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:	**Hon. Chief Justice Hargun**
Appearances:	**Mr. Mark Diel and Mr. Dantae Williams, Marshall Diel & Myers Limited, for the Plaintiff**
	Mr Delroy Duncan QC and Mr Ryan Hawthorne of Trott & Duncan for the 2nd Defendant
Dates of Hearing:	**15 February 2022**
Date of Judgment:	**22 March 2022**

JUDGMENT

Application for fortification of undertaking as to damages; principles to be applied; security for costs on ground that the plaintiff is outside the jurisdiction

Hargun CJ

Introduction

1. Following the Judgment of this Court dated 2 August 2021, the Court heard four applications on 15 February 2022. The four applications are:

2. First, the adjourned application on behalf of the Plaintiff, Griffin Line General Trading LLC (**"Griffin Line"**) to prohibit Templar Capital Ltd (**"TCL"**) to amend the injunction granted by Subair Williams J on 16 September 2020 (the **"Freezing Order"**) and to prohibit TCL from taking steps to advance and/or implement the Revised Business Rescue Plan (dated 11 September 2020) (the **"Plan")** approved in the South African Business Rescue Proceedings (on 28 September 2021) concerning Optimum Coal Mine (Pty) **("OCM").**

3. Second, an application on behalf of TCL to vary the Freezing Order to allow TCL to implement the Plan.

4. Third, an application on behalf of TCL for an order to amend the undertaking given by Griffin Line in relation to the Freezing Order and an order that Griffin Line provide fortification for the undertaking by payment of US$23,586,000, failing which the Freezing Order should be discharged.

5. Fourth, an application by TCL for an order that Griffin Line pay security for costs in the amount of US$1,535,399**.**

Background

6. The background to these proceedings is set out in the earlier Rulings and Judgments relating to Griffin Line and Centaur Ventures Ltd (**"CVL"**) and in particular the Judgment of this Court dated 2 August 2021 at [4] to [15]. In considering these applications the Court bears in mind that this is not an ordinary commercial dispute between parties to a freely negotiated contract. In essence, these proceedings relate to a claim by Griffin Line that the CVL's sale and assignment of the OCM Claim (defined below) to TCL under an agreement dated 15 June 2020 should be set aside pursuant to sections 36A to 36E of the Conveyancing Act 1983 on the ground that the sale and assignment of the OCM Claim was a disposition of property made with the requisite intention and at an undervalue and is voidable at the instance of an eligible creditor in the position of Griffin Line. The background facts are essential to the determination of these applications and are helpfully set out in the written submissions on behalf of Griffin Line which the Court considers to be accurate.

7. 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").**

8. 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.

9. CVL entered into coal trading contracts with OCM. OCM failed to deliver and ultimately owed CVL a debt of $74,577,285 million (the **"OCM Claim").**

10. 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.

11. 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.

12. 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.

13. 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.

14. 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*".

15. 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.

16. 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.

17. 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 (the **"Statutory Demand"**).

18. 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"**).

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

20. 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***."

21. 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*". 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.

22. 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.

The application to vary the Freezing Order

23. On 5 July 2021, the Freezing Order was varied so as to prohibit TCL from taking any steps to implement the Plan in relation to OCM. TCL submits that conditions should be removed from the Freezing Order, and the Court should specifically permit TCL to take such steps

as may be necessary to ensure that the Plan is implemented.

24. TCL argues that the Court should be guided by four interrelated legal principles which are particularly relevant to the question of whether the Court should prevent the Plan from proceeding or give specific permission for TCL to take such steps as may be necessary to ensure that the Plan is implemented.

