

IAN FLETCHER INTERNATIONAL INSOLVENCY LAW MOOT COMPETITION 2021

IN THE SUPREME COURT OF NUZILIA

Between

Blujay Fund Limited and Blujay Opportunities Limited

Appellant

and

Robin Investment Fund Limited

Respondent

SUBMISSION FOR THE APPELLANT

Represented by Team 26

I. Solomon J erred in holding that the discharge of debt pursuant to recognition of the Bermudian Schemes was not effective due 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 which is part of the common law of Nuzilia.² Per the Gibbs Rule, 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. A large part of the debt in question and all bonds are governed by US law (**US debt**) in the instant case.⁴ Thus, an application of Gibbs Rule requires the debt to be compromised in accordance with US law.
3. Recognition of the Bermuda sanctioned schemes under Chapter 15 by a US Bankruptcy Court constitutes compromise of debt in accordance with 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 59.

- 3.1. There exists a catena of Chapter 15 orders which purport to discharge US debt discharged or modified by a foreign sanctioned scheme.⁵
- 3.2. Solomon J's reliance on the Hong Kong ruling in *Matter of Rare Earth Magnesium Technology Group Holdings Limited (Rare Earth)*⁶ is misplaced as:
 - 3.2.1. The remarks on Gibbs Rule in Rare Earth are obiter as the facts involved compromising Hong Kong law-governed debts through a Hong Kong scheme of arrangement, and therefore there was no Chapter 15 recognition sought in the Rare Earth case.
 - 3.2.2. The US Bankruptcy Court in a subsequent decision in *Re Modern Land (China) Co. Ltd. (MLC)*⁷ held that the obiter remarks in Rare Earth had misinterpreted US case law (in particular the Agrokor⁸ ruling) on the subject. The territorial limitation in Agrokor did not suggest that the Court lacked authority to discharge United States law-governed debt under United States law.⁹
 - 3.2.3. The MLC ruling further held that in recognizing and enforcing the Scheme under Chapter 15, the discharge of debt is binding and effective.¹⁰
 - 3.2.4. The MLC ruling being a decision of the US Bankruptcy Court is authoritative on the effect of a Chapter 15 order as a matter of US law, in contrast with obiter remarks on the same made by a Hong Kong court.
4. Thus, a Chapter 15 order constitutes a valid and complete discharge of the US debt as a matter of the US law. Accordingly, the US debt in the instant case was compromised according to US law. The Schemes are thereby effective in Nuzilia as the Gibbs Rule is satisfied, and no parallel scheme was required.

⁵ In re Inversora Eléctrica de Buenos Aires S.A., 560 B.R. 650 (Bankr. S.D.N.Y. 2016); In re Cell C Proprietary Ltd., 571 B.R. 542 (Bankr. S.D.N.Y. 2017); In re Servicios de Petroleo Constellation S.A., 613 B.R. 564, 568 (Bankr. S.D.N.Y. 2020).

⁶ HCMP 2227/2021&HCCW 81/2021.

⁷ No. 22-10707 (MG) (Bankr. S.D.N.Y. 2022) (Dkt. No. 27).

⁸ In re Agrokor D.D., 591 B.R. 163 (Bankr. S.D.N.Y. 2018) ('Agrokor').

⁹ Supra note 8.

¹⁰ Supra note 7.

