In The Supreme Court of Bermuda

CIVIL JURISDICTION
2020: No. 262

BETWEEN:

GRIFFIN LINE GENERAL TRADING LLC

Plaintiff

-and-

(1) CENTAUR VENTURES LTD
(2) TEMPLAR CAPITAL LTD

Defendants

Before:	**The Hon. Chief Justice Hargun**
Appearances:	**Mr Mark Diel and Mr Dantae Williams, Marshall Diel & Myers Limited, for the Plaintiff**
	Mr Delroy Duncan KC and Mr Ryan Hawthorne of Trott & Duncan for the Second Defendant
Date of Hearing:	**30 January 2023**
Date of Judgment:	**31 March 2023**

JUDGMENT

Application for a stay of the Bermuda proceedings on the ground of foreign proceedings dealing with the same subject matter; principles to be applied

HARGUN CJ

A. Introduction

1. On 30 January 2023, following the Judgment of this Court dated 22 March 2022 ("**the Judgment**"), the Court heard two further applications on behalf of the Second Defendant, Templar Capital Ltd ("**TCL**"). The two applications are:

2. First, an application made by Summons dated 6 January 2023 whereby TCL seeks a case management direction that the Bermuda proceedings in this action be stayed pending the outcome of the South African proceedings commenced by the National Director of Public Prosecutions in South Africa ("**the NDPP**") seeking to "preserve" TCL's claim against Optimum Coal Mine (Pty) ("**OCM**"), which originally was held by Centaur Ventures Ltd ("**CVL**") ("**the OCM Claim**"). The OCM Claim was sold to TCL on 15 June 2020 and that sale is the subject of the present proceedings whereby Griffin Line General Trading LLC ("**Griffin Line**") seeks an order and/or declaration that the sale and/or assignment of the OCM Claim to TCL be set aside pursuant to sections 36A to 36E of the Conveyancing Act 1983 on the basis that the sale was an undervalue disposition with the requisite intent. Griffin Line also seeks all such consequential directions as the Court thinks

fit for restoring the position to what it would have been if the sale and/or assignment of the OCM Claim to TCL had not been entered into, thus protecting and/or restoring the interest and rights of Griffin Line.

3. Second, an application by TCL for leave to appeal the Judgment whereby the Court (i) allowed Griffin Line's application to vary the freezing order granted on 16 September 2020 ("**the Freezing Order**"); (ii) dismissed TCL's application for leave to implement the OCM Revised Business Rescue Plan (dated 11 September 2020) ("**the Plan**") approved in the South African Business Rescue Proceedings on 28 September 2021; (iii) allowed TCL's application for an order amending the cross undertaking in damages given by Griffin Line in relation to the Freezing Order; (iv) dismissed TCL's application for fortification of that cross undertaking in damages; and (v) partially allowed TCL's application for security for costs.

B. Background

4. The background facts are set out in the Judgment and are repeated here for ease of reference.

5. Griffin Line loaned money to CVL pursuant to two loan facility agreements respectively dated 15 February 2016 and 7 November 2016 (together the **"Facility Agreements").**

6. CVL repaid portions of the sum owing to Griffin Line under the Facility Agreements but the sum of $104,127,604.72 remains outstanding with interest continuing to accrue at the rate of 4% per annum.

7. CVL entered into coal trading contracts with OCM. OCM failed to deliver and ultimately owed CVL a debt of $74,577,285 million, which is the basis of the OCM Claim.

8. OCM entered into Business Rescue Proceedings in South Africa in February 2018. CVL suspended its own trading activities in February 2018 and directed its efforts to the recovery of the OCM Claim.

9. On 31 March 2020, CVL entered into an agreement to sell the OCM Claim to LURCO Group South Africa Proprietary Limited ("**Lurco**") for $73,359,323.46 (the "**Lurco Agreement**"). This agreement lapsed on or around 8 May 2020.

10. 45 Days after the Lurco Agreement fell through CVL signed a cession agreement between itself and TCL, an affiliated company, on 15 June 2020 where CVL sold and/or assigned its interest, rights, options, and/or claims in and over OCM to TCL (the "**TCL Agreement**"). CVL knew at the time of the TCL Agreement that it was unable to repay the outstanding amounts owed to Griffin Line under the Facility Agreements. Additionally, CVL knew that the only significant asset it held to repay Griffin Line was the OCM Claim. Although CVL had an offer to purchase the OCM Claim for USD$73,539,323.46 in April 2020, forty five (45) days later CVL sold the same OCM Claim for approximately USD$11.9 million or 17% of the Lurco offer. The TCL Agreement was executed by Mr McGowan for CVL and Mr McGowan for TCL as its sole director and shareholder. The payment arrangement for the TCL Agreement was a five-year low interest loan.

11. On 22 June 2020 Griffin Line was granted a Freezing Injunction restraining CVL from disposing of or dissipating the proceeds of sale to be received by CVL from the sale of the OCM Claim. This injunction was premised on the sale of the OCM Claim to Lurco. However, unknown to Griffin Line, at the time of the Freezing Injunction, the OCM Claim had been sold by Mr McGowan as the principal of CVL to his own company, TCL.

