

# IAN FLETCHER INTERNATIONAL INSOLVENCY LAW MOOT

2018

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Insolvency Institute, assisted by QUT Law*

## **In the Matter of Electric Bike Holdings Ltd**

File reference: SC(M) No 1 of 2018

Appeal from: *Group of Senior Noteholders v Balade/Electric Bike Holdings Ltd*  
[2018] Insolvency 1(M)

Judge: Ross J

Date of decision: 2 February 2018

### **Background**

1. Electric Bike Holdings Ltd (Electric Bike Holdings) is a company incorporated in Nuzilia for the purpose of controlling a business which manufactures electric bikes.
2. Its wholly owned subsidiary, Electric Bike Operations Ltd (Electric Bike Operations), is the operating company of the business, which built a manufacturing facility in Nuzilia. Electric Bike Operations continues to manufacture electric bikes and distribute them around the world.
3. To fund these operations, Electric Bike Holdings raised debt capital, which it passed on in whole to Electric Bike Operations, by issuing \$NZ500 million in senior secured notes. In return for the advance of this debt, Electric Bike Holdings granted security to the Senior Noteholders over all the shares that Electric Bike Holdings holds in Electric Bike Operations (as to \$NZ250 million) and over a property that it owned in Nuzilia, as to the balance.
4. The facility documents governing the issuance of the senior debt nominated the laws of Nuzilia in their jurisdiction and choice of law clauses.
5. A downturn in the purchase of electric bikes hit Electric Bike Holdings hard. It became apparent that Electric Bike Holdings would not be able to repay the \$NZ500 million to noteholders when due. The directors of Electric Bike Holdings called in restructuring experts led by Beatrice Balade from a global accounting firm to come up with a solution to this problem.
6. A solution was proposed and the directors of Electric Bike Holdings implemented the following debt restructuring strategy:
  - a. All of its bank accounts were moved from Nuzilia to the USA, from which all payments of debts were made;
  - b. Its registered office was changed to New York;
  - c. Ms Balade was appointed to the board as Chief Restructuring Officer to oversee the strategy;
  - d. Temporary shared office space, in the nature of a serviced office, was leased in New York, with rent being paid only on the limited occasions when business needed to be transacted from that location. The office featured no branding or logos of Electric Bike Holdings.



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- e. Board meetings were held in New York, rather than at the Head Office of Electric Bike Holdings in Nuzilia, although to save money some of the directors simply telephoned in from Nuzilia.
  - f. The website of the business carried a message that Head Office had been moved to New York, and letters sent to creditors publicised this fact.
  - g. Arranged for Electric Bike Operations to transfer title to all of its trading assets to Electric Bike USA. Electric Bike Holdings continued to own all shares in Electric Bike Operations. All of the physical assets remain in Nuzilia.
7. Electric Bike Holdings opened a Chapter 11 Proceeding in the US Bankruptcy Court for the Southern District of New York (SDNY). The commencement of this proceeding constituted an event of default entitling the senior noteholders to be repaid.
  8. The Chapter 11 Reorganization Plan was confirmed by the SDNY Bankruptcy Court and featured the following key terms:
    - a. Senior notes were not repayable for another 3 years, in return for a slightly higher interest rate applying;
    - b. The assets of Electric Bike Operations were transferred to Electric Bike USA; and
    - c. Senior noteholders were not to take enforcement action against any of the Electric Bike group anywhere in the world.
  9. A group of senior noteholders comprising approximately 25% of all of the senior notes were dissatisfied with the Chapter 11 Reorganization Plan and did not participate in the Chapter 11 proceedings.

### **The application at first instance**

10. The Senior Noteholders brought an application for the appointment of a Judicial Monitor before the Court of Insolvency of Nuzilia. That action was presided over by Ross J.
11. They sought the appointment of a Judicial Monitor to undertake an independent investigation of the circumstances in which Electric Bike Holdings was made subject to the confirmed Chapter 11 plan.
12. A cross-application by Ms Balade, Chief Restructuring Officer of Nuzilia. Electric Bike Holdings, sought recognition of the Chapter 11 proceeding in Nuzilia.
13. In support of her application for recognition, Ms Balade submitted that:
  - a. The Chapter 11 proceeding should be recognized as a foreign main proceeding, because its “centre of main interests” was located in New York; or
  - b. Alternatively, the Chapter 11 proceeding should be recognized as a foreign non- main proceeding, because it had an “establishment” in New York.
14. Ms Balade opposed the appointment of a Judicial Monitor on the basis that



appointment of a Judicial Monitor was futile in the face of the Chapter 11 Reorganization Plan having already been confirmed.



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15. It was common ground that:

- a. The Chapter 11 proceeding is a “foreign proceeding” under article 2(a) of the Model Law;
- b. Ms Balade is a “foreign representative” under article 2(d) of the Model Law;
- c. It is unnecessary to consider whether the place at which Electric Bike Holdings had the “centre of its main interests”, for the purposes of article 17(2)(a) of the Model Law, should be determined as at the date on which the Chapter 11 plan was confirmed or the date on which the application for recognition was filed in this Court.
- d. There is no question of public policy (e.g. under article 6 of the Model Law) that arises and it is accepted that the Reorganization Plan is not manifestly contrary to Nuzilian law; and
- e. There is no issue of conflict of laws to consider arising from the Senior Noteholders declining to participate in the Chapter 11 proceedings.