II. Solomon J rightly observed that Robin had submitted to the jurisdiction of the Bermuda Supreme Court.

5. Robin waived its right to challenge jurisdiction by filing the Scheme Letter with the Bermudan court.
 - 5.1. There will be a waiver of the right to challenge jurisdiction if the defendant voluntarily submits by taking a step in the proceedings which cannot be explained except on the basis that the defendant accepts that the court has jurisdiction.¹¹ Such step would constitute the doing of an act inconsistent with maintaining a challenge to the jurisdiction.¹²
 - 5.2. A defendant who takes a chance on a favourable judgment should be bound.¹³
 - 5.3. Under private international law, as a rule, a defendant who wishes to deny that a court has jurisdiction over them must not argue the merits of their case before it.¹⁴
 - 5.4. The Scheme Letter sent by Robin to the Bermuda Court noted that Robin objects to its treatment under the Schemes.¹⁵ This constitutes voluntary submission as Robin took a step in the proceedings which cannot be explained otherwise than by its recognition of the Bermudan court's jurisdiction.
 - 5.5. Furthermore, such a step by Robin, which is an objection over the merits of the Scheme proceedings before the Bermudian court, would fall inconsistent to arguing against its submission to the jurisdiction.
6. Additionally, the common law rule is that the appropriate jurisdiction for insolvency related proceedings is the place of incorporation of the entity.¹⁶
 - 6.1. Moreover, the common law jurisdictions which have not adopted the Model Law similar to Nuzilia, have recognised the concept of centre of main interest

¹¹ *Astro Exito Navigacion S.A. v. W.T. Hsu*, [1984] 1 Lloyds Reports, 266.

¹² *Deutsche Bank AG London v Petromena AS*, [2015] EWCA Civ 226.

¹³ *Re Dulles Settlement (No. 2)*, [1951] 1 Ch. 843 at 8.

¹⁴ Claim No. BVIHC (COM) 062 of 2014 between JSC VTB Bank v Alexander Katunin and Sergey Tarutas; In *Re A. Lund & Co. Ltd. A. Lund & Co. Ltd. v Wembley Wear Pty. Ltd.*, N.S.W. Supreme Court (1957).

¹⁵ Clarification 13.

¹⁶ *Singularis Holdings Ltd v. PricewaterhouseCoopers*, [2014] UKPC 36.

(COMI) as a part of their common law.¹⁷ There exists a strong presumption that the COMI of the entity is the same as its registered office.¹⁸

6.2. Both Apellants were registered in Bermuda.¹⁹ All board meetings of each of the entities is conducted in Bermuda, where each of them also has an independent board member domiciled.²⁰ This meant that all significant management decisions were made in Bermuda.

6.3. Thus, Bermuda being the COMI for both the funds, Robin could have assumed that entering into a business relationship with any of these entities would subject it to submission before the Bermudian courts at some point of time.

7. Arguendo, under common law, per the fourth case of Rule 43 of Dicey's Conflict of Laws (**Dicey**),²¹ a foreign default judgment is enforceable at common law against a judgement debtor who agreed to submit to the jurisdiction of the foreign court.

7.1. Submission to the forum in which the judgment was obtained may be express or implied.²²

7.2. In his judgment,²³ Lord Collins set out the two classes of implied term under English law. The first class, being terms implied as a matter of fact, consists of terms implied from the circumstances in order to give effect to the intention of the parties. The second class, being terms implied by law, are implied as a necessary incident of the contractual relationship.

7.3. The second class of such implication holds relevance at present. Robin has indirectly invested in a Bermuda based company, i.e., the Holding, which is the ultimate beneficiary of the moneys the bonds raised. It is the Holding which is the leading company of the Group and determines the strategy of the entire group.²⁴

¹⁷ Re Opti-Medix Ltd (in liquidation) and another matter, [2016] SGHC 108.

¹⁸ Article 3(1) Model Law, Re Eurofood IFSC Ltd, [2006] ECR I-3813, [2006] Ch 508.

¹⁹ Clarification 4.

²⁰ Id.

²¹ Dicey, Morris and Collins, Conflict of Laws, (15th edn, Sweet & Maxwell 2012, para 14R-054).

²² Blohn v Desser, [1962] 2 QB 116.

²³ Vizcaya Partners Ltd v Picard and another (Gibraltar), [2016] UKPC 5.

²⁴ Judgement 60 [4].

7.4. As a result, it could expect as a necessary incident of its contractual relationship that a Bermuda Court at some stage would have jurisdiction to rule on a question of law concerning the Group.

