

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2020/0187

**IN THE MATTER OF BAJA SUN FOUNDATION LTD
AND IN THE MATTER OF SECTION 184I OF THE BVI COMPANIES ACT 2004**

BETWEEN:

**(1) KEVIN LEDGERWOOD
(2) CARY W. BULLER
(3) JOHN SCHULTZ**

Claimants

AND

**(1) AMS TRUSTEES LTD
(2) SANDRA BERRY
(3) BAJA SUN FOUNDATION LTD**

Defendants

Appearances:

Ms. Nelcia St Jean of McW Todman & Co for the Claimants

Mr. Daniel Fligelstone Davies of Silk Law for the First and Second Defendants

The Third Defendant did not appear and was not represented

2022 June 29 and 30
July 12

JUDGMENT

[1] **JACK, J [Ag.]**: This dispute over the ownership of shares was heard by Zoom. The sole witness called for the claimants purported to be the third claimant, John Schultz. When giving evidence under affirmation on Zoom, he wore a full-face black beard. The beard was a fake, but no issue was raised by counsel as to this

whilst he gave evidence. In fact the witness was Sheldon R Caughey (“Mr. Caughey”). The deception only came to light after Mr. Caughey had completed his evidence. He did not return to the box to explain himself, although he had that opportunity.

The facts and issues

- [2] Before coming back to the consequences of this, I shall set out the facts and issues. By a fixed date claim form issued on 3rd November 2020, the claimants, represented by Ms. St Jean, assert that they are the shareholders of the third defendant (“Baja Sun”). The first claimant (“Mr Ledgerwood”) says he holds 15,000 shares; the second defendant (“Mr. Buller”) says he holds 15,110; and Mr. Schultz says he holds 20,000. They seek rectification of the register of shareholders to reflect their respective shareholdings. (The total number of shares exceeds the issued capital of 50,000 one dollar shares, but I was not addressed on this anomaly.) The second defendant (“Ms. Berry”), represented by Mr. Davies, asserts the company is hers and that she owns the only share in it.
- [3] Ms. Berry married Charles Filiatrault (“Mr. Filiatrault”) in 1985. In 1995 they decided to purchase land in Los Cabos, in the state of Baja California Sur in Mexico, to build a house. The investment vehicle used was Baja Sun, which was incorporated in this Territory on 15th May 1995. The registered agent was Aleman, Cordero, Galindo & Lee Trust (BVI) Ltd, who appointed two of its nominee directors, Andres M Sanchez and Marcos A Muñoz, as first directors. These directors had previously on 9th March 1995, purportedly appointed Mr. Filiatrault and Ms. Berry as attorneys-in-fact of Baja Sun, notwithstanding that the company had not yet been incorporated. There was one bearer share issued. Ms. Berry’s evidence, which I accept, is that the share was held jointly by her and her husband. Further, even if the share was solely owned by her husband, she was entitled to the share on his death on 19th June 2016 as his widow.
- [4] It appears that Mr. Filiatrault was at some point appointed as a director. There is no direct evidence of this, but on 1st September 1995, the registered agents were

changed to the first defendant (“AMS”). That would be consistent with Mr. Filiatrault becoming a director at that time in place of the original nominee directors of the original registered agent. On 31st October 2011, Baja Sun was struck off the register and dissolved for non-payment of fees. On 18th December 2019, Ellis J restored Baja Sun to the register. By this time, however, all the papers held by AMS in respect of the company had been destroyed. The transition period for the conversion of bearer shares into registered shares expired on 1st January 2010. In the absence of evidence to the contrary, I can in my judgment apply the maxim *omnia praesumuntur rite esse acta*. I find that the proper steps for conversion of the bearer share into common stock were carried out.

- [5] After Baja Sun was incorporated, Mr. Filiatrault and Ms. Berry started to build a house. They used Mr. Próspero Tapia Hernandez (“Mr. Tapia”), a local architect and builder, to assist them in the work. The house became their matrimonial home.
- [6] On 13th February 2010, the claimants say there was meeting held at the Scottsdale Plaza Resort in Arizona. The “minutes of the meeting of subscribers and members of Baja Sun Foundation Ltd” purportedly held at that resort on that date are typed, but the document is effectively home-made. No company professional would draft minutes in the form in which they appear. The minutes do not list the attendees at the meeting but the only persons mentioned in the body of the minutes are Mr. Filiatrault, Mr. Ledgerwood and Mr. Schultz. They purported to appoint themselves as directors of Baja Sun. They also purported to pass a motion “that the Directors... authorise the Company to issue and sell one class of stock, that being Common Stock, and that certificates be issued as BEARER shares.” In what purports to be his second affidavit, someone purporting to be Mr. Schultz says that Mr. Buller arrived later and was appointed as an additional director. Nothing of that is said in the minutes.
- [7] Mr. Schultz/Caughey’s evidence at trial was that the meeting started in the morning and continued after lunch. At the meeting, Mr. Filiatrault showed him the