### Findings

16. At the trial at first instance, Ross J made the following findings:

- a. the Chapter 11 proceeding is not recognised as a foreign main proceeding;
- b. the Chapter 11 proceeding is recognised as a foreign non-main proceeding;
- c. it would be inappropriate to exercise the court’s discretion to make an order under art 21(1)(a) of the Model Law; and
- d. a Judicial Monitor be appointed to Electric Bike Holdings.

### Grounds for Appeal

17. Leave has been granted for the parties to appeal on the following matters and grounds only.

18. For the appellant (Balade):

- (i) whether Ross J erred by:
  - a. not recognising the Chapter 11 proceeding as a foreign main proceeding;
  - b. ordering that a Judicial Monitor be appointed; and
  - c. declining to order a stay under art 21(1)(a) of the Model Law.

19. For the *respondents* (*Group of Senior Noteholders*):

- (i) whether Ross J erred in recognizing the Chapter 11 proceeding as a foreign non-main proceeding.



20. On the appeal the Supreme Court expects to hear from counsel on:

- (i) whether Electric Bike Holdings has its “centre of main interests” in the United States of America; this issue includes the question whether the presumption, that it will generally coincide with the place at which the registered office is located, was rebutted; and
- (ii) whether it was open for the Judge, on the facts found in her judgment, to make an order appointing a Judicial Monitor in circumstances where, upon recognition of a foreign non-main proceeding, a stay is likely to have been granted under art 21(1)(a). This will include argument on whether, if the Judge was right to recognize the Chapter 11 proceeding as a foreign non-main proceeding, the power conferred on the Judicial Monitor to “supervise the management of [Electric Bikes] for the duration of the order” was so incompatible with the powers conferred on the Office Holder by the confirmed Chapter 11 plan as to justify refusal of an art 21 (1)(a) stay.

21. On the cross-appeal, the Supreme Court expects to hear from counsel on:

- (i) whether Electric Bike Holdings had an “establishment” in the United States of America; this includes argument on the applicable legal test.

**Relevant law:**

The law relevant to the determination of the appeal is the UNCITRAL Model Law on Cross- border Insolvency (1997) as adopted in the jurisdiction of Nuzilia in the *Cross-border Insolvency Act 2016* (Nuzilia) and the Companies Ordinance 2012 (Nuzilia).



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IN THE COURT OF INSOLVENCY OF NUZILIA  
REGULAR SESSION

Case No. 1/18

UNDER

the Cross-Border Insolvency Act 2016 and the  
Companies Ordinance 2012

AND

IN THE MATTER OF

ELECTRIC BIKE HOLDINGS LTD

BETWEEN

GROUP OF SENIOR NOTEHOLDERS

Applicants

AND

BEATRICE BALADE

Respondent

Hearing: 1 February 2018

Judgment: 2 February 2018

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**JUDGMENT OF ROSS J**

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## The applications

1. Electric Bike Holdings Ltd (Electric Bike Holdings) is incorporated in Nuzilia. Electric Bike Operations Ltd (Electric Bike Operations) is its wholly owned subsidiary. It too was incorporated under Nuzilian law.
2. In circumstances to which I shall refer,<sup>1</sup> a reorganisation proceeding was brought under Chapter 11 of the US Bankruptcy Code (the Chapter 11 proceeding) in respect of Electric Bike Holdings. Subsequently, the US Bankruptcy Court confirmed the proposed Chapter 11 plan. Ms Beatrice Balade, the Chief Restructuring Officer of Electric Bike Holdings (the Office Holder), is responsible for the operations of Electric Bike Holdings, under the Chapter 11 plan.
3. Electric Bike Holdings Ltd issued \$NZ500 million worth of notes (the Senior Notes) to a group of entities (the Senior Noteholders). They were issued under Nuzilian law. The Senior Noteholders acquired a security interest over all the shares that Electric Bike Holdings holds in Electric Bike Operations (as to NZ \$250 million), and over a property that it owned in Nuzilia, as to the balance.
4. When Electric Bike Holdings received the money, it advanced the same amount to Electric Bike Operations, to enable the latter to build a new manufacturing facility in Nuzilia. That factory makes electric bikes that are sold around the world. The day-to-day operation of the factory continues. Whether the factory continues to operate notwithstanding the Chapter 11 plan (as contended by the Senior Noteholders) or pursuant to the terms of the confirmed Chapter 11 plan (as asserted by the Office Holder) is not something I need to decide on the present applications.
5. There are two applications before the Court:
  - a. The Senior Noteholders seek an order appointing a Judicial Monitor to undertake an independent investigation of the circumstances in which Electric Bike Holdings was made subject to the confirmed Chapter 11 plan. That application is made under s 101 of the

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<sup>1</sup> See paras [6] and [7] below.



Companies Ordinance 2012 (the Ordinance).<sup>2</sup> That enactment applies to companies incorporated in Nuzilia.

