In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2020: No. 185

BETWEEN:

GRIFFIN LINE TRADING LLC

Applicant

-and-

(1) CENTAUR VENTURES LTD
(2) DANIEL JAMES MCGOWAN

Respondents

Before: **Hon. Chief Justice Narinder Hargun**

Appearances: **Steven White and John McSweeney, Appleby (Bermuda) Limited for the Applicant**

Date of Hearing: **17 June 2020**

Date of Ruling: **22 June 2020**

RULING

1. By ex parte Summons filed on 16 June 2020, Griffin Line Trading LLC ("Griffin Line" or the "Applicant") seeks:

    (a) a worldwide freezing order to prevent Centaur Ventures Limited ("CVL") and Daniel McGowan (Mr. McGowan) (together referred to as the

"Respondents") from dissipating CVL's assets up to the value of $104.1 million, together with an ancillary order for disclosure of assets;

(b) substituted service on the Respondents; and

(c) leave to serve Mr. McGowan out of the jurisdiction.

Background

The Parties

2. Griffin Line is and was at all material times a general trading company incorporated in the United Arab Emirates ("UAE"). Mr. Kamal Singhala, a director of Griffin Line, has filed an affidavit dated 10 June 2020, in support of the present applications.

3. 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 Optimum Coal Mine (Pte) Ltd. ("OCM") entered into business rescue in February 2018. CVL is not specifically targeting further coal opportunities at present.

4. 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.

5. 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.

6. 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

7. 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.

8. 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.

9. 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.

10. 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.

11. 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 First Facility Agreement

12. On 27 January 2019, Griffin Line, through its attorneys Kobre & Kim (Cayman), served a statutory amount upon CVL claiming that CVL owed Griffin Line the sum of $89,270,918.29, representing principal and interest due and owing under the First Facility Agreement. The statutory demand expressly stated that under the First Facility Agreement the amounts drawn down and accrued interest were due and payable to Griffin Line, in accordance with the third agreed extension, on 14 June 2017.

13. On 29 January 2019, 2 days later, CVL responded to the statutory demand 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".*

14. It appears that as a result of the response from CVL, Griffin Line decided to take no further steps in relation to the statutory demand. It appears that, following the letter

from CVL dated 29 January 2019, Griffin Line decided to abandon the statutory demand procedure.

15. Nothing further happened 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 moneys 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.

16. On 28 May 2019, Wakefield Quin, CVL's Bermuda attorneys, pointed out that CVL's contention that the outstanding loans were not due to 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.

17. 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

18. 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.

19. 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.

20. 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 to purchase his shares at fair value and without discount.

Relevant Legal principles

21. I accept Mr. White's submission that the relevant cited authorities show that the 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. A good arguable case means a case which is *"... more than barely capable of serious argument and yet not necessarily one which the judge believes to have better than* 50 *per cent chance of success*." (See *Locabail International Finance Ltd v Manios and Transways (Chartering) SA* [1980] Bda LR 10 at pages 10-11 citing *The Niedersachen* [1983] 2 Lloyd's Rep 600).

    (b) The defendant has no assets or insufficient assets within the jurisdiction to satisfy the plaintiff's claim and also that there are assets outside the jurisdiction (for 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. The test as to whether there is a real risk of dissipation is whether there is a "*real risk*" that a judgment in favour of the applicant would remain unsatisfied because of the dissipation or disposal of assets should an order not be made, per da Costa JA in *Locabail* at pages 11-15. The applicant must establish that such a risk exists by adducing *"solid, cogent evidence that there is a risk of dissipation."* (See *Bank of Bermuda Ltd. V Todd* [1992] Bda LR 17 at pages 116-117).

Good arguable case

22. Mr. White contends that Griffin Line has a strong case based on the loan documents, extension agreements, and statements of account, which include the significant repayments of $9.1 million already paid by CVL. Counsel points out that CVL does not dispute that the money was advanced to it under the First Facility Agreement. The dispute, on CVL's case, is not whether the money should be repaid (it is accepted by CVL that it must) but rather when it becomes due.

23. Mr. White accepts that in relation to the Second Facility Agreement, there is a factual dispute as to whether, as contended by Griffin Line, the sum of $3.2 million was drawn down by CVL shortly after the facility was first made available in November 2016.

24. In relation to the timing of repayment under the First Facility Agreement, Mr. White points to the sworn evidence of Mr. Singhala that the entirety of the principal and accrued interest was due and repayable on 14 June 2017 in accordance with the Amendment Agreement No. 3. Mr. Singhala denies under oath that he ever signed the Amendment Agreement No. 4 extending the due date to 4 January 2021. Second, 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. Third, Mr. Singhala points out that the font and the font size in which his name is typed is different from the font size otherwise used in the agreement.

25. On the other hand, as noted in my Judgment of 29 April 2020 at [24], if the amount was due in June 2017, as contended by the Griffin Line, it is not clear why no formal demand was made for its 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. These two facts would appear to indicate that the principal and accrued interest under the First Facility Agreement was not due on 17 June 2017 (in accordance with the Amendment Agreement No. 3) and would be consistent with the contention advanced by CVL that Amendment Agreement No. 4 was indeed executed extending the due date to 4 January 2021.

26. In this connection, I must deal with a new contention advanced on behalf of Griffin Line. In Mr. Singhala's First Affidavit sworn on 10 June 2020, he refers to the fact that CVL suspended its own trading activities in February 2018 and he was approached by its directors to discuss a further extension to the repayment date. Mr. Singhala asserts that the following discussions in the succeeding months, Griffin Line agreed verbally to extend forbearance on the first loan amount until 6 November 2018 and he refers to this agreement as the "Forbearance Agreement". He explains that at the date of 6 November 2018 was selected as this was the repayment date under the Second Facility Agreement.

27. It should be noted that there is no mention of the Forbearance Agreement in the Statutory Demand served on behalf of Griffin Line on 25 January 2019. The Statutory Demand contends that the principal and accrued interest under the First Facility Agreement was to on 14 June 2017 (in accordance with the third extension). Mr. White contends that the terms of the Statutory Demand are consistent with the existence of the Forbearance Agreement. He says that monies were indeed due on 14 June 2017 in accordance with the parties' contractual obligations but that Griffin Line had agreed not to enforce those contractual obligations under the Forbearance Agreement.

28. Further, Griffin Line instructed Kennedys in Bermuda and engaged in correspondence with Wakefield Quin, attorneys acting for CVL, in the form of Kennedys' letters dated 17 May 2019, 23 July 2019 and 22 August 2019. Throughout this correspondence, Kennedys continued to maintain the position on behalf of Griffin Line that monies were due under the First Facility Agreement on 14 June 2017 (in accordance with the third

extension). There is no mention in that correspondence of any Forbearance Agreement under which Griffin Line had agreed not to take any legal action to enforce payment until 6 November 2018. It appears that the first time there is any mention of the Forbearance Agreement is in the First Affidavit of Mr. Singhala sworn on 10 June 2020.

29. Furthermore, if the true position is, as explained by Mr. White, that under the First Facility Agreement, monies were indeed due to be repaid on a 14 June 2017 (in accordance with the third extension), it is not clear how the auditors of Griffin Line could have described the monies advanced under the First Facility Agreement as "current" as at 31 December 2017. The fact that under the Forbearance Agreement, Griffin Line had agreed not to take legal action to enforce that contractual obligation would not appear to make the monies advanced as "current".

30. In the end, I do not have to decide this point at this stage but merely determine whether Griffin Line's position is *"more than barely capable of serious argument".* At this *ex parte* stage, without the benefit of evidence and argument from CVL and with some hesitation, I have come to the view that Griffin Line's claim passes the test of a good arguable case.

Risk of dissipation

31. Griffin Line contends that there is solid evidence of a risk of dissipation and asserts that this evidence 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.

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

33. In relation to the allegation of insolvency, Griffin Line questions the collectability of two assets shown in the management accounts. First, JGMG is shown in the accounts as a debtor to CVL for $19.2 million. Griffin Line contends that this company in fact cancelled its trade licence and shut down on or around 9 May 2018, 11 months before Mr. Raswant issued his winding up petition. Without this receivable CVL's Statement of Account, contends Mr. White, would show a negative net equity of approximately $2 million.

34. Second, AGEV is shown in the accounts as the debtor to CVL for $17 .8 million. On 31 December 2019, AGEV's auditors advised its creditors that the company had no assets and liabilities of $19 million. Without this receivable, Mr. White submits, CVL's Statement of Account would show a negative total net equity of approximately $19 million.

35. Against this, the Court is bound to take into account the delay in making an application for a freezing order. The statutory demand was served on behalf of Griffin Line on 25 January 2019 and by the stage Griffin Line must have taken the view that CVL was in default of not paying to Griffin Line the sum of $89, 270,918.29. However, Griffin Line elected not to make any application for a Mareva injunction.

36. Furthermore, the letter from Wakefield Quin dated 28 May 2019 made it clear that the defence advanced by CVL was that Griffin Line had entered into a further amendment agreement whereby Griffin Line and CVL had agreed to extend the date of repayment to 4 January 2021. By 23 July 2019, Kennedys, on behalf of Griffin Line, were contending that the document relied upon by CVL in that regard was a forgery. Despite that, Griffin Line elected not to make any application for a freezing injunction. The failure to make any such application would appear to indicate that, at least at this stage, Griffin Line took the view that there was no serious risk of dissipation.

37. Prior to commencement of these proceedings, the last action taken by Griffin Line appears to be a letter written by Kennedys dated 22 August 2019. No further action appears to have been taken for the next 10 months until the commencement of this proceedings.

38. Mr. White contends that at the delay is understandable given that the Ruling of this Court dated 26 August 2019 imposed stringent limitations on the ability of CVL to dissipate assets other than in the ordinary course of its business. Mr. White further contends that the application for a freezing injunction is made necessary by the fact that the main asset of CVL, in the form of the OCM claim, has been sold and CVL may be expecting substantial cash payments in respect of that sale imminently.

39. Again, at this *ex parte* stage and without the benefit of evidence and argument from CVL, I have concluded that the evidence presented by Griffin Line meets the test of real risk of dissipation.

40. However, the submissions made on behalf of Griffin Line make it clear that its real concern is that the expected payments to be made to CVL in respect of the OCM claim may be dissipated. In the circumstances, whilst I am prepared to grant the injunction sought against CVL, I consider that the injunction should be limited in the following respects:

    (a) The risk of dissipation relates to the use of sale proceeds of the OCM claim being used for purposes other than the ordinary and proper course of business. Accordingly, the injunction should be limited to the proceeds of the OCM claim and should expressly allow proceeds to be used in the ordinary and proper course of business of CVL (in terms of the first sentence of paragraph 12 of the draft order).

    (b) The provision for information from CVL should be limited to the OCM claim in terms of paragraph 9 of the draft order and CVL should be allowed 14 days to provide the relevant information.

    (c) CVL should be given the opportunity to make representations and challenge the Order as soon as possible and for this purpose the Court orders a further hearing on 6 July 2020 at 9.30 am.

Order against Mr. McGowan

41. Mr. White explains that Mr. McGowan has been included on the basis that he is the sole active director of CVL and is the CVL's controlling mind. Mr. White submits that, as Mr. McGowan has the power to direct the flow of funds, an inference can be drawn that any forward transmission would be in the hands of Mr. McGowan.

42. Mr. McGowan is in fact one of two directors of CVL and Mr. McGowan indirectly owns up to 50% of its shares. The remaining 50% of the shares are presently owned by Mr. Raswant. It seems to me that paragraph 15 of the draft order which provides that "*A Respondent which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, employees or agents, or in any way*" would in any event cover Mr. McGowan in his capacity as a director and employee of CVL.

43. Mr. White also relied upon the *Chabra* line of cases (*T.S.B. Private Bank International S.A. v Chabra* [1992] 1 WLR 231). I accept that the Court has the jurisdiction to grant an injunction in favour of Griffin Line and against Mr. McGowan even though Griffin Line may not have a good arguable cause of action against Mr. McGowan as a sole defendant. The jurisdiction is exercised where the injunction against the primary defendant (CVL) is inadequate to protect the plaintiff. In the ordinary case such an order is made where the secondary defendant apparently owns the property which may be beneficially owned by the primary defendant and which is sought to be the subject matter of the freezing injunction. There is no proper evidential basis for saying that Mr. McGowan is in possession of property which belongs to CVL.

44. In my view a freezing order against CVL itself is adequate to protect the interests of Griffin Line and as noted earlier, Mr. McGowan is in any event bound to comply with the terms of the order in his capacity as a director and/or employee of CVL.

Service out of jurisdiction

45. Given that the Court has decided not to grant any injunctive relief against Mr. McGowan and no substantive relief is sought against in the Statement of Claim, the issue of service out of jurisdiction upon Mr. McGowan no longer arises.

Substituted service

46. I accept and order that leave be granted to effect substituted service of the Specially Endorsed Writ of Summons, ex parte Summons, First Affidavit of Mr. Singhala, First Affidavit of Mr. McSweeney, this Ruling and the Order of the Court, on CVL via email address at info@centaurholdings.com and further by leaving the same "care of" of CVL at its registered office at "Cedar House", 41 Cedar Avenue, Hamilton HM 12, Bermuda. I further direct that these documents be sent via email to Mr. Horseman at Wakefield Quin and Mr. McGowan at his email address d.mcgowan@centaurasset.com.

47. Counsel is requested to prepare a draft order for the consideration of the Court.

Dated 22 June 2020

NARINDER K HARGUN

CHIEF JUSTICE