

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 FINANCIAL SERVICES DIVISION

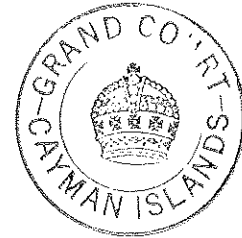
3 CAUSE No: FSD 80 OF 2014 (AJJ)

5 Before The Hon. Justice Andrew J. Jones QC

6 In Open Court, 21 January 2015

9 IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

11 AND IN THE MATTER OF BROOKEMIL LTD. ("the Company")



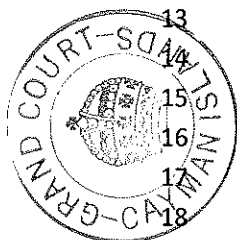
13 **Appearances:** Mr Jeremy Walton and Mr Sebastian Said of Appleby for the Company

14 The Petitioner was not represented and did not appear.

18 REASONS

21 **Introduction and procedural history**

- 23 1. Brookemil Ltd ("the Company") was incorporated under the Companies Law on 13
24 December 1991 and carries on business as a holding company. It was the majority
25 shareholder in a number of subsidiaries incorporated in Russia, through which it
26 owned real estate in Moscow. It claims that its shares in these subsidiaries were
27 unlawfully expropriated and proceedings arising out of this allegation have been
28 pending in the District Court of Nicosia in Cyprus since 2011.
- 30 2. On 30 July 2014 a creditor's winding up petition was presented against the Company
31 by OOO Mezhhregionalnaya investitsionnaya kompaniya ("the Petitioner") based upon
32 the non-payment of \$2,239,857.40 which purportedly became due and payable not
33 earlier than 16 July 2012 under a promissory note dated 16 July 2007 and issued to
34 Blidensol Trading and Investments Ltd ("Blidensol"). The Promissory Note was
35 purportedly assigned by Blidensol to the Petitioner on 24 June 2013 and a statutory
36 demand, served at the Company's registered office on 2 July 2013, went unanswered.



1 3. The petition was duly advertised and listed for hearing on 1 September 2014 when the
2 Company was represented by counsel who indicated that it intended to defend the
3 petition on the grounds that the Promissory Note is a forgery and that no debt is owing
4 to the Petitioner. At that stage, the Company's evidence comprised an affidavit sworn
5 that day by Mrs Thalia Constantantinou who describes herself at its sole director. I
6 ordered that the petition be adjourned and fixed a case management conference to
7 take place on 7 October 2014. In the event, the case management conference was
8 continued on 14 October 2014 when I directed that the petition be stayed, pending the
9 trial of the following preliminary issue –

10
11 “Whether the promissory note relied on by the Petitioner in these proceedings is valid and
12 enforceable in accordance with its terms or whether it is forged, or otherwise unenforceable.”

13
14 I fixed the new trial date, gave directions for serving pleadings and further affidavit
15 evidence and directed that a further case management conference would be held on 28
16 November 2014. These directions were given on the basis that the burden of proving
17 that the Promissory Note is a forgery or otherwise invalid as a matter of law rests on
18 the Company. The further evidence filed on behalf of the Petitioner comprised an
19 affidavit sworn on 20 November 2014 by Mr. Dimitry Garkusha in which he give a
20 detailed description of the circumstances in which the Promissory Note is alleged to
21 have been executed. In addition to the Promissory Note and a separately executed
22 version of it, he maintains that a promissory note purchase agreement, a promissory
23 note acceptance certificate and a letter from the Company to Mr Garkusha, were all
24 signed on behalf of the Company by Mr Gogokhia on 16 July 2007.

25
26 4. On 28 November 2014, having read the pleadings and affidavits and heard counsel for
27 both parties, I gave directions for trial including a direction that the parties should
28 jointly instruct Mr Robert W. Radley (“Mr Radley”) or such other forensic document
29 examiner and handwriting expert as may be agreed between them to examine and
30 express an expert opinion upon the authenticity of (a) the Promissory Note and, in the
31 event that they are disputed, (b) the four other documents described in paragraphs 23-
32 28 of Mr Garkusha's first affidavit. The authenticity of these other documents is
33 disputed by Mr. Gogokhia in his second affidavit sworn on 12 December 2014. There
34 was no disagreement between the parties about the appropriateness of these directions
35 and the matter appeared to be proceeding to trial in an orderly way. Then, on 11
36 December 2014, it took an unusual course when the Petitioner made an application for
37 leave to withdraw the winding up petition and vacate the trial of the preliminary issue.
38 This application was refused and a further case management conference was
39 convened for 22 December 2014 at which the Petitioner was expected to say whether
40 or not it intended to continue to participate in the proceeding. The Petitioner's general
41 director, Mr. Viktor Finagin, swore an affidavit in which he recognised (at paragraph
42 6) the risk that the handwriting expert report may show that the Promissory Note is
43 indeed a forgery and said (at paragraph 7) that the Petitioner had made the business
44 decision not to participate in the proceedings any further considering the costs

involved, the risk that the petition may not succeed and the amount which it may potentially recover. The Petitioner's counsel came off the record and it played no further part in the proceeding.

5. For these reasons the trial of the preliminary issue took place on 21 January 2015 in the absence of the Petitioner. I decided the issue in favour of the Company, with the result that the winding up petition was dismissed. I now give my reasons for that decision.

The evidence

6. The Company's evidence comprises the six affidavits (together with documentary exhibits) sworn by four witnesses of fact and the expert report of Mr Radley. Each of the witnesses attended the hearing and could have been cross-examined on behalf of the Petitioner had it chosen to participate. Each gave oral evidence in response to questions asked by counsel for the Company and by the Court.

7. By the time the Petitioner abandoned its case, it had filed four affidavits, three sworn by Mr Viktor Finagin and one sworn by Mr Dmitry Garkusha, which is highly relevant to the determination of the Preliminary Issue. Notwithstanding Mr Garkusha's failure to attend for cross-examination (either in person or via a video link) in accordance with the order for directions, I concluded that his evidence should be taken into account. I also took account of the three affidavits sworn by Mr Finagin.

8. Mr Garkusha's affidavit describes in some detail the circumstances in which he says that the Promissory Note was executed by Mr Gogokhia on behalf of the Company. He describes his business relationship with Mr Ashot Yegiazaryan whom he has known since 1996. He says that in July 2007 he agreed (on behalf of Blidensol) to make a loan for the benefit of the Company (which is said to be beneficially owned by Mr Yegiazaryan) in connection with the acquisition of a property in Moscow. He says that it was agreed that the loan would be advanced to a company called Strabag AG Company, but it would be secured by a Promissory Note issued by the Company. He says that it was agreed that the Promissory Note would be executed by Mr Gogokhia, a close friend of Mr Yegiazaryan, whom he knew to be acting for the Company under a power of attorney.

9. Mr Garkusha says that he and his assistant met with Mr Gogokhia at Mr Garkusha's office in Moscow in the afternoon of 16 July 2007 for the purpose of executing the Promissory Note and related documents. He says that the relevant documents, including the Promissory Note, had been prepared by his assistant and that Mr Gogokhia signed them in his presence, having first called Mr Yegiazaryan on his cell phone to confirm his authority. He says that Mr Gogokhia had brought the Company's

1 seal with him and that he affixed it to the Promissory Note in his presence. His
2 assistant is said to have made copies of the documents. The copy of the Promissory
3 Note was given to Mr Gogokhia and Mr Garkusha retained the original. He says that
4 he gave instructions to Blidensol's bank to transfer the funds to the account of Strabag
5 AG Company at the same time. Copies of the agreement between Blidensol and the
6 Company and the bank credit advice are exhibited to his affidavit.

7
8 10. Mr Gogokhia addressed this evidence in his second affidavit. He denies having
9 attended any meeting at Mr Garkusha's office on 16 July 2007 and denies having
10 signed any of the documents described by Mr Garkusha, including the Promissory
11 Note itself. He also gave oral evidence. He was shown each of the documents said to
12 have been executed at the meeting and denied having signed any of them. In answer
13 to questions from me, he admitted that he was authorised under a power of attorney to
14 act for the Company, but he was emphatic that he had never executed this Promissory
15 Note. He described Mr Yegiazaryan as Mr Garkusha's former boss. Mr Gogokhia's
16 evidence is that Mr Garkusha has betrayed his former boss and is now working for
17 someone else. Although he does not say so in terms, my understanding of his
18 evidence is that Mr Garkusha has fabricated his evidence about the Promissory Note
19 in order to further the interests of his new boss, whom Mr Gogokhia is not willing to
20 name.

21
22 11. Mr Gogokhia's evidence that the Promissory Note and related documents are
23 forgeries is supported by the expert opinion of Mr Radley. He is a very experienced
24 and well known forensic document and handwriting expert who has an impressive
25 curriculum vitae. He told me that during his 37 years of professional practice he has
26 given evidence on several hundred occasions in 21 different countries. The summary
27 of his opinion about the authenticity of the Promissory Note and four related
28 documents is as follows (Report dated 9 January 2015 paragraphs 3-7) –

- 29
30 (i) *"The non-availability of the original questioned documents has hampered the*
31 *examination slightly. (They were not available because the Petitioner failed to*
32 *produce them).*
- 33 (ii) *The comparison documentation presented is considered adequate for the*
34 *examination process. These documents show an illegible but highly*
35 *personalised and fluent structuring of the signatures of Mr Gogokhia.*
- 36 (iii) *All questioned signatures show significant differences relative to known*
37 *writings. I am consequently of the opinion that there is very strong evidence to*
38 *support the proposition that Mr Gogokhia did not sign any of the five*
39 *signatures in question but these are crude and poorly executed simulations*
40 *(freehand copies) of his general signature style.*
- 41 (iv) *I am of the opinion that the likelihood that the questioned signatures were*
42 *written by Mr Gogokhia in an unusual style due to adverse conditions etc,*
43 *may be realistically discarded.*

1 (v) I consider the possibility of Mr Gogokhia having written the signatures in
2 question in deliberately disguised forms to be highly unlikely and I can find no
3 evidence to support such a proposition."
4

5 12. Mr Radley's oral evidence was compelling. He explained his methodology and talked
6 me through the way in which the documents were examined and the reasons why he
7 has come to his conclusion. He also explained the glossary of opinion terminology set
8 out in Appendix C of his report. The highest level of confidence is an absolute or
9 conclusive opinion. He does not express this level of confidence in this case. He says
10 that "there is very strong evidence to support the proposition that Mr Gogokhia did
11 not sign any of the five signatures in question." In the "scale of opinion" this is the
12 second highest level of confidence, marginally below an absolute or conclusive
13 opinion. Mr Radley's expertise is self-evident and I have no hesitation in accepting
14 his evidence at face value.
15

16 13. I also attach weight to the evidence of Mr John Campbell Law. He swore an affidavit
17 in which he said that he is an authorised representative of Trulaw Securities Limited,
18 a local professional service provider which was appointed as company secretary of the
19 Company from May 2003 until April 2012. Having reviewed the files still in the
20 possession of his firm, Mr Campbell's evidence is that there is no record of the
21 Company ever having had a seal in the form of that which appears on the Promissory
22 Note. He produced a sample of the seal actually adopted by the Company which bears
23 no resemblance to the seal on the Promissory Note. He said that his firm has no record
24 of having been asked for a facsimile of the seal adopted by the Company or for
25 another form of seal and there is no record of any resolution having been passed for
26 the adoption of any other form of seal for use outside of the Cayman Islands. Mr Law
27 also gave oral evidence. In answer to a question from me, he said that he had not seen
28 anything on his file to suggest that the Company might have created a seal without
29 telling him or his firm. Mr Law's evidence tends to corroborate the evidence of Mr
30 Gogokhia who said that he had never before seen a seal in the form of the one
31 stamped on the Promissory Note.
32

33 14. Two other witnesses were called on behalf of the Company. Mr Loucas Haviaras is a
34 partner of a Cypriot law firm called Haviaras & Philippou LLC which acts for the
35 Company in the related proceedings in Cyprus. His affidavit describes the nature of
36 the proceedings in some detail. This evidence is not directly relevant to the issue
37 which I have to decide although it does put the matter in its broader context. In
38 closing counsel for the Company did not place reliance on this evidence and I need
39 not say any more about it.
40

41 15. I also read two affidavits sworn by Mrs Thalia Constantinou who is an employee of a
42 corporate service provider in Cyprus called Peck Ltd, in which capacity she has been
43 appointed as the sole director of the Company. Her oral evidence was most

1 unsatisfactory. She did not appear to have personal knowledge of the matters about
2 which she was giving evidence and was unable to explain the source of her
3 knowledge in a satisfactory way. In his closing submission, counsel said that he did
4 not seek to rely on Mrs Constantinou's evidence. I have therefore disregarded it.
5

6 **Conclusions**

7

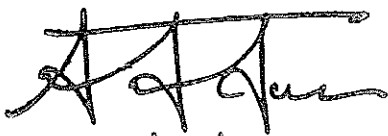
8 16. Mr Garkusha's affidavit sets out a story in a relatively detailed and coherent way.
9 However, the key part of this story, namely the meeting said to have taken place at his
10 office in July 2007, is flatly denied by Mr Gogokhia and I have come to the
11 conclusion that I should accept Mr Gogokhia's version of events for the following
12 reasons. First, Mr Garkusha's evidence is discredited by the way in which the
13 Petitioner attempted to withdraw its own petition and effectively abandoned its case.
14 Second, having heard Mr Gogokhia's oral evidence I formed the view that he is a
15 truthful witness. Third, Mr Radley's expert evidence is compelling. Finally, Mr Law's
16 evidence is unimpeachable and, so far as it goes, does tend to support Mr Gogokhia's
17 evidence.
18

19 17. I am satisfied on the balance of probabilities that the Promissory Note and the four
20 related documents are forgeries. It follows that the petition cannot succeed and should
21 be dismissed.
22

23 18. I have also come to the conclusion that the Petitioner has commenced and conducted
24 this proceeding improperly within the meaning of GCR Order 62, rule 4(11). It is
25 improper to present a winding up petition on the basis of a forged document. The fact
26 that the Petition was abandoned at the point when the forensic expert was about to be
27 instructed does not mitigate the impropriety. For these reasons I have come to the
28 conclusion that the Company should have its costs on the indemnity basis. However, I
29 cannot overlook the fact that I disregarded the evidence of Mrs Constantinou. I direct
30 that the costs of preparing her affidavits be disallowed on taxation.
31

32 Orders accordingly.
33

34 DATED this 12th day of June 2015
35

36 
37
38

39 **The Hon. Justice Andrew J. Jones QC**
40 **JUDGE OF THE GRAND COURT**