- b. In response, the Office Holder applies under art 15(1) of the Cross-Border Insolvency Act 2016 (Nuzilia) to recognize the Chapter 11 proceeding as a foreign insolvency proceeding in Nuzilia. Primarily, recognition is sought as a foreign main proceeding. However, in the event that the foreign proceeding is recognized as a foreign non-main proceeding, relief is sought under art 21(1)(a) to stay all proceedings in respect of Electric Bike Holdings in Nuzilia, including the application for the appointment of a Judicial Monitor. The Cross-border Insolvency Act is based on the UNCITRAL Model Law on Cross-Border Insolvency. For convenience, I refer to that Act as “the Model Law”.

## Background

6. The Senior Notes are governed by the law of Nuzulia. As a matter of Nuzilian law, Electric Bike Holdings fell into default of payment obligations owed under the Senior Notes. This default occurred before the Chapter 11 proceeding was filed. As time went on, it became clear to its board that Electric Bike Holdings would not be able to repay the \$NZ500 million owing to all noteholders. After taking advice, a plan was devised to preserve value in the business operated by Electric Bike Holdings, for the benefit of its shareholders.
7. Over a period of about three weeks before the date on which the Chapter 11 proceeding was filed, Electric Bike Holdings took the following steps to implement the scheme. It:
  - a. Moved all of its bank accounts from Nuzilia to the United States. From that time on, all debts payable by Electric Bike Holdings (including those incurred from its operations in Nuzilia) were settled by payments made from the United States.

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<sup>2</sup> The relevant parts of s 101 of the Companies Ordinance are set out at para [37] below.





- b. Hired Ms Balade. She was appointed to the Board of Directors of Electric Bike Holdings. Ms Balade was authorised by the board to undertake a restructuring process out of New York.
- c. Leased temporary shared office space in New York, for which Electric Bike Holdings paid rent only on the limited occasions on which it was necessary to transact particular business from that location. Electric Bike Holdings' name was not shown on the door to the office. Rather, that carried the name of the building owner, Brass Plate Realty.
- d. Started holding board meetings in the United States. Before that time, all board meetings had been held at the Head Office of Electric Bike Holdings, situated in Nuzilia.
- e. Took steps to change the registered office of Electric Bike Holdings to New York.
- f. Sent letters to creditors (including the Senior Noteholders) notifying them that the Head Office had been moved to New York. A message to this effect was also posted on Electric Bike Holdings' website.
- g. Created a wholly owned US subsidiary, known as Electric Bike USA LLC (Electric Bike USA).
- h. Arranged for Electric Bike Operations to transfer title to all of its trading assets to Electric Bike USA. Electric Bike Holdings continued to own all shares in Electric Bike Operations. All of the physical assets remain in Nuzilia.

### **The US restructuring proceeding**

- 8. After giving effect to those transactions, Electric Bike Holdings filed a voluntary Chapter 11 petition in the US Bankruptcy Court for the Southern District of New York. By this stage, the right of the Senior Noteholders to demand payment of



the amounts owing under the Senior Notes had been triggered, as a matter of Nuzilian law.<sup>3</sup>

9. The effect of Electric Bike Holdings' confirmed plan of reorganisation was to cure its default of payment obligations under the Senior Notes and to extend the term of all of the Senior Notes for a period of three years, with a slightly higher interest rate applying during the three-year extension. As a matter of US law, the confirmed plan operated as an injunction to prevent all Senior Noteholders from taking any enforcement action against Electric Bike Holdings, Electric Bike Operations or Electric Bike USA, anywhere in the world.
10. The Chapter 11 plan was accepted by significantly more than one-half in number, and two-thirds in amount of the Senior Noteholders who cast votes on it. Under US bankruptcy law, that was sufficient to constitute approval of the plan by all Senior Noteholders, as a class. In consequence, the Bankruptcy Court entered an order confirming the plan and issued an injunction in the terms sought. The effect of confirmation was to bind all Senior Noteholders to the plan.
11. As a result, all Senior Noteholders lost their immediate ability to recover debts owed to each by enforcing the security over the shares that Electric Bike Holdings continued to hold in Electric Bike Operations, and its land. However, the Senior Noteholders retained their security interest in the shares, in case of later non-payment or other default.
12. The Senior Noteholders who oppose the recognition application made a deliberate decision not to appear in the US proceeding, and not to cast votes on the plan. Collectively, they own or manage some 25% of all of the Senior Notes (in number and amount outstanding). Instead of participating in the Chapter 11 proceedings, they have elected to make their own application to this Court to appoint a Judicial Monitor. The Senior Noteholders seek that order to enable a judicially supervised investigation to be undertaken into the circumstances in which the restructuring arrangement came to be devised. Depending on the outcome of that investigation, the Senior Noteholders may seek to pursue any available remedies to recover losses suffered by them.

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<sup>3</sup> See para [6] above.



## Agreed positions

13. The parties agree that:

- a. The Chapter 11 proceeding is a “foreign proceeding”, as defined in art 2(a) of the Model Law.
- b. The Office Holder is a “foreign representative”, as defined by art 2(d) of the Model Law.
- c. It is unnecessary to consider whether the place at which Electric Bike Holdings had the “centre of its main interests”, for the purposes of art 17(2)(a) of the Model Law, should be determined as at the date on which the Chapter 11 plan was confirmed or the date on which the application for recognition was filed in this Court.
- d. No question of public policy arises. As a result, it is unnecessary to consider whether the way that the confirmed plan is structured is manifestly contrary to the laws of Nuzilia.
- e. No questions of conflict of laws arise out of the decision of the Senior Noteholders not to participate in the Chapter 11 proceeding in New York.

