In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2020: No. 185

BETWEEN:

GRIFFIN LINE GENERAL TRADING LLC

APPLICANT

-and-

CENTAUR VENTURES LTD

RESPONDENT

Before:	**Hon. Chief Justice Narinder Hargun**
Appearances:	**Steven White and John McSweeney, Appleby (Bermuda) Limited, for the Applicant**
	Richard Horseman, Wakefield Quin Limited, for the Respondent
Dates of Hearing:	**10 July 2020**
Date of Ruling:	**24 July 2020**

RULING (Inter-partes)

Application to set aside a Mareva injunction; test for a good arguable claim; effect of delay in making the application; whether the requirement of a real the risk of dissipation made out; whether there was material nondisclosure in the presentation at the ex parte hearing

Introduction

1. This Ruling relates to an application on the part of the Respondent, Centaur Ventures Ltd (**"CVL**"), to set aside the *ex parte* injunction granted by the Court on 22 June 2020.

2. By Order dated 22 June 2020, the Court ordered that CVL must not (1) remove from Bermuda any of its assets which are in Bermuda up to the value of $104,127,604.72; or (2) in any way dispose of or deal with or diminish the value of any of its assets whether they are in or outside Bermuda up to the same value. The Court limited the application of the Order to CVL's assets insofar as they may consist of or be related to the proceeds of sale and/or consideration for the sale and/or assignment of its interest, rights, options and/or claims in or over Optimum Coal Mine (Pty) Limited (**"OCM Claim"**).

3. The original *ex parte* application was supported by the First Affirmation of Kamal Singhala (**"Mr. Singhala"**) affirmed on 9 June 2020. Following the ex parte hearing on 9 June 2020, further substantial evidence has been filed. The additional evidence comprises the First Affidavit of Mr. Daniel McGowan **("Mr. McGowan")** sworn on 2 July 2020; the reply evidence in the form of Second Affirmation of Mr. Singhala affirmed on 8 July 2020; Second Affidavit of Mr. McGowan sworn on 7 July 2020; Third Affidavit of Mr. McGowan sworn on 7 July 2020; the Fourth Affidavit of Mr. McGowan sworn on 9 July 2020; and the Third Affirmation of Mr Singhala affirmed on 9 July 2020 and handed up during the hearing. After the conclusion of the hearing, CVL took the point that the Court should not admit the evidence of Mr. Singhala as the Affirmations were not executed before a qualified Notary Public. As the Affirmations have now been affirmed before a consular official and commissioner of oaths, I will admit the evidence contained therein.

Background

4. Background to this application is set out in my Ruling dated the 22 June 2020 (**"earlier Ruling"**), dealing with the *ex parte* application for the grant of the freezing injunction. For convenience I set out below that background with minor amendments.

The Parties

5. Griffin Line is and was at all material times, a general trading company incorporated in the United Arab Emirates. Mr. Singhala, a director of Griffin Line,filed an affirmation dated 10 June 2020 in support of the *ex parte* application seeking a freezing order in respect of the assets of CVL.

6. CVL, is and was at all material times, a Bermuda exempted company incorporated by registration on 18 July 2014. Historically, CVL has acted as a commodities trader of coal in South Africa, but its trading activities appear to have been suspended when OCM entered into business rescue in February 2018. CVL is not specifically targeting further coal opportunities at present.

7. As noted in my Judgment of 29 April 2020, the initial shareholders in CVL were Mr. Akash Garg and CGL, another company incorporated in Bermuda. Mr. Garg and CGL were equal 50% shareholders in CVL, both holding 50 shares of each of the 100 issued shares.

8. The sole director of CGL is Mr. McGowan, and Mr. McGowan has been appointed a director of CVL since its incorporation. Mr. Garg also acted as a director of CVL until 13 August 2018 when he sold his entire shareholding to Mr. Raswant and resigned as director of CVL. Since that date, Mr. Raswant has held 50 shares in CVL and replaced Mr. Garg as a director.

9. It appears that Mr. Raswant has a long-standing employment/business relationship with Mr. Garg and Mr. Garg's business entities. Mr. Raswant acted as a director of AGEV Investment Ltd ("AGEV"), one of Mr. Garg's companies which was the recipient of loans made by CVL, which now amount to $17,836,950. Mr. Garg also has a familial relationship with Mr. Singhala, being married to Mr. Singhala's cousin. In the audited accounts of Griffin Line for the year ended 31 December 2017, the auditors described CVL as an "Associated Company".

The Loan Agreements

10. In the Statement of a Claim filed in the present proceedings, Griffin Line asserts that it entered into a loan facility agreement on the 15th February 2016 with CVL ("First Facility Agreement"). The material terms of this agreement provided that:

    (a) Griffin Line agreed to make available to CVL a loan facility of $100,000,000;

    (b) The money drawn down by CVL under this facility would bear interest at the rate of 4% per annum (the draw down and interest together is referred to as the " First Loan Amount");

    (c) The First Loan Amount was repayable on or before 14 August 2016. However, the original payment date under the First Facility Agreement was, according to the case advanced by Griffin Line, extended on 3 occasions by written agreements between Griffin Line and CVL. First, on 7 August 2016 the original repayment date was extended by 2 months to 14 October 2016. Second, on 11 October 2016, the date was further extended by further 2 months to 14 December 2016; and third, on 13 December 2016, the date was extended by 6 months to 14 June 2017.

11. The First Facility Agreement is a three-page document signed on behalf of Griffin Line by Mr. Singhala and on behalf of CVL by Mr. McGowan. Despite the fact that under this agreement Griffin Line had agreed to lend to CVL an amount of $100,000,000, it did not provide for any security in respect of the amounts advanced by Griffin Line to CVL. Under this agreement Griffin Line was content to assume the position of an unsecured lender.

