

IAN FLETCHER

INTERNATIONAL INSOLVENCY LAW MOOT

2019

Nuzilia International Commercial Court
In the Matter of Super Rides Ltd

File reference: NICCAC No 12 of 2019

Appeal from: *Insolvency Representatives of Super Rides Ltd appointed by the High Court of Yin v Finco* [2019] NICCHC

Judge: Solus J

Date of decision: 18 February 2019

Background

1. Super Rides Ltd (Super) provides ride hailing services in countries Xylia, Yin and Zeeland, in Asia. Super was incorporated in 2016 in the Cayman Islands. It has never carried on business in that jurisdiction. Rather, its board of directors, management offices and accounting functions were located in Xylia, from which its business was carried on exclusively until mid-2017. Most of its financing was raised there from banks located in Xylia in the course of 2017. It was also subsequently listed on the subsidiary board of Xylia in 2018; it was not eligible to be listed on the main board.
2. Super expanded to Yin and Zeeland in 2017 by way of localised apps, hiring of local drivers, and aggressive marketing. In each country, these activities were carried out through representative offices which were registered under the respective laws.
3. Super grew phenomenally for a few months and, using the increased revenue, bought a building in Xylia's financial district, where it housed many of its employees and had its board meetings.

4. As a number of competitors in each of these countries came into the market, there was intense competition. The largest of these was Snatch, in Yin. Super found that while revenue growth in all three countries was likely to be strong in the mid-term, in the immediate future, it was likely to incur a loss across the three countries because of marketing and promotional expenditure to fend off competition for both drivers and passengers. As it was, Super failed to make payments to some suppliers in Xylia; these suppliers are threatening to wind up Super in Xylia.
5. Super then decided in September 2018 to undergo restructuring, but in Yin, with the intention of making use of Yin's speedier restructuring processes and the less onerous requirements under Yin's laws, which allow cram downs and a simple majority in favour. In contrast, Xylia's restructuring laws require super-majority consent in all voting classes. Super also thought that restructuring in Yin would make it operationally easier for a subsequent merger with Snatch, which had expressed some interest. The decision to restructure in Yin, and the possibility of a merger were reported in various news outlets at the time.
6. Super then made use of Yin's redomiciliation law, *Foreign Corporations Act 2017* (Yin). In November 2018, Super moved its registration, the venue of its board meetings, senior management offices, and most back-end work to Yin. Nevertheless, it still maintains to this day a sizeable R&D software presence and its stock exchange listing in Xylia. Super issued a press release on the change of registration, but did not publicise the other changes. Super leased out several floors of its building in Xylia, but otherwise kept things as they were. The restructuring took the form of a court supervised rehabilitation, a scheme of arrangement, involving some deferred payment of returns.
7. Redomiciliation was largely completed by mid-December 2018. An application for deregistration is to be made in the Cayman Islands but as of the

hearing, this has not yet been completed. Under *Foreign Corporations Act 2017* (Yin), deregistration is to be completed within 6 months from registration in Yin. As there was some uncertainty in how the proceedings in Yin would be viewed in Xylia, rehabilitation proceedings were actually commenced in both jurisdictions in January 2019.

8. Judges from Xylia and Yin are members of the Judicial Insolvency Network (JIN), a network of insolvency judges from around the globe. The goal of the Judicial Insolvency Network is to enhance coordination and cooperation between the JIN members' courts in cross-border restructuring and insolvency proceedings. The Judicial Insolvency Network has issued the JIN Guidelines that have been adopted by the Xylia and Yin courts which supervise restructuring and insolvency proceedings.
9. After parallel rehabilitation proceedings opened in both Xylia and Yin, court to court communication occurred in these proceedings under a modified form of the JIN Guidelines, resolving queries by each court about the proceeding in the other court. This resulted in the rehabilitation proceedings in Yin proceeding to completion and a scheme of arrangement approved and insolvency office-holders appointed in Yin in February 2019. These insolvency office-holders have been recognised on 15 February 2019 as foreign representatives in Xylia under the UNCITRAL Model Law on Cross-Border Insolvency as adopted by Xylia. Xylia adopted the Model Law as promulgated by UNCITRAL and as a schedule to the *Insolvency (Cross-border) Act 2015* (Xylia). The Xylia Court recognised the Yin proceedings as the foreign main proceedings, finding that the base of operations as well as the registered office were located in Yin, and gave assistance to the foreign representatives, with the Xylia proceedings indefinitely stayed.
10. In the meantime, in Zeeland all the debts owed by Super were bought up by Finco, a Zeeland finance company dealing in distressed debts.

