

IN THE NUZILIA MOOT COURT OF APPEAL

Between

GROUP OF SENIOR NOTEHOLDERS, Appellants

And

KELLEY AMES, Respondent

SUBMISSION FOR APPELLANTS

REPRESENTED BY TEAM 5

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GROUND FOR APPEAL: PEARSON J WAS CORRECT NOT TO RECOGNISE THE CHAPTER 11 PROCEEDING AS A FOREIGN MAIN PROCEEDING. PEARSON J WAS INCORRECT TO RECOGNISE IT AS A FOREIGN NON-MAIN PROCEEDING.

I. CAR PART MANUFACTURING HAS ITS CENTRE OF MAIN INTERESTS IN NUZILIA

1. For Car Part Manufacturing (“CPM”) to be granted relief under the Cross-Border Insolvency Act 2016 (Nuzilia) (“CBIA”), the Chapter 11 proceedings (“Proceedings”) must be recognised as either a foreign main proceeding or a foreign non-main proceeding. The Proceeding is a foreign main proceeding if it is where the debtor has its centre of main interests (“COMI”). The COMI is where a debtor administers its economic interests on a regular basis and is ascertainable by third parties.¹ The relevant factors to consider when determining a debtor’s COMI are the location of its operations, employees and directors, financial activities, and principal assets.² Facts leading up to the commencement of the foreign proceeding, especially if there are grounds to suspect that the debtor sought to change its COMI to frustrate the interests of its creditors, are also relevant.³ All factors indicate that CPM’s COMI is in Nuzilia.
2. First, CPM operates in Nuzilia. All management decisions affecting CPM’s business continue to be made in Nuzilia.⁴ Conversely, the board meetings held in New York were infrequent,⁵ and its resolutions were unlikely to concern the immediate operational decisions of the corporation.⁶ The leased office bears negligible association with CPM as it is seldom utilised, and is marked with another company’s logo.⁷ Even though CPM had notified its

¹ Report 6500/96 of the EU Council, [75].

² *Legend International Holdings Inc v Legend International Holdings Inc* [2016] VSC 308, [92].

³ *Commerzbank v Brehm* [2014] BPIR 359, [25].

⁴ Judgment, [28].

⁵ Background, 6(d).

⁶ Judgment, [28].

⁷ Judgment, [7][c].

creditors of its head office's address in New York, a third party would not have reasonably identified the physical location of CPM's head office.

3. Secondly, the majority of CPM's staff are in Nuzilia. The majority of the Board of Directors reside in Nuzilia, with only two members attending the meetings in New York regularly.⁸ There are only a handful of CPM employees in New York administering the payment of accounts,⁹ and key employees such as CPM's CEO are also not located in New York.¹⁰
4. Thirdly, CPM's financial activities are organised in Nuzilia. The contracts entered into by CPM are governed by Nuzilian law. This includes the senior secured notes,¹¹ and presumably the contracts with CPM's trade creditors. In contrast, there is only the occasional need to transact business in New York,¹² suggesting the minimal business transactions being conducted and governed by New York law.
5. Fourthly, CPM's principle assets are in Nuzilia. At the commencement of the Proceedings, CPM's only assets were the shares in its Nuzilian subsidiary Car Part Operations ("CPO") and American subsidiary Car Part USA ("CPUSA").¹³ CPM has assets in both jurisdictions, as shares are deemed to be located "where [they] can be dealt with effectively per the law of the place of incorporation of the relevant company".¹⁴ However, as a debtor requires assets in the US before Proceedings can be filed,¹⁵ CPUSA was likely created solely for the purposes of the Proceedings. Thus, the shares in CPUSA should not be given much weight in determining its COMI, as it cannot be an indication of CPM's principal assets.

⁸ Clarification, Question 3.

⁹ Judgment, [30].

¹⁰ Judgment, [27].

¹¹ Judgment, [6].

¹² Judgment, [7][c].

¹³ Judgment, [7][g].

¹⁴ Wellard & Mason, "Global rules on conflict-of-laws matters in international insolvency cases: An Australian perspective" (2015) 23 ILJ 1, 14.

¹⁵ 28 US Code § 1408.

6. Accordingly, CPM's COMI is in Nuzilia, and the Proceedings should not be recognised as a foreign main proceeding.

II. CPM DOES NOT HAVE AN ESTABLISHMENT IN THE US

7. The Proceeding is a foreign non-main proceeding if it originates from a State where the debtor has an establishment. An establishment is a place of operations where non-transitory economic activities are carried out with human resources.¹⁶ The economic activities must be conducted externally on the market, and a purely occasional place of operations cannot constitute an establishment.¹⁷ CPM's payment of accounts and conduct of board meetings cannot support a finding of an establishment in the US.

8. First, the payment of accounts does not constitute an economic activity. The payment of guarantees is not an economic activity, as the satisfaction of a debtor's liabilities does not amount to conducting activities on the market.¹⁸ Similarly, the mere satisfaction of CPM's liabilities cannot constitute an economic activity for the purposes of the CBIA.

9. Secondly, the board meetings are transitory. CPM does not have a permanent location for the conduct of its board meetings, as they merely lease a temporary office space on limited occasions.¹⁹

10. Accordingly, CPM does not have an establishment in the US, and the Proceeding is not a foreign non-main proceeding.

¹⁶ Cross-Border Insolvency Act 2016 (Nuzilia), Arts 2(c) & 2(f).

¹⁷ *Supra* n 1, [71].

¹⁸ *Trillium (Nelson) Properties Ltd v Office Metro Ltd* [2012] EWHC 1191, [31]–[33].

¹⁹ Judgment, [7][c].

RESPONSE TO CROSS-APPEAL: PEARSON J WAS CORRECT TO ORDER FOR CAR PART MANUFACTURING TO BE PUT INTO LIQUIDATION.

I. IT IS OPEN FOR THE COLLECTIVE PROCEEDING OF LIQUIDATION TO CONTINUE, NOTWITHSTANDING THE ARTICLE 21(1)(a) STAY

11. The stay of proceedings granted by Pearson J under Article 21(1)(a) of the CBIA affects individual proceedings, but it does not prevent the Appellants from commencing a collective proceeding.²⁰ A collective proceeding deals with “substantially all of the assets and liabilities of the debtor”.²¹ It must also provide “equitable treatment to creditors, by treating similarly situated creditors in the same way”.²² The design and “parameters of the particular proceeding” must be examined in determining if a proceeding is truly for the benefit of all creditors.²³
12. The liquidation order necessarily involves all of CPM’s assets and creditors. The liquidator owes duties to the general body of creditors and not to any group or individual creditor.²⁴ Under Nuzilian law, a liquidation order will involve the sale of the shares in both CPO and CPUSA, and be distributed to all creditors. The liquidator will evaluate each creditor’s rights under the Nuzilian law of creditor-priority and distributes payment on a *pro-rata* basis for creditors that rank *pari passu* to each other.²⁵ Since the liquidation proceeding should be deemed “collective” as all of CPM’s assets and creditors are involved, it is open for the collective proceeding of liquidation to continue, notwithstanding the Article 21(1)(a) stay.

²⁰ Judgment, [37].

²¹ UN, *UNCITRAL Model Law of Cross-Border Insolvency: The Judicial Perspective* (English, Publishing and Library Section, United Nations Office, 2013), [72].

²² UN, *UNCITRAL Legislative Guide on Insolvency Law*, Part One, II, (United Nations Publication, 2005), [35].

²³ *In Re ABC Learning Centres Ltd* 445 BR 318, 330.

²⁴ *In Re Stanford International Bank Ltd* [2010] 3 WLR 941, Annex [4].

²⁵ Clarifications, [7a].

II. THE TERMS OF THE CHAPTER 11 PLAN ARE CONSISTENT WITH THE REMEDY OF LIQUIDATION

13. Courts have an obligation to aid insolvency proceedings which emanate from foreign courts.²⁶ Minimally, the obligation requires courts to not make orders that are inconsistent with the foreign insolvency proceeding.²⁷ The liquidation order is not inconsistent to the Chapter 11 Reorganization Plan as the aims of the two remedies are aligned, and it ensures that the better remedy prevails. This is because:

- A. the liquidation order is consistent with the object of the Reorganization Plan;
- B. the liquidation order will likely achieve a greater realisation of assets;
- C. the Reorganization Plan is reversible; and
- D. the liquidation order can be stayed indefinitely.

A. THE LIQUIDATION ORDER IS CONSISTENT WITH THE OBJECT OF THE REORGANIZATION PLAN

14. The object of Chapter 11 reorganisations includes preserving the business of the insolvent company and the interests of the creditors.²⁸ Under the liquidation order, only CPM – the holding company of the Car Part Group – will be liquidated. The liquidation of the holding company does not dissolve the business of the Car Part Group. The business of the Car Part Group will continue through CPUSA,²⁹ and the livelihood of the employees in Nuzilia would be preserved.³⁰ Additionally, the interests of the creditors would be protected as they would benefit from the realisation and distribution of CPM's assets. Thus, the liquidation order is consistent with the object of the Reorganization Plan.

²⁶ *Re Independent Insurance Co Ltd* [2005] 193 FLR 43, [18].

²⁷ *Supra* n 2, [141].

²⁸ *Legend International Holdings Inc (in liq) v Indian Farmers Fertiliser Cooperative Limited* [2016] VSCA 151, [26].

²⁹ Judgment. [32].

³⁰ Judgment, [35].

B. THE LIQUIDATION ORDER WILL LIKELY ACHIEVE A GREATER REALISATION OF ASSETS

15. Under Nuzilian law, a liquidator can conduct investigations into the company's affairs.³¹ When a company faces imminent insolvency, directors owe fiduciary duties to creditors.³² As a liquidator is both an agent of the company and a trustee for the creditors, he may commence proceedings against a company's directors for breach of directorial duties.³³
16. It is contended by the Appellants that CPM's directors breached their directorial duties to the Senior Noteholders in depriving them of their "immediate (and effective) rights of enforcement of their securities".³⁴ The Nuzilian liquidator can commence proceedings in CPM's name against these directors to obtain compensatory relief. The relief will contribute to a greater pool of assets for distribution. Moreover, a local liquidator would have greater "familiarity and experience" in the use of local insolvency legislation, resulting in lower investigation costs as compared to investigations conducted by a foreign official.³⁵ Given that CPM's business operations are largely within Nuzilia, appointing a Nuzilian liquidator would be more cost-effective than a US trustee.
17. The appointment of an independent liquidator to investigate the conduct of the directors is both desirable and consistent with the Proceeding because it ensures that the Confirmation Order was obtained by proper means. Difficulties in procuring evidence in establishing fraudulent behaviour is widely acknowledged; the liquidator's investigation will assist the Appellants in obtaining evidence in revoking the confirmation order.³⁶ Thus, the liquidation order will likely achieve a greater realisation of assets.

³¹ Judgment, [36].

³² *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] BCC 885.

³³ *Re D'Jan of London Ltd* [1994] 1 BCLC 561.

³⁴ Judgment, [15].

³⁵ *Bank of Western Australia Ltd v Henderson (No 3)* [2011] FMCA 840, [45].

³⁶ United Nations, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, (United Nations Publication, 2014), [6].

C. THE REORGANIZATION PLAN IS REVERSIBLE

18. A Chapter 11 confirmation order that implements the Reorganization Plan can be revoked “if such order was procured by fraud”.³⁷ As the secured creditors’ rights of enforcement are now deprived, there is a need to investigate “those responsible for restructuring CPM if they were found to have acted fraudulently”.³⁸ Effectively, the value of the creditors’ security over CPO’s shares are now diminished, as the transference of trading assets to CPUSA renders the CPO shares less valuable than before. If fraud is present, the confirmation order will be revoked, as the Respondent’s actions prejudiced the creditors’ rights of enforcement. Thus, the Reorganization Plan is reversible.

D. THE LIQUIDATION ORDER CAN BE STAYED INDEFINITELY

19. While it is unclear if the Nuzilian Insolvency Act 2014 contains a provision to stay or terminate winding up orders, the courts possess an inherent power to stay liquidation proceedings indefinitely at common law if there are sufficient merits in doing so.³⁹ If the investigations do not evince any wrongdoing on part of the CPM directors, the court can stay the liquidation proceedings.

20. Given that the Nuzilian court can invoke its inherent power to stay the liquidation proceedings if it finds that the liquidator’s investigations are not fruitful, the liquidation would not unduly prejudice CPM’s interests as the Chapter 11 Reorganization Plan can still be brought to fruition. Thus, the stay prevents inconsistency between the liquidation order and the terms of the Chapter 11 Reorganization Plan.

21. Accordingly, the terms of the Chapter 11 plan are consistent with the remedy of liquidation.

(2000 words)

³⁷ 11 US Code § 1144.

³⁸ Judgment, [15][a].

³⁹ *Brinds Ltd v Offshore Oil NL (No. 2)* [1985] 10 ACLR 242; *supra* n 28, [33].