12. In accordance with the terms of the First Facility Agreement, CVL drew down the sum of $99,222,862 during the period from 16 February 2016 to 26 November 2016. During the period 18 April 2017 and 31 July 2017, CVL repaid Griffin Line $9,999,232.91.

13. Griffin Line and CVL entered into a further loan facility agreement on 7 November 2016 ("Second Facility Agreement"). The material terms of this agreement provided that Griffin Line would make available to CVL an additional loan facility of $25,000,000; the money drawn down by CVL would bear interest at the rate of 4% per annum; and the drawdown and interest would be repayable on or before 6 November 2017.

14. Griffin Line asserts that on or about 30 November 2016, CVL drew down the sum of $3,200,000 and the remaining balance under this agreement was never drawn down and now stands canceled. CVL, on the other hand, disputes that any monies whatsoever were drawn down under this agreement.

Griffin Line's efforts to collect amounts due under the Agreements

15. On 27 January 2019, Griffin Line, through its attorneys Kobre & Kim (UK), sent a letter before action claiming that CVL owed Griffin Line the sum of $98,317,863.43 comprising principal in the amount of $89,270,918.29, and interest in the amount of the $9,131,999.80 and claimed that this amount was *"due immediately"* under the First Facility Agreement.

16. On 29 January 2019, 2 days later, CVL responded to the letter before action stating: "*We would recommend that you revert to your client to obtain the correct information in this regard inclusive of the validly executed commercial agreements. We assume that your client has not furnished you* with *such as if they had, you would not be stating in your letter that the amounts are "due immediately".*

17. It appears that as a result of the response from CVL, Griffin Line decided to take no further steps in relation to the letter before action until the letter from Kennedys, Griffin Line's Bermuda attorneys, dated 17 May 2019. Kennedys referred to CVL's letter of 29 January 2019 and disagreed with CVL's position that the monies outstanding were not "*due immediately*" and pointed out that the letter of 29 January 2019 failed to state any reason in support of this contention.

18. On 28 May 2019, Wakefield Quin, CVL's Bermuda attorneys, pointed out that CVL's contention that the outstanding loans were not due on 14 June 2017, was based on the fact that on 14 June 2017, CVL and Griffin Line entered into a further amendment agreement in respect of the First Facility Agreement (the "**Amendment Agreement No 4**") whereby Griffin Line and CVL agreed to extend the date for repayment to 4 January 2021. A copy of the Amendment Agreement No 4 was provided to Kennedys under cover of that letter.

19. In the Kennedys letter of the 23 July 2019, Griffin Line disputed the validity of the Amendment Agreement No 4 and in particular it was asserted that Mr. Singhala denied executing that Amendment Agreement. The same points were repeated in the Kennedys letter of 22 August 2019 but no further steps were taken for the recovery of the amounts claimed to be due by Griffin Line until the commencement of these proceedings on 16 June 2020.

Related Proceedings

20. On 3 July 2019, Mr. Raswant, the 50% shareholder in CVL, commenced winding up and minority oppression proceedings under sections 161 (g) and 111 of the Companies Act of 1981. At a hearing on 6 August 2019, I heard an application made on behalf of Mr. Raswant for the appointment of joint provisional liquidators.

21. In a Ruling dated 26 August 2019, I declined to appoint joint provisional liquidators but accepted certain undertakings offered by CVL in relation to the day-to-day management of CVL. The Ruling provided, inter alia, that:

    (a) CVL is not allowed to accept any offer in relation to the OCM claim unless the offer achieves full recovery of the claim.

    (b) CVL is not allowed, without prior notice to Mr. Raswant and Board approval to make any payment in excess of $25,000 for any one transaction; to dispose of or otherwise deal with any asset of CVL including any loan payable to CVL; and to deal with any monies that is in CVL's custody accounts.

(c) CVL is not allowed to declare or pay any dividend that shall confer any benefit on The Centaur Group Limited or Mr. McGowan.

22. By Judgment dated 29 April 2020, in the same proceedings, I struck out the petition presented by Mr. Raswant on the ground that Mr. Raswant was acting unreasonably in proceeding with the petition in light of the offer made by The Centaur Group Limited and that Mr. McGowan had offered to purchase his shares at fair value and without discount.

Issues in dispute

23. It is common ground that a Court may grant a freezing order restraining a party from dissipating or disposing of its assets if the Court is satisfied that:

(a) The plaintiff has a good arguable case on the substantive claim over which the Court has jurisdiction;

(b) The defendant has no assets or no sufficient assets within the jurisdiction to satisfy the plaintiff's claim and also that there are assets outside the jurisdiction (for a worldwide freezing order);

(c) There is a real risk of dissipation of assets that would render a judgment in the applicant's favour as likely to be unsatisfied; and

(d) That it is just and convenient to grant the injunction.

24. The issues between the parties at this *inter partes* hearing are as follows:

(a) Whether Griffin Line can demonstrate that it has a good arguable claim which is pleaded in the underlying pleadings;

(b) Whether Griffin Line can establish that there is a real risk of dissipation of CVL's assets;

(c) Whether the injunction granted in the earlier Ruling should be discharged on the ground that Griffin Line failed to make a full and frank disclosure of all material facts at the *ex parte* hearing; and

(d) Whether it is just and convenient that the freezing order should be made.

Good arguable case

25. In considering whether Griffin Line has made out a good arguable case, I keep in mind following legal propositions, which I do not believe were disputed by Counsel:

(a) In order to obtain an interlocutory injunction an applicant needs to demonstrate that in relation to the underlying cause of action there is a serious issue to be tried between the parties (*American Cyanamid Co. V Ethicon Ltd* [1975] AC 396).

