Neutral Citation Number: [2023] CA (Bda) 20 Civ

Civil Appeal No. 11 of 2023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2020: No. 243

Before:

JUSTICE OF APPEAL GEOFFREY BELL
(Sitting as a Single Judge of the Court of Appeal)

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Between:

TEMPLAR CAPITAL LIMITED

Appellant

- and -

(1) GRIFFIN LINE GENERAL TRADING LLC
(2) CENTAUR VENTURES LTD (in liquidation)

Respondents

Delroy Duncan KC and Ryan Hawthorne, Trott & Duncan Limited, for the Appellant

Dante Williams, Marshall Diel & Myers Limited, for the Respondent

Hearing date(s): 12, 13, 18 and 19 October 2023
Ruling date: 23 October 2023

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APPROVED RULING

BELL JA:

1. This ruling is made on the application of Templar Capital Limited ("TCL") for leave to appeal against the ruling of the Chief Justice of 22 March 2022, in which he refused TCL's application to vary the terms of a freezing injunction made by Subair Williams J on 16 September 2020, and dealing with related ancillary matters of fortification of the

undertaking in damages and security for costs. The Chief Justice refused leave to appeal on 31 March 2023.

2. This ruling is concerned only with the application to amend the freezing order, with argument not yet having been heard on the issues of fortification and security. However, there was a preliminary matter which arose, because Griffin Line ("GL") argued that TCL was not entitled to relief because of the delay in making the application, and because of the likelihood that a trial of the substantive matter could be heard at much the same time as the appeal of the interlocutory application, thus making the benefit of any variation in the freezing order doubtful. I declined to accede to GL's argument on the basis that, although the delay has been considerable, it had not been clearly established that TCL was to blame for that delay, and, in relation to the second aspect, it seemed to me that GL was being overly optimistic as to the likely date of a trial, given the extent of the outstanding trial preparation.

3. The background concerns the operation of a coal mine in South Africa, Optimum Coal Mine (Pty) ("OCM"), which is in business receivership in South Africa, where the relevant insolvency procedure is conducted by regulated business rescue practitioners ("BRPs"), similar to insolvency practitioners in this jurisdiction. The BRPs have proposed a number of rescue plans, the latest of which ("the Plan") is supported by TCL. The Plan deals with a claim which Centaur Ventures Ltd ("CVL", a company which is itself in liquidation) has against OCM ("the OCM Claim"), relating to pre-payments for coal which was not delivered by OCM. CVL and TCL are Bermuda companies, while GL is incorporated in the United Arab Emirates. The funds for that transaction came in the form of loans from GL to CVL with a value of approximately US$74 million. CVL sold the OCM Claim to TCL in April 2020 for approximately US$11.9 million, after a previous sale for approximately US$73 million had fallen through. The effect of the Plan would be to transfer the OCM Claim to a subsidiary of TCL, Liberty Coal, which is outside the jurisdiction, such that questions of recoverability of the benefit of the OCM Claim from TCL arise. The substantive issue in these proceedings concerns the transaction whereby CVL sold the OCM Claim to TCL, both of which are companies said to be controlled by Daniel McGowan, where the proceedings seek to set aside the sale of the OCM Claim to TCL pursuant to the relevant provisions of the Conveyancing Act 1983.

4. Mr McGowan had maintained that the sale of the OCM Claim had been on a genuine arm's length commercial basis, but had declined to give the details which had been sought in relation to the transaction, something which led to a finding of contempt of court. That no doubt also explained the court's cynicism regarding Mr McGowan's business dealings, and in this regard I should mention that there are a number of related proceedings before the lower court, of which the Chief Justice has knowledge, but I do not. No doubt it was this background which led the Chief Justice to comment in paragraph 22 of his judgment that the background facts demonstrated to the court that GL was fully justified in its concern that unless the court took all measures available to it, there was a serious risk that Mr McGowan and the corporate entities controlled by him would make it impossible for GL or CVL to have any recourse to the OCM Claim, in the event that GL were to be successful in the substantive proceedings.

5. TCL argued before the Chief Justice that the transaction in question, namely the implementation of the Plan, was not an unjustified disposal of assets, an argument which the Chief Justice rejected. He noted that TCL had voluntarily placed itself in the position of supporting the Plan when it knew that its ownership of the OCM Claim was being challenged in these proceedings. He took the view that if the Plan were to be implemented there would be a serious risk that GL would have no recourse to the assets represented by the OCM Claim, and accepted GL's submission that the structure proposed under the Plan (which would ultimately pass the OCM Claim to Liberty Coal) benefitted Mr McGowan to the detriment of GL.

6. I should add that an already complex commercial background is further complicated by the existence of claims by the South African authorities (equivalent as I understand it to the role of DPP) which seek to impugn the OCM Claim as representing the proceeds of crime, with the effect that, if successful, the OCM Claim will be forfeited to the South African state. There is a judgment expected imminently in relation to this aspect of matters, but it is said that the appellate process might take two or three years to be exhausted, so that the position will necessarily remain unclear for a significant period.

7. Against that brief background Mr Duncan KC for TCL argues that the fundamental error made by the Chief Justice was that he proceeded on the basis that GL would succeed in its underlying claim. Mr Duncan said that the critical question was the purpose of the transaction. Referring to paragraph 52 of the judgment, which dealt with the issue of

fortification, Mr Duncan argued that there was no evidence entitling the Chief Justice to make the determination which he did, and in relation to paragraph 61, dealing with security, he failed to take into account the bona fides of the transaction, and the evidence that the effect of the injunction would be to cause the Plan to fail, and consequently make the OCM Claim worthless. He acknowledged that if the South African proceedings were successful, there would be a similar result.

8. Mr Duncan reviewed the authorities, and the applicable legal principles. The authority of Organic Grape Spirit v Nueva IQT SL [2020] 2CLC 176 is to the effect that it is not for the court to prohibit a transaction merely because it involves a degree of business risk or speculation, and neither is it the court's function to consider whether a particular business venture was reasonable. Similar support can be found in the case of Halifax PLC v Chandler [2001] EWCA Civ 1750, and in Gee on Commercial Injunctions.

9. One matter that did concern me was the Chief Justice's reference (paragraph 35 of the judgment) to the corporate structure of Liberty Coal, when he said that the reality was that TCL did not have a direct or indirect interest in Liberty Coal, despite the fact that the schematic set out in paragraph 33 does suggest that TCL has a 100% indirect interest in Liberty Coal. But the Chief Justice was clearly concerned at the prospect of recovery of the OCM Claim (assuming success in the main proceedings) when the ownership of that claim had left the jurisdiction. That seems to me to be an entirely different question, although one with which the Chief Justice was understandably concerned.

10. On the other hand, the evidence of the BRPs was that if the Plan was not implemented, the value of the OCM Claim would be lost in any event. In those circumstances it could not be said that the irrecoverability of the OCM Claim would be of great significance; it would be a claim of no value.

11. For GL, Mr Williams laid weight on the fact that the Plan was designed to transfer the asset represented by the OCM Claim out of TCL's hands. He pointed out that if GL succeeded in its claim that the transaction whereby CVL transferred the OCM Claim to TCL were to be set aside, it would still be open to CVL to support the implementation of the Plan. And he referred to the fact that the BRPs' reports had shown there to be a number of bids for the mine (from which coal was apparently still being extracted by Mr McGowan pursuant to some other arrangement).

12. In reply, Mr Duncan stressed that the purpose of the injunction was to prevent the implementation of the Plan, a matter which Mr Williams had failed to address. He maintained that the involvement of the BRPs demonstrated the bona fides of the transaction. He repeated that the Chief Justice had been overly concerned at the apparently exceptional nature of this case.

13. Both counsel were agreed upon the principles to be applied on granting leave, expressed most recently in this jurisdiction in the case of Apex Fund Services Ltd v Clingerman [2020] SC (Bda) 12 Comm, where the different tests of arguability in terms of 'reasonably arguable' 'arguable prospects of success' and 'reasonable prospect of success' were held to have no meaningful distinction. The hurdle is recognised by appellate courts considering the grant of leave as being a relatively low one.

14. I can well understand the Chief Justice's concern at the prospect of the OCM Claim, the only asset likely to be able to satisfy any part of GL's claim against CVL, being transferred out of the jurisdiction, and hence potentially not available to satisfy the claim. But as stated in Gee on Commercial Injunctions (7th Ed) § 12-040, "It is not every risk of a judgment being unsatisfied which can justify Mareva relief. The risk must be of dissipation which is improper or unjustifiable". The involvement of professional insolvency practitioners does indicate some measure of bona fides and would not support the contention that the purpose of the implementation of the Plan was the dissipation of the asset representing the OCM Claim. Indeed, it would indicate the contrary. In this case there are other factors to be considered; one such is the action of the South African authorities, which might reduce the value of the OCM Claim to zero, in any event. And the value of the claim has been the subject of widely varying estimates. Ultimately, the criticism of the transaction may or may not be justified.

15. But the key factor to be considered is the purpose of the transaction of which complaint is made. In this case it does seem to me to be arguable that the purpose of the implementation of the Plan is to preserve the value of TCL's asset, the OCM Claim, rather than to dissipate the value of that asset, or even to move the value of that asset out of the jurisdiction of Bermuda. And even that risk seems to me to be far from clear, given that TCL would remain in control of the claim through its ultimate subsidiary Liberty Coal. The factual position is complex, and factors such as the events in South Africa cannot be forecast with any degree of accuracy.

16. In the circumstances I would grant leave to TCL to appeal the Chief Justice's ruling refusing TCL's application to vary the freezing order so as to permit the implementation of the Plan.