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

DANIEL JAMES MCGOWAN

Contemnor

Before:	**Hon. Chief Justice Hargun**
Appearances:	**Mr. Mark Diel and Mr. Dante Williams, Marshall Diel & Myers Limited, for the Plaintiff**
	Mr. Paul Harshaw of Canterbury Law Limited for Templar Capital Ltd.
	Mr. Daniel McGowan appearing in person.
Dates of Hearing:	**5 July 2021**
Date of Judgment:	**2 August 2021**

JUDGMENT

whether a defendant is in contempt of court on ground of disobedience to an existing court order; whether a defendant is barred from being heard on ground of unpurged contempt of court; whether terms of the existing order are clear, certain and unambiguous

HARGUN CJ

Introduction

1. On 5 July 2021 the Court heard two applications on the behalf of the Plaintiff, Griffin Line General Trading LLC ("**Griffin Line**"). The first application is by way of Notice of Motion dated 10 May 2021 seeking declarations that Templar Capital Ltd ("**TCL**"), the Second Defendant, and Daniel James McGowan ("**Mr. McGowan**"), as sole director of TCL, are and continue to be in contempt of an injunction order made by Subair Williams J on 16 September 2020 (the "**Freezing Order**"). In relation to this application the Plaintiff seeks an order punishing TCL and/or Mr. McGowan for their contempt by imposing a daily fine in respect of each daily act of breach, with such penalty continuing until the terms of the Freezing Order have been complied with. The Plaintiff also seeks an order that Mr. McGowan be committed to prison for his contempt in failing to comply with the direction of this Court given in the Freezing Order.

2. The second application is made by the Plaintiff by Summons dated 24 June 2021 seeking an order that to the extent that paragraphs 6 (1) and 6(2) (as read with paragraph 4) of the Freezing Order do not prohibit TCL from taking steps to advance and/or implement the Revised Business Rescue Plan dated 11 September 2020 (the "**Rescue Plan**") approved in the South African Business Rescue Proceedings on 28 September 2021 concerning Optimum Coal Mine (Pty) ("**OCM**"); the Freezing Order be varied to prohibit the following actions:

(a) Acquiring OCM and its assets to a newly formed company ("**New OCM**") by debt-to-equity conversion;

(b) Converting TCL's claim against OCM (the "**OCM Claim**") into fixed equity in exchange for new OCM Class V shares;

(c) Taking any steps to advance and/or implement the Rescue Plan until further order of this Court;

(d) Any formal legal agreement required to give effect to the acquisition of OCM by New OCM or any other entity, corporation or individual; and

(e) Adopting any structure or option directly or indirectly, which takes or has the ability to take, the right of TCL over OCM outside Bermuda or beyond the jurisdiction and control of the Bermuda courts.

3. The Notice of Motion is supported by the Second and Third Affirmations of Mr. Kamal Singhala dated 9 May 2021 and 18 June 2021. In opposition TCL has filed the Affidavit of Brett Tate dated 11 June 2021 and the Affidavit of Mr. McGowan dated 14 June 2021.

Background

4. The background to these proceedings is set out in the First Affirmation of Mr. Singhala dated the 13 September 2020 filed in support of the Freezing Order.

5. This is the second action brought by Griffin Line in the Supreme Court of Bermuda. The first set of proceedings are against Centaur Ventures Limited ("CVL"), a company incorporated in Bermuda, the First Defendant in these proceedings. In the first proceedings Griffin Line claims recovery of US $104,127,604.72 (plus continuing interest) under two loan facility agreements dated 15 February 2016 and 7 November 2016.

6. The Court has given two Rulings in the first proceedings, both of which relate to a successful application for a freezing order against CVL in relation to the OCM claim. The first Ruling dated 22 June 2020 dealt with the ex parte application and the second Ruling dated 24 July 2020 dealt with the application by CVL to set aside the injunction, which application was unsuccessful.

7. As noted in the earlier Rulings in the first proceedings, the main asset of CVL which has any real value, is in the form of the OCM Claim valued at US $74,577, 288. The OCM Claim arises as a result of CVL having entered into coal trading contracts with OCM. However, OCM did not deliver and as a result owed CVL $74,577,285. On 19 February 2018 OCM entered into Business Rescue Proceedings in South Africa and around the same time CVL suspended its own trading activities which have never resumed. At the time CVL had been recognised in South African proceedings as OCM's largest independent creditor, and therefore a powerful voice with blocking vote within those proceedings. In April 2020, CVL signed an agreement to sell the OCM Claim to LURCO Group South Africa Proprietary Limited ("LURCO") for $73,359, 323.46. The Court granted the ex parte order on the basis that there was a real concern on part of Griffin Line that the expected payments to be made to CVL in respect of the OCM claim may be dissipated. The Court ordered that the injunction should be limited to the proceeds of the OCM Claim and further provided for the provision of information from CVL in relation to the OCM Claim.

8. CVL subsequently sought to set aside the ex parte injunction in the first proceedings and that resulted in the 24 July 2020 Ruling. 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*".

9. 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*."

10. It subsequently transpired that CVL (through Mr. McGowan) had sold the OCM Claim to TCL, a company owned by Mr. McGowan of which he was the sole director. A copy of the Cession Agreement between CVL and TCL dated 15 June 2020, produced in these proceedings, shows that the agreement on behalf of CVL, as the vendor of the OCM Claim, was signed by Mr. McGowan alone in his capacity as a director of CVL and on behalf of TCL, as the purchaser of the OCM Claim, the agreement was again signed by Mr. McGowan alone in his capacity as a sole director of TCL.

11. In the July Ruling 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. The Court formed the clear view that there was "*real risk*" of a dissipation of assets. In those circumstances the Court ordered that the injunction granted on 22 June and 2020 should not be discharged.

12. Following the discovery that CVL had disposed of the OCM Claim to TCL, as set out in the July 2020 Ruling, Griffin Line commenced these proceedings against CVL and TCL by Generally Endorsed Writ of Summons dated 11 August 2020. In these proceedings Griffin Line seeks an order and/or a declaration that the sale and/or assignment of CVL's interest, rights, options, and/or claims in and over OCM Claim to TCL pursuant to the Cession Agreement dated 15 June 2020 be set aside or pursuant to sections 36A-36E of the Conveyancing Act 1983 ("**the Set Aside Proceedings**"). Griffin Line also seeks consequential directions as the Court thinks fit for restoring the position to what it would have been if the sale and/or assignment had not been entered into and protecting the interests of Griffin Line.

13. CVL is presently in liquidation as a result of a winding up petition presented by a company affiliated to CVL on the ground that it is insolvent. At the hearing of these applications I understood Mr. McGowan to advise the Court that in the Set Aside Proceedings the liquidators of CVL will shortly be taking the position that they oppose the application to set aside the transaction to transfer the OCM Claim from CVL to TCL. Subsequent to the hearing the Court received the Defence filed by CVL in the Set Aside Proceedings and it appears that the actual position is to the contrary. Paragraph 5 of the Defence filed by CVL and dated 8 July 2021 states that the Joint Liquidators of CVL "*do not oppose the Plaintiff's claims."*

14. Following the filing of the Writ of Summons Griffin Line sought an injunction to protect the position pending the determination of its claim to set aside the transfer of the OCM Claim from CVL to TCL. In paragraph 42 of Mr. Singhala's First Affirmation he explained the rationale for seeking an injunction in the proceedings in the following terms:

> *"I further believe that unless restrained by an injunction, TCL/Mr. McGowan, now acting as a director of TCL, will continue to take steps to dispose of or further transfer on the OCM Claim and/or CVL's other assets pending the determination of the Set Aside Proceedings. This runs the risk of creating a dire situation where the transfer of the OCM Claim to TCL either cannot be unwound by directions of this Court or where TCL has no assets to satisfy any order this Court might make. In this regard, I wish to draw the Court's attention to paragraph 51 of the July Judgment where Honourable Chief Justice found there to be "solid and cogent evidence that there is a real risk of dissipation of assets of CVL". This position is not improved upon at all in light of the CHW Letter. Quite to the contrary, it appears that Mr. McGowan has misled the Court as to CVL's solvency and that the Company is now "<u>hopelessly insolvent</u>". Furthermore, Mr. McGowan is now actively seeking to consolidate control over CVL's remaining assets, including by ensuring that Mr. McGowan becomes the sole director of CVL's South African subsidiaries. Mr. McGowan, as the sole director of TCL, is likely to consider this course of conduct unless restrained by this Court."*

15. It was in these circumstances that Subair Williams J made the Freezing Order dated 16 September 2020. By paragraphs 4 -6 of that Order TCL was restrained from dealing with its assets and/or claims as follows:

> *"4.* ***DISPOSAL OF ASSETS***
>
> *Until further Order of the Court, the Second Respondent [TCL] must not-*
>
> *(1) Remove from Bermuda any of its assets which are in Bermuda up to the value of $74,577,285; or*
> *(2) In any way dispose of, deal with or diminish the value of his assets whether they are in or outside Bermuda up to the same value.*
>
> *5. Paragraph 4 applies to all the Second Respondent's assets whether or not they are in his own name of whether they are solely or jointly owned. For the purpose of this Order the Second Respondent's assets included any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Second Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.*
>
> *6. The prohibition in paragraph 4 in relation to the Second Respondent's assets extends to the following assets in particular-*
>
> *(1) TCL's interest, rights, options and/or claims in and over Optimum Coal Mine (Pty) Ltd in business rescue proceedings in South Africa (OCM Claim);*
>
> *(2) Any shares or any other interest whether held directly or indirectly by the Second Respondent in respect of any debt to equity conversion of the OCM Claim within the business rescue proceedings in South Africa and/or distribution related thereto including but not limited to shares in New OCM."*

16. The injunction Order also required TCL to provide information to Griffin Line. This was provided by paragraph 9 of the Order:

*"**PROVISION OF INFORMATION***

9. The Second Respondent shall forthwith and no later than 24 hours from the date of this Order and to the best of his ability disclose in writing to the Applicant's attorneys the information ordered to be produced in paragraphs 9(1) and 9(2) below. The obligations in 9(3) is a continuing obligation which shall continue for the duration of this Order:

(1) Full details of its assets worldwide whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.

(2) For details of any proposal to deal with the OCM Claim within or related to the business rescue proceedings in South Africa;

(3) All updated, varied, modified and/or amended such proposals as specified in paragraph 9(2) that may be sent or received by TCL in the business rescue proceedings in South Africa, which are material to the OCM claim, within 24 hours of such proposal being sent or received by TCL."

The contempt application

17. In relation to the contempt application Griffin Line takes a preliminary point that both TCL and Mr. McGowan should not be heard in their defence in relation to this application until they have purged their existing contempt of court. The issue arises in this way. On 15 October 2020, TCL and Mr. McGowan were found to be in contempt of court and were fined as follows:

    (1) TCL was required to pay into court forthwith a fine of $100,000.

    (2) Mr. McGowan was required to pay into court forthwith a fine of $50,000.

(3) Both TCL and Mr. McGowan were required to pay a penalty of $10,000 each per day they continue to be in breach of the terms of the injunction Order dated 16 September 2020.

18. Griffin Line contends that both TCL and Mr. McGowan owe a combined sum of $190,000 to the Court in unpaid fines ordered pursuant to the Order dated 15 October 2020. TCL remains in contempt of court for failure to pay its fines. In the circumstances Griffin Line submits that non-compliance with the Court's order of 15 October 2020 prevents TCL from making further submissions in relation to this current application (and any subsequent application) unless and until TCL and Mr. McGowan purge their contempt. Counsel for Griffin Line submits that such a course is in accordance with the Court of Appeal's decision in *Hadkinson v Hadkinson* [1952] P. 285. Counsel submits that such a course is appropriate as there is no other effective means securing that TCL complies with the existing orders of the Court.

19. Mr. Harshaw, appearing for TCL, contends that the supposed rule in *Hadkinson* is subject to exceptions and in particular if an application is made against the party in contempt of court, that party is entitled to be heard in defence of that application. Mr. Harshaw submits that the rule in *Hadkinson* is intended to prevent the party in contempt being heard in support of an application made by that party.

20. All judgments in *Hadkinson* accept that the rule is subject to exceptions. Romer LJ, with whom Somervell LJ agreed, appeared to accept, as contended by Mr. Harshaw, that the prohibition is primarily intended to prevent the party in contempt from being heard in support of an application made by that party. Romer LJ accepted that "*A person against whom contempt is alleged will also, of course, be heard in support of his submission that, having regard to the true meaning and intendment of the order which is said to have disobeyed, his actions did not constitute a breach of it; or that, having regard to all the circumstances, he ought not to be treated as being in contempt.*"

21. Romer LJ referred to the decision in *Gordon v Gordon* [1904] P. 163 where Vaughan Williams LJ expressed the rule as follows: "*Taking it generally, it has not been disputed in the discussion before us that this rule, that a person who is in contempt cannot be heard, prima facie applies to voluntary applications on his part - when he comes and asks for something; and not to cases in which all he is seeking is to be heard in respect of matters of defence*."