(b) In relation to an application for a *Mareva* injunction the applicant needs to do more and is required to establish that in relation to the underlining cause of action he has a good arguable case (*Locabail International Finance Limited v Manios et al*, Civil Appeal 1988 No. 4, per Da Costa JA applying the reasoning of Mustill J and Kerr LJ, in the Court of Appeal, in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH* [1983] 2 Lloyd's Rep 600).

(c) In *Ninemia* Mustill J described, at page 600, a good arguable case as *"one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success".* In *Orr v Moundreas* [1981] Com LR 168, a case dealing with service outside the jurisdiction under RSC Order 11, Mustill J explained that the requirement of "good arguable case" does not require the Court to apply the standard of proof which must be attained at the trial. The Court is not required to be satisfied that the plaintiff is more likely to be right then wrong. However, it is not enough to show an arguable case which a competent advocate can get on its feet but must be one which is "*strong"* and *"good*".

(d) In considering an application for a *Mareva* injunction, the court is expected to apply the approach laid down in the *American Cyanamid* case and in particular the court would follow the guidance set out by Lord Diplock at 407-408 in relation to the approach of the Court to disputed facts:

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing':* Wakefield v. Duke of Buccleugh *(1865) 12 L.T. 628, 629." (*See: Parker LJ in *Derby & Co. Ltd v Weldon and Ors* [1990] 1 Ch. 48 at 57E).

(e) Whilst the court will abstain from expressing a final view on the merits, it will nevertheless *"take into account the apparent strength or weakness of the respective cases in order to decide whether the claimant's case, on the merits, is sufficiently strong to reach the threshold, and this will include assessing the apparent plausibility of statements in the affidavits. This test is not a particularly onerous one, however."* (Commercial Injunctions, Steven Gee, Sixth edition, at 12-026).

(f) The Court is concerned to see if the evidence is inherently consistent and credible even though there may be minor inconsistencies:

> *"I accept Miss Heilbron's submission that in the various formulations, "good arguable case", "good chance", "good reason" the emphasis is always on "good". Is the documentary evidence of Mr Ibrahim good enough on a preliminary view of the matter to warrant the grant of leave*

to serve out of the jurisdiction and the consequences of the Mareva injunction and of the charge on Stanstead Hall? I also accept Miss Heilbron's submission that in the approach to this question one should look to see whether his evidence is inherently consistent and credible. But in saying this I am adopting a guideline for a particular case, and I am not trying to lay down a rule of law. Minor inconsistencies may be perfectly compatible with substantial truth. Although the question of inherent credibility is crucial, it must be approached with due regard to the fact that the account is sworn to and that even an unlikely account may turn out to be true. Everything must depend upon the strength which the assertions command in the circumstances of the particular case. (per Nolan LJ in *Silvera v Faleh Al-Rashidi and Others* [1993] Lexis Citation 2822).

(g) The observations of Lord Templeman in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460,465, that applications relating to forum non conveniens should be measured in hours not days, that appeals should be rare and the Court of Appeal should be slow to interfere, apply equally to applications for the grant of Mareva injunctions (See: Parker LJ in *Derby & Co. Ltd v Weldon and Ors* [1990] 1 Ch 48 at 58B-C).

26. Griffin Line argues that on the present state of the evidence, the Court should conclude that it does indeed have a good arguable claim both under the First and Second Facility Agreements.

27. In relation to the First Facility Agreement Griffin Line relies upon the following facts and circumstances:

(a) Until the filing of the evidence in this application there was no or no credible suggestion that the monies borrowed under the First Facility Agreement were disputed. Thus, the Draft Management Accounts for CVL, as at February 2018, record indebtedness due to "External Funding" owed by CVL to Griffin Line in the amount of $97,684,293. Likewise, the audited accounts of Griffin Line, for the year ended 31 December 2017, record

"receivable" in the amount of AED (United Arab Emirates Dirham) in the amount of $327,624,270 which is approximately US $89,270,918.30 at the current exchange rate of 3.67. The dispute relates to the timing of payment, namely, whether the amounts due under the First Facility Agreement are due on 14 June 2017 or 4 January 2021.

(b) The fact that the amounts claimed have indeed been borrowed and received by CVL is not disputed by CVL in correspondence. Thus, the letter from Kobre & Kim dated 27 January 2019, written on behalf of Griffin Line, claimed that the amount of US $98,317,864.43, comprising of principal due in the amount of US $89,185,863.63 and accrued interest in the amount of US $9,131,990.80, was "*due immediately*" and demanded payment from CVL. In response by letter dated 29 January 2019, challenged whether the amounts were "*due immediately*". There was no challenge on the ground that no monies have been borrowed at all. Likewise, the letter from Kennedys, Griffin Line's then Bermuda attorneys, dated 17 May 2019 claimed repayment of US $99,647,099.32 under the First Facility Agreement. The response from Wakefield Quin, CVL's Bermuda attorneys, did not challenge that the monies had been borrowed but made the limited challenge that *"CVL had not failed to repay any amount of principal and/or interest to Griffin, as there are no amounts currently to be repaid."* Wakefield Quin asserted the positive case that as a result of the Amendment Agreement No. 4, Griffin Line had agreed to extend the date of prepayment to for January 2021.

(c) CVL accepts that it has in fact repaid US $12,999,136.37 under the First Facility Agreement.

(d) The initial letter from CVL dated 29 January 2019, denying that the monies were *"due immediately"*, did not refer to the Amendment Agreement No. 4 and it did not suggest that the due date had been extended to 4 January 2021.

(e) Griffin Line did not agree to the Amendment Agreement No. 4 extending the time of repayment under the First Facility Agreement to 4 January 2021.

In that regard, the Court has the sworn evidence of Mr. Singhala that he did not sign the Amendment Agreement No. 4 and the writing purporting to be his signature is said to be a forgery.

(f) CVL first suggested that the due date for repayment of the monies borrowed had been extended to 4 January 2021, as a result of Amendment Agreement No. 4, in the letter from Wakefield Quin dated 28 May 2019 and provided a copy of that agreement to Kennedys in Bermuda. In response Griffin Line immediately pointed out, in the letter from Kennedys dated 22 August 2019 "*that the validity of the alleged Facility Agreement Amendment Agreement NO. 4… on 14 June 2019 is disputed by our client, whose Mr. Singhala denies executing that agreement."* Both Griffin Line and Mr. Singhala have consistently taken that position since that time.

(g) Consistent with the terms of the Amendment Agreement No. 3, the repayment date for the loan amount was 14 June 2017. During the late 2016 and up until 31 July 2017, CVL did indeed make a number of pre-payments to Griffin Line in the total amount of US $12,999,136.37. Mr. Singhala makes the point that some of these payments were made after 14 June 2017, i.e. after the alleged extension to January 2021 under the alleged Amendment Agreement No. 4. It is Mr. Singhala's sworn evidence that payments totaling US $2,837,232.91 were made after 14 June 2017. Mr. Singhala contends that this can only have been on the basis that there was no agreement to extend the repayment date, otherwise CVL would not have been obliged to make any payment of any sum before 4 January 2021.

(h) Mr. Singhala has given sworn evidence that he did not agree to a fourth extension extending the due date to January 2021 as they wanted to keep Griffin line's options for legal remedy open. At the same time Mr. Singhala and Griffin Line were not unduly worried about the fact that the entirety of the loan amount had not been repaid by 14 June 2017, as he considered that Griffin Line had a good working relationship with Mr. McGowan and Mr. Garg, who is married to Mr. Singhala's cousin. Mr. Singhala further says that Mr. Garg and Mr. McGowan were in frequent communication with him

and offered what appeared to be, at that stage at least, transparency in respect of CVL's finances. He says they even copied Griffin Line into correspondence between CVL and its business partners/prospective clients.

(i) On 19 February 2018, OCM became distressed and entered into a process of business rescue e. CVL had previously entered into coal trading contracts with OCM and was owed approximately $74.5 million by OCM. CVL suspended its trading activities in February 2018 and it is Mr. Singhala's evidence that he was approached by CVL's directors to discuss a further extension to the repayment date. It is Mr. Singhala's sworn evidence that following discussions in the succeeding months, Griffin Line agreed verbally to extend forbearance on the First Facility Agreement to 6 November 2018 ("**Forbearance Agreement**"). He says that the Forbearance Agreement brought the timing of repayment into line with the Second Facility Agreement.

(j) In paragraph 106 of his First Affidavit, Mr. McGowan suggests *"there can only be two (2) possible scenarios, Mr. Garg forged Mr. Singhala's signature and provided the signed agreement to CVL, and CVL had no knowledge of such and are the innocent party, or Mr. Garg received a signed version from Mr. Singhala, and Mr. Singhala has belatedly changed his mind and concocted a story".* Mr. Singhala denies that he signed the relevant agreement. If it is indeed the case that the agreement was signed by Mr. Garg that would not bind Griffin Line despite the fact that CVL may be the innocent party.

(k) All the previous extensions to the due date were for a short period of a few months. Under the Amendment Agreement No. 1, the due date was extended by 2 months; under the Amendment Agreement No. 2, the due date was extended by another 2 months; and under the Amendment Agreement No. 3, the due date was extended by a further 6 months. Mr. Singhala contends that no sensible commercial rationale has been offered by CVL justifying why Griffin Line would extend the due date by 3 ½ years under the alleged Amendment Agreement No. 4.

(l) Mr. Singhala has provided further evidence in relation to the drawdown under the Second Facility Agreement. In his Second Affidavit Mr. Singhala points out that, as can be seen from the First Facility Agreement and corresponding Bank Statements, during the period of 16 February to 26 November 2016, CVL drew down a total of US $99,222,862. It is therefore readily understandable, he contends, why CVL would choose to drawdown on the Second Facility shortly after it had been agreed and entered into on 7 November 2016. Mr. Singhala says that on a careful review of the Bank Statements, it becomes clear that CVL's 30 November 2016 drawdown request could only have been honoured and booked against the Second Facility, as the loan facility available under the First Facility Agreement had been exhausted.

28. CVL submits that Griffin Line has not made out a good arguable case that monies are presently due and contends that the evidence is clear that, as a consequence of the Amendment Agreement No. 4, nothing is due until 4 January 2021. CVL points to the following facts and circumstances:

(a) At the core of the dispute between the parties is whether Griffin Line executed the Amendment Agreement No. 4 dated 14 June 2017. Mr. Singhala admits in his First Affirmation that he did receive the unsigned Amendment Agreement No. 4 but was unaware of it at the time. He says *"I subsequently carried out search of my inbox and discovered Garg's email. However, I have not seen it at the time it was received and I never responded to it."* CVL invites the Court to conclude that this evidence is devoid of credibility considering the importance of the document and the amount of the loan as compared to Griffin Line's total assets.

(b) The delay in pursuing this action, bearing in mind that it is Griffin Line's case that CVL was in default of the First Facility Agreement as of 14 June 2017. CVL submits that the delay in pursuing the matter is relevant to the issue of whether Griffin Line has made out an arguable case as well as whether the Court should grant a freezing injunction.

(c) Griffin Line seeks to explain, in part, the fact of delay in commencing proceedings by reference to the Forbearance Agreement. However, despite numerous correspondence between the various attorneys who have previously represented Griffin Line, there is no reference to the existence of any Forbearance Agreement and there is no reference to any such agreement in any of the contemporaneous documentation in relation to the First Facility Agreement. The first time there is a reference to the Forbearance Agreement is in the First Affirmation of Mr. Singhala affirmed on 9 June 2020. Furthermore, Mr. Singhala provides no details as to when, where and with whom such an agreement was negotiated and concluded. The lack of any detail being provided to substantiate the agreement necessarily means that CVL is unable to respond in any meaningful way other than to deny that any such discussions took place.

(d) In paragraph 19 of his First Affirmation, Mr. Singhala states that the repayment date under the First Facility Agreement was 14 June 2017 in accordance with the Amendment Agreement No. 3. Mr. Singhala then states that *"I chose not to agree to a fourth extension but wanted to keep GL's options for legal remedy open, which would be nullified by signing an extension agreement."* Paragraph 19 gives the impression that Mr. Singhala made the deliberate decision not to agree to the fourth extension and that decision was made around June 2017. However, this contention would appear to be in conflict with paragraph 27 of his First Affirmation where he states that that he only searched for the Amendment Agreement No. 4 in his inbox after he received a copy of the executed agreement from Wakefield Quin under cover of their letter of 5 August 2019 and that he was unaware of it at the time when it was sent to him.

(e) Mr. Singhala has given sworn evidence that he did not sign the Amendment Agreement No. 4 and that the writing which purports to be his signature is a forgery.

29. In considering the issue of the good arguable case the starting point is that, in accordance with the guidance given by Lord Diplock in *American Cyanamid*, it is not

the function of the Court at this stage of the proceedings to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend.

30. The issue whether the Amendment Agreement No. 4 was ever signed can only be determined at the trial of this action. It is simply not possible for the Court to resolve, at this stage, disputed issues of allegedly forged documents on affidavit evidence.

31. I have come to the view that Griffin Line has, for purposes of this *Mareva* application, established that it has a good arguable case for both the First and Second Facility Agreements, for the reasons advanced by Griffin Line and set out at paragraph 27 above. In particular, I rely upon:

    (a) The fact that substantial amounts, as claimed by Griffin Line, had been drawn down by CVL and do not appear to be disputed on any substantial ground. The loan amounts under the First Facility Agreement have to be repaid either on 14 June 2017 (if the Amendment Agreement No. 4 was not executed) or on 4 January 2021 (if the Amendment Agreement No. 4 was executed).

    (b) The initial letter from CVL dated 29 January 2019, denying that the monies were *"due immediately*" made no explicit reference to the Amendment Agreement No. 4 or that the due date had been extended to 4 January 2021.

    (c) After 14 June 2017 CVL made repayments of the loans advanced by Griffin Line in the amount of US $2,837,232.91 and those payments would be consistent only with the position that there was no agreement to extend the repayment date to 4 January 2021.

    (d) The first two extensions were for short periods of 2 months and the third extension was for a period of 6 months. No sensible commercial rationale has been offered by CVL as to why Griffin Line would agree to extend the due date by 3 ½ years under the alleged Amendment Agreement No. 4.

(e) In relation to the Second Facility Agreement, Mr. Singhala gave credible evidence that a careful review of the bank statements discloses that CVL's 30 November 2016 drawdown request in the amount of US $3,200,000 could only have been honoured and booked against the Second Facility, as the loan facility available under the First Facility Agreement had been exhausted.

32. I accept that this is not a case where CVL is unable to advance points of criticism against Griffin Line. In particular, I have considered the point made against Griffin Line that if the repayment date was indeed 14 June 2017, why did the Griffin Line wait until 27 January 2019 to instruct attorney, Kobre & Kim, to send a letter before action demanding from CVL that the sum of $98,317,863.43 had to be "*paid immediately*." A partial explanation for the delay is provided by Mr. Singhala in his first affirmation when he says that Griffin Line was not unduly worried about the fact that the entirety of the loan amount had not been repaid by 14 June 2017, as he considered that Griffin Line had a good working relationship with Mr. McGowan and Mr. Garg, who is married to Mr. Singhala's cousin. Mr. Singhala says that he took comfort from the fact that Mr. Garg and Mr. McGowan were in frequent communication with him and offered what appeared to be transparency in respect of CVL's finances.

33. I also accept that in relation to the Forbearance Agreement, the first time there is a reference to such an agreement is in the First Affidavit of Mr. Singhala dated 9 June 2020.

34. An explanation is also required in relation to what appears to be a discrepancy between Mr. Singhala's assertion in paragraph 19 of his First Affirmation that he chose not to agree to the Fourth extension (presumably around June 2017) and his subsequent assertion in paragraph 27 that he was unaware of the draft Amendment agreement No. 4 until after receipt of the signed agreement from Wakefield Quin undercover of their letter dated 28 May 2019.

35. As noted above, at this stage of the proceedings, it is not the function of the Court to make binding findings of fact or to decide whether the plaintiff has better than 50% chance of success at trial. The Court has to decide whether the underlying claim is more

than fairly arguable. For the reasons given above and despite the contrary points advanced by CVL, I am of the view that Griffin Line's underlying claim passes the threshold of a good arguable case.

Risk of dissipation

36. There is no relevant dispute between the parties in relation to the test to be applied in relation to the requirement that there must be a real risk of a dissipation. In *Locabail International Finance Limited v Manios et al*, Civil Appeal 1988 No: 4, da Costa JA considered at pages 12-13 that the test is whether in the whole of the evidence there is a real risk that the judgment or an award in favour of the plaintiff would remain unsatisfied. It is no longer necessary for a nefarious intent to be demonstrated, though in circumstances where it can be shown, the court will obviously be more disposed to grant *Mareva* relief than otherwise. The burden is on the plaintiff to adduce "solid evidence" to support his assertion that there is a great risk of the judgment or award going unsatisfied. It is not possible to lay down any general guidelines as to how and when this evidential burden will be satisfied, since each case depends on its own facts.