12. CVL applied to discharge the CVL Freezing Injunction but was unsuccessful for the reasons set out in the Judgment dated 24 July 2020. In

relation to the application to set aside the *ex parte* injunction Mr McGowan filed on behalf of CVL, an affidavit dated 2 July 2020 in which he volunteered that *"on 15 June 2020 CVL disposed of its creditor claim in OCM on an arm's-length commercial basis*." No details were given as to the identity of the purchaser or in relation to the price paid or any other terms which could allow Griffin Line or the Court to objectively verify that the disposal of the OCM Claim was indeed "*on an arm's-length commercial basis*".

13. When requested to identify the purchaser of the OCM Claim Mr McGowan refused to do so. In his subsequent affidavit sworn on 9 July 2020 Mr McGowan explained that CVL had voluntarily disclosed this information and explained that CVL "*had no obligation to do this, nor to identify the party who acquired the claim. These commercial matters are private and confidential to CVL and are not matters of which [Griffin Line] or any of CVL's other creditors are entitled to do.*"

14. In the 24 July 2020 Judgment the Court expressed its concern at the reluctance of Mr McGowan and his legal advisers to disclose the identity of the valuer and the details of the consideration for which the OCM Claim had been disposed of. The Court expressed the view that in light of the alleged disposal of the OCM Claim to a company wholly owned by Mr McGowan; the manner in which the disposal was disclosed; and the refusal to provide the necessary information so that the disposal can be examined on an objective basis, there was "real risk" of a dissipation of assets. In those circumstances the Court ordered that the injunction granted on 22 June 2020 should not be discharged.

15. Three days after the failed set-aside application on 13 July 2020, Centaur Group Finance Ltd ("CGF"), an associated company of CVL, whose sole registered director is Mr McGowan, served a statutory demand on CVL relating to the repayment of various alleged intercompany loans.

16. Griffin Line filed a Generally Endorsed Writ of Summons in the Supreme Court of Bermuda on 11 August 2020 seeking, *inter alia*, to set aside the TCL Agreement and the assignment and/or sale of the OCM Claim from CVL to TCL (the "Writ").

17. Nine (9) days after the Writ was filed, CGF filed a petition to wind up CVL dated 20 August 2020.

18. On 24 August 2020, Mining Weekly published an article, including quotes from Mr McGowan that TCL was proposing to convert the OCM Claim into R1.3 billion of equity in NewCo, Griffin Line states that R1.3 billion equates to approximately $90,454,024.50. The article stated "*The new business rescue plan proposes to convert its creditor claims against Optimum in the amount of about R1.3 billion into equity... The total equivalent value of Templar's debt to equity proposal is about R3.2 billion, excluding the capital required to bring the mind back into production.*"

19. On 1 September 2020, Cox Hallett Wilkinson Limited acting as attorneys for Mr Deepak Raswant (as a former director of CVL and its 50% shareholder), wrote to Appleby (Bermuda) Limited and Wakefield Quin Limited, Bermuda attorneys acting for CVL, stating that Mr McGowan had disposed of the OCM Claim without Mr Raswant's approval, at a time when he was still a director of CVL in circumstances where Wakefield Quin had confirmed in an email of 8 August 2020 that CVL was "*hopelessly insolvent*".

20. The statement by Wakefield Quin on 8 August 2020 that CVL was "*hopelessly insolvent*" so that it was liable to be wound up is to be contrasted with the sworn evidence of Mr McGowan to this Court by way of his First Affidavit in Civil Jurisdiction No 185 of 2020 (*Griffin Line General Trading LLC v Centaur Ventures Ltd*) where in paragraph 8 Mr McGowan

advised the Court that " *It is also CVL's position that it is not balance sheet insolvent as it has claims against all third parties involved which would be equal to or greater than the loan receivables and/or the amounts due to CVL creditors.*" In taking this position Mr McGowan relied upon the draft management accounts of CVL as of February 2018 which stated that CVL's assets included coal pre-payment with OCM in the amount of US$ 74,577,792.

21. In its Judgment the Court expressed the view that the background facts outlined above demonstrate to this Court that Griffin Line is fully justified in its concern that unless this Court takes all the measures which are available to it there is a serious risk that Mr McGowan and the corporate entities controlled by him will make it impossible for Griffin Line (or CVL) to have any recourse to the OCM Claim (or its replacement assets) in the event Griffin Line is successful in its claim to set-aside the transaction under the Conveyancing Act 1983.

22. The pleadings in this action are now closed. On 1 December 2022 the Court made a further Order for Directions which provided:

    (1) The Parties shall mutually exchange Lists of Documents verified by affidavit relating to the matters in issue within 42 days of the date of the order. The parties have exchanged Lists of Documents and have also verified the Lists by filing the appropriate affidavits.

    (2) There shall be an inspection of those documents within seven days thereafter.

    (3) The Parties shall file and mutually exchange Witness Statements 28 days from the date on which the period of inspection ends.

(4) The Parties are granted leave to adduce expert evidence in the form of an expert report and the Parties shall file and explained expert report within 21 days following the exchange of witness statements.

