

IN THE SUPREME COURT OF NUZILIA

Between

BEATRICE BALADE, Appellant

And

GROUP OF SENIOR NOTEHOLDERS, Respondents

SUBMISSION FOR APPELLANT

REPRESENTED BY TEAM 6

1 Ross J erred in not recognising the Chapter 11 proceeding as a foreign main proceeding under art 17(2)(a) of the *Cross-Border Insolvency Act 2016* (Nuzilia).

1.1 A ‘foreign main proceeding’ (‘**FMP**’) is a foreign proceeding held in the State where the debtor has its centre of main interests (‘**COMI**’).¹ There is a rebuttable presumption, pursuant to art 16(3), that a corporation’s COMI is in the State of its registered office. Hence, the COMI of Electric Bike Holdings Ltd (‘**EBH**’) is presumed to be in the United States. This presumption cannot be rebutted on the present facts.

1.2 A corporation’s COMI should correspond to a location where it conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.² Factors adduced in support of, or to rebut, the art 16(3) presumption must accordingly be objective, and apparent to the ‘reasonably diligent creditor’³ in their dealings with the debtor, without the need for specific inquiry.⁴ The ‘nerve centre’ concept used by Ross J to determine EBH’s COMI does not, even in jurisdictions where it carries significant probative weight, control the analysis.⁵

¹ *Cross-Border Insolvency Act 2016* (Nuzilia) art 2(b) (‘**CBIA**’).

² See *Re Eurofood IFSC Ltd* (C-341/04) [2006] ECR I-3813, I-3868 [32]; *Re Probe Resources Ltd* [2011] BCSC 552 [21]; *Re Fairfield Sentry Ltd*, 714 F 3d 127, 138 (2nd Cir, 2013) (‘*Fairfield*’).

³ *Irish Bank Resolution Corp Ltd v Quinn* [2012] NICH 1 [28].

⁴ *Re Stanford International Bank Ltd* [2011] Ch 33, 68 [56].

⁵ *Fairfield* at 138.

1.3 COMI is assessed holistically on a case-by-case basis.⁶ While certain indicia have emerged in the jurisprudence,⁷ they are non-exhaustive. The following salient factors suggest that EBH’s COMI is in the United States:

1.3.1 The relocation of EBH’s head office to New York was publicised on EBH’s website and in letters sent to creditors.⁸ A Senior Noteholder attending this address demonstrates that the location was objectively perceived by relevant third parties to be EBH’s head office.

1.3.2 The movement of all bank accounts to the United States represents a significant shift in location of EBH’s principal assets.⁹ Payments of debts are made from this jurisdiction.¹⁰

1.3.3 EBH’s reorganisation will be undertaken from New York.¹¹

1.3.4 Contrary to Ross J’s finding, EBH’s ‘nerve centre’ — where its officers ‘direct, control, and coordinate’¹² its activities — is in the United States. EBH’s functions as a holding company must be assessed in isolation, divorced from its subsidiaries.¹³ Ross J’s finding that management decisions concerning the electric bicycle factory are made in Nuzilia is an assessment of only one of EBH’s activities. EBH also employs staff to manage all accounts, holds its board meetings, and is undergoing restructuring in New York. The range of activities taking place there outweighs the sole activity undertaken in Nuzilia, demonstrating that the direction, control, and coordination of EBH takes place primarily in the United States.

1.4 The Respondents’ contention that the change to COMI amounted to ‘forum-shopping’ is unfounded — there is no evidence that EBH manipulated its COMI in bad faith. Regardless, a debtor’s subjective reason for relocation has no bearing on *recognition* pursuant to art 17(2)(a);¹⁴ such matters are relevant, if at all, only to the

⁶ *UNCITRAL Model Law on Cross-Border Insolvency Guide to Enactment and Interpretation* (UNCITRAL, 2013) [146] (‘*Guide to Enactment*’).

⁷ See, eg, *Re SPhinX Ltd*, 351 BR 103, 117 (Bankr SDNY, 2006) (‘*SPhinX*’); *Re Massachusetts Elephant & Castle Group Inc* [2011] ONSC 4201 [30].

⁸ See *Regulation (EU) 2015/848* [2015] OJ L 141/19, 22 [28] (‘*2015 EC Regulation*’).

⁹ *Ibid*; *SPhinX* at 117.

¹⁰ See *Guide to Enactment* at [147].

¹¹ *Ibid*.

¹² *Hertz Corp v Friend*, 559 US 77, 92–3 (2010).

¹³ *Re Lightsquared LP* [2012] ONSC 2994 [29]; *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (UNCITRAL, 2012) [64].

¹⁴ *Re Creative Finance Ltd*, 543 BR 498, 516 (Bankr SDNY, 2016); *Guide to Enactment* at [161].

Court's consideration of *relief* under arts 19–22, and the discretionary powers it may exercise therein.¹⁵ Thus, the Chapter 11 proceeding should be recognised as the FMP, as there has been a perceptible shift in EBH's COMI sufficient to maintain the art 16(3) presumption.

2 In the alternative, Ross J was correct in recognising the Chapter 11 proceeding as a foreign non-main proceeding under art 17(2)(b) of the *Cross-Border Insolvency Act 2016* (Nuzilia).

2.1 A 'foreign non-main proceeding' ('FNMP') is a foreign proceeding taking place in a State where the debtor has an establishment.¹⁶ An 'establishment', under art 2(f), is any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. The registered office in New York is, at a minimum, an establishment.

2.2 The generally accepted legal test for an 'establishment' requires a 'local place of business',¹⁷ where activities of a commercial, industrial or professional nature are exercised on the market, having external effect perceptible by third parties.¹⁸ 'Human means' necessitates a minimum level of organisation and stability, more than the mere presence of assets.¹⁹ Given the requirement of external effect on the market, the interpretation of 'non-transitory' should emphasise the duration, frequency, and consistency of the relevant 'economic activity' rather than the specific location at which that activity is carried out.²⁰

2.3 EBH has a local place of business in New York, with eight staff members conducting economic activities of a commercial nature through maintenance of accounts and the payment of debts. These activities meet the requirement of non-transitoriness: they occur frequently and consistently. Furthermore, although EBH — as a holding company — does not provide 'goods or services' in the traditional sense, this presents no obstacle to FNMP recognition.

¹⁵ See *Re Millennium Global Emerging Credit*, 458 BR 63, 82 (Bankr SDNY, 2011) ('*Millennium*').

¹⁶ *CBIA* art 2(c).

¹⁷ *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd*, 374 BR 122, 131 (Bankr SDNY, 2007) ('*Bear Stearns*').

¹⁸ *Williams v Simpson (No 5)* [2011] 2 NZLR 380, 393 [52]–[53], quoting Miguel Virgos & Etienne Schmit, *Report on the Convention on Insolvency Proceedings* (EU Council Doc 6500/96, 1996) [71] ('*Virgos-Schmit Report*').

¹⁹ *Re Interdil Srl (C-396/09)* [2011] ECR I-9939, I-9959–60 [62]–[64].

²⁰ See *Re Office Metro Ltd* [2012] BCC 829, 839 [33] ('*Metro*'); *Olympic Airlines Pension Trustees v Olympic Airlines SA* [2015] 1 WLR 2399, 2405 [13] ('*Olympic*'); *Re Ran*, 607 F 3d 1017, 1028 (5th Cir, 2010) ('*Ran*').

2.3.1 The establishment concept in the Model Law is derived from art 2(h) of the Council Regulation (EC) No 1346/2000.²¹ EC Regulation cases considering the definition of ‘establishment’ have held that the word ‘goods’ in that text was included as a mistranslation, the more accurate English term being ‘assets’.²² Similarly, ‘goods’ in art 2(f) of the Model Law should be construed as extending to assets.²³ There is, in principle, no reason for the term to be limited to chattels only.

2.3.2 The requirement of human means and assets may be satisfied by the presence of assets together with management of those assets,²⁴ provided that there is third party involvement.²⁵ Here, this standard is met by the presence of bank accounts, maintained by staff, and payment of third-party debts. Therefore, EBH’s New York office is a local seat for business activity, and consequently an establishment. Ross J was thus correct to recognise the Chapter 11 proceeding as a FNMP.

3 Ross J erred in ordering that a Judicial Monitor be appointed, and in declining to grant a stay under the *Cross-Border Insolvency Act 2016* (Nuzilia).

3.1 If the Chapter 11 proceeding is recognised as the FMP, a stay, encompassing the Judicial Monitor (‘JM’) proceeding, will follow automatically pursuant to art 20(1). If the Chapter 11 proceeding is recognised as a FNMP, a JM should not be appointed and a stay should be ordered pursuant to art 21(1)(a).

3.2 Ross J erred in finding that the requirements in s101(3) of the Companies Ordinance 2012 (Nuzilia) were satisfied, such that a JM could be appointed following FNMP recognition.

3.2.1 Under s101(3)(a), EBH has not operated fraudulently or recklessly pursuant to s101(4).

3.2.1.1 Sections 101(4)(a) and 101(4)(b) are inapplicable, as EBH contracted debts with an honest belief in its ability to repay its debtors, and did not

²¹ *Guide to Enactment* at [88]; *Ran* at 1027.

²² *Metro* at [19]; *Olympic* at [3]. The updated 2015 EC Regulation now reads ‘assets’ in its equivalent art 2(10), instead of ‘goods’.

²³ *Re Legend International Holdings Inc* [2016] VSC 308 [125].

²⁴ *Millennium* at 84.

²⁵ *Olympic* at [13].

operate recklessly. The downturn in demand that caused EBH's financial difficulty was unforeseeable.

3.2.1.2 Contrary to Ross J's finding, s101 (4)(c) is also inapplicable. The phrase 'intent to defraud' connotes actual dishonesty,²⁶ of which there is no explicit evidence. Nor can a fraudulent intent be inferred from the circumstances.²⁷ The restructuring scheme — though it may delay creditors' payments — has been conducted transparently and with the approval of EBH's creditors, attained through legitimate avenues. Accordingly, the best characterisation of EBH's intent was to ensure its business' survival following an unexpected downturn; there was no concomitant fraudulent design.

3.2.2 Further, or in the alternative, under s101(3)(b), the collective interests of EBH's creditors do not require independent investigation into EBH's affairs. A majority of voting Senior Noteholders consented to the Reorganisation Plan, demonstrating their trust in EBH's stewardship of their interests.

3.2.3 Further, or in the alternative, under s101(3)(c), countervailing circumstances justify the refusal of the application. The Chapter 11 proceeding — which has the effect of maintaining thousands of Nuzilian jobs, generates taxable revenue in Nuzilia, and preserves value in EBH thereby maximising the assets available for distribution to Senior Noteholders²⁸ — should be given effect. The appointment of a JM risks hindering that proceeding through the introduction of invasive powers of investigation.

3.3 As the appointment of a JM is inappropriate, a stay should be granted under art 21(1)(a). The grant of relief under art 21 is discretionary,²⁹ and must conform to the art 22 requirement that the interests of both creditors and debtors are adequately protected.³⁰ Giving effect to the injunction ordered under the Reorganisation Plan through the grant of a stay is in EBH's interests as it allows 'breathing space' to implement the Plan.³¹ Furthermore, a majority of Senior Noteholders consented to

²⁶ *Re Patrick & Lyon Ltd* [1933] Ch 786, 790.

²⁷ See *Cannane v J Cannane Pty Ltd* (1998) 192 CLR 557, 566 [12]; *Re Soza*, 542 F 3d 1060, 1067 (5th Cir, 2008).

²⁸ See *CBIA Preamble* paras (d)–(e).

²⁹ *Bear Stearns* at 126.

³⁰ *Re Tri-Continental Exchange Ltd*, 349 BR 627, 637 (Bankr EDCal, 2006).

³¹ *Guide to Enactment* at [37].

this Plan, expressly agreeing not to take enforcement action against the Electric Bike group, akin to a stay with global effect.

3.4 In the alternative, if a JM is appointed, its role is compatible with that of the Office Holder ('OH') such that a stay can be ordered.

3.4.1 Contrary to Ross J's finding, there is a distinction between 'management' and 'supervision'. The OH's role is managerial, involving policy and decision making regarding EBH's business affairs.³² The JM has an investigative role, requiring the supervision of that management under s101(5)(a). This involves no managerial component: the JM cannot make decisions affecting the operation of the company.³³

3.4.2 Under art 22(2)–(3), relief may be granted subject to conditions, and later modified or terminated. A court may therefore order a stay capable of coexisting with the JM. Such an order should be made to reflect the policy underlying s101 by preventing creditors from enforcing their interests while the JM is operating.

3.5 In the alternative, if a JM is appointed and is found to be incompatible with the OH, this is not itself grounds for refusal of a stay — the two can coexist, as explained in 3.4.2 above. Further, as outlined at 3.3, a stay is in the interests of all relevant stakeholders.

Word count: 1996

³² *Commissioner for Corporate Affairs v Bracht* [1989] VR 821, 830.

³³ *Cullen v Corporate Affairs Commission (NSW)* (1988) 14 ACLR 789, 794.