bearer shares which it was proposed to give to the three men, but then “crossed them out” and produced common stock certificates, which Mr. Schultz/Caughey signed and on which Mr. Filiatrault affixed the company seal. Mr. Filiatrault, it is said, produced three promissory notes, one for each of the claimants. The maker of each of the promissory note was Baja Sun; Mr. Filiatrault guaranteed the obligation. He had signed all three earlier. The monies lent were repayable at latest 31st December 2015 with interest at five per cent per annum. Accompanying each promissory note was a “security agreement” between the creditor under the note and Baja Sun. The operative part provided that Baja Sun “grants a security interest in the property” and the details of the Los Cabos property are given.

Discussion

- [8] The promissory notes and the security agreements are again obviously home-made. None of the usual provisions included in a professionally drawn guarantee are present. It is likely that Mexican law would apply to the security agreements, since they concern Mexican real estate. There is no evidence that a home-made English-language document not witnessed by a Mexican notary purporting to give security over a house in Mexico has any legal effect in that country. The whole composite transaction is also odd. If the underlying idea was that \$100,000 was to be merely lent by the claimants, they would not have been entitled to the shares at all. They were given security over the Los Cabos house (albeit the security might have been deficient) for the loans shown by the promissory notes. There was no reason for the shares to be sold to the claimants, if the money advanced was just a loan.
- [9] Copies only of the documentation were in evidence. I have thus been unable to examine the originals. Even from the copies, however, it is plain to the eye that the purported signatures of Mr. Filiatrault on the documents are all identical. They have either been affixed electronically or by photocopying an original signature onto the relevant pages. The claimants had the burden of proving that the documents were genuine. Because the claim was brought by a fixed date action,

no order for disclosure of documents was made. The provisions of CPR 28.18 accordingly do not apply. These provide that documents disclosed under CPR Part 28 are deemed to be authentic unless a notice to prove is served. However, since Part 28 did not apply, it was incumbent on the claimants to prove the validity of the documents on which they relied.

- [10] Mr. Schultz/Caughey said that he had paid the \$45,000 which was his contribution by a cheque issued by the Fairfield Fund, a mutual fund in which he invested. There is no documentary evidence that any money was paid. The sole evidence is his oral assertion. Later in his cross-examination he said he gave \$35,000 with “ten to fifteen thousand dollars along the way”. That is inconsistent with the purported documentation showing payment of \$45,000 on 13th February 2010.
- [11] This assertion of payment on 13th February 2010 is also inconsistent with his second affidavit. At para 4 of that affidavit, he says: “The shares were transferred to us by Charles Filiatraut [*sic*] because we put pressure on Charles Filiatraut to return money, we loaned to him for payments for the Property.” This says expressly that the monies had already been lent, rather than (as the claim form asserts) that they were lent on 13th February 2010.
- [12] Further, the promissory notes give a long-stop date for repayment of 31st December 2015. There is no evidence any demand was made by any of the claimants on Mr. Filiatrault for repayment after that date. Mr. Schultz/Caughey said in cross-examination that he pressed Mr. Filiatrault for payment orally after his note fell due, but he contradicted himself later in the same cross-examination when he said that he was lending money to Mr. Filiatrault as late the last weeks of his life.
- [13] There is even less evidence about the payment of any monies by Mr. Ledgerwood and Mr. Buller to Mr. Filiatrault.

