[2019] SC (Bda) 55 Com (26 August 2019)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 284

BETWEEN:

DEEPAK RASWANT	Petitioner
-and-	
CENTAUR VENTURES LTD.	1st Respondent
THE CENTAUR GROUP LIMITED	2nd Respondent
DANIEL McGOWAN	3rd Respondent

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Matthew Watson, Cox Hallett Wilkinson Limited, for the Petitioner**
Mr Richard Horseman, Wakefield Quin Limited, for the Respondents

Date of Hearing: **6 August 2019**

Date of Ruling: **26 August 2019**

RULING

Jurisdiction to appoint provisional liquidators; Petitioner seeking relief under sections 111 and 161(g) of the Companies Act; relevant factors to be taken into account

Introduction

1. This is the hearing of an ex parte application (on notice) by Mr Deepak Raswant, ("the Petitioner"), seeking an order that Rachelle Frisby and John Johnston of Deloitte Ltd in Bermuda be appointed to act jointly and severally as Provisional Liquidators ("JPLs") of Centaur Ventures Limited ("CVL" or "the Company").

2. The application seeks that the powers of the JPLs shall not be limited, pursuant to section 170(3) of the Companies Act 1981 ("the Act"), by the order appointing them and in particular that the JPLs shall be empowered to have the conduct of the Company's creditor claim in Optimum Coal Mine (Pty) Ltd (In Business Rescue) ("OCM"), including but not limited to vote in respect of any business rescue plan on behalf of the Company.

3. The underlying proceedings were commenced by the Petitioner by filing a Petition dated 3 July 2019, seeking orders under sections 161(g) and 111 of the Act.

4. Under section 161(g) the Petitioner seeks an order that the Company be wound up on the basis that it is just and equitable to do so.

5. At the same time the Petitioner seeks relief under section 111, the alternative remedy to winding up in cases of oppressive or prejudicial conduct, that the Petitioner be restored his shareholding to 50% in the Company and that the Company's bye laws be restored from those amended bylaws purportedly adopted on 31 May 2019, to those amended bylaws adopted by Order of the Court dated 19 March 2019. The effect of the relief sought under section 111, the Petitioner asserts, is to obtain 50% of any surplus net assets upon the winding up of the Company, which the Petitioner says are valued at excess of US $17 million.

6. The relief sought under section 111 is only available if the Court is satisfied the Company's affairs are being conducted or have been conducted in a manner oppressive or prejudicial to the interests of some part of the members and that wind up of the Company would unfairly prejudice that part of the members, but otherwise the facts would justify making the winding up order on the ground that

it was just and equitable, that the Company should be wound up. The apparent conceptual inconsistency in seeking relief under section 161(g) and 111 at the same time will have to be argued at the hearing of the Petition.

The legal regime for the appointment of provisional liquidators

7. The statutory basis for the appointment of provisional liquidators is to be found in section 170(2) of the Act and rule 23(1) of the Companies (Winding-Up) Rules 1982.

8. Section 170(2) provides that:

> *"The Court may on the presentation of a winding-up petition or at any time thereafter and before the first appointment of a liquidator appoint a provisional liquidator who may be the Official Receiver or any other fit person."*

9. Rule 23(1) of the Companies (Winding-Up) Rules 1982 provides that:

> *"After the presentation of a petition for the winding-up of a company by the Court, upon the application of a creditor, or of a contributory, or of the company, and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator, the Court, if it thinks fit and upon such terms as in the opinion of the Court shall be just and necessary, may make the appointment."*

10. The appointment of provisional liquidators is an exercise of judicial discretion. In exercising that discretion, the courts in Bermuda (*Re CTRAK Ltd* [1994] Bda LR 37 (Ground J); *Discover Reinsurance Co v PEG Reinsurance Co Ltd* [2006] Bda LR 88 (Kawaley J); and *BNY AIS Nominees Ltd v Stewardship Credit Arbitrage Fund Ltd* [2008] Bda LR 67 (Bell J)), have followed the guidance given in the judgment of Sir Robert Megarry in *Re Highfield Commodities Ltd* [1984] 3 All ER 884, at 892-893 in following terms:

"At the outset let me say that I accept that the court will be slow to appoint a provisional liquidator unless there is at least a good prima facie case for saying that a winding-up order will be made: see Re Mercantile Bank of Australia [1892] 2 Ch 204 at 210, Re North Wales Gunpowder Co [1892] 2 QB 220 at 224. Founding himself on cases such as Re Cilfoden Benefit Building Society (1868) LR 3 Ch App 462(where the words 'in general' should be noted) and Re London and Manchester Industrial Association (1875) 1 Ch D 466, counsel for HCL contended that if the company opposed the application for the appointment of a provisional liquidator, no appointment would be made (and any ex parte appointment would be terminated) unless either the company was obviously insolvent or it was otherwise clear that it was bound to be wound up, or else the company's assets were in jeopardy, as seems to have been the case in Re Marseilles Extension Rly and Land Co [1867] WN 68.