## The competing contentions

14. There is a degree of overlap among the arguments advanced in favour and in opposition to the cross-applications. Some of the factors relevant to determination of the Office Holder’s application for recognition of the Chapter 11 proceeding are also relevant to the question whether a Judicial Monitor should be appointed. For that reason, I summarise the arguments together.

15. The Office Holder contends:

- a. Electric Bike Holdings has its “centre of main interests” in New York. Accordingly, the Chapter 11 proceeding should be recognized as a foreign main proceeding under the Model Law. If the proceeding were recognized as such, relief should follow in a form that gives



effect to the confirmed Chapter 11 plan; in particular the associated injunction.

- b. Alternatively, Electric Bike Holdings has an “establishment” in the United States that permits recognition as a foreign non-main proceeding. If this Court recognized the Chapter 11 proceeding as a foreign non main proceeding, a stay is sought under art 21(1)(a) of the Model Law to ensure that the interests of all stakeholders are adequately protected. That is sought to give effect to the world-wide injunctive relief under the Chapter 11 plan.<sup>4</sup>
- c. This Court should not make an order appointing a Judicial Monitor. First, to do so would be futile. As a result of the confirmation of the Chapter 11 plan, the Office Holder is entitled to manage Electric Bike Holdings’ business affairs. Second, as a matter of discretion, it would be inappropriate to appoint a Judicial Monitor when his or her powers include supervision of the management of a company for the duration of an order. That would conflict with the purpose of an order recognising the Chapter 11 proceeding as a foreign non main proceeding.

16. The Senior Noteholders contend:

- a. Electric Bike Holdings’ “centre of main interests” remains in Nuzilia. The attempt to change the centre of main interests of Electric Bike Holdings from Nuzilia to the United States was ineffective because it amounted to illegitimate “forum-shopping”. It is asserted that Electric Bike Holdings sought out a friendly jurisdiction so that its restructuring plan could be implemented under Court supervision, even though the effect of confirmation of the plan was to deprive secured creditors of immediate (and effective) rights of enforcement of their security under Nuzilian law.
- b. Electric Bike Holdings does not, and never did, have, an “establishment” in the United States, as that term is defined by art 2(f) of the Model Law. As a result the Chapter 11 proceeding

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<sup>4</sup> See para [9] above.



cannot be recognized as a foreign non-main proceeding. Alternatively, given the need for appointment of a Judicial Monitor, this Court should not exercise its discretion to grant the relief sought by the Office Holder, under art 21(1)(a) of the Model Law.

- c. Whether recognition is granted or refused, a Judicial Monitor ought to be appointed. That will enable the affairs of the company to be investigated independently, in the interests of Senior Noteholders, and other affected persons.

### **The issues**

17. Four substantive issues arise for determination:

- a. Is the centre of main interests of Electric Bike Holdings Nuzilia or the United States of America?
- b. If the centre of main interests is not in the United States, does Electric Bike Holdings have an “establishment” in that country?
- c. If recognition were granted, either as a foreign main proceeding or a foreign non-main proceeding, what relief (if any) should follow?
- d. Whether or not recognition is granted, are the Senior Noteholders entitled to an order appointing a Judicial Monitor?

18. I deal with the first two issues under the same heading. The question in respect of each is whether the Chapter 11 proceeding should be recognized in Nuzilia. The first question is directed to whether recognition should be granted as a foreign main proceeding. The second requires a determination on whether the Chapter 11 proceeding should be recognized as a foreign non-main proceeding.



## Analysis

(a) *Should a recognition order be made?*

19. Article 15(1) of the Model Law enables a foreign representative to apply to this Court for recognition of a foreign proceeding, either as a foreign main proceeding or a foreign non-main proceeding. I have received certified documents from the Bankruptcy Court that satisfy me that the Chapter 11 proceeding is a “foreign proceeding” to which the Model Law applies. It is agreed that the Office Holder is a “foreign representative”.

20. The term “foreign main proceeding” is defined by art 2(b) of the Model Law:

**foreign main proceeding** means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

21. To determine whether the Chapter 11 proceeding is a foreign main proceeding it is necessary to decide the location of Electric Bike Holdings’ centre of its main interests.

22. The term “foreign non-main proceeding” is defined by art 2(c) of the Model Law:

**foreign non-main proceeding** means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

23. To determine whether a foreign proceeding qualifies for recognition as a “foreign non-main proceeding”, the question is whether Electric Bike Holdings had, at the relevant time, an “establishment” in the United States.

24. The term “establishment” is defined by art 2(f) of the Model Law:

**establishment** means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;

25. Article 17(1) and (2) of the Model Law provide that this Court must recognize a foreign proceeding if it qualifies either as a foreign main proceeding or a foreign non-main proceeding.