(5) The Parties' experts shall confer in an attempt to narrow the issues in dispute within 14 days from the date of the exchange of the experts reports.

(6) Within 14 days of the meeting of experts, a joint memorandum of issues that are agreed and that are not agreed, shall be filed and served with brief reasons for any disagreement.

(7) The Parties, if required, shall adduce reply expert evidence to be filed and served within 7 days of the filing of the joint memorandum of issues.

(8) The Plaintiffs submit agreed dates on or before 16 December 2022 to the Registrar for the trial of this action no sooner than 1 April 2023 before a judge with a time estimate of 10 days.

(9) The Plaintiff shall prepare, file and serve a bundle of documents (agreed as possible) with the Defendants not less than 21 days before the trial.

(10) The Parties shall file and mutually exchange Skeleton Arguments 7 days before the trial.

C. Application for a stay of the Bermuda proceedings

23. The application for a stay of the Bermuda proceedings is made on behalf of TCL and is supported by the first affidavit of Ms Naomi Simpson, a partner at the English firm of solicitors, Mishcon de Reya LLP. This first affidavit

of Ms Simpson was sworn and filed on 21 December 2022. This application is opposed by Griffin Line and that opposition is supported by the seventh affidavit of Mr Kamal Singhala, the manager of Griffin Line, and filed on 23 January 2023.

24. In her affidavit, Ms Simpson states that the preservation application made by the NDPP was granted on 23 March 2022, when the South African court made an order preserving all claims held by TCL against OCM under section 38(2) of the Prevention of Organised Crime Act 1998 ("**POCA**") ("**the TCL Preservation Order**"). At the same time, the South African court made another order under section 38 (2) of POCA ("**the OCM Preservation Order**") preserving (i) all shares held in OCM; (ii) the business of OCM, as defined in the Plan; and (iii) in Optimum Coal Terminal ("**OCT**"). Ms Simpson states that the effect of the TCL Preservation Order and the OCM Preservation Order (together, the "Preservation Orders") is to effectively freeze any dealings with OCM or the OCM Claim.

25. Ms Simpson further states that on 12 April 2022, the National Union of Mineworkers ("**NUM**") applied for leave to appeal certain portions of the OCM Preservation Order. On 13 April 2022, the OCM Business Rescue Practitioners ("**the BRPs**") applied for leave to appeal the OCM Preservation Order. Further, on 13 April 2022, the BRPs of OCT also applied for leave to appeal the entirety of the OCM Preservation Order.

26. On 11 May 2022, TCL and Liberty Coal (Pty) Ltd ("**Liberty**") applied for leave to intervene in the NUM and BRPs' applications for leave to appeal the OCM Preservation Order. On 15 July 2022, the Supreme Court of South Africa granted each of the applications referred to in this and the previous paragraph. Ms Simpson states that she understands from TCL's South African legal representatives that the Supreme Court of Africa is unlikely to hear the appeal until the last quarter of 2023.

27. Ms Simpson states that she understands from TCL's South African legal representatives that the preservation orders are effectively precursors to forfeiture applications. On 1 July 2022, the NDPP issued forfeiture applications (i) against TCL, seeking an order forfeiting the assets preserved under the TCL Preservation Order to the State; and (ii) against BRPs of OCM, OCT seeking an order forfeiting the assets preserved under the OCM Preservation Order. Ms Simpson understands that the NDPP is seeking the forfeiture applications to be heard in late 2023, with a decision to be expected within 6 months thereafter. She further states that there would then be the possibility of appeals for either side but an appeal could take 2-3 years if pursued to the highest court in South Africa.

28. The TCL forfeiture application is made on the grounds that the OCM Claim is the proceeds of unlawful activities and/or the instrumentality of money laundering offences under Chapter 3 of POCA. Ms Simpson confirms that TCL is opposing the forfeiture application and denies the allegations made against it. TCL does not consider that the NDPP's prospects of the TCL forfeiture application are good.

29. Given the existence of the forfeiture applications, TCL submits that there are compelling circumstances that would justify the exercise of the court's discretion in favour of staying the Bermuda proceedings. TCL contends that the continuation of the proceedings without a stay would be wholly contrary to the Overriding Objective, in terms of saving expenses (rule 1(2)(b)); dealing with cases in ways which are proportionate (rule 1(2)(c)); dealing with cases expeditiously and fairly (rule 1(2)(d)); and the appropriate allocation of the court's resources (rule 1(2)(e)).

30. TCL contends that if the NDPP succeeds in the TCL forfeiture application, the OCM Claim will be forfeited to the South African State. In that event, the subject matter of these proceedings will no longer be held by TCL. The

Bermuda proceedings will have been entirely moot. The Bermuda proceedings will have wasted very substantial amounts of time, money and court resources.

31. Conversely, TCL contends, if the TCL forfeiture application is not successful, the Bermuda proceedings could resume, and this Court would at that stage have the benefit of factual findings made in the South African proceedings, which are likely to include findings in respect of Griffin Line's conduct and the impact that such conduct has on the OCM Claim and its true value. Such findings, TCL contends, are likely to be highly relevant to the Bermuda proceedings, in which Griffin Line is seeking discretionary relief, and the value of the OCM Claim is the central issue.

