>	<i>This is not required for the points on which the Court expects to hear.</i>
<b>Question 8</b>	Is it assumed that Car Part Manufacturing and its various entities are an enterprise group?
<b>Clarification</b>	<i>This is not relevant to the points on which the Court expects to hear. These require consideration of the UNCITRAL Model Law on Cross-border Insolvency (1997) as adopted in the hypothetical jurisdiction of Nuzilia.</i>



<b>Question 9</b>	a) By what means were the assets transferred from Car Part Operations to Car Part USA?
<b>Clarification</b>	<i>This is not relevant to the points on which the Court expects to hear.</i>
<b>Question 9</b>	b) What does “trading assets” encompass, as detailed in paragraph 7(h) of the Judgment of Pearson J? In contrast, paragraph 6(g) of The Problem describes a transfer of “all of its assets, including the factory ... ”.
<b>Clarification</b>	<i>To clarify, “trading assets” as detailed in paragraph 7(h) of the Judgment of Pearson J are the same as “business assets” in paragraph 8(b) of the Background document. To the extent there is any inconsistency, the statement in the Judgment of Pearson J in paragraph 7(h) overrides the statement “all of its assets, including the factory...” in paragraph 6(g) of the Background document.</i>
<b>Question 10</b>	What is the “security” that was granted to the Senior Noteholders over the shares of Car Part Manufacturing?
<b>Clarification</b>	<i>This is not relevant to the points on which the Court expects to hear.</i>
<b>Question 11</b>	a) Did Car Part Manufacturing fully register its New York office (as stated in paragraph 6(b) of the Background) before filing Chapter 11 proceeding? Or did they merely “take steps to”, but not necessarily complete, registering the New York Office as suggested in paragraph 7(e) of the Judgment of Pearson J?
<b>Clarification</b>	<i>Car Part Manufacturing Ltd fully changed its registered office to New York before filing the Chapter 11 proceeding.</i>
<b>Question 11</b>	b) What exactly is the corporate structure? It looks as though Car Part Operations was never officially “moved” to New York?
<b>Clarification</b>	<i>Car Part Operations and Car Part USA are wholly owned subsidiaries of Car Part Manufacturing Holdings Ltd. Car Part Operations continues to be registered in Nuzilia.</i>





IN THE SUPREME COURT OF NUZILIA

SC Case No. 1/17

IN THE MATTER OF CAR PART MANUFACTURING HOLDINGS LTD

BETWEEN GROUP OF SENIOR NOTEHOLDERS,  
Appellants

AND KELLEY AMES  
Respondent

SUBMISSION FOR APPELLANTS  
REPRESENTED BY TEAM TT

**GROUND FOR APPEAL: Pearson J erred in recognising the Chapter 11 proceeding as a foreign proceeding for which relief was available under the Cross-border Insolvency Act 2016 (Nuzilia). Pearson was correct not to recognise it as a foreign main proceeding. Pearson J was incorrect to recognise it as a foreign non-main proceeding.**

ARGUMENT 1 ...

1. The submissions follow the logic of arguments to be raised by the Appellant relevant to the Ground for Appeal.
- 2.

**RESPONSE TO CROSS-APPEAL: Pearson J was correct to order that Car Part Manufacturing Holdings Ltd be put into liquidation.**

ARGUMENT 1 ...

1. The submissions follow the logic of arguments anticipated to be raised by the Respondent on the Cross-Appeal.
- 2.

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Respondent

SUBMISSION FOR RESPONDENT  
REPRESENTED BY TEAM TT

**GROUND FOR CROSS-APPEAL: Pearson J erred in making an order that Car Part Manufacturing Holdings Ltd be put into liquidation.**

ARGUMENT 1 ...

1. The submissions follow the logic of arguments to be raised by the Respondent relevant to the Ground for Cross-Appeal.
- 2.

**RESPONSE TO APPEAL: Pearson J was correct in recognising the Chapter 11 proceeding as a foreign proceeding for which relief is available under the Cross-border Insolvency Act 2016 (Nuzilia). Pearson J erred in not recognising the Chapter 11 proceeding as a foreign main proceeding.**

ARGUMENT 1 ...

1. The submissions follow the logic of arguments anticipated to be raised by the Appellant on the Appeal.
- 2.