

**IN THE NUZILIA MOOT COURT OF APPEAL**

Between

**GROUP OF SENIOR NOTEHOLDERS, Appellants**

And

**KELLEY AMES, Respondent**

**SUBMISSION FOR RESPONDENT**

**REPRESENTED BY TEAM 5**

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**GROUND FOR CROSS-APPEAL: PEARSON J ERRED IN MAKING AN ORDER THAT CAR PART MANUFACTURING HOLDINGS LTD BE PUT INTO LIQUIDATION**

**I. THE LIQUIDATION OF CAR PART MANUFACTURING IS PROHIBITED BY THE ARTICLE 21(1)(a) STAY**

**A. *THE LIQUIDATION OF CAR PART MANUFACTURING IS NOT A COLLECTIVE PROCEEDING***

1. For a proceeding to be collective, it must “consider the rights and obligations of all creditors” rather than a class of creditors.<sup>1</sup> The liquidation of Car Part Manufacturing (“CPM”) forwards the interests of the Appellants, ignoring the rights of the other Senior Noteholders accrued following the Chapter 11 proceedings (“**Proceedings**”). Under the Proceedings, the majority of Senior Noteholders are entitled to higher interest payments.<sup>2</sup> By ordering the liquidation of CPM, the Senior Noteholders would be deprived of any possible benefit attainable under the Proceedings.
2. Furthermore, liquidating CPM would run contrary to the majority’s intention to keep CPM as a going concern.<sup>3</sup> Thus, the liquidation ordered is not for the benefit of creditors generally, but only the Appellants who refuse to subject their claims to the Proceedings. Accordingly, the liquidation of CPM is not a collective proceeding for the purposes of the Cross-Border Insolvency Act (“**CBIA**”).

**B. *THE LIQUIDATION OF CPM IS ANTITHETICAL TO THE SCOPE AND PURPOSE OF THE ARTICLE 21(1)(a) STAY***

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<sup>1</sup> *British American Ins. Co. Ltd (In re)* 425 BR 884, 910.

<sup>2</sup> Judgment, [9]–[10].

<sup>3</sup> Judgment, [10].

3. The purpose of the Article 21(1)(a) stay is to allow the subject company to remain focused on the restructuring of its financial affairs by maintaining the *status quo* amongst its creditors.<sup>4</sup> To fulfil this purpose, the scope of the stay is to prevent creditors whose claims against the company are subject to the collective proceeding in question from being able to pursue their claims against the company.<sup>5</sup>
4. First, a liquidation order would be contrary to the purpose of the Art 21(1)(a) stay. By liquidating CPM, the Senior Noteholders would no longer be bound by the Chapter 11 plan. Therefore, this fails to maintain the stay of proceedings and distracts the directors from restructuring the company. Furthermore, dissolving the entire company to repay its debts would leave the directors of CPM with no company to restructure.
5. Secondly, the Appellants are caught within the scope of the Art 21(1)(a) stay. Although the Appellants refused to participate in the Chapter 11 proposal, their claims are nonetheless subject to the Chapter 11 plan.<sup>6</sup> A liquidation order enables the Senior Noteholders to enforce their claims outside of the collective Chapter 11 plan.<sup>7</sup> Accordingly, the liquidation of CPM is antithetical to the scope of the Art 21(1)(a) stay, which is to prevent creditors whose claims are subject to the collective proceedings to bring actions outside of that process.

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<sup>4</sup> United Nations, *UNCITRAL Legislative Guide on Insolvency Law*, Part One, II, (United Nations Publication, 2005), [12]; *Ronelp Marine Ltd v STX Offshore and Shipbuilding Co* [2016] EWHC 2228, [16].

<sup>5</sup> *In re OGX Petroleo E Gas SA* [2016] BLR, [50].

<sup>6</sup> Judgment, [11].

<sup>7</sup> Judgment, [13][a].

## **II. THE ORDER TO LIQUIDATE IS INCONSISTENT WITH THE TERMS OF THE CHAPTER 11 REORGANIZATION PLAN**

### **A. *LIQUIDATION UNDERMINES THE COMPROMISE DEBT AND HIGHER INTEREST RATE UNDER THE PLAN***

6. Liquidation amounts to winding up, which is inconsistent with term (a). Term (a) delays repayment of debt in return for a higher interest rate, which preserves CPM's solvency. Under a liquidation order, the Noteholders can effectively enforce the debt obligations,<sup>8</sup> as a direct consequence of the disposal of assets. With CPM's inability to repay the debt, Noteholders are entitled to enforce the security over Car Part Operations ("CPO") shares. A liquidation order would precipitate the insolvency that term (a) was intended to prevent and make reorganisation impossible.
7. Furthermore, liquidation proceedings, in triggering repayment of the Senior Notes, would prevent the Noteholders from attaining higher interest rates which are contingent on their maturity in three years' time.<sup>9</sup> Given so, the order deprives the majority of their right to higher interest rates. Accordingly, liquidation undermines the compromise debt and higher interest rate under the plan.