26. Article 16(3) of the Model Law makes it clear that, in the absence of proof to the contrary, the place of a corporate debtor's registered office is presumed to be its centre of main interests. Although Electric Bike Holdings remains registered in Nuzilia, it has (in accordance with Nuzilian law) changed the location of its registered office to New York. The question becomes whether the presumption that its centre of main interests is now in New York is rebutted by plausible evidence to the contrary.
27. Although the registered office of Electric Bike Holdings had been moved to New York before the Chapter 11 proceeding was filed, the Senior Noteholders produced evidence that, prior to the Office Holder's appointment as Chief Restructuring Officer, all board meetings had been held in Nuzilia, and all significant operational decisions had been made out of its headquarters in this country.
28. There was also evidence that one of the Senior Noteholders, while on holiday in New York, attended at the office from which Electric Bike Holdings claims that it was operating and asked to meet with its Chief Executive Officer. The receptionist said that the office was used as a temporary location for companies that required a room for a short period of time. She did not know where the Chief Executive Officer was located. There was nothing in the building to suggest that Electric Bike Holdings operated out of it.
29. In general terms, the "centre of main interests" of a company will be treated as the place at which its "nerve centre" is based. In my view, that means the place from which all significant operating decisions are made. In this case, while the registered office is now in New York and limited operational functions are carried out from a leased room in that city, all management decisions affecting the day-to-day business of Electric Bike Holdings are made in Nuzilia. I consider that the preponderance of evidence points to Electric Bike Holding's centre of main interests being in Nuzilia. For that reason, I decline to recognize the Chapter 11 proceeding as a foreign main proceeding.
30. The next question is whether, notwithstanding that conclusion, I can recognize the Chapter 11 proceeding as a foreign non-main proceeding. This turns on whether Electric Bike Holdings can be said to have an "establishment" in the United States.



31. Albeit on a small scale, there were staff of Electric Bike Holdings operating in the United States, and some functions were undertaken of a business nature; in particular the payment of accounts and the holding of board meetings. By a fine margin, I am satisfied that the functions undertaken in the United States amount to a “place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”. Economic activity was undertaken through the payment of accounts by staff employed by Electric Bike Holdings, who were based in New York. Board members also attended meetings in New York to undertake their governance functions.

32. In those circumstances, I hold that “non-transitory economic activity” was carried out through human means from New York. In particular, the maintenance of bank accounts with positive balances and the payment of debts from those accounts constituted relevant “services” for the purposes of the definition of “establishment” in art 2(f) of the Model Law. I hold that Electric Bike Holdings did have an “establishment” in New York. I make an order recognising the Chapter 11 proceeding as a foreign non-main proceeding.

*(b) Relief*

33. I now consider the Office Holder’s application for a stay of all proceedings in Nuzilia, under art 21(1)(a) of the Model Law. Article 21(1)(a) provides:

**Article 21. Relief that may be granted upon recognition of a foreign proceeding**

1. Upon recognition by the High Court of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including:

- (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations, or liabilities, to the extent they have not been stayed under paragraph (1)(a) of article 20;

....

34. Having recognized the Chapter 11 proceeding as a foreign non-main proceeding, I have a discretion whether to grant relief under art 21(1)(a) of the Model Law.





35. Relief may be crafted “to protect the assets of the debtor or the interests of the creditors”. Reflecting that emphasis on the need to protect the interests of creditors, art 22(1) provides that, in determining whether to grant or deny relief under art 21, a Court “must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected”.
36. Notwithstanding the interests of the Senior Noteholders, the restructuring that has occurred has had the effect of preserving thousands of jobs in Nuzilia that might otherwise have been lost; and, Electric Bike USA is generating taxable revenue for the benefit of the Nuzilian economy.
37. In my view, the question whether I should make an order under art 21(1)(a) must be considered by reference to the need (or otherwise) to appoint a Judicial Monitor. Dealing with the circumstances in which a Judicial Monitor may be appointed, s 101 of the Ordinance provides:
- (1) In this section, the term “Court” means the Court of Insolvency.
  - (2) If an application has been made to the Court for an order that a company be put into liquidation, or the company has been placed in a collective insolvency regime in another jurisdiction, a creditor of the company may apply to the Court for an order appointing a Judicial Monitor.
  - (3) The Court may make an order appointing a Judicial Monitor if it is satisfied that:
    - (a) There is sufficient evidence that the company has in the preceding six months operated fraudulently or recklessly; and
    - (b) The collective interests of the creditors of the company are such as to require an independent investigation into the affairs of the company; and
    - (c) There are no countervailing circumstances that would justify refusal of the application.
  - (4) For the purposes of this section, a company has operated fraudulently or recklessly if, in the period of six months prior to the application—
    - (a) It has contracted debts which the officers of the company did not, at the time the debts were contracted, honestly believe on reasonable grounds the company would be able to pay when they fell due for payment as well as all its other debts (including future and contingent debts); or
    - (b) It has carried on any business or operates in a reckless manner; or
    - (c) It has carried on any business or operates with intent to defraud its creditors or for any other fraudulent purpose.