11. Both before and after the rehabilitation proceedings, all debts owed by Super are governed by English law.

The application at first instance

12. The Yin insolvency office-holders now seek recognition as foreign representatives in Zeeland. This is opposed by Finco, which wishes to proceed against Super in the expectation that it will be able to recover more than it paid. The domestic laws of Zeeland prohibit communications with courts of other countries. Such communications must always be channelled through the executive agency. The courts of Zeeland are also unable to enter into any agreement, including memoranda of understanding, with any other courts of any other jurisdiction as this is regarded as a matter falling under the executive branch. Zeeland, whose insolvency and restructuring laws are contained in their *Insolvency and Rehabilitation Act 2018 (Zeeland)*, implements the Model Law through the *Cross-border Insolvency Act 2018 (Zeeland)*. Unlike Xylia, Zeeland amended the Model Law when adopting it domestically. Zeeland did not adopt Article 25 and made other minor variations to align with its prohibition on court to court communications.
13. Zeeland's *Insolvency and Rehabilitation Act 2018 (Zeeland)* has given concurrent jurisdiction in insolvency laws to the Nuzilia International Commercial Court ("NICC"), as long as a judge from Zeeland is part of the *coram* at first instance. While unusual, the objective of this was to instil confidence in its newly introduced insolvency and rehabilitation proceedings and to boost investment in Zeeland. This arrangement was contemplated under the Free Trade Agreement in force between Zeeland and Nuzilia. Under the laws of Zeeland as well as the statute governing the NICC, appeals may be heard in the NICC Appeal Court, which may consist of three judges from any jurisdiction.

14. At first instance, the insolvency office-holders from Yin sought recognition of the scheme of arrangement and assistance as foreign representatives of the foreign main proceedings under the *Cross-border Insolvency Act 2018* (Zeeland). Finco opposed recognition of the scheme and of the insolvency office-holders.

Findings

15. Judgment was given by Justice Solus, a Zeeland judge sitting in the NICC, ruling that no recognition ought to be given to the Yin insolvency office-holders as being contrary to public policy, given the prohibitions against court to court communications under the laws of Zeeland. The proceedings in Yin were not the foreign main proceedings as the redomiciliation and change in centre of main interests (COMI) should not be recognised. The COMI was identified as the place of original registration, i.e. the Cayman Islands. Further, no assistance ought to be given to the Yin insolvency office-holders. Finally, the scheme of arrangement in Yin involved a compromise of English law debts, which could only be done against Finco in an English court.

Grounds for Appeal

16. Leave to appeal was given by the NICC Appeal Court for the following issues:
 - (a) Whether the court to court communications between the Courts in Xylia and Yin did or did not violate Article 6 as being manifestly contrary to the public policy of Zeeland;
 - (b) Whether the redomiciliation of Super Rides Ltd should or should not be recognised and that the proceedings in Yin did or did not constitute the foreign main proceedings;

- (c) If the redomiciliation was not effective, which jurisdiction constituted the COMI; and
 - (d) Whether supposed violation of the rule in *Gibbs & Sons v Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 (*Gibbs*) was a matter that should or should not affect recognition of and granting of assistance to the Yin insolvency representatives.
17. No leave to appeal is given in respect of any issues concerning Zeeland's securities exchange laws, choice of law rules, or other laws governing insolvency and restructuring.
18. It is to be assumed that Cayman Islands law on the *Gibbs* rule is identical to English law.

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 Zeeland in the *Cross-border Insolvency Act 2018* (Zeeland).

Gibbs & Sons v Societe Industrielle et Commerciale des Metaux (1890) 25 QBD 399

**IN THE NUZILIA INTERNATIONAL COMMERCIAL COURT
HIGH COURT**

[2019] NICCHC 56

Suit No 12 of 2019

Between

- (1) Insolvency Representatives of
Super Rides Ltd appointed by the
High Court of Yin

Plaintiffs

And

- (2) Finco

Defendant

JUDGMENT

[Catchword(s)]

TABLE OF CONTENTS

JUDGMENT.....1

INTRODUCTION.....1

THE DECISION3

 PUBLIC POLICY3

OTHER ISSUES4

 WHETHER THE YIN PROCEEDINGS ARE THE FOREIGN MAIN PROCEEDINGS.....4

CONCLUSION6

**Insolvency Representatives of Super Rides Ltd,
appointed by the High Court in Yin**

v
Finco

[2019] NICCHC 56

NICC High Court — Suit No 12 of 2019
Solus J
15 February 2019

18 February 2019

Judgment reserved.

Solus J:

Introduction

1. Super Rides Ltd (“Super”), a company incorporated in the Cayman Islands, is well known in Asia as a provider of ride hailing services. Using Super’s software on mobile phones, commuters can obtain rides from drivers of vehicles at rates usually lower than those charged by traditional taxi companies. The competition in transport services has been a boon to passengers throughout this region, though not without cost to many traditional providers.