22. The Court was not referred to any other cases where the rule in *Hadkinson* has been considered. However, it would be wrong to assume that *Hadkinson* has not been further refined in subsequent cases. In *Mubarik v Mubarik* [2006] EWHC 1260 (Fam) Bodey J considers the further refinements at paragraphs 47 - 49 of the judgment. At paragraph 47 Bodey J states:

> *"**[47]** The basic principles applicable to Hadkinson applications are now clear. There was once thought to be a rule (with certain defined exceptions) that a person in contempt would not be heard. However, in Hadkinson v Hadkinson itself [1952] P 285, 298, [1952] 2 All ER 567, [1952] 2 TLR 416, Lord Denning said:*
>
> > *". . . It is a strong thing for a court to refuse to hear a party to a cause and it is only be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing [his] compliance . . . I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not, of itself, a bar to his being heard but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."*

> *This "more flexible" approach was accepted and approved by House of Lords in X Ltd v Morgan-Grampian (Publishers) Ltd [1991] 1 AC 1, [1990] 2 All ER 1, [1990] 2 WLR 1000, as being in accord with ". . . contemporary judicial attitudes to the importance of ensuring procedural justice" (per Lord Bridge of Harwich)."*

23. Having regard to the "*more flexible*" approach it would not, in my judgment, be just or appropriate to prevent TCL or Mr. McGowan from being heard in relation to the present contempt of court application bearing in mind that it is their contention that the acts complained of cannot constitute contempt of court as those acts are not in breach of the Freezing Order dated 16 September 2020. This is particularly so given that Griffin Line seeks an order that Mr. McGowan be committed to prison for his contempt in failing to comply with the provisions of the Freezing Order.

24. In relation to the factual basis for the present contempt application, Griffin Line contends that on or about 15 March 2021, TCL received the status report in the OCM Rescue Plan (the "**March 2021 Report**"). The March 2021 Report contains a schedule of actions to be completed by TCL by no later than 28 September 2021. Additionally the March 2021 Report contains acts completed by TCL since the Freezing Order of 16 September 2020 including preparatory steps to dispose of, or deal with and/or diminish the OCM Claim. The steps, Griffin Line argues, include the following:

> *(8) The operations planned at New OCM will create approximately 2000 employment opportunities. The BRPs [Business Rescue Practitioners] and TCL have engaged with (among others) the National Union of Mineworkers throughout the process, and continues to do so on a weekly basis. It is intended that the representative and NUM will sit on the Implementation Committee that TCL has proposed to put in place to ensure a smooth transfer of OCM's assets and operations to New OCM.*

(9) TCL has engaged with approximately 10 funding partners, and it is in the process of finalizing its chosen mix of debt and/or equity that were aligned with the proposed vendor financing component

…

(11) A first draft of the Sale and Purchase Agreement was provided to the BRPs by TCL, and this agreement is expected to be finalized between the parties by within the next month.

…

(14) TCL has indicated to the BRPs that it would like to commence mining on a portion of its LOM plan on an expedited basis, and it is expected that an amount of approximately R40 million will be placed into trust with its attorneys for this purpose.

…

(16) TCL has incorporated New OCM and its immediate holding company.

25. Griffin Line submits that the March 2021 Report contained updated information that was material to the OCM Claim and TCL's failure to disclose the March 2021 Report is in breach of paragraph 9 (2) and 9 (3) of the Freezing Order.

26. Griffin Line also relies on the fact that on or about 19 April 2021 TCL received a further status report in the OCM Rescue Plan (the "**April 2021 Report**"). Griffin Line contends that the April 2021 Report contains, inter alia, information on steps taken by, or proposed to be taken by TCL, since the Freezing Order to deal with the OCM claim and as such contends that this information should have been provided by TCL to Griffin Line. The April 2021 Report refers to the following steps taken by, and proposed to be taken by, TCL:

"(2) Notification by TCL to the BRPs that it is satisfied with the results of the studies undertaken by it by no later than 31 January 2021. TCL confirmed on 14 January 2021 that it is satisfied with the results of the studies undertaken by it as

contemplated in paragraph 13.1 of the adopted business rescue plan. The written notification constituted due fulfillment of this suspensive condition as contemplated in paragraph 15.1 of the adopted business rescue plan.

(3) By no later than 60 (sixty) days following 1 January 2021, TCL must furnish the BRPs with proof acceptable to them that New OCM (a new private company incorporated in South Africa), (or TCL, as the case may be) has concluded definitive formal financing agreements for funding facilities to the drawdown in the estimated amounts required to enable the mine to be brought into immediate production and progressively restored to full production within 18-24 months thereafter.

(4) By no later than the end of July 2021, TCL and BRPs must:

> *a. Finalise, adopt, execute and/or register all relevant constitutive and corporate documents, agreements or other deeds required to give effect to (i) the establishment of New OCM; (ii) the assumption of liability for Claims; (iii) the debt-to-equity conversions; (iv) the shareholder arrangements and (v) the administration of distributions;*
>
> *b. Appointment of an administrator;*
>
> *c. Conclude the formal legal agreements required to give effect to the acquisition of the Business and related transactions*

…

(6) By no later than 28 September 2021:

> *a. All the above-mentioned agreements must have become unconditional in accordance with its terms, save for any suspensive condition requiring the other of them to be unconditional.*
>
> *b. All necessary regulatory approvals to the agreements must have been obtained, including in particular the consent of the Minister of the DMRE in terms of section 11 of the Mineral and Petroleum Resources Development Act and all relevant merger approvals by the Competition Authorities.*

c. The trustees of the Optimum Mine Rehabilitation Trust must have been replaced with nominees acceptable to TCL with the approval to the extent required of the DMRE

27. Griffin Line contends that the April 2021 Report contained updated information that was material to the OCM claim and TCL's failure to disclose the April 2021 Report was in breach of a paragraph 9 (2) and (3) of the Freezing Order.

28. In response Counsel for TCL notes that Griffin Line's application appears to be based on the assumption that a simple status update amounts to a "*proposal*" to "*deal with*" the OCM claim within or related to the business rescue proceedings and that such a status update is a "*proposal*" which is "*material to the OCM claim*"

29. Counsel for TCL submits that the business rescue status reports are merely information and do not fit the description of "*proposal*" within the meaning of paragraph 9 of the Freezing Order. Counsel argues that the Freezing Order contains no obligation to disclose the "*existence*" of mere information.

30. TCL also notes that Griffin Line now appears to accept TCL's position that the Freezing Order does not prohibit TCL from participating in the Rescue Plan, because Griffin Line has applied by Summons dated 24 June 2021 for an order that the Freezing Order be varied so as to, *inter-alia*, prevent TCL from "*taking any steps to advance and or implement the Rescue Plan until further order of this Honourable Court*."

31. Counsel for TCL further argues that had Griffin Line believed it was entitled to the status reports detailed in section 6 of the Rescue Plan, such could have been requested or queried at any point since September 2020. Counsel argues that Griffin Line knew or must have known of the existence of these status reports as the Rescue Plan was approved, and a copy of the Rescue Plan was exhibited to Mr. Singhala's First Affirmation filed on 13 September 2020.

32. In considering these rival submissions in relation to the proper scope of the Freezing Order it has to be borne in mind that it is an established rule that no order or undertaking will be enforced by contempt unless its terms are clear, certain and unambiguous (see: *Marketmaker (Beijing) Co Ltd v CMC Group PLC* [2009] EWHC 1445 (QB), Teare J at [18]).

33. In relation to the provision of the status reports Griffin Line relies upon paragraph 9 (3) of the Freezing Order, which requires TCL to provide to Griffin Line "*(3) All updated, varied, modified and/or amended such proposals as specified in paragraph 9 (2) that may be sent or received by TCL in the business rescue proceedings in South Africa, which are material to the OCM claim, within 24 hours of such proposal being sent or received by TCL."*

34. Whilst the Court readily accepts that Griffin Line's position that the status reports contained *updated* information that was material to the OCM claim is eminently arguable, it is far from clear that the terms of paragraph 9 (3) can be said to be clear, certain and unambiguous requiring TCL to provide to Griffin Line any status reports received by it. It seems to me that the contrary position, contended for by Mr. Harshaw, that the status reports are merely information and do not fit the description of a "proposal" within the meaning of paragraph 9 of the Freezing Order is equally arguable.

35. In the circumstances the Court is not satisfied that it would be just or proper to hold that TCL and Mr. McGowan are in contempt of court on the basis that they have deliberately disobeyed the clear, certain and unambiguous terms of the injunction Order (paragraph 9 (3)). This is particularly so in circumstances where the Notice of Motion seeks an order that Mr. McGowan be committed to prison for his contempt in failing to comply with the terms of paragraph 9 (3) of the Freezing Order.

36. In relation to the argument that TCL's participation and steps taken in the Rescue Plan in South Africa amounted to a breach of the Freezing Order, again I can see that the contention is certainly arguable. I say that as paragraph 4(2) expressly provides that TCL must not "*in any way dispose of, deal with or diminish the value of his assets whether they are in or outside of the Bermuda up to the same value [$74,577,285]"*. Further, paragraph 6 (1)

extends the prohibition contained in paragraph 4 (2) to "*TCL's interest, rights, options and/or claims in and over Optimum Coal Mine (Pty) Ltd in business rescue proceedings in South Africa (OCM Claim)"*. However, it cannot be said that the position is clear, certain and unambiguous.

37. First, the Freezing Order does not expressly prohibit in terms that TCL is restrained from participating in the OCM Rescue Plan or from voting in relation to it.

38. Second, paragraph 9 (2) assumes that a state of affairs may arise when TCL is the owner of the shares in New OCM: "*Any shares or any other interest whether held directly or indirectly by [TCL] in respect of any debt to equity conversion of the OCM claim within the business rescue proceedings in South Africa and/or distribution related thereto <u>including but not limited to shares in New OCM</u>*." TCL could only become a shareholder of New OCM, by converting its OCM claim into shares of New OCM, if the Rescue Plan was implemented.

39. Third, the Summons issued by Griffin Line dated 24 June 2021 is premised on the assumption that the injunction Order may not be clear so as to prohibit TCL from taking steps in the Rescue Plan. Paragraph one of the Summons states "*To the extent that paragraph 6(1) and 6(2) (as read with paragraph 4) of the injunction granted by the Honourable Judge Subair Williams on 16 September 2020 (the "**Freezing Injunction**") does not prohibit Templar Capital Ltd ("**TCL**") from taking steps to advance and/or implement the Revised Business Rescue Plan (dated 11 September 2020) (the"**Rescue Plan**") approved in the South African Business Rescue Proceedings (on 28 September 2021) concerning Optimum Coal Mine (Pty) ("**OCM**")… the Freezing Injunction be varied to prohibit the aforesaid actions*." The terms of the Summons dated 24 June 2021 recognise that the Freezing Order is not clear, certain and unambiguous in prohibiting TCL from participating and/or taking steps in the Rescue Plan.

40. In the circumstances and having regard to the above matters the Court does not consider that the Court can reasonably conclude that the terms of the Freezing Order are clear, certain and unambiguous in prohibiting TCL from participating and/or taking steps in the

Rescue Plan. Accordingly, it would not be just or appropriate to hold TCL and/or Mr. McGowan guilty of contempt of court on the basis that TCL has participated in the Rescue Plan.

Summons dated 24 June 2021

41. By this Summons Griffin Line seeks to vary the Freezing Order so as to prohibit TCM from taking the following actions**:**

    a. Acquiring OCM and its assets through newly formed company ("**New OCM**") by debt to equity conversion;

    b. Converting TCL's claim against OCM into a fixed equity in exchange for new OCM Class V shares;

    c. Taking any steps to advance and/or implement the Rescue Plan until further order of this Court;

    d. Concluding any form of legal agreement required to give effect to the acquisition of OCM by New OCM or any other entity, corporation or individual; and

    e. Adopting any structure or option, directly or indirectly, which takes or has the ability to take, the rights of TCL over OCM outside Bermuda or beyond the jurisdiction and control of the Bermuda Courts.

42. In relation to this application for Mr. Harshaw, on behalf of TCL, accepts that in the event all the suspensive conditions have been complied with, TCL will have to come back to the Court to have the injunction lifted or varied so that TCL is allowed to consummate the transaction. Mr. Harshaw accepts that prior to the exchange of debt into equity transaction

is consummated TCL will have to obtain the approval of this Court. However, it is not clear to the Court, in terms of timing, when such an application will be made to the Court.

43. The concern of Griffin Line, as noted in Mr. Singhala's First Affirmation, is that the implementation of the Rescue Plan, whereby TCL's OCM Claim is exchange for shares in New OCM runs a significant risk that by the time the present Set Aside Proceedings are concluded, the assets represented by the OCM Claim might be completely outside the reach of this Court or might be dissipated altogether. This is particularly so as the exchanged assets (shares in New OCM) are outside the jurisdiction and it is proposed that the shares in New OCM are held through a South African subsidiary of TCL. Griffin Line fears that it will be open to the South African subsidiary to enter into further transactions with respect to the New OCM shares making it virtually impossible for this Court to grant an effective remedy, in the event Griffin Line is successful in the Set Aside Proceedings. The Court considers that these are reasonable concerns on the part of Griffin Line and the Court should be anxious to preserve the position that an effective remedy can be provided to Griffin Line in the event it is successful in its claim to set aside the transfer of the OCM claim from CVL to TCL.

44. In his affidavit dated 14 June 2021 Mr. McGowan cautions the Court against granting the relief sought by Griffin Line in the Summons as it will interfere with the insolvency proceedings pending in South Africa under South African legislation in relation to a mining enterprise which is of national importance. Mr. McGowan points out that the Rescue Plan was published by OCM's BRPs and circulated to OCM's creditors on 11 September 2020. He points out that OCM has over 340 creditors with 87.79% of creditors voting in favour of the Rescue Plan. No motions were tabled at the relevant meeting to modify or vary the Rescue Plan and that no creditors have brought proceedings to set aside the Rescue Plan to date.

45. Mr. McGowan and Mr. Brett Tate, head of litigation at Andersen South Africa, assert that the Rescue Plan is binding on OCM, the BRPs and all creditors since the Rescue Plan was approved, unless and until set aside by a South African Court, or until the proposals in the

Rescue Plan are fully implemented and the BRPs file a notice of substantial implementation, or until the Rescue Plan fails based on the various conditions within the Rescue Plan.

46. Mr. Harshaw, on behalf of TCL, submits that the Court should be very slow to make an order which will have the practical effect of interfering with the workings of a legal process (OCM Rescue Plan) in a foreign land that will deprive certain creditors of a company in that foreign land of vested rights under the relevant laws.

47. In the circumstances the Court will not presently rule on the substantive relief sought in the Summons. However, the Court is anxious to preserve the position that the OCM Claim and any assets acquired by its exchange (New OCM shares or any other asset) remain within the control of this Court pending the outcome of the Set Aside Proceeding. With the aim of achieving this object the Court orders, on a temporary basis, that TCL and any of its subsidiaries or any affiliated company are, with effect from 2 August 2021, restrained from taking any further steps to implement the Rescue Plan without prior approval of this Court in relation to such steps, pending the determination by this Court of any additional measures to preserve the assets of TCL and in particular the OCM Claim or any other asset acquired in exchange of the OCM claim. "*Steps to implement the Rescue Plan*" include any steps designed to convert TCL's claim against OCM into fixed equity in exchange for New OCM Class V shares.

48. For the purposes of considering what further steps the Court should take to preserve the OCM Claim, TCL is ordered to file an affidavit, within the next 21 days, setting out (i) full information in relation to the debt to equity conversion contemplated in relation to the OCM Claim; (ii) value placed upon the OCM Claim for the purposes of the debt to equity conversion; (iii) the corporate or other structure contemplated to own TCL's rights to the shares in New OCM; (iv) breakdown of the composition of the shareholders of New OCM; and (v) the composition of the Board of Directors of New OCM.

49. The Court directs that the Summons be adjourned to a date to be fixed by the Registrar at which time the Court will consider the evidence filed by TCL and any additional evidence filed by Griffin Line and will consider whether and if so what additional relief should be

granted to Griffin Line in order to preserve the assets of TCL pending the determination of the Set Aside Proceedings.

Dated this 2nd day of August 2021

NARINDER K HARGUN

CHIEF JUSTICE