- (5) A Judicial Monitor has the following powers:
- (a) To supervise the management of the company for the duration of the order;
  - (b) To require production of all company documents and accounting records that may reasonably be required to undertake the investigation;
  - (c) To summon any person involved directly or indirectly in the management of the company to give evidence on oath about any aspect of the company's affairs required for the investigation;
  - (d) To exercise any further powers conferred by the Court.
- (6) The Judicial Monitor shall file a report to the Court on such date as the Court may direct when appointing a Judicial Monitor, and his or her appointment shall continue for a period of 30 working days from the date on which the report is filed, or such longer period as the Court may order.
- (7) The Court shall, on receipt of the Judicial Monitor's report:
- (a) Determine the persons on whom, and the time by which, the report shall be served.
  - (b) Fix a date on which it shall hear from interested parties on any orders to be made having regard to the terms of the report.

38. In my judgment, if a Judicial Monitor were appointed, it would be inappropriate to exercise my discretion to make an order under art 21(1)(a) of the Model Law. Given that s 101(5)(a) empowers a Judicial Monitor to supervise the management of the company for the duration of such an order, it would be inconsistent with the policy underlying s 101 to enable the Office Holder to exercise similar powers of management. In this context, I draw no distinction between the concepts of "supervision" (in the sense of governance) and management. As I am satisfied that a Judicial Monitor ought to be appointed,<sup>5</sup> I decline to grant relief under art 21(1)(a).

*(c) Should a Judicial Monitoring order be made?*

39. My reasons for deciding that a Judicial Monitor ought to be appointed are:

- a. In terms of s 101(2), I am satisfied that the Chapter 11 proceeding is a collective insolvency regime into which Electric Bike Holdings has been placed in another jurisdiction. That enables the Senior Noteholders to apply for an order appointing a Judicial Monitor.

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<sup>5</sup> See para [39] below.



- b. For the purposes of s 101(3), there is sufficient evidence that Electric Bike Holdings has, in the last six months, operated fraudulently or recklessly. In terms of s 101(4)(c) of the Ordinance, I consider that the actions taken by the Board of Electric Bike Holdings to implement the restructuring scheme could amount to carrying on the business of Electric Bike Holdings with intent to defraud the Senior Noteholders, as creditors.
- c. For the purposes of s 101(3)(b), the collective interests of the creditors of Electric Bike Holdings Ltd are such as to require an independent investigation into the affairs of that company.
- d. The need to give effect to the Chapter 11 proceeding, as a recognized foreign non main proceeding, is not a countervailing circumstance, for the purposes of s 101(3)(c) that would justify refusal of the application. To the contrary, the fact that an investigation is required in Nuzilia has led me to the view that a stay should not be ordered under art 21(a) of the Model Law. The need to investigate the conduct of those who moved assets of Electric Bike Holdings out of Nuzilia in suspicious circumstances outweighs the need to stay proceedings under art 21(1)(a).

40. I make an order appointing a Judicial Monitor.



IN THE SUPREME COURT OF NUZILIA

SC Case No. 1/18

UNDER

the Cross-Border Insolvency Act 2016 and the Companies Ordinance 2012

AND

IN THE MATTER OF

ELECTRIC BIKE HOLDINGS LTD

BETWEEN

BEATRICE BALADE

Appellant

AND

GROUP OF SENIOR NOTEHOLDERS

Respondents

Hearing: (on the papers)

Judgment: 5 February 2018

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**JUDGMENT OF THE COURT**

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1. The appellant seeks leave to appeal against a judgment given by Ross J in the Court of Insolvency on 2 February 2018. The respondents seek leave to bring a cross-appeal against a different aspect of the judgment. The circumstances require an urgent appeal hearing.
2. We have considered the proposed grounds of appeal. We are satisfied that permission to appeal should be given on Model Law issues raised by Her Honour's judgment, but do not consider that any arguable questions of Nuzilian domestic law arise.
3. We grant leave. The following points are approved for argument:
  - a. On the appeal, the approved grounds are whether Ross J erred by:
    - i. not recognising the Chapter 11 proceeding as a foreign main proceeding;
    - ii. ordering that a Judicial Monitor be appointed; and
    - iii. declining to order a stay under art 21(1)(a) of the Model Law.
  - b. On the cross-appeal, the approved ground is whether Ross J erred in recognizing the Chapter 11 proceeding as a foreign non-main proceeding.
4. On the appeal, we expect to hear from counsel on two points. The first is whether Electric Bike Holdings has its "centre of main interests" in the United States of America; this issue includes the question whether the presumption, that it will generally coincide with the place at which the registered office is located, was rebutted. The second is whether it was open for the Judge, on the facts found in her judgment, to make an order appointing a Judicial Monitor in circumstances where, upon recognition of a foreign non-main proceeding, a stay is likely to have been granted under art 21(1)(a). This will include argument on the question whether, if the Judge was right to recognize the Chapter 11 proceeding as a foreign non-main proceeding, the power conferred on the Judicial Monitor to "supervise the management of [Electric Bikes] for the duration of the order" was so incompatible with the powers conferred on the Office Holder by the confirmed Chapter 11 plan as to justify refusal of an art 21 (1)(a) stay.



5. On the cross-appeal, we expect to hear from counsel on whether Electric Bike Holdings had an “establishment” in the United States of America; this includes argument on the applicable legal test.
6. The appeal is set down for hearing on 8 February 2018.



**The Ian Fletcher International Insolvency Law Moot (2018)**  
**CLARIFICATIONS**

**Grounds for Appeal**

Regarding a typographical error in the Background document, please note, if there are inconsistencies between the Background information and the Judgments, the Judgments take precedence.