32. It is common ground that the Court has inherent, discretionary power to order a case management stay pursuant to sections 12 and 18 of the Supreme Court Act 1905 relying upon the judgment of Chief Justice Kawaley in *Re Celestial Nutrifoods Limited (in liquidation)* [2017] Bda LR 11:

> *"12. However, the Applicants' counsel sensibly conceded that the Court clearly had, independently of the statutory insolvency stay powers recited in the Recognition Order, the inherent jurisdiction to stay proceedings. The Company's counsel did not demur. It is helpful to remember what the source of that inherent jurisdiction is. The following statement of principle was approved by the English Court of Appeal (Lord Bingham, LCJ) in Reichold Norway Asa and Reichold Chemicals Inc v Goldman Sachs International (a Firm) [1999] EWCA Civ 70628-4 (at page 7):*
>
> > *'On the issue of jurisdiction the judge expressed himself briefly in these terms:*
> >
> > *"The court's power to stay proceedings is part of its inherent jurisdiction which is expressly preserved by section 49(3) of the*

Supreme Court Act 1981. It is exercised under a wide range of circumstances to achieve a wide variety of ends. Subject only to statutory restrictions, the jurisdiction to stay proceedings is unfettered and depends only on the exercise of the court's discretion in the interests of justice. I am in no doubt, therefore, that I do have jurisdiction to stay the present proceedings; the question is whether it would ever be right to do so in a case such as the present, and if so under what circumstances."'

13. This Court's inherent jurisdiction is preserved without express reference to the power to grant a stay by sections 12 and 18 of the Supreme Court Act 1905..."

33. The applicable principles governing the Courts discretionary power to order a case management stay are summarised by Butcher J in *Banca Intesa Sanpaola SpA v Commune di Venezia* [2020] EWHC 3150 (Comm) at [34]:

"The relevant principles were recently restated by Bryan J in MAD Atelier International BV v Manes [2020] EWHC 1014 (Comm) at [82] as follows:

...The principles relevant to the exercise of this discretion can be summarised as follows:

(1) The court has a discretion to stay an action pending the resolution of a claim pending in another forum, but a stay should only be granted in "rare and compelling circumstances": Reichhold Norway ASA v. Goldman Sachs [2000] 1 WLR 173 at 186 (CA).

(2) "Exceptionally strong grounds" are required to justify a stay on case management grounds where the parties have conferred exclusive jurisdiction on the English court: Mazur Media Ltd v. Mazur Media GmbH [2004] 1 WLR 2966 at [69]-[70] (Lawrence Collins J); Jefferies International Ltd v Landsbanki Islands HF [2009] EWHC 894 (Comm) at [26]. The danger of inconsistent judgments is not a

legitimate consideration amounting to exceptional circumstances and does not justify a stay in a case where the court has jurisdiction under the Brussels I Regulation Recast ("BIR"), especially exclusive jurisdiction: Mazur, supra, at [71].

(3) The court's power to stay proceedings cannot be used in a manner which is inconsistent with the Judgments Regulation: Mazur, supra, at [69]; Jefferies, supra, at [26]. A defendant should not be permitted "under the guise of case management, [to] achieve by the back door a result against which the ECJ has locked the front door": Skype Technologies SA v. Joltid Ltd [2009] EWHC 2783 (Ch) at [22] (Lewison J).

(4) A stay will not, at least in general, be appropriate if the other proceedings will not bind the parties to the action stayed or finally resolve all the issues in the case to be stayed, or the parties are not the same: Klöckner Holdings GmbH v. Klöckner Beteiligungs GmbH [2005] EWHC 1453 (Comm) at [21] (Gloster J)."

34. The Court accepts Mr Diel's submission that the authorities also demonstrate that the Court should be slow to order case management stays of *bone fide* claims based on properly pleaded causes of action. Thus, in *Athena Capital Fund SICAV-FIS S.C.A. v Secretariat of State for the Holy See* [2022] EWCA Civ 1051, Males LJ held at [59]:

> *"There is, as it seems to me, no reason to doubt that it is only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad. After all, the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and Article 6 ECHR. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional. In my judgment all of the guidance in the cases which I*

have cited is valuable and instructive, but the single test remains whether in the particular circumstances it is in the interests of justice for a case management stay to be granted. There is not a separate test in "parallel proceedings" cases..."

35. Having considered the respective submissions of the parties in relation to this issue of stay, the Court has determined, in the exercise of its discretion, to refuse TCL's application for a stay of the Bermuda proceedings pending the outcome of the South African proceedings. The Court's brief reasons for taking this view are as follows.

36. As an introductory matter it is to be noted that this is not a case of parallel proceedings between the same parties in relation to the same subject matter. Griffin Line is the Plaintiff in the present Bermuda proceedings but is not a party to any proceedings in South Africa. Only TCL is a party to the South African proceedings.

37. The cause of action and the subject matter of the Bermuda proceedings is the application by Griffin Line to set aside the sale/assignment of the OCM Claim from CVL to TCL on the ground that it was a sale at an undervalue with the requisite intent, contrary to sections 36A to 36E of the Conveyancing Act 1983. The essential issue in the Bermuda proceedings is the valuation of the OCM Claim. Indeed, the parties have agreed to produce expert evidence in relation to that valuation exercise. The South African proceedings are concerned with the attempts by NDPP to "preserve" and/or forfeit the OCM assets including the OCM Claim. The focus of the South African proceedings is the alleged wrongdoing which forms the basis for "preservation" and/or forfeiture proceedings under the POCA. It is anticipated that the South African proceedings may potentially last for a number of years. As noted earlier, Ms Simpson states that it is not clear when the African proceedings will conclude, but she understands that the

NDPP are seeking for the forfeiture applications to be heard in late 2023, with a decision to be expected within six months thereafter. Ms Simpson adds that there would then be a possibility of appeals for either side, but an appeal could take 2 to 3 years if pursued to the highest Court in South Africa.

38. In his seventh Affidavit Mr Singhala complains of the oddity of the position adopted by Mr McGowan (through TCL) that on the one hand Mr McGowan attempts to advance the argument before this Court that Griffin Line's loan to CVL constituted proceeds of money laundering and on the other hand Mr McGowan argues that the NDPP's forfeiture proceedings in relation to the OCM Claim are likely to fail presumably on the basis that there is no relevant wrongdoing.

39. The Court agrees that it is of importance and of significant value that only the party which is lawful owner of the OCM Claim should be entitled to take steps in the South African proceedings to safeguard that asset. This is particularly important given that (i) the South African proceedings may last many years; and (ii) Mr McGowan (through TCL) arguably is not the appropriate person to safeguard the OCM Claim in the South African proceedings. This is so because in order to safeguard the OCM Claim in the South African proceedings Mr McGowan (through TCL) has to argue that the OCM Claim is not infected with any relevant wrongdoing which may constitute a ground for "preservation" and/or forfeiture under the South Africa POCA. Mr McGowan may have particular difficulties in asserting that position given that the South African proceedings are principally based upon his sworn affidavit evidence in the Bermuda proceedings. Thus, in the Founding Affidavit of Juliana Galetlane Rabaji-Rasethaba the wrongdoing relied upon in support of the forfeiture order includes the following:

(1) "56. Finally, I emphasise that for Templer to avoid forfeiture of the CVL claims in these proceedings, Templar must show that, on 15 June 2020

when it acquired the CVL claims, it had no knowledge, no reasonable grounds for believing that the CVL claims were the proceeds of crime or the instrumentality of the offence of money laundering.

57. But by June 2020, it is clear that Mr McGowan, the controlling mind of Templar, not only had reason to believe that the CVL claims were the proceeds of crime and the instrumentality of the offence of money laundering, it seems clear that he subjectively believed as much. Thus, in the sworn statements that he made in his Bermuda affidavit of 2 July 2020, Mr McGowan made clear that he believed that:
57.1 The Gupta family was engaged in widespread criminal activity against the South African State;
57.2 The funds in Griffin Line were proceeds of crime;
57.3 The loan from Griffin Line to CVL was a money laundering device to distribute Griffin Line proceeds of crime to other entities associated with the Gupta family."

(2) *"78. In this context, it is of obvious significance that, like the NPA, Mr McGowan believes that the Griffin Line funds that were advanced to CVL were the proceeds of crime. As pointed out by Mr Tshikovhi in the preservation application, Mr McGowan furnished an affidavit in Case 185 of 2020 in Bermuda on 2 July 2020 in which he states of these funds:*

"5. CVL finds itself in the middle of a well-orchestrated scheme, in which, CVL, on the recommendation, advice and instruction of Akash Garg has borrowed monies from the Applicant, Griffin Line General Trading LLC, which were in turn disbursed to a web of companies, on the recommendation, advice and instruction of Mr Garg, which all related back to and/or are connected to and/or owned by Mr Garg, Mr Singala, Griffin, the Gupta Family and their associates. Mr Singala reports directly to his father and acts on his father's instructions... I now have little doubt that he is involved in his father's and the wider

families alleged money-laundering activities and is an active player in his father's and wider families alleged corruption network.

...

22. From publicly available information, CVL believes it is highly likely that the revenue and profit reflected in Griffin's audited accounts is money stolen from the South African government and laundered via Mr Singala on behalf of his father and wider family members. CVL will be seeking full disclosure from Mr Singala and Griffin to provide documentary proof of the source of these funds in order to advance the defence of illegality.

...

27. I would hazard a guess that these monies, or a portion of them, eventually made their way to Griffin, dressed up as general trades for commodities and/or products which didn't actually exist in a similar pattern to how the various companies who borrowed monies from CVL have spirited away the monies under the guise of fake invoices.

...

35. Neither CVL nor Mr McGowan had or could have had any knowledge of what Mr Garg and Mr Singala were plotting at the time CVL entered into the loan facility agreements with Griffin. CVL is an innocent party caught up in what seems highly likely is a money laundering scheme."