2. Super had a lucrative start in this business. It listed on the secondary board in Xylia, where it had, until its purported change of domicile and centre of main interests to Yin, a sizeable presence. It also has through its representative office in Zeeland, a sizeable number of employees mostly in marketing and promotion, as well as service support. Apparently though the barriers to entry were not that great, and many competitors emerged, creating stiff competition. Super ran into difficulties and attempted a restructuring, accompanied by redomiciliation into Yin, which is apparently permitted by Yin law, with a merger being planned with its primary competitor in Yin, Snatch. In September last year, Super decided to undergo restructuring in Yin, as Yin’s restructuring processes were swifter and Super would be

subject to less onerous requirements under Yin's laws as compared to Xylia's laws: Yin's laws allowed cram downs and a simple majority in favour.

3. In the event, although rehabilitation proceedings were started first in Yin, they were also pursued in Xylia, as Super wanted to be cautious and avoid difficulties in the legal proceedings. Thus rehabilitation applications were pursued in Yin and Xylia. As it was, because of different timelines in the two countries, the rehabilitation plan was approved first in Yin, under which payment of the debts owed to creditors in Yin was reduced and deferred. Under the rehabilitation plan, insolvency representatives were appointed in Yin. The Yin insolvency representatives did not see the point of having separate proceedings continue in Xylia, and asked the Yin Court to initiate court to court communications between Yin and Xylia, in the course of which various queries from the Xylia court were answered. Xylia then recognised the Yin proceedings as foreign main proceeding under the UNCITRAL Model Law on Cross-Border Insolvency as adopted in the *Insolvency (Cross-border) Act 2015* (Xylia).

4. In Zeeland in the meantime, Finco had purchased all the debts owed by Super to creditors in Zeeland at a discount, in the expectation that it will be able to recover more in the debts owed. Finco has filed proceedings in Zeeland to recover those debts. It must be noted that because of the presence of English-trained solicitors in the region, all the contracts between Super and its creditors in Xylia, Yin and Zeeland are governed by English law, and all the debts owed by Super are thus English law debts.

5. The Yin insolvency representatives, in applications before me, sitting as a judge in the NICC, seek recognition under the *Cross-border Insolvency Act 2018* (Zeeland), which is based on the UNCITRAL Model Law on Cross-Border Insolvency. For convenience, I refer to that Act as "the Model Law". They also seek assistance under Article 21, including preventing actions such as those by Finco from proceeding. This is the first case under which Zeeland proceedings are heard in the Nuzilia International Commercial Court, under the Free Trade Agreement between Nuzilia and Zeeland. The objective is to ultimately build up Zeeland expertise in commercial law

through the guidance of the NICC. Zeeland law is thus applied by a Zeeland judge in the setting of an international commercial court.

6. Finco on the other hand objected to the application, arguing that:

(a) The Court should not recognise and assist the rehabilitation proceedings in Yin because they proceeded on grounds manifestly contrary to public policy in Zeeland, as it involved court to court communications which are impermissible under Zeeland law;

(b) The proceedings in Yin should not be recognised as the foreign main proceeding as the redomiciliation and purported change of centre of main interests (COMI) to Yin should not be recognised by a Zeeland Court;

(c) The court should not exercise its discretion to assist, such as by a stay against Finco proceeding against Super on its debt, under Article 21 as the rehabilitation proceedings violated the rule in *Gibbs*, a rule of English law, which is the same as Cayman Islands law.

7. It is not disputed that the formal requirements under the Model Law have been met by the Applicants.

The Decision

8. Having considered the arguments, I am of the view that the application should be dismissed as recognition and assistance would be manifestly contrary to the public policy of Zeeland; that the redomiciliation should not be recognised, and that the COMI is in the Cayman Islands; and that the Yin rehabilitation violated the rule in *Gibbs*.

Public Policy

9. I took note that following court to court communications utilising a modified form of the Judicial Insolvency Network (JIN) Guidelines, the courts in Yin obtained information from the proceedings in Xylia, which allowed rehabilitation proceedings

to be completed in Yin. The Xylia court then effectively gave precedence to the Yin proceedings and stayed the proceedings before it, and recognised the Yin rehabilitation. While such communications are in vogue, and used by other jurisdictions, its use is prohibited under the laws of Zeeland.

10. When Zeeland adopted the Model Law, it omitted Article 25 that contemplates court to court communications. The laws of Zeeland prohibit court to court communications between domestic courts. Accordingly, I am of the view, given our local laws, it is manifestly contrary to our public policy for us to recognise the fruits of such communications between courts, though they occur abroad. Otherwise, it would be altogether too easy for our prohibitions to be circumvented.