<b>Question A</b>	Based on the framing of the grounds of appeal, is the Appellant entitled to assume a stay under art 21(1)(a) has been granted in order to argue the compatibility of an art 21(1)(a) stay with a Judicial Monitor order?
<b>Clarification</b>	<i>On the basis of Ross J's judgment, no such stay has been granted. One of the questions raised on the appeal is whether that was an error: see para 3[a][ii] and [iii] of the Supreme Court's leave judgment. Accordingly, the Appellant (Balade) is not entitled to assume a stay under art 21(1)(a) has been granted.</i>
<b>Question B</b>	Do the Respondents seek <i>only</i> a Judicial Monitor order, or do they equally wish for relief under art 21(1)(a) not to be stayed?
<b>Clarification</b>	<i>Ross J made an order appointing a Judicial Monitor. The appeal point is whether she was right to do so. The question is whether she was wrong to refuse an art 21(1)(a) stay because that relief was incompatible with the order appointing a Judicial Monitor. The Respondents (group of Senior Noteholders) seek to uphold the order appointing a Judicial Monitor.</i>
<b>Question C</b>	Since Ross J has decided that a stay under art 21(1)(a) will not be granted to the Appellant, does the burden of appealing on this point lie with the Appellant instead of the Respondent? To this end, is there an error in the drafting of [3b] and [5] in the 5 February 2018 judgment by labelling it a “cross-appeal” on the part of the Respondent?
<b>Clarification</b>	<i>This has been addressed in a revised Supreme Court leave judgment that has been posted to the website.</i>
<b>Question D</b>	Regarding Cross-Appeal Issue 2, what are the negative consequences of a stay under Article 21(1)(a) for the Respondents?
<b>Clarification</b>	<i>This has been addressed in a revised Supreme Court leave judgment that has been posted to the website.</i>
<b>Question E</b>	With regards to Cross-Appeal Issue 2, why does the apparent conflict of powers between the Judicial Monitor and the Office Holder preclude the Ross J's discretionary power to grant a stay under Article 21(1)(a)?
<b>Clarification</b>	<i>This is relevant to the points on which the Court expects to hear.</i>



## Clarifications

For clarity, a revised document has been posted to the website.



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## Clarifications

### Facts

<b>Question 1</b>	With reference to [7a] in the 2 February 2018 Judgment, what kind of payments were made from the US? Who were payments made to?
<b>Clarification</b>	<i>The payments were for all debts payable by Electric Bike Holdings. This included debts incurred from its operations in Nuzilia. Payments were made to the parties to whom they were owed.</i>
<b>Question 2</b>	With reference to [29] in the 2 February 2018 Judgment, what is the day-to-day business still continuing in Nuzilia?
<b>Clarification</b>	<i>The day-to-day business still continuing in Nuzilia is the operation of the factory manufacturing electric bikes.</i>
<b>Question 3</b>	With reference to [7h] in the 2 February 2018 Judgment, what were the trading assets that were transferred to Electric Bike USA?
<b>Clarification</b>	<i>The trading assets that were transferred to Electric Bike USA were those used to enable manufacture of electric bikes in Nuzilia for sale.</i>
<b>Question 4</b>	Does the appointment of the Judicial Monitor mean that the directors / management of the company lose all their powers and control of the company?
<b>Clarification</b>	<i>This is relevant to the points on which the Court expects to hear.</i>
<b>Question 5</b>	Does the appointment of the Judicial Monitor include a moratorium against all claims against the company?
<b>Clarification</b>	<i>No.</i>
<b>Question 6</b>	Is the Judicial Monitor permitted (or expected) to run the business of the company during his/her term? Or does the company completely / mostly cease operations (as it would in liquidation)?
<b>Clarification</b>	<i>This is relevant to the points on which the Court expects to hear.</i>
<b>Question 7</b>	What are the creditors' recourse if the Judicial Monitor makes a poor business decision in running or safeguarding the interests of the company? Does the Judicial Monitor have personal liability?
<b>Clarification</b>	<i>This is not required for the points on which the Court expects to hear.</i>



## Clarifications

<b>Question 8</b>	During the period of a Judicial Monitor's appointment, are the creditors precluded from enforcing their security over the company's assets?
<b>Clarification</b>	No.



## Clarifications

<b>Question 9</b>	Is the Judicial Monitor's role restricted to only conducting an investigatory report on the Company?
<b>Clarification</b>	<i>No. the Judicial Monitor is also to supervise the management of the company for the duration of such an order.</i>
<b>Question 10</b>	Assuming relief under art 21(1)(a) is not granted, can the Respondents enforce their security if and when the report of the Judicial Monitor reveals fraud on the part of the Company?
<b>Clarification</b>	<i>This is not required for the points on which the Court expects to hear.</i>
<b>Question 11</b>	Is the Judicial Monitor empowered to reverse transactions that the company had made if it is found that those transactions are made fraudulently or recklessly by the directors of the company?
<b>Clarification</b>	<i>No.</i>
<b>Question 12</b>	Does the Judicial Monitor have power to sell and/or distribute assets and/or proceeds from the sale of assets to the creditors?
<b>Clarification</b>	<i>No.</i>
<b>Question 13</b>	Is the appointment of Judicial Monitor under s 101 of the Companies Ordinance a domestic proceeding for the purposes of article 29 of the 2016 Nuzilia Cross Border Insolvency?
<b>Clarification</b>	<i>Yes.</i>
<b>Question 14</b>	Is s 101 of the Companies Ordinance part of the Nuzilia Insolvency Act 2014?
<b>Clarification</b>	<i>No.</i>
<b>Question 15</b>	Is s 101 of the Companies Ordinance a subsidiary legislation of the Nuzilia Insolvency Act 2014?
<b>Clarification</b>	<i>No. It is a separate piece of domestic legislation.</i>
<b>Question 16</b>	Are there similar/the same provisions as s 101 of the Companies Ordinance in the Nuzilia Insolvency Act 2014?
<b>Clarification</b>	<i>No.</i>