### **B. *LIQUIDATION CONTRADICTS THE STAY OF PROCEEDINGS GRANTED AS UNDER THE PLAN***

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<sup>8</sup> Clarifications, Question 7.

<sup>9</sup> Background, [8].

8. An order for liquidation would result in the “disposal of assets for the purpose of distribution”,<sup>10</sup> which contradicts term (c).<sup>11</sup> Term (c) prevents the noteholders from taking enforcement action against the Group. The aim of a stay of proceedings is to prevent “execution against the assets of the insolvency estate”.<sup>12</sup> A liquidation, though for the purposes of investigation, nevertheless contradicts the intended effect of the stay.
9. Furthermore, a stay of proceedings is meant to prevent the dissipation of resources due to litigation.<sup>13</sup> In *Legend International Holdings Inc v Indian Farmers Fertiliser Cooperative Limited*,<sup>14</sup> liquidation was ordered as the Chapter 11 proceedings were in its “infancy” and its progress was uncertain.<sup>15</sup> In contrast, the Proceedings in the present case has been concluded, alongside an approved plan. Accordingly, liquidation would ignore the sunk costs involved and is contrary to the purpose of a stay granted to a confirmed plan.

**C. A LIQUIDATION ORDER WOULD NOT BE APPROPRIATE AS THE DIRECTORS DID NOT BREACH THEIR DUTY**

10. The directors did not breach its duties by acting in the interests of its shareholders when CPM was imminently insolvent.<sup>16</sup> The UNCITRAL Working Group considers the “no worse off” standard as the *de facto* standard of liability in cases involving insolvency of

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<sup>10</sup> Clarifications, Question 7.

<sup>11</sup> Background, [8].

<sup>12</sup> *Supra* n 4, [7].

<sup>13</sup> United Nations, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, (United Nations Publication, 2014), p. 49.

<sup>14</sup> *Legend International Holdings Inc (in liquidation) v Indian Farmers Fertiliser Cooperative Limited* [2016] VSCA 151.

<sup>15</sup> *Id*, [45].

<sup>16</sup> Judgment, [6].

enterprise groups.<sup>17</sup> This requires that creditors “will be no worse off under the steps that are taken than they would have had those steps not been taken”.<sup>18</sup> The Noteholders are no worse off, since no assets within CPM were shifted. Thus, the directors should not be liable for breach.

11. It cannot be argued that the Noteholders are prejudiced by the decrease of value of their security, the CPO shares. This is immaterial in light of the continued operations of CPM and thus enforcement of security does not arise for consideration. Accordingly, a liquidation order would be inappropriate.

**RESPONSE TO APPEAL: PEARSON J WAS CORRECT TO RECOGNISE THE CHAPTER 11 PROCEEDINGS AS A FOREIGN NON-MAIN PROCEEDING. PEARSON J ERRED IN NOT RECOGNISING THE CHAPTER 11 PROCEEDINGS AS A FOREIGN MAIN PROCEEDING.**

#### **I. CAR PART MANUFACTURING HAS ITS CENTRE OF MAIN INTERESTS IN NEW YORK**

12. The Proceedings is a foreign main proceeding if it is where the debtor has its centre of main interests (“COMI”). The location of where a debtor regularly administers its economic interests in a manner that is ascertainable by third parties is where its COMI is.<sup>19</sup> The factors relevant to determine a debtor’s COMI are the location of its operations, assets and financial activities, and its staff.<sup>20</sup> A debtor’s COMI should be determined as at the date of presentation of an insolvency petition.<sup>21</sup> To inquire into a debtor’s past when

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<sup>17</sup> United Nations, *UNCITRAL Working Group V (Insolvency Law), Forty-ninth Session (A/CN.9/WG.V/WP.139)* at [10].

<sup>18</sup> *Id.*, [16].

<sup>19</sup> Report 6500/96 of the EU Council, [75].

<sup>20</sup> *Legend International Holdings Inc v Legend International Holdings Inc* [2016] VSC 308, [92].

<sup>21</sup> *Lombard North Central v Blower* [2014] ILP 46, [42].

determining its COMI might result in conflicting COMI determinations, decreasing the effectiveness of the CBIA.<sup>22</sup> These factors indicate that CPM's COMI is in New York.