25. First, TCL submits, when it comes to freezing orders, "*the court's concern is with unjustified disposals*" relying upon *Organic Grape Spirit Ltd v Nueva IQT SL* [2020] 2 CLC 176 at [15]. Accordingly, when considering whether to permit a transaction, TCL argues, the Court should sanction it unless it appears that the defendant wishes to undertake it with the object of putting his assets beyond reach or that the transaction is so speculative that it has no reasonable prospect of success. TCL argues that the transaction in issue, i.e. the implementation of the Plan, is not an unjustified disposal of assets. It is not being carried out with the object of putting assets beyond the reach of Griffin Line and is not so speculative as to have no reasonable prospect of success

26. Second, TCL submits, *"Mareva relief should only be granted for the purpose of preventing the defendant from honouring [a pre-existing legal obligation which it is appropriate for him to satisfy]"*: *Gee on Commercial Injunctions (7th Ed)* at 12-040. TCL argues that the transaction is one that TCL has a pre-existing legal obligation to take steps to implement.

27. Third, TCL submits, a freezing order should not be used as an instrument of ransom relying upon *Camdex International Ltd v Bank of Zambia* (No 2) [1997] 1 WLR 632, in which the plaintiff judgment creditor had obtained a freezing order against the defendant judgment debtor and the defendant applied for permission for the release by it of unissued banknotes for export to Zambia. The English Court of Appeal granted that permission, holding that: (i) as the unissued notes had no value on the open market and were therefore not an asset on which execution might be levied, their retention was not the proper use of the *Mareva* jurisdiction; and (ii) not releasing the banknotes caused substantial hardship for third parties. Sir Thomas Bingham MR explained the reasoning at 636H to 637 B:

> *"It seems to me that in a situation such as this, it is important to go back to first principles. A Mareva injunction is granted to prevent the dissipation of assets by a prospective judgment debtor, or a judgment H debtor, with the object or effect of denying a claimant or judgment creditor satisfaction of his claim or judgment debt. Here, it is plain that the defendant wants to transfer these bank notes to Zambia. In doing so it would not, as it seems to me, dissipate any asset available to satisfy the judgment debt because the asset has, in the open market, no value. It is not an asset of value to the plaintiff or other creditors of the defendant if it were put up on the market and sold. It is true that the denial of this asset to the defendant would put the defendant in a position of such extreme difficulty that the defendant would seek to pay a price beyond the market value of the asset in order to recover it, but that is, as it would seem to me, what would in ordinary parlance be described as holding someone to ransom."*

28. TCL argues that, in using the Freezing Order as a *"roadblock"* to the implementation of the Plan, Griffin Line is attempting to hold TCL to ransom. TCL contends that if the Plan does not go ahead, the OCM Claim will be rendered worthless and there will be catastrophic consequences for TCL, and there would be no corresponding benefit to Griffin Line *qua* Plaintiff or prospective judgment creditor.

29. Fourth, TCL submits, a freezing order should not be granted if, or should be varied to the extent that, it would destroy the value of the very thing that it is purportedly being granted to protect and/or prevent the relevant defendant from acquiring assets.

30. Seeking to apply these principles, TCL argues, that the transaction in issue, i.e. the implementation of the Plan, is not an unjustified disposal of assets. It is not being carried out with the object of putting assets beyond the reach of Griffin Line and is not so speculative as to have no reasonable prospect of success. TCL argues that it is clear that, should the Freezing Order prevent the Plan from being implemented, it will destroy the value of the very thing that it was purportedly granted to protect, namely the OCM Claim, and would prevent TCL from acquiring valuable rights.

31. 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. Furthermore, 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. TCL, in the Court's view, cannot pray in aid alleged legal obligations it has voluntarily elected to assume with the full knowledge that its ownership to the OCM Claim was being challenged in this Court.

32. Having regard to the evidence outlined at [6] to [22] above the Court does not accept that the corporate structure of New OCM (referred below as "**Liberty Coal**") is not designed and will not have the consequence that if Griffin Line is successful in setting aside the transfer of the OCM Claim from CVL to TCL, it will be virtually impossible to enforce that judgment against the assets represented by the OCM Claim. 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.

33. It appears that the corporate structure established to own TCL's rights in relation to the OCM Claim in Liberty Coal is as follows:

Company	Shareholding	Director
TCL	Owned 100% by Daniel McGowan	Daniel McGowan sole director

Liberty Ventures (Singapore) PTE Ltd **("LVS")**	Owned 100% by TCL	Information not provided
Liberty Energy (Ply) Ltd **("LE")** (South Africa)	Owned 100% by LVS	Information not provided
Liberty Coal (South Africa)	Owned 100% by LE	Currently Mr McGowan and Ulrich Bester

34. 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 the following will occur:

    (1) TCL will transfer control or ownership in the OCM Claim to an entity outside Bermuda, thereby making it virtually impossible to enforce any judgment of this Court against the assets represented by the OCM Claim. The current structure filed by TCL in the revival plan of OCM includes holding entities incorporated in South Africa and Singapore, which confirms TCL's intent to move the OCM Claim beyond the jurisdiction of Bermuda Court; and

    (2) Allowing the implementation of the Plan will lead to TCL creating third party rights which would make it impossible to unwind the transaction.

35. 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. The Court accepts Griffin Line submission that the present structure benefits Mr McGowan to the detriment of Griffin Line:

    (1) Mr McGowan will never repay the loan CVL obtained from Griffin. Mr McGowan (through CVL) used the loaned funds to purchase contracts in

OCM that ultimately led to CVL acquiring the OCM Claim.

(2) CVL, although insolvent, ceded its claim in OCM to TCL through transactions executed by Mr McGowan for CVL and TCL. Mr McGowan (through CGF) wound up CVL after its most valuable asset, was ceded to Mr McGowan (TCL). Mr McGowan (through TCL) is now the beneficiary of the loaned funds from Griffin Line.

(3) Mr McGowan (through TCL) stands to benefit substantially through converting the OCM Claim into equity in Liberty Coal.

(4) Mr McGowan (through Liberty Coal) has set up a layered corporate structure to hold Liberty Coal which creates third-party rights and removes any possibility of Griffin Line recovering the funds loaned.

36. As noted, Griffin Line points out that TCL acquired the OCM Claim using the funds loaned by Griffin Line (in CVL). CVL acquired rights under OCM as a result of funds loaned under the Facility Agreements. CVL then ceded its claims over OCM to TCL who now possess the rights acquired from CVL under the funds loaned through the Facility Agreements, which, CVL now asserts are the proceeds of money laundering. In proceedings issued by CVL in this Court (2020 No 437) by a Writ of Summons dated 2 December 2020 CVL claims, *inter alia*, that Griffin Line, Mr Kamal Singhala, Mr Akash Garg and Mr Jitin Garg *"facilitated what [CVL] now believes was the proceeds of money laundering, by way of a loan to [CVL] which in turn [Mr Akash Garg], acting in his capacity as a director of [CVL] advised, and/or instructed and/or facilitated the advance of various loans from [CVL] 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 [CVL]. [CVL] was therefore the victim of a layering scheme orchestrated by the [Defendants] so as to distribute the funds borrowed from [CVL] to entities associates of the [Defendants]."*

37. The Court accepts Griffin Line submission that if the funds loaned to CVL truly are the proceeds of crime, this assertion is another reason why TCL's application for variation should be resisted because to allow the variation will allow dissipation of assets.

38. The appropriate way forward, in the Court's view, is for TCL to seek a stay or an adjournment of the implementation of the Plan pending the determination of the set-aside proceedings in this Court. In that regard, as indicated at the hearing, the Court will assist the parties by allowing this matter to be heard as speedily as possible. The Court will assist the parties in providing further directions, if required, in relation to such a speedy hearing. The Court also notes that an application has been made by the South African Director of Public Prosecutions seeking to "*preserve*" the OCM Claim, which if granted would prevent the debt-to-equity swap contemplated by the Plan and therefore the implementation of the Plan itself. It is understood that a clear picture may emerge by or before 25 March 2022 in this regard.

Terms of undertaking and fortification of the undertaking

39. Paragraph 1 of Schedule B of the Freezing Order provides that *"if the court later finds that this Court are caused loss to [TCL] and decides that [TCL] should be compensated for the loss, [Griffin Line] will comply with any order of the Court may make <u>but so that this undertaking is limited to the property and assets in [Griffin Line]</u>".*

40. TCL contends that the underlined words are non-standard and cut down the breadth of the cross undertaking. TCL submits that there is no reason why Griffin Line should have given, or why it should now be permitted to rely upon, such as a limited, non-standard cross undertaking.

41. Griffin Line contends that TCL's application to vary the terms of the Freezing Order should not be allowed because TCL failed to take this point at the previous hearings. Further, Griffin Line contends that the current parameters of the Freezing Order are unlimited.

42. In the ordinary case the enforcement of any order this Court may make in relation to any

loss suffered by TCL against Griffin Line would be limited to the property and assets of Griffin Line. However, any order this Court may make in respect of the loss suffered by TCL should not be limited by reference to the property and assets of Griffin Line. Accordingly, the Court is persuaded that the words *"but so that this undertaking is limited to the property and assets in [Griffin Line]"* should be deleted in paragraph 1 of Schedule B of the Freezing Order.

43. In relation to the application for fortification of the undertaking TCL refers the Court to the decision of the English Court of Appeal in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2015] 1 WLR 2309 where the court held:

    (1) "*Since the claimant has obtained a freezing order preserving assets over which it may be able to enforce on the basis of having shown a good arguable case, it is only appropriate that if the defendant can show a good arguable case in consequence of the making of the order, it should equally be protected*." [52]

    (2) "*It is completely contrary to principle to require proof on the balance of probabilities on such an application*." What is required is "*(i) an intelligent estimate to be made of the likely amount of any loss which may be suffered by the applicant for fortification…by reason of the making of an interim order… (ii) the court to ascertain whether there is sufficient level of risk of loss to require fortification…(iii) that the loss has been or is likely to be caused by the granting of the injunction*" [53] (numbering added)

    (3) "*In some cases the assessment of loss may at the interlocutory stage be difficult. It is in such cases that an intelligent estimate is required. An intelligent estimate will be informed and realistic although it may not be entirely scientific*." [53]

    (4) "*As to causation, it is sufficient for the court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered… it is of course open to the defendant to demonstrate…*

that there is no causal link between the granting of the injunction order and the loss in question. If however, disapproving the asserted causal link as to which a good arguable cause is shown requires the deployment of extensive contentious evidence and argument that is not an exercise to be attempted at the interlocutory stage." [54]

44. As to the intelligent estimate of the likely amount of loss caused by the failure of the Plan TCL asserts that TCL and its subsidiaries' share of the loss of future profits from bringing OCM's mine back into operation is conservatively estimated at US$ 23,586,779.60 over a five-year period.

45. If the Plan fails, TCL asserts that it will have wasted costs in the sum of circa US$ 12.3 million.

46. TCL also contends that if the Plan fails because TCL is unable to fulfil its obligations under it, it will be exposed to very substantial damages claims and those claims could amount to more than US$ 300 million.

47. In the circumstances TCL submits that there is plainly a sufficient level of risk of loss to require fortification. TCL also submits that it is clear that the Freezing Order will be an effective cause of the loss. As a result, TCL seeks fortification by the provision of security reasonably satisfactory to it in the sum of US$ 23,586,000, which it says is the estimate of loss of expectation value.

48. In response Griffin Line argues that TCL does not have a good arguable case of loss in an amount that the Court can intelligently estimate. Further, TCL is unable to say with any certainty what the estimated loss would be because the estimated loss is not a loss TCL will experience. Paragraph 61 of McGowan5 reads that *"If the Plan fails, TCL will lose, via its subsidiaries, the value that would have accrued from bringing OCM back into production."* On Mr McGowan's own evidence, Griffin Line argues, the estimated losses are losses for third parties who are not before the court, nor have they made an application to the Court.

49. In relation to whether there is sufficient level of risks of loss Griffin Line contends that it should not have to fortify its undertaking in circumstances where the Freezing Order already contains an undertaking as it relates to third parties

> *Schedule B*
>
> *4. The Applicant will pay the reasonable cost of anyone other than the First Respondent and Second Respondent which have been incurred as* a *result of this Order including the costs of ascertaining whether that person holds any of the Second Respondent's assets and that if the Court later finds that this Order has caused such* a *person loss, and decides that the person should be compensated for that loss, the Applicant will comply with any Order the Court may make but limited in like manner* as *undertaking 1 above.*

50. In relation to causation Griffin Line contends that TCL's application fails on causative link between the purported losses being caused by the Freezing Order. It argues that in paragraphs 44 to 49 of McGowan6, Mr McGowan acknowledges that the business rescue practitioners have given an undertaking which in fact means that the Plan cannot be implemented prior to 25 March 2022. Thus, argues Griffin Line, at present, there is no causative link between the purported losses being 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.

51. In relation to these contentions the Court accepts that in relation to the loss of future profits these losses are likely to be suffered by TCL's subsidiaries and not by TCL itself. The Court also accepts that the estimate of damages to be suffered by TCL is highly speculative. In this regard it is to be noted that it is the expert evidence of Mr Daniels SC that "*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…"

52. The above factors would tend to militate against an order requiring the provision of fortification of the undertaking for damages. Leaving these factors aside, the Court considers that in the exceptional circumstances of this case it would not be just to make such an order. The Court accepts Griffin Line's submission that it would be wrong in principle for the Court to require Griffin Line to post security in any amount in circumstances where the funds loaned by Griffin Line, that Mr McGowan is refusing to repay (in excess of US$104 million), are the funds used by Mr McGowan to secure the OCM Claim. The effect of requiring that Griffin Line to provide fortification in the amount sought is likely to stifle the pursuit of this claim against TCL which is, on Griffin Line's case, the beneficiary of Mr McGowan's wrongdoing. This is not a case where TCL and Mr McGowan seek fortification in relation to an asset that they purchased with their own funds.

53. In *Orb "CT-Mobile" v IPOC International Growth Fund Limited* [2006] Bda L.R. 53 Kawaley J (as he then was) provided helpful guidance at paragraphs 43 to 46 which is relevant to the fundamental consideration outlined in the previous paragraph:

> *43.* "*I declined to require that CTM fortify the undertaking it eventually agreed to furnish for three main reasons.* ***Firstly, 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****. This is particularly the case having regard to the view I take at this interlocutory stage of the apparent merits of the parties' respective cases, which entitles the Court to disregard any documented risk that the Plaintiff will not have the resources to honour the undertaking: Gee, "Commercial Injunctions", 5th edition (Sweet and Maxwell: London, 2004), paragraph 11.003. In this case,*

in any event, it is far from clear that CTM would not be able to compensate IPOC for any damage caused by the grant of the mandatory injunction sought and granted.

44. Secondly, although I did not have sufficient time to fully consider the interesting constitutional point raised by Mr. Attride Stirling in opposition, ***in the circumstances of the present case, it did seem to me that requiring such fortification would not only arguably discriminate unreasonably against CTM as a foreign litigant, but also potentially deprive it of its constitutional right of access to the Court****. The time involved to put such fortification in place and the huge sums involved, even if a small percentage of the share value was ordered as security, would on an application for urgent relief likely constitute a substantial procedural impediment to the Plaintiff obtaining substantive justice from this Court.*

45. ***Thirdly, in my view this case is in any event exceptional, and outside of the typical scenario where a cross-undertaking is given on the grant of an injunction which deprives the defendant of the use of what are, prima facie, their own assets.*** *Ordering IPOC to lift the arrest of the shares obtained by IPOC in the St. Petersburg Proceedings, is not depriving IPOC of the use of what are prima facie its own assets in circumstances where it seems unlikely that any material breach of the undertaking offered by the Plaintiff will occur. Moreover, the Plaintiff's action, in support of which the present interlocutory relief is based, is the unusually straightforward claim of seeking to enforce an arbitration agreement which the Defendant has itself invoked and does not contend is invalid. The strength of the Plaintiff's claim turns not on complicated untested evidence, but on a narrow foreign law analysis of the scope of an arbitration clause, in circumstances where the Defendant has yet to present a coherent basis for concluding that claims for rectifying the contracts in question, albeit based on Russian law arguments, fall without the arbitration agreements."*

54. *Gee on Commercial Injunctions* (7th Ed) confirms at paragraph 21-030 that the court may consider it appropriate not to require the fortification when arguably the plaintiff is unable to provide security by reason of the very conduct of which complaint is made in the proceedings for redress. *Gee* relies upon *Orb a.r.l v Ruhan [*2016] EWHC 850 (Comm) at [198] where Popplewell J held:

> *"There are two further reasons for not requiring any additional fortification of the cross undertaking, which I have already identified when addressing the argument that the March Order should be discharged due to the inadequacy of the existing fortification. The first is that…Secondly, I would not have thought it right, in the exercise of my discretion, to refuse the injunctive and disclosure relief which is otherwise appropriate and necessary to render Mr Ruhan's arguable claim effective on the countervailing grounds that he is unable to provide assets to back his cross undertaking when that inability has arguably been caused by the very conduct of which he complains and for which he has a good arguable case for redress."*

55. In the Court's view the reasoning of Kawaley J in *IPOC* and Popplewell J in *Orb* applies equally to the circumstances of this case. At its heart the present proceedings commenced by Griffin Line is the claim that an asset of CVL (the OCM Claim), which was acquired with the proceeds of a loan made by Griffin Line to CVL, should be returned to CVL so that CVL can, at least in part, repay the loan to Griffin Line. In the judgment of the Court, it is wrong in principle to require Griffin Line to provide fortification of its undertaking to pay damages. In the exceptional circumstances of this case the Court declines to make an order requiring Griffin Line to provide fortification of its undertaking to pay damages.

Security for costs

56. TCL seeks an order pursuant to RSC Order 23, rule 1 that Griffin Line provide security for TCL's costs in the amount of $1,535,399.

57. TCL relies upon the decision of Meerabux J in *Gill v Appleby, Spurling & Kempe* [2000]

Bda LR 21 for the relevant principles to be applied on an application for security for costs. The Court's approach to the provision of security for costs in circumstances where the plaintiff is outside the jurisdiction was reviewed by Kawaley J (as he then was) in *Artha Master Fund LLC v Dufry South America* [2011] Bda LR 16 where the Court held that in the ordinary case security for costs could only be ordered for any additional difficulty in enforcing a costs order abroad:

> *9. Mr. Smith acknowledged in his oral argument that the historical practice of ordinarily granting applications for security for costs as against foreign plaintiffs had been modified as a result of the English post-Human Rights Act 1998 position, without referencing any local authorities in this regard. This required an interpretation of the security for costs provisions of Order 23 in a way which did not discriminate against foreign plaintiffs on the grounds of their place of origin. The relevant principle is generally considered to derive from the English Court of Appeal decision of Nasser-v-United Bank of Kuwait [2002] 1 WLR 1868, upon which the Plaintiff's counsel also relied. Mance LJ held that the English rule empowering the Court to order any plaintiff not resident in England or any other Lugano Convention State was based on the implicit premise that plaintiffs not so resident would be more difficult to enforce costs orders against.* ***Construing the relevant rule in a manner which was not discriminatory meant that security for costs could only be ordered to mitigate any additional difficulty in enforcement flowing from the plaintiff's residence 'abroad' in the requisite sense.*** *Where a plaintiff was so impecunious that requiring security would stifle a claim, this might give rise to a further ground for not ordering security at all, Mance LJ held.*
>
> *10. Gross J considered the proper approach to security to costs in Texuna International Ltd.- v-Cairns Energy Plc. [2004] EWHC 1102(Com), to which the Defendant's counsel also helpfully referred. This case added the refinement that the Court can take into account without formal evidence varying degrees of difficulty of enforcement which may objectively arise in deciding at what level security should be fixed. At the lower end of the scale*

would be jurisdictions where reciprocal enforcement legislation existed (e.g. applicable Commonwealth countries); at the higher end would be jurisdictions where enforcement would be so difficult as to border on impossible. In cases at the higher end, the implications of foreign enforcement might mean that security for the full amount of the defendant's costs might be required."

58. TCL submits that Griffin Line should be required to provide security for costs of these proceedings, as proxy for the costs of re-litigating the same dispute in Dubai, in the sum of BMD 1,535,399, or, alternatively, BMD 350,000, which it estimates the costs of enforcement in Dubai. The sum of $350,000 comprises legal fees of $50,000 for Bermuda counsel, $100,000 for English solicitors and English counsel and $200,000 for UAE counsel.

59. In considering the exercise of discretion in relation to the issues (a) whether it is appropriate to order security for costs against Griffin Line; and (b) if so, the appropriate quantum of such security, the Court considers the following factors to be relevant.

60. First, as noted earlier, this is an exceptional case where (i) Griffin Line is seeking to recover the loans of over $100 million made it to CVL; (ii) CVL used those funds to acquire the OCM Claim; (iii) Mr McGowan has caused the OCM Claim to be assigned to TCL, a company of which he is the sole owner and director; (iv) the assignment is being challenged by Griffin Line in this Court as being in breach of the Conveyancing Act 1983; and (v) the OCM Claim in reality is the only asset by which Griffin Line can hope to recover any part of its loan to CVL. In these circumstances this Court would be most reluctant to impose any steps on Griffin Line which may stifle the pursuit of this claim.

61. Second, on the face of it and subject to considering the evidence of the valuation experts, this would appear to be a good claim. In this respect Griffin Line points out that (i) in the draft management accounts for CVL as at February 2018 at the OCM Claim is booked by

CVL as representing an asset of the company in the amount $74,577,285; (ii) Mr McGowan relied upon the February 2018 draft management accounts in his sworn evidence before this Court in support of his contention that CVL was in fact balance sheet solvent; (iii) on 31 March 2020, CVL entered into an agreement to sell the OCM Claim to Lurco for $73,359,323.46; (iv) after the Lurco transaction fell through CVL signed an agreement between itself (without the knowledge and consent of the other director of CVL) and TCL, a company owned by Mr McGowan, for approximately $11.9 million or 17% of the LURCO offer; (v) 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, R1.3 billion equates to approximately $90,454,024.50; (vi) the relief sought by Griffin Line that the assignment of the OCM Claim from CVL to TCL be set aside is not opposed by CVL, one of the parties to the transaction.

62. Third, there has been unexplained delay in making this application for security for costs. These proceedings were commenced by Writ of Summons dated 11 August 2020 and no explanation has been advanced by TCL as to why it has waited for nearly 18 months to make this application. Griffin Line relies upon the Hildyard J in *Re RBS Rights Issue Litigation* [2017]1 WLR 4635 quoting the decision of Mr Richard Millett QC, sitting as a deputy judge of the Chancery Division, in the case of *Re Bennet Invest Ltrf* [2015] EWHC 1582 where he said, at para 28:

> *"Delay in making the application is one of the circumstances to which the court will have regard when exercising its discretion to order security. The court may refuse to order security where delay has deprived the claimant of the time to collect the security, or led the claimant to act to his detriment or may cause hardship in the future costs of the action. The court may deprive* a *tardy applicant of security for some or all of his past costs or restrict the security to future costs ...* "

63. The Court is sympathetic to Griffin Line's submission that in the circumstances there should be no order for security at all. However, balancing all the interests and in the

exercise of its discretion the Court considers that there should be partial security for costs on account of additional costs which may be incurred in enforcing any cost order of this Court in Dubai. The Court accepts Griffin Line's submission that the starting point for an order for security for costs is $150,000 which is derived from the opinion of Holman Fenwick Willan Middle East LLP and that figure should be reduced by 50% on account of the factors outlined above. In the circumstances the Court orders that Griffin Line provide security for costs in the sum of $75,000, to the satisfaction of attorneys for TCL, within the next 45 days.

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

Dated this 22 day of March 2022.

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NARINDER K HARGUN
CHIEF JUSTICE