7.5. Accordingly, Robin as a matter of law impliedly submitted to the jurisdiction of Bermudian Court when it entered into a business relationship with the Blujay group of companies.

8. Thus, Robin submitted to the jurisdiction of the Bermuda Court.

III. The injunction in the Enforcement Order was enforceable in Nuzilia and enjoined Robin and other bondholders from taking any action related to the Blujay Claims or Blujay Liabilities.

9. While Nuzilia has not adopted the Model Law,²⁵ some of the provisions of the Nuzilia insolvency law are quite similar to the Model Law.²⁶

10. Nuzilia *does* recognise an insolvency-related judgement if certain criteria are met.²⁷ Article 13 of the Model Law lays down such criteria.²⁸ In the present instance, all criteria are met as:

10.1. Firstly, Enforcement Order (**E.O.**) is an “insolvency related Judgement”.²⁹

10.2. Secondly, E.O. is enforceable and effective in the originating State (Bermuda).³⁰

10.3. Thirdly, recognition is sought by an insolvency representative (Jane Bargewell)³¹ from the Nuzilia Supreme Court (before which the issue of recognition is raised).³²

²⁵ Judgement 58.

²⁶ *Id.*

²⁷ *Id.*

²⁸ UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgement, 2019 (**UNCITRAL ML-R**), Article 13; UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgement with Guide to Enactment (**UNCITRAL MLRG**), 96.

²⁹ Judgement 58.

³⁰ Chapter 15 Order 3.

³¹ Judgement 58.

³² Appeal 1.

10.4. Fourthly, there is no dispute that Robin was sent and received all documents relating to the Bermuda Proceeding.³³

10.5. Fifthly, the recognition is not contrary to the public policy of Nuzilia.³⁴

10.6. Sixthly, the E.O. is not subject to any grounds of refusal all documents were received by Robin,³⁵ the creditors and other parties-in-interest were sufficiently protected,³⁶ etc.

11. If recognition and enforcement of the judgement as a whole is not possible, the severable part of the judgement could be recognised and enforced, provided, that part is capable of standing alone.³⁷

11.1. This depends on whether recognizing and enforcing only that part of the judgement would significantly change the obligations of the parties.³⁸

11.2. *Arguendo* if it is held that the E.O. as a whole is not possible, the permanent injunction within the E.O. is severable and can nonetheless be enforced,³⁹ as it significantly changes the obligations of the parties:

11.2.1. Firstly, the Transaction Documents are given full force, are binding upon and enforceable against all Entities.⁴⁰

11.2.2. Secondly, the Releases are enforceable by the Blujay Released Parties.⁴¹

11.2.3. Thirdly, a permanent stay against Debtor's asset has been imposed on all Entities.⁴²

³³ Clarification 9.

³⁴ Judgement 61.

³⁵ Judgement 60; Clarification 9.

³⁶ Chapter 15 Order.

³⁷ UNICTRAL MLRG, 125.

³⁸ *Id.*

³⁹ Judgement 61.

⁴⁰ Chapter 15 Order 3(a).

⁴¹ Chapter 15 Order 3(b).

⁴² Chapter 15 Order 3(c).

12. Additionally, Nuzilia is a common law jurisdiction and, as such, its binding legal principles include judge-made or common law.⁴³ English common law has advanced the idea that fairness between creditors required that bankruptcy proceedings should have universal application.⁴⁴

12.1. The principle of universality underlay the common law principles of judicial assistance in international insolvency, and those principles were sufficient to confer jurisdiction on the court to assist, by doing whatever it could have done in the case of a domestic insolvency.⁴⁵

12.2. The English Courts are not only bound to recognise the existence of bankruptcy and the restructuring proceedings, but also to regard itself as under a duty to give such aid and assistance to the foreign court as it is able to give. This duty is a matter of common law.⁴⁶ Thus the general rule is that the court should provide assistance unless there are powerful reasons not to.⁴⁷

12.3. Even without a winding up, the court could, on ordinary principles of private international law, have recognised as a matter of comity the vesting of the company's assets in an agent or office-holder appointed or recognised under the law of its incorporation.⁴⁸

12.4. Moreover, the purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.⁴⁹

⁴³ Appeal 1[1].

⁴⁴ Cambridge Gas Transportation Corp'n v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26.

⁴⁵ McGrath v Riddell [2008] 3 All ER 869, 879 [19].

⁴⁶ AWB Geneva S.A. v North America Steamships Limited [2007] 1 CLC 749, 760 [32].

⁴⁷ In Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852.

⁴⁸ Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36 [12].

⁴⁹ Rubin v Eurofinance SA [2013] 1 AC 236.

12.5. Thus, even if Nuzilia does not have a cross border insolvency regime at place, the same cannot be a limitation for enforcing the injunction in the E.O. on account of well-established common-law principles at place.

13. The Nuzilian proscribes three conditions where a Court may grant comity.⁵⁰ All the three conditions are satisfied as:

13.1. Firstly, there is just treatment of all holders of claims as the plan was premised on all creditors being offered the same treatment.⁵¹

13.2. Secondly, an opportunity for a fresh start for the entity was provided.⁵²

13.3. Thirdly, the relief is not manifestly against the public policy of Nuzilia:

13.3.1. Under the Model Law, a local court may refuse assistance in relation to foreign insolvency proceedings where assistance would be manifestly contrary to the public policy of the local State.⁵³ Moreover, the notion of public policy is grounded on national law and may differ from State to State.⁵⁴

13.3.2. The use of the word 'manifestly', however, suggests that "the public policy exception should be interpreted restrictively"⁵⁵ and only invoked where a case involves matters considered to be of fundamental importance.⁵⁶

14. Moreover, in the restricted category of the term public policy fits a party's right to a fair hearing, or due process.⁵⁷ Due process is so fundamental that one state may refuse to recognize another member's proceedings if due process was denied to a party.⁵⁸

⁵⁰ Clarification 16.

⁵¹ Judgement 62.

⁵² Appeal 4[15].

⁵³ United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, Article 6.

⁵⁴ United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, Guide, at para. 101.

⁵⁵ *Ephedra Products Liability Litigation* (In re) 349 B.R. 333 (S.D.N.Y. 2006).

⁵⁶ Ian Fletcher, *Insolvency in Private International Law*, 13 (2nd edn, Oxford University Press 2005) at 462.

⁵⁷ *VJ Re Eurofood IFSC Ltd* [2006] E.C.R. 1-03813 at 138.

⁵⁸ *Buchanan v. Rucker*, 9 East 192, 103 Eng. Rep. 546 (K.B. 1808).

14.1. Robin was provided with all the necessary information and was given a full and fair opportunity to be heard in meaning full way in connection with the proceedings in the U.S. Court.⁵⁹ Thus, just treatment and due process of law were satisfied in the instant case.

15. Further, the COMI of the Blujay Holdings has been rightly determined to be based out of Bermuda.⁶⁰ All the companies have been incorporated in Bermuda and the board meetings of each entity take place in Bermuda as well.⁶¹ Thus, the principal place of business of the group can be said to be based out of Bermuda and hence eligible for recognition and assistance.⁶²

16. Moreover, the proceedings have shifted from liquidation to restructuring and as such, enforcing of the injunction in Nuzilia confers judicial assistance upon the foreign representative⁶³ i.e., provisional liquidator of Blujay et.al, and the same does not exceed the powers given to local liquidators under Nuzilian law in similar circumstances.⁶⁴

Word count: 2550

⁵⁹ Appeal [13].

⁶⁰ Appeal 2[7].

⁶¹ Clarification 4.

⁶² Re Ping A Securities Group (Holdings) Ltd [2021] HKCFI 651.

⁶³ Provisional Liquidator of Global Brands Group Holding Ltd v Computershare Hong Kong Trustees Ltd [2022] HKCFI 1789.

⁶⁴ Judgment 12.