.....

I do not think that the old authorities, properly read, had the effect of laying down any rule that the power to appoint a provisional liquidator is to be restricted in the way for which counsel for HCL contends. No doubt a provisional liquidator can properly be appointed if the company is obviously insolvent or the assets are in jeopardy; but I do not think that the cases show that in no other case can a provisional liquidator be appointed over the company's objection. As the judge said, s 238 is in quite general terms. I can see no hint in it that it is to be restricted to certain categories of cases. The section confers on the court a discretionary power, and that power must obviously be exercised in a proper judicial manner. The exercise of that power may have serious consequences for the company, and so a need for the exercise of the power must overtop those consequences. In particular, where the winding-up petition is presented because the Secretary of State considers that it is expedient in the public interest that the company should be wound up, the

public interest must be given full weight, though it is not to be regarded as being conclusive"

11. I accept the submission that *Highfield Commodities* makes clear that the categories of cases in which it would be appropriate to appoint a provisional liquidator are not closed. Indeed this is demonstrated by the practice in this Court of appointing provisional liquidators to facilitate restructuring where the Company is in the "zone of insolvency" (see *Discover Reinsurance,* per Kawaley J at [18], [19]).

12. Counsel for the Respondents does not take issue with the discretionary nature of the Court's jurisdiction to appoint provisional liquidators. He cautions that the Court is bound to take into account the commercial consequences of such an appointment and urges that an appointment should not be made if other measures adequate to preserve the status quo are available (*Derek French, Applications to Wind Up Companies*, 3rd edition, 4.90).

The Petitioner's case for the JPLs

13. In support of the application for the appointment of the JPLs the Petitioner relies upon the following facts and circumstances as demonstrating that there is a good *prima facie* case for winding up the Company and for the appointment of JPLs.

(1) Insolvency of the Company

14. First, it is said that the Company is potentially insolvent. The management accounts for the Company, as at February 2018, show assets of $146,121 273 and liabilities of $128,707,037 showing net equity of $17,434,236. Included in the liabilities is amount owing to Griffin Line General Trading LLC ("Griffin Line") in the amount of $97,664,293. This amount represents indebtedness under a loan facility in the amount of $100 million granted by Griffin Line to the Company and there appears to be a dispute as to whether this amount is presently due or some time in the future.

15. The Company contends that the indebtedness to Griffin Line is not due and payable until 4 January 2021, relying on a loan amendment agreement which appears to be executed by Mr McGowan on behalf of the Company and a Mr Singhala on behalf of Griffin Line. That document does indeed state that the repayment date has been extended to 4 January 2021. The Court was referred to correspondence from Kennedys, Bermuda attorneys acting on behalf of Griffin Line, which appears to dispute the validity of the loan amendment agreement. It appears to be suggested that the signature of Mr Singhala on the amendment agreement may not be genuine.

16. I accept that if the true position is that the amendment agreement is a forgery and therefore the indebtedness under the loan facility is presently due, then the Company is likely to be insolvent on a cash flow basis. However, I am not in a position to take a considered view on this matter. Having said that I do note if the amount was due in June 2017, as appears to be contended in the letter from Kennedys dated 17 May 2019, it is not altogether clear why no formal demand for its repayment was made until 27 January 2019 by Kobre & Kim (UK) LLP 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.

(2) Loss of substratum

17. Second, it is said that Company has ceased carrying on any business since February 2018, for which it was incorporated and as a result can fairly be said that its substratum no longer exists. In support of this proposition the Petitioner relies on the fact that the Company has not traded in the last 17 months; it has not entered into any material contract since 13 August 2018; it has no cash resources presently available to it; it has no known loan facilities available to it; it has no banking facilities of its own, such that it utilises a custodian account holder; and the only action the Company has taken since February 2018 are consistent with recovering assets to wind up its operations.

18. It does appear that the Company has not entered into any new business contracts in the recent past and bulk of its activities appear to be directed at recovering its assets and in particular, progressing its very substantial claim of $74,577,285 in the Business Rescue Proceedings of OCM in South Africa.

(3) Dishonest and/or unlawful conduct

19. Third, the Petitioner relies upon the core allegation in the previous litigation (No. 63 of 2019) that Mr McGowan, one of the two directors of the Company and an indirect 25% shareholder in the Company, unlawfully and/or fraudulently adopted bylaws on 13 August 2018 (when the Petitioner became a director and a 50% shareholder in the Company), which unknowingly provided a right for Mr McGowan (on behalf of The Centaur Group Limited ("TCGL"), the remaining 50% shareholder) to remove the Petitioner as a director. This was not discovered by the Petitioner until 21 January 2019, when the Company Secretary provided a copy of these bylaws to the Petitioner. After proceedings were commenced against the Company, the Company consented to the Order on 19 March 2019, which restored the bylaws and provided for full inspection of the Company's books and records by the Petitioner. In consenting to this Order, the Company was also required to pay the Petitioner's legal costs on an indemnity basis.

(4) Abuse of Petitioner's rights as a director and shareholder

20. Fourth, the Petitioner complains that Mr McGowan has systematically abused the Petitioner's rights as a director of the Company. It is said that he has unlawfully excluded the Petitioner from important financial information, consultation and decision-making in respect of the Company's financial affairs, particularly in respect of its affairs in South Africa. An example of this complaint is that on 18 July 2019, the Petitioner was provided with a copy of a nondisclosure agreement which Mr McGowan apparently executed on behalf of the Company and entered into with Lurco dated 20 June 2019, together with Lurco's offer to purchase the Company's creditor claim in the restructuring of OCM. The Petitioner complains that this is especially egregious as Mr McGowan withheld the nondisclosure for

more than a month notwithstanding correspondence from the Petitioner's attorneys that Mr McGowan should continue to inform the Petitioner of *all* developments as and when they occur, including but not limited to recovery or payment of monies and all updates and documents in respect of the Company's creditor claim in OCM.

(5) Dilution of the Petitioner's shareholding

21. Fifth, the Petitioner complains that Mr McGowan improperly engineered the dilution of the Petitioner's interest in the Company from a 50% shareholder to less than 1% shareholder, so that all of its remaining assets, after payment of debts, will be paid to Mr McGowan and TCGL (in which Mr McGowan owns a 50% stake through Centaur Holdings Limited ("CHL")). The Petitioner relies heavily on this particular allegation as, demonstrating not only wrongdoing on the part of McGowan but also a complete breakdown of trust and working relationship between the two directors and shareholders.

22. The Petitioner argues that the dilution of his shareholding involved Mr McGowan deliberately putting the Company in the position of being unable or unwilling to pay the debt owed to IMR Metallurgical Resources AG ("IMR") out of existing resources so as to avoid the need for a share issuance altogether. IMR served a statutory demand on the Company on 21 January 2019, in the amount of $976, 023.65 that expired 21 days thereafter creating the possibility that IMR could apply to wind up the Company.

23. The Petitioner says that this amount could have been paid to IMR if the Company did not make improper payments to the law firm Jones Day. It appears to be common ground between the parties that the Company paid $1,085,848 in legal costs to Jones Day over the period of its 11 invoices issued from 20 December 2017 to 9 October 2018 which the Company now admits in correspondence to Jones Day, were not its obligation to pay. The Petitioner had no involvement in making these payments to Jones Day and was wholly unaware that they have been made.

24. The Petitioner also says that this amount could have been paid to IMR if the Company's debtors had been pursued in respect of debts which they owed to the Company. The debts owed to the Company include (i) the principal amount of $8,700,000 together with interest in the amount of $1,442,867 owned by Centaur Commodities International DMCC that was due and payable to the Company by 1 August 2018; (ii) the amount of $17,853,370 owed to the Company by AGEV Investment Ltd ("AGEV") under a loan facility agreement dated 7 November 2016 and this amount was due and payable to the Company on 6 November 2018; and (iii) the amount of $1,085,151 from Mr Akash Garg under a shareholder loan facility agreement dated 10 April 2017 which was due and payable to the Company on 9 April 2018.

25. Finally, the Petitioner says that this amount due to IMR could have been paid if Mr McGowan had utilised the substantial loan facilities that were available to the Company. It is to be noted that the Company points out that the lending facilities with the Centaur associated companies would not have responded as those agreements gave the lender the unilateral right to determine whether a particular loan should be made. The Company also points out that the Griffin Line lending facilities would also not have responded because the Griffin Line was taking the position in January 2019 that the monies advanced under the facilities were now due and had to be repaid by the Company.