## Clarifications

<b>Question 17</b>	What are the operational functions carried out by Electric Bikes USA (e.g. sale of bikes) mentioned in [29] of the judgment?
<b>Clarification</b>	<i>The operational functions referred to in the judgment of Ross J at [29] are the operational functions of Electric Bike Holdings.</i>



## Clarifications

<b>Question 18</b>	With reference to [31] of the 2 February 2018 Judgment, how many board meetings have been held in New York?
<b>Clarification</b>	<i>No more than six meetings have been held in New York.</i>
<b>Question 19</b>	What percentage and how many of Board Members call into meetings from Nuzilia? /What is the proportion of Electric Bike Holdings directors working directly in the USA? How many board members are located in the New York? How many board members are located in the Nuzilia?
<b>Clarification</b>	<i>There were 6 members of the Board, including Ms Balade. The Chair and Ms Balade were always in New York for Board Meetings. On 2 occasions, 2 other Directors were in New York for Board Meetings. All Directors who were not in New York for a Board Meeting telephoned into that Meeting from Nuzilia.</i>
<b>Question 20</b>	How many staff are located in New York?
<b>Clarification</b>	<i>There were 8 Electric Bike Holdings staff members operating in the United States, paying accounts and arranging board meetings etc.</i>
<b>Question 21</b>	Were all the creditors consulted on the Chapter 11 restructuring plan? What was the negotiation process? How involved were the creditors?
<b>Clarification</b>	<i>This is not required for the points on which the Court expects to hear.</i>
<b>Question 22</b>	What were some evidence Ross J relied on to find that there is an intent to defraud (at [39c] of the judgment)?
<b>Clarification</b>	<i>Ross J relied on evidence to which she refers in the judgment, including the activities by Electric Bike Holdings Ltd during the three weeks before the date on which the Chapter 11 proceeding was filed.</i>
<b>Question 23</b>	Are there other creditors? If so, do they hold a secured interest? Against what assets is their interest secured? What are the classes of creditors? In what country(ies) are the other creditors based?
<b>Clarification</b>	<i>This is not required for the points on which the Court expects to hear.</i>
<b>Question 24</b>	Can you provide a list of assets held by Electric Bike Operation, Electric Bike Holdings, Electric Bike USA?
<b>Clarification</b>	<i>This is not required for the points on which the Court expects to hear.</i>



## Clarifications

<b>Question 25</b>	What percentage of the other classes of creditors approved the chapter 11 proceedings? Can a list of how each class of creditors voted in the chapter 11 be provided?
<b>Clarification</b>	<i>This is not required for the points on which the Court expects to hear.</i>
<b>Question 26</b>	What is the financial situation with respects to debts owed to creditors? Are interest payments or principal repayments in arrears or have all the debts been paid so far?
<b>Clarification</b>	<i>This is not required for the points on which the Court expects to hear.</i>
<b>Question 27</b>	What were the contents of the letter sent to the creditors (per 6.f on page 2)? Did it specifically address the transfer of bank accounts from Nuzilia to New York? Did it specifically address the change of the registered office to New York?
<b>Clarification</b>	<i>The letter to creditors advised that the Electric Bike Holdings Head Office had moved to New York and provided new contact details. It contained no additional information.</i>
<b>Question 27</b>	Which company owns the shares in Electric Bike USA LLC?
<b>Clarification</b>	<i>Electric Bike Holdings Ltd.</i>
<b>Question 27</b>	Did the agreement between the secured creditors and Electric Bike Holdings place any restrictions on: <ul style="list-style-type: none"> <li>i. the transfer of assets from Electric Bike Holdings or its subsidiaries; or,</li> <li>ii. The relocation of assets to another jurisdiction?</li> </ul>
<b>Clarification</b>	<i>This is not required for the points on which the Court expects to hear.</i>
<b>Question 27</b>	What is the significance of moot problem paragraph 15(c) on page 3? Is this paragraph meant to preclude any consideration of the timing of transfers of the bank accounts and the title to EBO's trading assets?
<b>Clarification</b>	<i>Paragraph 15(c) in the preliminary Background is intended to be a copy of Ross J paragraph [13(c)]. (Please note, if there are inconsistencies between the preliminary Background information and the Judgments, the Judgments take precedence.) This statement on the parties' agreed position precludes any consideration of the timing of the assessment of the 'centre of main interests'.</i>



## Clarifications



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