13. First, CPM's key operational decisions are made in New York. The determinants of where the "nerve centre" of a company was where the "actual centre of direction, control and coordination was".<sup>23</sup> This denotes a place where the head office functions are carried out, as opposed to the company's day-to-day operations.<sup>24</sup> Such head office functions include strategic decision-making and the general supervision of the business.<sup>25</sup> The board meetings would involve such strategic decisions, such as those involving the company's restructuring efforts. It cannot be contended the lack of an identifiable, permanent office location would indicate that CPM's COMI is not in New York. The court should be minded that CPM is facing severe financial difficulties, and is seeking to exercise financial prudence while undergoing restructuring efforts. The office space was thus rented only when required to reduce overhead costs.<sup>26</sup>

14. Secondly, a large proportion of CPM's assets are located in New York. All of CPM's bank accounts are located there, and payment of all debts were made from the US.<sup>27</sup> This would have been reasonably ascertainable by third parties dealing with CPM, as all payments made to trade creditors would be undersigned by US banks. Additionally, shares are located "where (they) can be dealt with effectively according to the law of the

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<sup>22</sup> *Lavie v Ran*, 607 F3d 1017 (5<sup>th</sup> Cir Tex 2010).

<sup>23</sup> *Hertz Corp v Friend* (130 SCt 1181, 1192-94 (2010)).

<sup>24</sup> M. Virgós and F. Garcimartín, "The European Insolvency Regulation: Law and Practice" (The Hague, Kluwer, 2004), p 42.

<sup>25</sup> *Ibid.*

<sup>26</sup> Judgment, [7][c].

<sup>27</sup> Judgment, [7][a].

place of incorporation of the relevant company”.<sup>28</sup> Thus, CPM possesses substantial shares in New York, as Car Part USA (“CPUSA”) is CPM’s wholly owned US subsidiary.<sup>29</sup>

15. Thirdly, the majority of CPM’s staff are in New York. CPM has employees administering payment of accounts in New York.<sup>30</sup> Conversely, CPM has few to no employees in Nuzilia, as it has shifted its Head Office to New York. Companies within a corporate group are distinct legal entities that must be considered separately from one another.<sup>31</sup> Thus, the workers in CPO’s Nuzilian factory cannot be considered as CPM’s employees. Furthermore, most members of the Board of Directors are also present in New York for Board Meetings.<sup>32</sup>

16. It cannot be argued that CPM’s move to New York was engaged in illegitimate “forum-shopping”. A debtor is entitled to change its COMI from its original location.<sup>33</sup> There is judicial support for companies to ensure that their COMI is relocated to reorganise the company for the benefit of its creditors.<sup>34</sup> In *Hellas Telecommunications*, a Luxembourg entity informed its creditors of the relocation of its COMI to England shortly before it entered administration.<sup>35</sup> The court found that the presumption that the debtor’s COMI was in Luxembourg was rebutted. Similarly, CPM has notified its creditors of its shift to

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<sup>28</sup> Wellard & Mason, “Global rules on conflict-of-laws matters in international insolvency cases: An Australian perspective” (2015) 23 ILJ 1, 14.

<sup>29</sup> Judgment, [7][g].

<sup>30</sup> Judgment, [30].

<sup>31</sup> *Re Northsea Base Investment* [2015] 1 BCLC 539, [16].

<sup>32</sup> Clarifications, Question 3.

<sup>33</sup> *Interdil v Fallimento Interdil* [2012] BLR 1582, [55].

<sup>34</sup> See Advocate General Colomer’s opinion in *Staubitz Schreiber* [2006] ECR I-701.

<sup>35</sup> *Hellas Telecommunications (Luxembourg) II SCA* [2010] BCC 295.

New York,<sup>36</sup> and has additionally obtained the support of most of its creditors for the Proceeding.<sup>37</sup> The shift is thus not illegitimate. Accordingly, CPM's COMI is in New York.

## **II. IN ANY EVENT, CAR PART MANUFACTURING HAS AN ESTABLISHMENT IN THE US**

17. The Proceedings is a foreign non-main proceeding if it originates from the State where the debtor has an establishment at. An establishment constitutes a location where the debtor conducts non-transitory economic activity with human means. This requires activities to demonstrate a “minimum level of organisation”.<sup>38</sup> CPM's activities have demonstrated such a level of organisation. New York was the location where all of CPM board meetings were conducted, as well as where its employees administered the CPM's payment of accounts.<sup>39</sup>

18. It cannot be argued that the recency of the shift to conduct these activities in the US is indicative of the its transitory nature. The use of the present tense in Article 2(c) implies that an establishment analysis should be at the time when the foreign representative files for a recognition.<sup>40</sup> Similar to the COMI analysis, it is inappropriate to enquire into CPM's past. Accordingly, CPM does have an establishment in the US, and the Proceedings should be recognised as a foreign non-main proceeding.

(2000 words)

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<sup>36</sup> Judgment, [7][f].

<sup>37</sup> Judgment, [10].

<sup>38</sup> *Supra* n 19, [71].

<sup>39</sup> Judgment, [7][a].

<sup>40</sup> *In re Ran*, 390 BR 257 (Bankr. S.D. Tex. 2008), [12].