(3) *"82. On behalf of CVL, Mr McGowan instituted an action against Griffin Line, Akash Garg, Kamal Singala and Jitin Garg in Bermuda in the case 437 of 2020 where he claims damages in the amount of $49,632,378.55. A copy of the writ of summons is attached. It states the following:*

> *"The Plaintiff will aver that the Defendants, acting individually or collectively conspired to cause and did in fact cause loss and injury to the Plaintiff by both lawful and unlawful means. The Plaintiff will*

further aver the First Defendant and/or the Second Defendant and/or the Third Defendant facilitated what the Plaintiff now believes was the proceeds of money laundering, by way of a loan to the Plaintiff which in turn the Third Defendant, acting in its capacity as a director of the Plaintiff advised, and/or instructed and/or facilitated the advance of various loans from the Plaintiff to various individuals and/or companies including himself and/or other entities connected, directly or indirectly, with himself and/or his associates and/or his family members, knowing the loans would never be repaid to the Plaintiff. The Plaintiff was therefore the victim of a layering scheme orchestrated by the First and/or Second and/or Third and/or Fourth Defendants so as to distribute the funds borrowed from the Plaintiff to entities and/or associates of the First and/or Second, and/or Third and/or Fourth Defendants."

(4) *"84. As pointed out by Mr Tshikovhi in his replying affidavit in the Templar preservation application, Mr McGowan has confirmed under oath that:*

> *"CVL and associated companies within the Centaur Group engage with companies owned or controlled by the Guptas and/or their associates on a good-faith, arm's-length commercial basis. The transactions we concluded were real (not simulated) and for value. We concluded proper due diligence and "know your client" checks before each transaction was concluded, and had no reason to believe that the monies we were learned or paid for the proceeds of crime."*

40. Furthermore, the purpose of the Bermuda proceedings by Griffin Line is to set aside the sale and/or assignment of the OCM Claim so that it can be made whole. In the event the OCM Claim is forfeited to the South African State there may still be other remedies open to CVL and/or Griffin Line on the basis that the sale and/or assignment of the OCM Claim was at an

undervalue with the requisite intent under the Conveyancing Act 1983. Such a finding by the Bermuda Court may potentially lead to actions for recovery against those who are responsible for the sale and/or assignment of the OCM Claim, for example, Mr McGowan in his capacity as a director of CVL and in his capacity as the sole director of TCL. In the circumstances the possibility that the OCM Claim might be forfeited to the South African State does not render the Bermuda proceedings without any utility or "moot".

41. Secondly, as noted earlier, the South African proceedings relating to "preservation" and/or forfeiture are likely to take many years. It appears to the Court that it is neither fair nor appropriate to Griffin Line or indeed CVL that the Bermuda proceedings should be put on hold for a long period of time in order to see the result of the South African proceedings. Griffin Line and CVL have a legitimate expectation that their claim that the OCM Claim was sold and/or assigned by Mr McGowan at an undervalue should be determined within a reasonable period of time.

42. Third, it is unlikely that the Bermuda Court would be assisted by any findings made in the South African proceedings. The issues in the two proceedings are entirely different: the Bermuda Court is principally concerned with the value of the OCM Claim whilst the South African proceedings are principally concerned with wrongdoing under the South African POCA. Further, and in any event factual findings made by the South African court are unlikely to be binding in the Bermuda proceedings given that Griffin Line, the Plaintiff in the Bermuda proceedings, is not a party to the proceedings in South Africa.

43. Fourth, the Court does not consider that the continuation of the Bermuda proceedings could potentially result in wasted expenditure in terms of legal costs in the event that the OCM Claim was forfeited to the South African State. As the Court noted earlier, even if the OCM Claim is forfeited to the South African State there are potential remedies open to Griffin Line and or

CVL for compensating the loss suffered by Griffin Line and/or CVL in the event the Court determined that the sale and/or assignment of the OCM Claim was in breach of the Conveyancing Act 1983.

44. Fifth, the Court accepts the submission made on behalf of Griffin Line that Mr McGowan's conduct to date has potentially deprived Griffin Line of in excess of $104 million of funds owed to Griffin Line. Not only is the money itself considerable, the loss of opportunity to invest the funds is equally great. Accordingly, the Court is unable to accept the submission advanced on behalf of TCL that granting a stay of the Bermuda proceedings causes no prejudice to Griffin Line.

45. For all these reasons, considered both singly and jointly, the Court, in the exercise of its discretion to manage these proceedings, considers that the appropriate order to make is to refuse to grant the stay of the Bermuda proceedings sought by TCL by summons dated 6 January 2023.

D. Application for leave to appeal the Judgment dated 22 March 2022 ("the Judgment")

46. Both Counsel for TCL and Griffin Line rely upon the judgment of Subair-Williams J in *Apex Fund Services Ltd v Clingerman* [2020] SC (Bda) 12 Com (18 February 2020) as setting out the appropriate test for giving leave to appeal:

> *"24. I find no meaningful distinction between the tests which require the appeal points to be 'reasonably arguable' or to have 'arguable prospects of success' and tests which require a 'reasonable prospect of success'. In the final chapter, it all means the same thing.*
>
> *25. To a great extent, Counsel's opposing arguments on the applicable test perch on the same branch. Where a decision made*

by a judge was done in the exercise of the Court's discretion, the grounds will not likely be reasonably arguable or have any real prospect of success unless one can sensibly contend that the judge erred by:

(i) exercising his/her discretion under a mistake of law or misapprehension of the facts;

(ii) taking irrelevant matters into consideration or (as I would add) failing to take relevant matters into consideration; or by

(iii) reaching any illogical conclusion on any reasonable view.