- [14] Mr. Schultz/Caughey said that John M Balforth, a notary, was at the meeting. He put his stamp on the documents. It was normal for American notaries not to put the stamp on the signature page, he said. There is no evidence that John M Balforth exists or that, if he existed, he was a notary in Maricopa County, Arizona, as asserted in the stamp Mr Balforth purportedly applied to the documents. The claimants made no attempt to show that Mr. Balforth did exist. His signatures on various documents are different, one from the other. This would be consistent with someone purporting to sign as him but not having developed the facility to sign the fake signature in a consistent manner.
- [15] The promissory notes were purportedly authenticated by Mr. Balforth on 14th February 2010, whereas the minutes of the meeting on 13th February 2010 were authenticated on that day. On Mr. Schultz/Caughey's account, there is no reason for this, when Mr. Balforth was present both in the morning and the afternoon of 13th February 2010.
- [16] No satisfactory explanation was given for the absence of Mr. Ledgerwood and Mr. Buller from the witness box.

The defence witnesses

- [17] Ms. Berry gave evidence. She responded well to cross-examination. She said that her husband had been expelled from the United States in 2008 and did not go back until 2016, when he was in a care home in Palm Springs, California, suffering from dementia. He could not have been in Arizona in 2010 as the claimants assert. Further her husband never told her about borrowing money in the manner alleged. He would have done if he had borrowed the money. She was asked about a divorce petition which she had issued in 2016. She said that this was necessary because her husband in his demented state had excluded her from the matrimonial home and the only way to get back into the house was by bringing matrimonial proceedings. She had never proceeded with the divorce. She had met Mr. Caughey only twice. She knew he had sustained injuries to much of his body in a gas explosion.

[18] Ms. Berry's evidence about her husband becoming demented by the end of 2015 and her exclusion from the matrimonial home in early 2016 was corroborated by Ms. Marilyn Plant, who gave live evidence. She was not challenged on her evidence; Ms. St Jean declined to cross-examine her. I thus accept Ms. Berry's and Ms. Plant's account of Mr. Filiatrault's exclusion of her from the matrimonial home whilst his mind was disordered. I found both women witnesses of truth.

Initial conclusion

[19] If the evidence had stopped there, I would have found in favour of Ms. Berry. The burden was on the claimants to establish their case. In my judgment, they failed to do so. The events of 13th February 2010 were unusual. There were, as I have outlined, serious inconsistencies in Mr. Schultz's evidence. There was no evidence any monies had been paid to Mr. Filiatrault by any of the claimants. The absence of Mr. Ledgerwood and Mr. Buller from the witness box was not adequately accounted for. The originals of the documents purportedly signed on that day were not produced to the Court. The copies showed strong indications of the signatures of Mr. Filiatrault being copied electronically. Despite the very existence of Mr. Balforth being challenged, no attempt was made to show he existed. As a professional man, Mr. Balforth's existence would have been easy to prove. I would not have accepted the claimants' claim on balance of probabilities.

Mr. Schultz/Caughey

[20] What puts the matter beyond doubt is the extraordinary revelation that the Mr. Schultz who gave evidence was in truth Mr. Caughey. It will be recalled that he was the only witness to give live evidence on the claimants' behalf. He was affirmed before giving evidence and said that he was the third claimant, Mr. Schultz. When he gave his evidence virtually, he appeared initially to have a black Covid-type face mask on, but in fact this turned out to be a fake black full-beard. Neither counsel raised any issue about the witness's appearance. In examination in chief he gave his name as John Schultz and gave his address. He affirmed the truth of his affidavits. He was cross-examined in the usual way, with no challenge

being made to his identity. There was no re-examination. At the conclusion of his evidence, I released him and the Court broke for lunch. During the adjournment, Mr. Tapia, who had been hearing the case as a member of the public and as a friend of Ms. Berry, told her counsel, Mr. Davies, that the witness was in fact Mr. Caughey.

- [21] In the circumstances, Mr. Davies applied to adduce Mr. Tapia's evidence "old style", without a witness statement having been served. Ms. St Jean did not oppose the application and I accordingly I heard Mr. Tapia's evidence. He said that he recognised Mr. Caughey by his face, which had been disfigured in a gas explosion, and by his voice. His white shirt with white coat was typical of what Mr. Caughey usually wore. He knew Mr. Caughey well, because they were both members of the Royal Red Roosters Club. He did not know any John Schultz. Mr. Tapia's evidence was barely challenged in cross-examination. In my judgment he was an obvious witness of truth. Ms. St Jean having taken instructions from her witness made no application to recall Mr. Schultz/Caughey to rebut this evidence.