26. The Petitioner contends that the dilution of his shareholding was made possible by Mr McGowan keeping the Petitioner in the dark with respect to the affairs of the Company by withholding information that would ordinarily be available to him as a director; even after the Court ordered on 19 March 2019 that he be permitted access to the Company's books and records.

27. The dilution of shareholding was also made possible, the Petitioner contends, by Mr McGowan creating an atmosphere of hostility and distrust between himself and the Petitioner in relation to the conduct of the Company's affairs so as to cause the Petitioner to be unwilling to invest more money in the Company even if

it was appropriate to issue shares. The arbitrary fixing of 50,000 ordinary shares at $12 per share contributed to that atmosphere of hostility and distrust. The Court notes that no credible attempt was made at this hearing by Mr McGowan or the Company to justify how it was determined that the number of common shares on offer should be fixed at 50,000 and/or the offer price should be fixed at $12 per share. The lack of any credible explanation in this regard by Mr McGowan and the Company is a strong pointer that the Petitioner's complaints in this regard are likely to be justifiable.

28. In conclusion, the Petitioner contends that this is a suitable case where the Court should exercise its discretionary jurisdiction to appoint JPLs. The Petitioner points out that the Company is no longer trading and has not been trading and therefore the risk of irreparable damage to the Company is low. It is said by the Petitioner that there is nothing unique that Mr McGowan brings to the table that the JPLs cannot do, particularly with the assistance of the South African attorneys, Tabacks.

The Respondents' case why JPLs should not be appointed

29. The primary submission made on behalf of the Respondents is that the appointment of the JPLs at this stage is likely to be extremely harmful to the commercial interests of the Company and that any reasonable concerns which the Petitioner may have can be appropriately met by an order of this Court which can regulate the Company's affairs in the meantime.

30. The Company contends that the appointment of the JPLs would potentially trigger default clauses in the various loan agreements with the Company's lenders, thus triggering immediate repayment of long-term liabilities which are presently not due. If that is indeed the case, that would ensure that the Company will become cash flow insolvent immediately which cannot conceivably be in the interest of the Company, its shareholders or its creditors.

31. Secondly, that the current situation concerning its claim in the restructuring of OCM in South Africa in the amount of $74,577,285 is an extremely complex one and at a critical stage. It would be impossible, the Respondents contend, for the JPLs to get a full understanding of all the moving parts. Through Mr McGowan's discussions, it is contended, an offer for the Company's full claim in OCM has been received from one of the consortiums bidding for OCM. The professional team that has supported the Company has intricate knowledge of the history, strategies and complexities. The Company argues that any change in the management or control of the Company would jeopardise the vote on the OCM plan and the Company's potential returns for its creditor claim.

32. Concurrently with these submissions, the Second and Third Respondents have offered to purchase the Petitioner's shares in the Company at a value to be determined by an independent expert jointly instructed on the basis that the Petitioner is a 50% shareholder subject, to an appropriate adjustment being made for the Second and Third Respondent's recent capital contribution to the Company. This is an open offer by the Second and Third Respondents to purchase the Petitioner's shares at a fair value and on the basis that the Petitioner is the owner of 50% of the shares in the Company.

33. The Court notes that this open offer is a substantial reversal on the part of the Respondents and also meets in large measure the relief sought pursuant to section 111 of the Act. As the Respondents correctly submitted, the order to buy out one shareholder by another at fair value without discount is ordinarily the order this Court makes where it finds that the case for unfair or prejudicial conduct under section 111 has been made out.

34. In order to meet the concerns expressed by the Petitioner in these proceedings, the Respondents submitted that these concerns can be met by an appropriate order regulating the affairs of the Company. This submission built upon the suggestion made by the Petitioner in a draft consent order sent under cover of a letter from CHW dated 3 July 2019. The proposed order by the Respondents would regulate the affairs, on an interim basis, as follows:

1. *The Company is at liberty to accept any offer of sale or enter in agreement or vote any business rescue plan which achieves 100 cents in the Rand recovery for its creditor claim in OCM;*

2. *In the event, Section 151 meeting proceeds as scheduled on the 26 August 2019, the Third Respondent will provide the Petitioner with ongoing daily status reports in respect of the Section 151 meeting(s) no later than 2 hours after the conclusion of that meeting(s);*

3. *In the event, any other offer is being considered which does not achieve 100 cents in the Rand, the Company will convene a Board meeting on no less than 3 days' notice to consider any such offer;*

4. *The Petitioner shall attend such meeting failing which the meeting shall be deemed quorate;*

5. *The Company shall not, without prior notice to the Petitioner and Board Approval:-*

    (i) Make any payment in excess of $25,000 for any one transaction;

    (ii) Dispose of charge, release, waive, assign or settle or compromise asset of the Company including but not limited to any loan payable to the Company without prior approval;

    (iii)Deal with any monies that is in the Company's custodial accounts (or any other bank or custodial account for or on behalf of the Company) except for any payments that may be made to IMR pursuant to the settlement reached with IMR on the 9 April 2019;

6. *For the purposes of the matters listed in 5(i) (ii)and(iii) or any other matter save considering any offers in the OCM matter, the Company will convene a Board meeting of no less than 7 days' notice with any potential transaction to be voted on to be clearly set out in the Notice of the Board meeting;*

7. *The Company will not declare or pay any dividend or pay any monies that shall confer any benefit on the Second and Third Respondents;*

8. *The matter is adjourned for mention to Friday, 6 September 2019;*

9. *The Company will not pay any monies or confer any benefit on the Second or Third Respondents;*

10. *The Company will not offer for subscription, allot, or register any unissued shares of the Company;*

11. *The Respondents shall not amend the bylaws of the Company;*

12. *The Respondents shall not execute any written resolution of the Board of Directors without first providing 7 days' notice of such written resolution;*

13. *The Respondents shall not convene any special general meeting or execute any written resolution to the members of the Company for the purpose of removing the Petitioner as a Director or member; or to amend the bylaws of CVL; or otherwise;*

13. *The Respondents shall provide to the Petitioner, within 48 hours of execution of this Order, a copy of all the Company's documents in its possession, custody, power or control including but not limited to any minutes, emails, letters and, or note of any telephone call with its South African attorneys; the business rescue practitioners of OCM;*

any creditor (including Eskom), shareholder or any bidder of OCM, for the period 18 April 2019 to present (which relates to the period in which the business rescue practitioners embarked on the sale process of OCM);

14. *The Respondents shall provide to the Petitioner a copy of any document (including but not limited to minutes, emails, letters, and any note of any telephone call) that may be sent, created or received by the Company, following execution of this Order by the Company, within 24 hours of it being sent, created or received by the Company.*

Discussion and conclusion

35. The Petitioner has presented a compelling case based upon loss of substratum and potential unlawful conduct resulting in dilution of Petitioner's shareholding. These grounds provide the factual basis on which the Court can reasonably conclude that there is a *prima facie* case that an order should be made winding up the Company.

36. The Petitioner's evidence in relation to dishonest and unlawful conduct (paragraph 19); abuse of Petitioner's rights as a director and shareholder (paragraph 20); and dilution of Petitioner's shareholding (paragraphs 21-28) calls for the Court to provide appropriate protection to the Petitioner pending the hearing of the Petition.

37. In the ordinary case, the Court would be minded to appoint provisional liquidators in these circumstances. However, I have come to the view that this is not an ordinary case because (1) there is credible evidence that the appointment of provisional liquidators is likely to be seriously damaging to the commercial interests of the Company and as a consequence its creditors and shareholders; and (2) the Respondents are prepared to agree to terms which are designed to meet, in large measure, the concerns expressed by the Petitioner.

38. The Company has filed evidence to the effect that if an order was made appointing provisional liquidators it would immediately trigger default clauses in various loans with the Company's lenders and thus triggering immediately repayment of long-term liabilities which are presently not due. The precise effect of the appointment of provisional liquidators would depend upon the terms of the loan facilities but in principle the Court can accept that this is a reasonable concern on the part of the Company.

39. As noted earlier the Company's balance sheet shows total assets of $146,121,273 of which $74,577,285 is represented by the Company's claim in the restructuring proceedings of OCM in South Africa. The claim represents the largest asset of the Company. It is clearly in the interest of the Company, its shareholders and creditors, that the recovery of this claim is not adversely affected.

40. The Company is represented in relation to the OCM claim by Tabacks, a law firm, in South Africa, who have assembled a team of no less than 10 legal profession, 4 directors and 4 advocates, working an equivalent of 284 full working days with the Company. The Company's team in relation to this claim consists of Mr McGowan and Ms. Willoughby-Foster, the Company's in house counsel. Tabacks have expressed their view in a memorandum dated 5 August 2019, which has been produced to the Court, and in that memorandum they say that the appointment of the provisional liquidators at this time will severely damage the Company's prospects of a successful recovery of the claim. The Court is obliged to take this advice into account in considering whether it is appropriate to appoint provisional liquidators at this time. Tabacks state:

> *"14. CVL's intricate knowledge of OCM assets, along with CVL's experienced and detailed knowledge of its business, operations - the Business Rescue Process generally, practically and legally, and a detailed knowledge and understanding of the regulatory landscape in South Africa both generally, and specifically in relation to mining, (including the Department of Mineral Resources, Competition Commission, Richard's Bay Coal Terminal approval process) - will be essential to the completion*

of the OCM sales process, and crucial to CVL realising best value for the creditor claim in OCM. The rapport between the representatives of CVL, Eskom and the Business Rescue Practitioners is as a result of an intense negotiation process and aggressive litigation launched by CVL to assert its position, which at times required rapid overnight responses to implement urgent applications in the best interests of CVL strategically led by Mr McGowan.

17. Suffice to state as follows, placing CVL under a JPL process, will not only completely and finally remove any chance of recovery of CVL's funds given the delays it will occasion, it would completely halt sales and rescue process of OCM. In a potential liquidation scenario the operation would be handed back to proxies of its erstwhile owners, the Gupta family, a position which, in itself would be the end of OCM"

41. Given the potential damage the appointment of the JPLs may cause in relation to the recovery of the claim in the OCM restructuring this Court will only make an appointment if it is satisfied that the concerns expressed by the Petitioner cannot be met in other ways. Having considered the concerns expressed by the Petitioner, I am satisfied that the order proposed by the Respondents is sufficient for the interim period. The effect on the day-to-day management of the Company would be as follows;

    (1) The Company is not allowed to accept any offer in relation to the OCM claim unless that offer achieves full recovery of the claim.

    (2) In the event an offer is made in relation to the OCM claim which does not achieve full recovery, the Company is obliged to convene a Board meeting, with not less than 3 days' notice, to consider that offer.

    (3) The Company is not allowed, without prior notice to the Petitioner and Board Approval (i) to make any payment in excess of dollars 25,000 for any one transaction; (ii) to dispose of or otherwise deal with any

asset of the Company including any loan payable to the Company; and (iii) to deal with any monies that is in the Company's custody accounts.

(4) The Company is not allowed to declare or pay any dividend that shall confer any benefit on the Second or Third Respondents.

(5) The Company is not allowed to offer for subscription, allot, or register any and of its unissued share capital.

(6) The Company is not able to amend its bylaws.

(7) There is no ability to pass written Board resolution without first providing 7 days' notice of such written resolution.

(8) The Company is not allowed to convene any special general meeting or execute any written resolution to the members of the Company for the purposes of removing the Petitioner as a director or member; or to amend the bylaws of the Company.

(9) The Company is obliged to provide the Petitioner, within 48 hours, any and all documents in relation to the OCM claim for the period 18 April 2019 to present.

(10) The Company is obliged to provide to the Petitioner a copy of any document that may be sent, created or received by the Company within 24 hours of it being sent, created or received by the Company.

42. I accept the submission made by the counsel for the Petitioner that if the Court was minded to accept this proposal, the Court should also provide that a representative of the Petitioner (who is not reasonably perceived to be associated with the Gupta family), is allowed to attend any physical or electronic meeting in

relation to the claim of the Company in the OCM restructuring in South Africa which is attended by either Mr McGowan or Ms. Willoughby-Foster or Tabacks.

43. In taking this view, the Court is encouraged by the open offer made by the Second and Third Respondents to purchase the shareholding of the Petitioner in the Company (for this purpose agreed to be 50% of the shares in the Company) at fair value. As indicated earlier, this is the usual order, the Court would make if it finds that there has been unfair prejudice or oppression in the affairs of the Company.

44. In all circumstances, the Court declines to make the order appointing the JPLs. However, the Court is satisfied that steps need to be taken in order to protect the concerns expressed by the Petitioner. In order to meet those concerns, the Court will make an order the substance of which is set out in paragraph 41 above together with the additional term appearing in paragraph 42 above. The draft order at paragraph 41 may need to be expressed in clearer terms. The Court invites counsel to prepare an appropriate draft of such an order.

45. I will hear counsel in relation to the issue of costs, if necessary.

Dated 26 August 2019

NARINDER K HARGUN
CHIEF JUSTICE