11. My determination of the requirements of public policy disposes of the application, but for completeness I will also address other issues that have arisen

Other issues

12. If I am wrong on the public policy issue, there are further obstacles to the application by the foreign insolvency representatives, namely:

(a) That they are not representatives from the foreign main proceeding under the Model Law, leaving the Court with discretion to deny assistance in respect of assets here in Zeeland;

(b) Assistance should be denied here as the interests of the local creditor, Finco, are prejudiced as it did not participate in the Xylia and Yin restructuring, and the compromise that occurred was contrary to English law, which governed the debts owed by Super.

Whether the Yin proceedings are the Foreign Main Proceedings

13. The question whether the Yin proceedings are the foreign main proceedings turns on where the COMI is. The applicants rely on the redomiciliation and other

factors pointing to Yin, including it being the location of board meetings, back-end offices and financial accounts. Finco took issue with this, arguing that the redomiciliation attempt should be ignored, and that the COMI is certainly not in Yin.

14. The erstwhile redomiciliation from the Cayman Islands to Yin occurred under the laws of Yin. That supposed redomiciliation was accompanied by a shift in the venue of board meetings, the offices of its senior management and much of its back-end operations. That is not disputed.

15. The foreign insolvency representatives rely on the redomiciliation in arguing that the registered office is now situated in Yin. However, this redomiciliation and purported change in COMI was initiated to make use of the supposedly better insolvency regime in Yin. Yin's regime is in many ways debtor friendly, as it has cram down provisions and allows for simple majorities: it is not surprising then that the debtor here chose to make use of that for its own advantage. This was nothing more than cynical forum shopping. To recognise this redomiciliation would be to encourage a race to the bottom, with each jurisdiction competing to be more debtor friendly, harming the legitimate interests of creditors the world over.

16. To my mind, the COMI must be where the registration of Super was before the purported redomiciliation, that is, in the Cayman Islands. All the activities in the region are split between the countries of Xylia, Yin and Zeeland. While this split is not equal, there is presence in all three countries, and there was little to point to one over the other. I did note that Super is listed on the secondary board in Xylia, but this did not tilt the scales as it was after all only a secondary listing. It is clear the Model Law in assessing the COMI looks to determine not just where the administration of the company is in reality situated, but also where third parties, such as creditors, should be able to determine this readily. As it was, the signals are mixed, and the best that can be determined is that effectively the operations are split between Xylia and Yin. Thus, the registered office becomes paramount. That is what any third party can readily ascertain. As I have rejected the redomiciliation, that registered office remained in the

Cayman Islands. From that it followed, that the applicants are not insolvency representatives from the foreign main proceeding.

17. That meant that recognition of the applicants would be under Article 21, as a foreign non-main proceeding. Under Article 21 the assistance of the Court is discretionary, and the court is required under Article 21.3 to be satisfied that the relief granted should be in relation to assets that should be administered in the foreign non-main proceeding, or information required there. I am of the view that my discretion should not be exercised in favour of granting assistance as any foreign main proceeding should be in the Cayman Islands, and such assets that are in Zealand should, in the interests of modified universalism, be administered in Cayman proceedings. Furthermore, it is likely that the rehabilitation in Yin would not be recognised in the Cayman Islands as it violates the rule in *Antony Gibbs and sons v La Societe Industrielle et Commercial des Metaux* (1890) 25 QBD 399, that an English law debt can only be compromised or discharged in English proceedings.

Conclusion

18. For these reasons therefore, I decline to recognise and render assistance to the foreign representatives. Directions for a hearing on costs will follow.

Solus J

**IN THE NUZILIA INTERNATIONAL COMMERCIAL COURT
APPEAL COURT**

[2019] NICCAC 234

Suit No 234 of 2019

Between

- (1) Insolvency Representatives of
Super Rides Ltd appointed by the
High Court of Yin

Appellants

And

- (2) Finco

Respondent

JUDGMENT OF THE COURT

1. The appellant seeks leave to appeal against a judgment given by Solus J in the NICC High Court on 18 February 2019.
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 His Honour's judgment, but do not consider that any arguable questions of Zealand domestic law arise.
3. We grant leave. The following points are approved for argument whether Solus J erred by:
 - a. not recognising the Yin scheme of arrangement as a foreign main proceeding; and
 - b. not recognising and granting assistance to the Yin insolvency representatives.
4. On the appeal, we expect to hear from counsel on four points.
 - a. Whether the court to court communications between the Courts in Xylia and Yin did or did not violate Article 6 as being manifestly contrary to the public policy of Zealand;
 - b. Whether the redomiciliation of Super Rides Ltd should or should not be recognised and that the proceedings in Yin did or did not constitute the foreign main proceedings;
 - c. If the redomiciliation was not effective, which jurisdiction constituted the COMI; and

- d. Whether supposed violation of the rule in *Gibbs & Sons v Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 (*Gibbs*) was a matter that should or should not affect recognition of and granting of assistance to the Yin insolvency representatives.
5. The appeal is set down for hearing on 31 March 2019.
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