37. In *Bank of Bermuda v Todd*, Civil Appeal No: 13 of the 1992 Da Costa JA stated, at 13-14, that *"In the case of dissipation of assets the plaintiff must prove by "cogent" "solid" evidence that there is "real risk" of dissipation and the standard of proof imposed upon a plaintiff in proving danger of dissipation on a Mareva application is the civil standard of the balance of probabilities."*

38. At the *ex parte* hearing, Griffin Line submitted that the evidence of risk of dissipation is not simply based upon Mr. McGowan's dishonesty in forging, whether alone or with Mr. Garg, Amendment Agreement No. 4, but includes the purposes towards which that dishonesty is directed, which is to delay repayment while CVL winds up its operations and transfers out the cash proceeds. In summary, Griffin Line relied upon the following facts and circumstances:

    (a) In the Judgment dated 29 April 2020, this Court accepted that since February 2018, CVL appears to have ceased trading activities and its actions have been directed towards the recovery of the OCM Claim. CVL has no known

loan facilities and no banking facilities of its own. It has not entered any material agreements since August 2018. This behavior is consistent with the company winding up its operations.

(b) The Court can infer that, far from acting in good faith, CVL and Mr. McGowan have procured a forged amendment agreement in order to delay repayment of the sums owing to Griffin Line.

(c) This is in a wider context where another key part of the Centaur Group, Centaur Asset Management Limited, has abandoned its long-standing representative offices in Dubai without paying rental arrears.

(d) CVL is clearly insolvent and this financial reality has been deliberately misrepresented by Mr. McGowan at the hearing leading to the April Judgment by relying upon outdated February 2018 draft management accounts which he would have known to be wrong. Rather than CVL having a slender net equity of approximately $17 million, it is deep in negative equity and currently unable to pay its debts to Griffin Line, with no realistic prospect of further money coming into the company.

(e) This misleading analysis of CVL's finances was deployed by Mr. McGowan in order to stave off for the appointment of a provisional liquidator, i.e. an independent professional or who would report to the Court on the true financial state of the company.

(f) It appears from the April Judgment that the sale of the OCM Claim to LURCO, which had either occurred or by the time of the hearing on 11 March 2020 or would have been imminent, was not seemingly disclosed to the Court.

39. In relation to the issue of dissipation of assets, CVL submits that:

(a) The legal test for a risk of dissipation was not met at the *ex parte* hearing and the freezing injunction should not have been granted. CVL argues that

no cogent evidence, nor in fact any prima facie evidence whatsoever, was provided that CVL intends to wind up its operations.

(b) Mr. Singhala has not attempted to explain how the fact of Centaur Asset Management Limited moving its representative office in Dubai, has any evidential weight or basis to demonstrate CVL is winding down its operations and/or intends to unjustifiably dissipate its assets, other than in the normal course of business.

(c) No solid cogent evidence was provided to the Court that CVL intended to transfer out any cash proceeds, other than in the normal course of business, whatsoever. CVL has not transferred out any of the alleged proceeds from the LURCO Cession of Claims Agreement, which completely contradicts the allegations made by Griffin Line.

(d) Had CVL had any desire to unjustifiably dissipate its assets, other than in the ordinary course of business, it could have done so at any point from its inception in 2014. CVL did not do this despite Griffin Line alleging amounts were "*due immediately*" as long ago as 27 January 2019.

(e) A freezing injunction does not give, and should not give, Griffin Line any proprietary interest in the frozen assets, and should not be granted merely to provide quasi-security for a claim. CVL contends that Griffin Line is openly seeking security to which it is not legally entitled.

40. At the hearing of the *inter partes* application seeking to discharge a *Mareva* injunction granted on an *ex parte* basis, the Court is bound to consider the entirety of the evidence filed by the parties in relation to the *inter partes* hearing. An application to discharge a freezing order takes the form of a complete rehearing, with each party being at liberty to put in evidence. The Court decides the application of all the evidence before it, including evidence of matters which have arisen post the grant of the order.

41. At the *ex parte* hearing, I concluded that evidence presented by Griffin Line met the test of a real risk of dissipation. Since the *ex parte* hearing, substantial additional

evidence has been filed in the form of four affidavits from Mr. McGowan and two additional affirmations from Mr. Singhala. Some of the additional evidence is, in my judgment, relevant to the issue of dissipation of assets.

42. As noted in my earlier Ruling, the main asset of CVL which had any real value, was in the form of the OCM Claim valued at $74,577,288. I also noted the submission of Griffin Line that the application for a freezing injunction is made necessary by the fact that the main asset of CVL, the OCM Claim, has been sold and CVL may be expecting substantial cash payments in respect of that sale imminently.

43. In his First Affidavit filed on 2 July 2020, Mr. McGowan volunteered at paragraph 148 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 this Court to objectively verify that the disposal of the OCM Claim was indeed "*on an arm's-length commercial basis*"

44. In his Second Affirmation filed on 9 July 2020, Mr. Singhala deals with this disposition of the OCM Claim and asserts:

    (a) Mr. McGowan has given no particulars of the sale or assignment and the impression deliberately created is that the parties involved in the transaction acted independently of and had no pre-existing relationship with each other. This is a highly misleading impression.

    (b) CVL conveniently failed to disclose in its affidavit evidence provided under oath that the OCM Claim had been acquired by Templar Capital Limited ("**TCL**"), a Bermuda exempt company of which Mr. McGowan is the sole director. This information was gleaned from the TCL's Register of Directors and Officers from the Bermuda Government website. This glaring omission is significant, and supports Griffin Line's earlier concerns that CVL/Mr. McGowan are acting to place CVL's only valuable asset beyond the reach of its creditors.

(c) Some of the details in relation to this disposition are set out in the letter from Tabacks, who have been acting as CVL's South African attorneys, dated 27 June 2020. In summary, the letter states that (1) TCL has recently acquired CVL's creditor claim in OCM; (2) TCL will exchange its creditor claim in OCM for equity in the new company to be established called "New Optimum", in the form of Class A shares in New Optimum; (3) that 100% of the issued Class A shares will be held by CVL. In this way, TCL appear to take all the risk but none of the benefit.

(d) It is remarkable and untruthful in the circumstances that CVL has suggested that the OCM Claim has been sold onto third party on an "*arm's-length commercial basis*". Mr. McGowan's affidavit wholly fails to disclose the true facts. Griffin Line is concerned that the sale is either a sham, or if genuine, TCL acquired the claim at effectively no value or at an undervalue.

45. Despite the fact that the Order giving directions for the *inter partes* hearing did not provide for any reply evidence on CVL, Mr. McGowan considered it necessary to file two additional affidavits replying to the criticisms made by Mr. Singhala in his Second Affirmation. In his Fourth Affidavit sworn on 9 July 2020, Mr. McGowan felt it necessary to refer again to the sale of the OCM Claim. At paragraph 10, Mr. McGowan states that CVL has voluntarily disclosed that it disposed of its creditor claim on an arm's-length commercial basis on 15 June 2020. He goes on to say 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."*

46. Again, Mr. McGowan provides no details as to the identity of the purchaser of the OCM Claim or the details of the consideration for the sale.

47. At the hearing of the *inter partes* application on 10 July 2020, Mr. White for Griffin Line advised the Court that Appleby had now managed to obtain a copy of the Register of Members of the TCL which shows that in addition to being its sole director, Mr. McGowan is also its sole shareholder. It follows therefore that the OCM Claim has been

"sold" by CVL, presumably upon the instructions of Mr. McGowan, to TCL, a company which is wholly owned by Mr. McGowan.

48. At the hearing I asked Counsel for CVL whether he could advise the court as to the identity of the valuer of the OCM Claim and the details of the consideration paid by TCL to CVL. Counsel advised the Court that his instructions were such that he was unable to advise the Court in relation to these issues.

49. I am unable to accept Mr. McGowan's assertion in paragraph 10 of his Fourth Affidavit that the identity of the purchaser of the OCM Claim and the consideration paid, are matters which are *"private and confidential to CVL and are not matters which [Griffin Line], or any of the CVL's other creditors are entitled to.*" In the context of a *Mareva* application, based upon real risk of dissipation of CVL's assets, CVL is duty-bound to disclose all relevant details of the sale of its main, if not only, asset. The single sentence statement made in paragraph 148 of Mr. McGowan's First Affidavit that "*On 15 June 2020 CVL disposed of its creditor claim in OCM on an arm's-length commercial basis*" gave the impression that the claim had been sold to third party. Mr. McGowan refused to disclose the identity of the buyer in his First Affidavit or in his Fourth Reply Affidavit and the recent discovery that CVL sold the OCM Claim to a company wholly owned by Mr. McGowan must necessarily and justifiably arouse suspicion.

50. In his Fourth Affidavit, Mr. McGowan says that CVL instructed an independent third-party expert to value its creditor claim in OCM and the claim was sold at fair value, as determined by the independent third-party expert, or an arm's-length commercial basis. Without knowing the identity of the valuer, the methodology used to value the OCM Claim, and the valuation arrived at by the valuer, it is of course impossible to objectively examine whether the disposal of this main asset of CVL was indeed on an arm's-length commercial basis.

51. In light of the alleged disposal of the OCM Claim to a company wholly owned by Mr. McGowan; the manner in which this disposal was disclosed; and the refusal to provide the necessary information so that the disposal can be examined on an objective basis, I have come to the clear view that there is "real risk" of a dissipation of assets. The events surrounding the disposal of the OCM Claim to a company wholly owned by Mr.

McGowan, in addition to the matters referred to in paragraph 38 above, provide, in my judgment, solid and cogent evidence that there is a real risk of dissipation of assets of CVL.

Material non-disclosure

52. Again, there is no material dispute between the parties as to the applicable legal principles in relation to the question of material non-disclosure at an *ex parte* application for a freezing injunction. These principles are set out in the judgment of Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1351, at 1356F-1357F:

> *"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:*
>
> *(i) The duty of the applicant is to make "a full and fair disclosure of all the material facts": Kensington Income Tax Commissioners (1917) 1 K.B. 486: per Scrutton L.J. at page 514.*
>
> *(ii) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Kensington Income Tax Commissioners case per Lord Cozens Hardy MR, citing Dalglish v. Jarvie, 2 Mac & G 231, 238; Browne-Wilkinson J., Thermax Ltd. v. Schott Industrial Glass Ltd. (1981) F.S.R. 289 at 295.*
>
> *(iii) The applicant must make proper inquiries before making the application: Bank Mellat v. Nikpour (1985) F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.*

(iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order upon the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in Columbia Picture Industries v. Robinson (1986) 3 W.L.R. 542; (1986) 3 A.E.R. 338; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. Bank Mellat at pages 92/93.

(v) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains…an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty…": per Donaldson L.J.: Bank Mellat v. Nikpour at page 91 citing Warrington L.J. in the Kensington Income Tax Commissioners case.

(vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends upon the importance of the fact to the issues which were to be decided by the judge upon the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty upon the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(vii) Finally "it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded": per Lord Denning MR: Bank Mellat v. Nikpour at page 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order

on terms. "Where the whole of the facts, including that of the original non-disclosure are before (the court), it may well grant a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed": per Glidewell L.J.: Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings PLC: Court of Appeal: 18th March 1987 page 12G."

53. Counsel for CVL emphasizes that *"It is the undoubted duty of counsel to draw to the Judge's attention weaknesses in his case and to make sure that the judge understands what might be said on the other side even if the judge says he has read the papers"* (Alliance Bank v Zhunus [2015] EWHC 714 (Comm), at [66] Cooke J).

54. CVL relies upon a number of factual issues as material non-disclosure by Griffin Line at the hearing of the *ex parte* application for the freezing injunction.

55. First, CVL refers to the representation made by Counsel for Griffin Line that CVL does not dispute that the money was advanced to it under the First Facility Agreement and that the dispute, on CVL's case, was not whether the money should be repaid but rather when it becomes due. CVL maintains that CVL's position has been fundamentally misrepresented by Counsel for Griffin Line. It is said by CVL that it has never acknowledged and/or confirmed the amounts which Griffin Line alleges are outstanding and have sought details and confirmations from Griffin Line.

56. It seems to me that there was no material misrepresentation by Griffin Line in relation to the indebtedness. On the evidence before the Court it appeared that the fact of indebtedness by CVL to Griffin Line was acknowledged by both parties. The indebtedness was acknowledged by CVL in its management accounts and the indebtedness was acknowledged by Griffin Line in its audited accounts for the year ended the 31 December 2017. There may have been a minor disagreement as to the precise amount of the indebtedness but any such disagreement was immaterial for the purposes of the *Mareva* application. It seems to me that the real dispute between the parties, on the basis of the evidence before the Court, is as to the timing of when that indebtedness is to be repaid by CVL to Griffin Line.

57. Second, CVL refers to the submission by Counsel for Griffin Line that, to the extent it is suggested by CVL that Mr. Singhala executed the document in Dubai and physically delivered it to Mr. Garg. Mr. Singhala denies that he was in Dubai on the date the document was allegedly executed by him. CVL complains that Counsel for Griffin Line had a duty to walk the Judge through the various other plausible arguments CVL had given in open correspondence. I do not consider that to be a material omission and in any event I was aware of the other alternatives which had been suggested by CVL in open correspondence.

58. Third, CVL refers to the submission made on behalf of Griffin Line that the fact that the font and the font size in which Mr. Singhala's name is typed is different from the font size otherwise used in the agreement. CVL complains that Counsel for Griffin Line had a duty to walk the Judge through the facts and explain fully that the PDF sent to Mr. Singhala, which Mr. Singhala acknowledged receipt of, did not include Mr. Singhala's name or title and such would have been required to be completed by whoever executed the agreement, either by hand, or typed into the document.

59. Fourth, CVL complains that it should have been brought forcefully to the attention of the Court that if the monies were due to be repaid on 14 June 2017 then Griffin Line could be expected to demand the entirety of the amount due after 14 June 2017 and not make request of minor payments to be made to third parties. The Court was fully aware of these matters and indeed in the earlier Ruling it is noted at paragraph 25 that "*it is not clear why no formal demand was made for repayment until 27 January 2019 by Kobre & Kim and why the audited accounts of Griffin Line continued to show that the loan made by Griffin Line was "current" as at 31 December 2017."*

60. At the *ex parte* hearing on 17 June 2020, Griffin Line expressly made disclosure of the following facts and circumstances which could be said to be against the case put forward by Griffin Line and may be material to the Court's exercise of its discretion:

    (a) That the money owing under the Facility Agreements is not due until 4 January 2021 (an argument based upon Amendment Agreement No. 4 said to be executed by Mr. Singhala on Griffin Line's behalf).

(b) That this is consistent with an argument that Griffin Line has otherwise inexplicably delayed in seeking to enforce its rights since June 2017.

(c) That the entries in Griffin Line's audited accounts as at 31 December 2017 showing the loans to be "current" rather than due, are similarly consistent.

61. Having regard to the relevant principles in relation to the obligation to make full and frank disclosure at an *ex parte* hearing seeking a freezing injunction, I have concluded that there was no material non-disclosure on the part of Griffin Line in the presentation before me at the earlier hearing. I should add that even if I had taken the view that there was material non-disclosure at the earlier hearing, I would have exercised my discretion not to discharge the order on this ground. I would have taken that view on the ground that any non-disclosure was innocent and minor and it would not have been in the interests of justice to discharge the order altogether.

Justice and convenience

62. This is a case where I have concluded that there is a real risk of dissipation of CVL's assets, in the form of the OCM Claim, and unless restrained by an order of this Court there is a real risk that any judgment obtained by Griffin Line in respect of its claims under the First and Second Facility Agreements is likely to go unsatisfied. The Court is concerned that the only realizable asset of CVL, the OCM Claim, has been "sold" to a company which is wholly owned by Mr. McGowan. The Court is concerned by 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 has been disposed of. In these circumstances and in the exercise of my discretion, I am of the clear view that the injunction granted on 22 June 2020 should not be discharged.

63. In order to take into account the disposal of the OCM Claim to TCL and acquisition by CVL of their shares in New Optimum the Order of a 22 June 2020 is varied as follows:

(a) Paragraph 6 is varied to include specifically " 6(3) *Any shares in New Optimum whether held directly or indirectly by the Defendant (CVL*)"; and

(b) Paragraph 9 is varied to require CVL to (i) "*Produce a copy of its sale and/or assignment agreement with TCL*", and (ii) to disclose "*Full details, dates and amounts of future payments and/or transfers of consideration to be made under its agreement with TCL or as otherwise may have been agreed."*

64. In granting the injunction I note that paragraph 11 of the Order expressly provides that "*This Order does not prohibit [CVL] from dealing with or disposing of any of its assets in the ordinary and proper course of business…"*

65. In conclusion, I refuse to discharge the Order made on 22 June 2020.

66. I will hear Counsel in relation to the issue of costs, if required.

Dated 24 July 2020

NARINDER K HARGUN

CHIEF JUSTICE