26. Where a judge's exercise of discretion is flawed on any of the above grounds, it is then arguable that the judge 'plainly got it wrong'."

E. The Variation and Permission Application (grounds 1 and 2 of the proposed Grounds of Appeal)

47. Before considering this and other proposed grounds of appeal there are two preliminary matters which should be noted. First, the Notice of Motion seeking leave to appeal was filed by TCL on 4 April 2022. By order dated 24 August 2022 the Court ordered that the application for leave to appeal should be determined on an *inter partes* basis on a date to be fixed by the Registrar. The *inter partes* hearing for the leave to appeal did not take place until 30th of January 2023. It does not appear that this application has been pursued with any degree of urgency.

48. Second, as noted earlier, it is the evidence of Ms Naomi Simpson, filed on behalf of TCL, that on 23 March 2022 the South African court made an order preserving all claims held by TCL against OCM under section 38 (2)

of the POCA. At the same time the South African Court made another order under section 38 (2) preserving (i) all shares held in OCM; (ii) the business of OCM, as defined in the Plan; and (iii) all shares held in Optimum Coal Terminal. Ms Simpson states in paragraph 18 of her first affidavit that the effect of the TCL Preservation Order and the OCM Preservation Order is to effectively freeze any dealings with OCM or TCL claims. Ms Simpson further confirms that it is not clear when the South African proceedings would be concluded but she understands that the forfeiture applications are likely to be heard in late 2023 with a decision to be expected within the six months thereafter. Ms Simpson suggests that there would then be the possibility of appeals for either side but an appeal could take 2 to 3 years if pursued to the highest court in South Africa. In the circumstances, it is TCL's own evidence that the effect of the TCL Preservation Order and the OCM Preservation order, granted by the South African court, is that the relevant assets are in fact frozen and are likely to be frozen for a number of years such that it is not possible to advance the South African Business Rescue Plan. Accordingly, the present appeal in relation to Freezing Order is entirely academic and has no practical effect.

49. In any event, the Court does not consider that grounds 1 and 2 have any reasonable prospects of success on appeal. The first grounds of appeal asserts that "*The Supreme Court erred in law and/or failed to take relevant matters into consideration by proceeding on the basis that Griffin would win the underlying claim, failing to acknowledge (let alone engage with) and treating the case as "exceptional" and one to which the usual principles relating to freezing orders did not apply.*"

50. The Court did not consider and did not proceed on the basis that *"Griffin would win the underlying claim."* In considering this issue it is relevant to note that the background facts set out in paragraph 6 to 21 of the Judgment are not seriously disputed by TCL. On the basis of those facts the Court noted in paragraph 16 that:

"In the 24 July 2020 Judgment the Court expressed its concern at the reluctance of Mr McGowan and his legal advisers to disclose the identity of the valuer and the details of the consideration for which the OCM Claim had been disposed of. The Court expressed the view that in light of the alleged disposal of the OCM Claim to a company wholly owned by Mr McGowan; the manner in which the disposal was disclosed; and the refusal to provide the necessary information so that the disposal can be examined on an objective basis, ***there was "real risk" of a dissipation of assets****. In those circumstances the Court ordered that the injunction granted on 22 June 2020 should not be discharged."* (emphasis added)

51. At paragraph 22 of the Judgment the Court again considered the issue of dissipation of the OCM Claim:

"The background facts outlined above demonstrate to this Court that ***Griffin Line is fully justified in its concern*** *that unless this Court takes all the measures which are available to it* ***there is a serious risk*** *that Mr McGowan and the corporate entities controlled by him will make it impossible for Griffin Line (or CVL) to have any recourse to the OCM Claim (or its replacement assets) in the event Griffin Line is successful in its claim to set-aside the transaction under the Conveyancing Act 1983. The present applications necessarily must be considered with these considerations firmly in mind."* (emphasis added)

52. The reference to the "*starting point*" in paragraphs 31 of the Judgment is not a reference to the starting point of the analysis but the starting point of the *transaction* in question:

"The Court is unable to accept the submissions in the exceptional circumstances of this case. As noted earlier, the Court is not being asked

to consider the variation of the Freezing Order in the context of a regular commercial transaction. The starting point ***of the transaction*** *(the transfer of the OCM Claim from CVL the TCL) was,* ***Griffin Line contends****, an attempt to put the assets beyond the reach of the creditors of CVL and the present transaction is an extension of the earlier transaction."* (emphasis added)

53. The Court did not ignore the authorities and the principles relied upon by TCL in support of its position that the Freezing Order should not be varied to allow TCL to proceed with the proposed arrangement. In particular:

(1) That there was a serious risk that the implementation of the proposed structure would be to place assets beyond the reach of the court. See: (i) "*Having regard to the conduct of Mr McGowan as set out at [6] to [22] above, the Court considers that if the Plan is implemented through the proposed corporate structure,* ***there is a serious risk that Griffin Line likely will have no recourse to the assets represented by the OCM Claim*** *in the event that it is successful in setting aside the transfer of the OCM Claim from CVL to TCL on the ground that such transfer was in breach of the Conveyancing Act 1983.*" (Paragraph 32); (ii) "*Griffin Line contends and* ***the Court accepts*** *that in the event the Court varies the Freezing Order to allow implementation of the Plan, in accordance with the corporate structure outlined above,* ***then it is likely that…will lead to TCL creating third party rights which would make it impossible to unwind the transaction.***" (Paragraph 34); and (iii) "*The Court accepts Griffin Line's submission that the reality of the corporate structure of Liberty Coal is that TCL does not have a direct or indirect interest in Liberty Coal and that once the OCM Claim is transferred to Liberty Coal,* ***there appears to be little or no possibility of recovery.***" (Paragraph 35) (emphasis added)

(2) TCL elected to place itself in the present position by supporting the Plan in circumstances where it had full knowledge that the transfer of the OCM Claim was being challenged by Griffin Line on the ground that it was in breach of the Conveyancing Act 1983 (paragraph 31 of the Judgment). Indeed, the Freezing Order was in place prior to the obligations under the Business Rescue Plan.

(3) The Freezing Order is being used for the legitimate purpose of preserving the only asset available to Griffin Line in order to satisfy its very substantial claims against CVL.

(4) The grant of the Freezing Order did not destroy the value of the OCM Claim. As noted earlier, all the relevant assets are frozen as a result of the Preservation Orders made by the South African court and are likely to remain frozen for a number of years. It is not suggested by TCL that the effect of the South African Court orders is to destroy the value of the OCM Claim.

F. The fortification application

54. The Court declines to give leave in relation to this application as it does not consider that there are any reasonable prospects of success.

55. It was common ground, applying the test in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2015] 1 WLR 2309 (paragraph 43 of the Judgment) that TCL must satisfy the following three conditions in order to obtain an order of fortification:

(1) Intelligent estimate of the likely amount of any loss which might result from the Freezing Order;
(2) TCL must show a sufficient level of risk of loss; and

(3) The Court must be satisfied that the loss has been or is likely to be **caused** by the grant of the injunction.

56. At the date of the hearing (15 February 2022) an undertaking was given by the BRPs that the Business Rescue Plan could not be implemented until 25 March 2022. There was, as noted in paragraph 50 of the Judgment, no causative link between the purported losses caused by the Freezing Order in circumstances where the very asset TCL has asked the Court to preserve cannot be released because of undertakings in South Africa concerning the very same assets. Following the hearing, as is made clear by the evidence of Ms Simpson, the South African courts have made TCL Preservation Order and OCM Preservation Order, the effect of which is to freeze the relevant assets so that the Business Rescue Plan cannot be implemented until the South African proceedings have been concluded. It is also the evidence of Ms Simpson that it may take a number of years before the South African proceedings are concluded. In the circumstances, the application for fortification of the undertaking is without any basis and this appeal is entirely academic.

57. In any event the Court was entitled to treat this case as "*exceptional*" as explained by Kawaley CJ in *Orb "CT-Mobile v IPOC International Growth Fund Limited* [2006] Bda LR 53 [paragraph 53 of the Judgement]; "*... having regard to my views of what the status quo represented in the present case, it seemed to me to be wrong in principle to require the registered shareholder of shares to post security in any amount for being given access to its own asset.*"

58. Secondly, based upon the evidence of Mr Daniels SC, produced on behalf of TCL, the Court was entitled to conclude that the estimate of the damages to be suffered by TCL was highly speculative: *"it is neither possible, nor sensible to attempt to protect precisely on what basis a claim for damages may follow, should the Plan, for whatever reason, fail. Whether the failure*

of the Plan will result in claim for damages, will depend on the facts and in particular, the reasons for the failure and whether the failure of the plan can be factually and legally attributed to any failure (of contractual obligation or other legal duty) on the part of TCL. Importantly business rescue does not, per se, impose legal duties or obligations and the failure of a business plan will not constitute a sui generis cause of action..." (See paragraph 51 of the Judgment)

G. Security for costs

59. The Court refuses the application in relation to security for costs (Grounds of Appeal 7-9) on the basis that it is not satisfied that there is any reasonable prospect of success on appeal.

60. The Court considers that it was entitled to consider this case as "*exceptional*" for the purposes of the security for costs application, as explained in paragraph 60 of the Judgment. The Court was also entitled to take into account the fact that Griffin Line's claim appeared to be a good claim and the fact that there had been unexplained delay in making the application for security for costs.

61. In conclusion, the Court dismisses TCL's application for leave to appeal the Judgment of the Court dated 22 March 2022.

62. The Court will hear the parties in relation to the issue of costs, if required

Dated this 31st day of March 2023

NARINDER K HARGUN

CHIEF JUSTICE