Further matters

- [22] After Mr. Davies' closing speech, Ms. St Jean indicated that her client, Mr. Schultz, wished to withdraw the case. That, however, left the issue as to the position of the other claimants. Neither Mr. Ledgerwood nor Mr. Buller appeared to have given instructions to withdraw the case. There was also the issue as to whether Mr. Schultz and Mr. Caughey were one and the same person, or whether Mr. Caughey was an imposter, passing himself off as the true Mr. Schultz. In the latter case, it would be from the true Mr. Schultz that Ms. St Jean would need to take instructions.
- [23] Overnight Ms. St Jean was able to take instructions from Mr. Buller but was unable to track Mr. Ledgerwood down.

[24] The issue regarding Mr. Balforth's existence led me overnight to check the notary who purported to attest the oaths of the claimants on their joint affidavit of 20th October 2020 in support of the application. This notary was a man called "Tom Royal" with a commission for Merin County, California. The public record of notaries published by the California Secretary of State showed that as at 29th June 2022 there was a notary "Tom Royall" (spelt with two "L"s) with a commission in San Rafael, some eighteen miles from Merin County, but no "Tom Royal" with a single "L" anywhere in the state of California. I left counsel to investigate the historic position in 2020, as the Secretary of State's website invites those with queries to do. In the event Ms. St Jean accepted that she could not establish that any of the affidavits of any of the claimants had been genuinely sworn before a notary.

The KYC documents

[25] At the conclusion of the case on the second day, there seemed real uncertainty as to whether the claimants existed. If they did exist, there was a further question as to whether they were giving instructions to Ms. St Jean, or whether Mr. Caughey had merely borrowed their names in order that he (Mr. Caughey) could give instructions to Ms. St Jean purportedly on their behalf. In consequence I ordered that Ms. St Jean's firm make and file an affidavit exhibiting the "know you client" information held for the claimants.

[26] Pursuant to that order, Shanelle Spencer sworn an affidavit dated 5th July 2022. In respect of Mr. Ledgerwood, this produced a copy of a Canadian passport for Gary Kevin Ledgerwood born on 21st July 1958. The copy was notarised by Mr. Peter I. Bonny of Ratcliff & Company LLP in North Vancouver on 13th December 2019. Mr. Bonny does exist and the stamps affixed appear (at least from the copy provided) genuine. In respect of Mr. Buller, a copy of his California driving licence in the name of Cary William Buller born on 5th May 1975 with an address in St Rafael and a copy of his US passport was produced. The copy was notarised by Susan S Pope, who exists and practises as a notary in Rockwall, Texas. Again the stamps appear genuine.

[27] In respect of Mr. Schultz, a copy of his California driving licence in the name of John Allan Schultz born on 28th March 1957 with an address in Truckee, California and Thihis US passport was produced. The documentation was purportedly notarised by “Tom Royal”, who does not exist. I am not a handwriting expert but the signature purportedly of Mr. Schultz on the passport and those on the affidavits together with a “to whom it may concern” letter dated 19th December 2019 are similar. As a non-expert I cannot say that the signatures on the affidavits are obvious fakes. Because of the disguise he wore in the witness box I cannot tell if Mr. Caughey and the Mr. Schultz shown in the driving licence and passport photographs are the same person. I find on the evidence available at present that it is possible Mr. Caughey and Mr. Schultz are one and the same person, but that it is also possible Mr. Caughey is an imposter.

Costs

[28] This leaves the question of costs. If Ms. St Jean was not genuinely instructed by the claimants and each of them, then the law is harsh. Her firm is strictly liable for the costs incurred by AMS and Ms. Berry: **Re Koshigi Ltd (In Liquidation); Pretlove v Koshigi Ltd**,¹ applying **Yonge v Toynbee**.² On the other hand, it is not clear whether she was properly instructed.

Final conclusion

[29] The appropriate course in my judgment is to order that Mr. Ledgerwood, Mr. Buller and Mr. Schultz be ordered jointly and severally to pay the costs of the action, but that there should be a liberty to apply to vary the order so as to make Ms. St Jean’s firm liable in the event that she brought these proceedings without proper instructions from the claimants or any of them. There should also be a liberty to apply to vary the order to make it clear (if such be the case) that Mr. Schultz and

¹ [2019] ECSCJ No 400 (5th December 2019) (Jack J).

² [1910] 1 KB 215 (English Court of Appeal).

Mr. Caughey are one and the same person, so that execution can issue against Mr. Caughey in the event that the costs are unpaid.

[30] Accordingly, I dismiss the action with costs, but with the liberty to apply set out in the previous paragraph.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar