

IN THE SUPREME COURT OF NUZILIA

Between

Blujay Fund Limited and Blujay Opportunities Limited

Appellant

and

Robin Investment Fund Limited

Respondent

SUBMISSION FOR THE RESPONDENT

Represented by Team 26

I. Solomon J rightly held that the Bermudian discharge was not validly granted and the US was not capable of recognising that discharge pursuant to the Gibbs Rule.

1. Nuzilia follows the rule as laid down in the case of Antony Gibbs & Sons v Societe Industrielle et Commerciale des Metaux (**Gibbs Rule**)¹ as a part of its common law.² The Gibbs Rule states that a debt is treated as discharged if compromised in accordance with the law of the jurisdiction, which governed the instrument giving rise to the debt.³
2. In the instant case, the bonds and a large part of the debt are governed by US law.⁴ Accordingly, Gibbs Rule requires compromise of debt according to US law for the debt to be discharged.
3. The Bermudian sanctioned schemes recognized under Chapter 15 in the US cannot be treated by a Nuzilian court as compromising debt governed by US Law as:

¹ (1890) 25 Q.B.D. 399.

² Judgment 58.

³ Ian Fletcher, 5 The Law of Insolvency (Sweet & Maxwell, 2017), 61 [30].

⁴ Judgment 57.

- 3.1. Firstly, the Bermudian sanctioned schemes are incapable of discharging U.S. debt pursuant to the Gibbs Rule.⁵
- 3.2. Secondly, recognition of the Schemes under Chapter 15 does not constitute a compromise of debt governed by US law. The Gibbs Rule requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law.⁶ In the insolvency context in the US, this is achieved under Chapter 11 of United States Bankruptcy Code and not Chapter 15.⁷ Recognition under Chapter 15 operates procedurally to prevent action by a creditor against a debtor's property in the US and cannot interfere with substantive common law rights.⁸
- 3.3. Thirdly, the Nuzilian High Court correctly relied on the Rare Earth judgment. The facts of *Re Modern Land (China) Co. Ltd. (MLC)*,⁹ which disagrees with the Rare Earth judgment, can be differentiated.
 - 3.3.1. In MLC, it was held that a Chapter 15 order that recognizes a discharge of U.S. law governed debt granted in a foreign proceeding is a complete and valid discharge of that debt as a matter of United States law.
 - 3.3.2. However, Rare Earth is a Hong Kong court judgment, which follows and applied the Gibbs Rule.¹⁰ On the other hand, MLC is a US Bankruptcy court judgment, and US does not follow the Gibbs Rule as a matter of US law.
 - 3.3.3. By virtue of applying the Gibbs Rule, the Hong Kong court in Rare Earth came to the conclusion that recognition, being procedural, is not sufficient to effect the discharge granted by a foreign sanctioned scheme. Such application is absent from the MLC judgment, hence the difference in conclusion.
 - 3.3.4. Accordingly, while restructurings as are envisaged by the MLC judgment may be allowed under US law, they are not effective in Nuzilia and in other

⁵ *Hong Kong Institute of Education v Aoki Group*, [2004] 2 HKLRD 760; *Gunel Bakhshiyeva v Sberbank of Russia & Ors*, [2018] EWCA Civ 2802 (**Sberbank case**).

⁶ *Matter of Rare Earth Magnesium Technology Group Holdings Limited (Rare Earth)*, HCMP 2227/2021&HCCW 81/2021; Judgment 59.

⁷ *Id* Rare Earth.

⁸ *Id*.

⁹ No. 22-10707 (MG) (Bankr. S.D.N.Y. 2022) (Dkt. No. 27).

¹⁰ *Supra* note 6 Rare Earth.

jurisdictions that apply the Gibbs Rule in the manner described by the Rare Earth court.

4. Appellant ought to have promulgated a parallel scheme of arrangement in Nuzilia, as is the longstanding practice for international restructurings of the present type as:
 - 4.1. In transnational cases, one of the relevant questions to be answered under Nuzilian law is whether the scheme is effective in other relevant jurisdictions.¹¹
 - 4.2. Whether or not a jurisdiction is of practical importance to the efficacy of a scheme is determined by considering if there is any reason to think that the Scheme Creditors will take action in a jurisdiction which will not recognise a scheme as compromising the debt.¹² Courts have considered the presence of substantial assets in a jurisdiction as relevant factor to come to such conclusion.¹³
 - 4.3. Substantial assets of Appellants are located in Nuzilia, and the COMI for the subsidiaries is Nuzilia as well [proved in detail in paragraph 6, *infra*]. This makes Nuzilia of practical importance to the efficacy of a scheme.
 - 4.4. Accordingly, the proper approach would have been instituting a parallel proceeding in Nuzilia where there is foreign debt that requires a parallel proceeding to effectively compromise it, by reason of the Gibbs rule.

II. Solomon J erred in holding that Robin had submitted to the jurisdiction of the Bermuda Supreme Court.

5. There was no voluntary submission by Robin to the jurisdiction of the Bermudian court.
 - 5.1. Under common law, a court of a foreign country has jurisdiction over a judgement debtor, where the party has submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings.¹⁴

¹¹ Judgment 59.

¹² *Re China Oil Gangran Energy Group Holdings Ltd*, [2021] HKCFI 1592; *Re China Singyes Solar Technologies Holdings Ltd*, [2020] HKCFI 467.

¹³ *Re China Singyes Solar Technologies Holdings Ltd*, [2019] HKCLC 1035.

¹⁴ *Rubin and another v Eurofinance SA and others*, [2012] UKSC 46.

- 5.2. A party who voluntarily participates in proceedings is considered to have accepted to be bound by its judgment. The touchstone of submission on this basis is therefore express consent.¹⁵
- 5.3. Robin did not participate in any of the hearings concerning the Bermudian Schemes¹⁶ It did not voluntarily appear for any of these proceedings which is evidenced by non-filing of any notice of appearance.¹⁷ There has been no mention of any express consent by Robin to be bound by the Bermudian courts which would prove its voluntary submission to the Bermudian jurisdiction.
6. On application of the useful and necessary test¹⁸ for determining submission under common law jurisdiction, the Scheme Letter by Robin cannot be treated as an unequivocal waiver to its objection to the Bermudian jurisdiction.
- 6.1. As per this test, a party submits to the jurisdiction by taking some step which is only necessary or useful if no objection to jurisdiction is being taken or if a prior objection is being waived.¹⁹
- 6.2. As a matter of principle, a party should only be taken to have waived a legal right if his conduct is unequivocal.²⁰ Such a waiver must clearly convey that the defendant is unequivocally renouncing its right to challenge the jurisdiction.²¹
- 6.3. The question whether there has been a submission is to be inferred from all the facts and the party's conduct as a whole.²²
- 6.4. In order to deem submission, courts have noted that participation in liquidation proceedings, attending creditors' meetings and voting on resolutions would be considered as necessary and useful steps.²³

¹⁵ Golden Endurance Shipping SA v RMA Watanya SA [2016] EWHC 2110; Williams & Glyn's Bank Plc v Astro Dinamico Compania Naviera S.A., [1984] 1 Lloyd's Rep. 453 (**Williams**).

¹⁶ Judgement 57.

¹⁷ Clarification 13.

¹⁸ Supra note 15 Williams; New Cap Reinsurance Corporation (In Liquidation) and another v A E Grant and others [2012] UKSC 46 (**New Cap**).

¹⁹ Id.

²⁰ SMAY Investments Ltd. v Sachdev [2003] 1 WLR 1973.

²¹ Deutsche Bank AG London v Petromena AS [2015] EWCA Civ 226.

²² Supra note 14.

²³ Supra note 18 New Cap.

- 6.5. Robin did not participate in any of the Scheme meetings or vote on the Schemes.²⁴ It did not participate in any of the hearings concerning the Bermudian Schemes²⁵ nor did it file a notice of appearance in the proceedings.²⁶ It only informally objected to its treatment in the schemes through the Scheme Letter,²⁷ which was not entertained by the court while it entered the Sanction orders.²⁸ This step alone in exclusion to its conduct as a whole throughout the proceedings cannot be attributed as a step so necessary or useful to infer submission.
- 6.6. Further, the Scheme Letter also made an objection on jurisdictional grounds²⁹ before the Bermudian court, in lieu of which it cannot be concluded that Robin unequivocally waived its right to challenge the jurisdiction and submitted to the Bermudian court.
7. Additionally, Robin having invested only in Blujay Fund Ltd. and Blujay Opportunities Ltd. (collectively referred as **subsidiaries**),³⁰ both of whose centre of main interest (**COMI**) was at Nuzilia, could not have expected for a Bermudian court to have jurisdiction in an insolvency proceeding.
- 7.1. There exists a presumption in common law in favour of the debtor's country of incorporation for all insolvency proceedings.³¹ However, this presumption is rebuttable.³²
- 7.2. Common law jurisdictions which have not adopted the Model Law similar to Nuzilia, have recognised the concept of COMI as a part of their common law.³³
- 7.3. Relevant factors in determining COMI includes the principal place of central management and operations of the corporation as well as the place of debtor's principal assets.³⁴

²⁴ Appeal 3 [3].

²⁵ Judgement 57.

²⁶ Clarification 13.

²⁷ Clarification 13.

²⁸ Appeal 3 [4].

²⁹ Appeal 3 [1].

³⁰ Clarification 7; Judgement 57.

³¹ *Singularis Holdings Limited v PricewaterhouseCoopers*, [2014] UKPC 36.

³² *Re HIH Casualty and General Insurance Ltd*, [2008] UKHL 21.

³³ *Provisional Liquidator of Global Brands Group Holding Ltd v Computershare Hong Kong Trustees Ltd* [2022] HKCFI 1789 (**Honk Kong Trustees Case**); *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108.

³⁴ *Id* Honk Kong Trustees Case.

7.4. The majority of management consisting of the board members and senior managers of the subsidiaries are domiciled in Nuzilia.³⁵ Their operations and assets of certain Nuzilian properties are located physically in Nuzilia.³⁶ Bermuda was merely the place of incorporation and the principal place of business, operation, and assets was Nuzilia, which would be the COMI for the subsidiaries.

8. Thus, Robin did not submit to the jurisdiction of the Bermudian Court.

III. The injunction in the enforcement order is not enforceable in Nuzilia and does not enjoin Robin and other bondholders from taking any action related to the Blujay Claims or Blujay Liabilities.

9. Solomon J. erred in holding that the discharge and permanent injunction/indefinite stay contained in the enforcement order are severable and can nonetheless be enforced.³⁷ If kept severable, the Claimant would be circumventing the longstanding Gibbs rule which would tantamount to permitting the Bermudian restructuring proceeding to extinguish US debt by way of an indefinite stay.³⁸

9.1. An indefinite stay, which side-lines the Gibbs rule, could only be granted if: (a) it was necessary to protect the interests of the Scheme Creditors;³⁹ and (b) that a stay was an appropriate way of achieving that protection.⁴⁰ In the instant case, neither of the conditions are satisfied:

9.1.1. Firstly, the Scheme Creditors have obtained everything to which they were entitled under the Bermudian Schemes, unless they deliberately chose not to participate in it, such as Robin. Since the reconstruction has substantially consummated,⁴¹ no “further protection” for the Scheme Creditors is warranted as the purpose of the Bermudian proceedings (i.e., to implement the schemes) has been achieved.

³⁵ Clarification 4.

³⁶ Clarification 4; Appeal 1 [2].

³⁷ Judgement 61.

³⁸ Supra note 5 Sberbank case.

³⁹ Id; 11 USC § 1521(a).

⁴⁰ Supra note 5 Sberbank case.

⁴¹ Appeal 4 [15].

- 9.1.2. Secondly, since there was no further protection which could be or was warranted to be offered to the creditors, the question of appropriateness of achieving the protection does not arise. *Arguendo*, it is material in this context to note that the Appellant could in principle have promoted a parallel scheme of arrangement in Nuzilia, but chose not to do so.⁴²
- 9.2. As a matter of principle, orders made should also cease to operate once the reason for having originally granted a stay and any other orders to recognise, aid or facilitate the conduct of the foreign proceeding has also ceased to exist.⁴³ By way of granting a permanent injunction under the enforcement order, the reorganisation plan was “kept artificially alive”, but as an insolvency proceeding, it had served its purpose and run its course as the Schemes had been substantially consummated.⁴⁴
- 9.3. Further, practical problems are likely to arise if relief continues beyond the duration of the relevant foreign proceeding.⁴⁵
10. The principle of comity allows a court to recognise a foreign representative to whom the Model Law does not apply or who cannot avail themselves of the statutory rights of recognition.⁴⁶ However, it does not pertain to an absolute obligation neither to a matter of mere goodwill or courtesy among each other.⁴⁷
11. Nuzilian law proscribes to the principle of comity wherein the relief granted is not manifestly against the public policy of Nuzilia amongst other factors.⁴⁸
- 11.1. The court has erred in holding that the COMI of Blujay et al., is situated in Bermuda at the time of proceedings.⁴⁹ The concept of COMI must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.⁵⁰

⁴² Supra note 5 Sberbank case.

⁴³ Board of Directors of Rizzo Bottiglieri De Carlini Armatori SpA v Rizzo Bottiglieri De Carlini Armatori SpA, [2018] FCA 153.

⁴⁴ Supra note 5 Sberbank Case.

⁴⁵ Yakushiji v Daichii Chuo Kisen Kaisha, (No. 2) [2016] FCA 1277.

⁴⁶ In re Atlas Shipping A/S, 404 B.R. 726, 733.

⁴⁷ Hilton v Guyot, 159 US 113 (1895).

⁴⁸ Clarification 16[3].

⁴⁹ Appeal 2 [7].

⁵⁰ Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd (In re), 389 B.R. 325 (S.D.N.Y. 2008).

- 11.1.1. It is pertinent to note that the COMI of a subsidiary company will not necessarily be the same as that of its foreign parent company, even if the parent has substantial control over the management of the subsidiary.⁵¹
- 11.1.2. In the present matter, the holding company i.e., Blujay Holdings has no operations as such and the only business is holding the two subsidiary funds. Moreover, the subsidiary funds though are registered in Bermuda, have operations and assets situated in Nuzilia and the majority of board members and senior managers domiciled in Nuzilia.⁵² Thus, the Bermudian proceedings are in the nature of foreign non-main proceedings since the principal place of business of the group can be identified in Nuzilia.
- 11.2. Recognition and assistance ought to be declined if the foreign liquidation is not taking place in the jurisdiction of the company's COMI.⁵³ However, the same can be granted to the liquidator appointed in the place of incorporation, irrespective of the COMI, only to an extent of managerial assistance.⁵⁴ Moreover, such managerial assistance is limited to only recognising the liquidator's authority to represent the debtor company and seeking order incident to such authority.⁵⁵
- 11.3. Having said that, providing relief by way of a permanent injunction in the present instance clearly exceeds the managerial assistance ought to be provided⁵⁶ and hence can be termed to be a judicial overreach in providing additional assistance to the soft- touch liquidator in the present matter.

Word count: 2489

⁵¹ Videology LTD, Re [2018] EWHC 2186 (Ch).

⁵² Clarification 4.

⁵³ Supra note 33 Honk Kong Trustees Case.

⁵⁴ Re Ping A Securities Group (Holdings) Ltd, [2021] HKCFI 651.

⁵⁵ Re Lamtex Holdings Ltd, [2021] HKCFI 622.

⁵⁶ Judgement 61.