

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHCM 2019/0055

BETWEEN:

AMPLE SPEED LIMITED

Claimant

and

GRAIN-TRANS LIMITED

Defendant

Appearances:

Mr. Andrew Gilliland for the Claimant
Mr. Robert Nader for the Defendant

2022: January 24, 25, 26;
May 18.

JUDGMENT

[1] **WALLBANK, J. (Ag.)** This is the Court's judgment upon the trial of this claim.

[2] The trial was unusual, in that although the Defendant's Counsel appeared, the Defendant's witnesses did not attend, and the Defendant's Counsel was left without instructions during the trial. This failure to show had not been foreshadowed by way of a prior indication to the Court, nor did the Defendant or its witnesses extend an apology or any explanation to the Court. This was to the evident embarrassment of the Defendant's Counsel, Mr. Nader, whose attempts to assist the Court in such awkward circumstances were commendable and entirely proper. The trial was interrupted to give the Defendant's legal representative opportunities to take instructions and for the Defendant's witnesses to attend. Ultimately, they did not appear and the trial proceeded without them. Nonetheless, both sides filed written closing submissions.

BACKGROUND TO THE DISPUTE

- [3] The Claim is for repayment of a loan and contractual interest pursuant to the terms of a loan agreement dated 6th July 2015 between the Claimant, as lender, and the Defendant, as borrower (the '**Loan Agreement**'). Such Loan Agreement was executed by the parties' representatives on 6th July 2015.
- [4] The Claimant is a company domiciled in Hong Kong SAR ('**Hong Kong**') and at the material time operated a business trading grain internationally, with its focus of operations in the Ukraine. At the relevant time, it is the Claimant's position that it was beneficially owned by one Mr. Oleg Shchurin.
- [5] The Defendant is a company incorporated in the British Virgin Islands and is beneficially owned by one Mr. Alekszej Fedoricsev, a Hungarian national living in Monaco.
- [6] Pursuant to the terms of the Loan Agreement, the Claimant claims the sum of US\$1,873,400.00 together with contractual interest at the rate of 1% per annum. The purpose of the loan as pleaded by the Claimant was to assist Mr. Fedoricsev to cover a short-term gap in cash flow affecting his grain terminals in the Ukraine. It is the Claimant's position that the request was made over several telephone calls between Mr. Fedoricsev and a Mr. Annikov on behalf of the Defendant and Mr. Shchurin on behalf of the Claimant. Mr. Annikov was, says the Claimant, responsible for financial matters within Mr. Fedoricsev's group of companies. Initially, Mr. Fedoricsev had requested prepayment for future trans-shipment services. However, Mr. Shchurin states in his witness statement that he was not prepared to do this but instead was prepared to provide a short-term loan. Mr. Shchurin said that this was accepted by Mr. Annikov on behalf of Mr. Fedoricsev.
- [7] As mentioned above, the Loan Agreement was entered into between the parties on 6th July 2015. On the same day, the funds were transferred by the Claimant from its bank account in Riga, Latvia, to the Defendant's bank account in the same city. The Claimants case is that the loan was not repaid within the one-week term agreed under the Loan Agreement, or at all. The Claimant's case is that on or about 13th July 2015 Mr. Annikov informed Mr. Shchurin that the

Defendant was unable to repay the loan at that time, and that, at Mr. Fedoricsev's request, Mr. Shchurin had agreed to forebear temporarily from seeking repayment of the loan, which Mr. Shchurin did to preserve his commercial relationship with Mr. Fedoricsev. The Claimant issued a statutory demand for payment on 12th June 2018, but that statutory demand was subsequently set aside. The Claim was issued on 16th April 2019 by the Claimant to recover the principal and interest.

[8] The Defendant has refused to pay. Its case is that the loan in question was not in fact a loan, but had been a working capital investment contribution by, ultimately, Mr. Shchurin and his business partner, a Mr. Brovdi, to a joint venture grain trading and trans-shipment project they shared with Mr. Fedoricsev, called 'Granum-GTG-TIS Trade'. According to the Defendant, investments of working capital to the joint venture project were made in the form of loans, and refunds were effectively made by way of profit-sharing payments. The Defendant's case is that the sum advanced had in fact been settled by the Defendant as it was offset against Mr. Fedoricsev's profit share in the joint project during the period November 2014 – July 2015. The Defendant took the position that the loan agreement had been a sham agreement.

[9] The Claimant rejected this explanation. It averred that Mr. Brovdi only became a partner with Mr. Shchurin in respect of the Claimant afterwards, in April 2016. The Claimant also contended that it was never involved in any joint project as alleged by the Defendant, and that the investments into that joint project in fact took place after the loan presently in issue was made.

A. **THE CLAIMANT'S EVIDENCE**

[10] In support of its case the Claimant relied on the evidence of Mr. Shchurin and Ms. Flordeliza Duller, the sole director of the Claimant. Mr. Shchurin and Ms. Duller both signed witness statements on 3rd September 2021 and appeared *via* video link to give oral evidence at the trial of the matter.

[11] The Claimant relied on Mr. Shchurin's witness statement as his evidence in chief, and in particular relies on the following points which were amplified by Mr. Shchurin during the course of his oral testimony: -

- (1) He was the sole beneficial owner of the Claimant at the time that the Claimant entered into the Loan Agreement, having purchased the Claimant company on 1st July 2015 as a trading company for the international grain market. Since then, on 24th October 2017, Mr. Shchurin divested himself entirely of interests in the Claimant company;
- (2) In the first half of July 2015, he received telephone calls from both Mr. Fedoricsev and Mr. Annikov requesting pre-payment of future trans-shipment services that would be provided to him in the future at Mr. Fedoricsev's grain terminals in Ukraine, with the funds being required to assist Mr. Fedoricsev with a short-term cash flow difficulty;
- (3) He was not prepared to agree to a pre-payment but was prepared to offer a short-term loan agreement to assist Mr. Fedoricsev with his cash flow issues;
- (4) Mr. Annikov confirmed to him that the loan was satisfactory to Mr. Fedoricsev;
- (5) The Loan Agreement was entered into on 6th July 2015 for a period of one week with Mr. Annikov signing the Loan Agreement document on behalf of the Defendant and the Claimant's authorised signatory, Mr. Shevchenko, signing on behalf of the Claimant;
- (6) The loan was never repaid;
- (7) At the time Mr. Fedoricsev requested that Mr. Shchurin not press for repayment of the loan. Mr. Shchurin was prepared to do this at the time as the use of Mr. Fedoricsev's terminals was critical to the Claimant's business;
- (8) In addition, Mr. Shchurin's written and oral evidence was that the Loan Agreement was not part of a joint venture entered into between Mr Shchurin and Mr. Brovdi on the one hand and Mr. Fedoricsev on the other as claimed in the Defence.

[12] Under cross-examination, Mr. Shchurin remained steadfast in his evidence that the Loan Agreement was completely independent from the joint venture agreement. In addition, Mr. Shchurin made it clear that Mr. Fedoricsev owned the only deep-water terminals in the Ukraine and that it would be impossible to operate out of the Ukraine without using the terminals owned by Mr. Fedoricsev and this was why the loan was not recalled at the time.

[13] Mr. Shchurin's evidence was that there had indeed been a joint venture agreement, entered into on or about 16th October 2014, between himself and Mr. Brovdi for the one part and Mr. Fedoricsev for the other. The purpose of this joint venture was to purchase, sell and move grain using Mr. Fedoricsev's deep water grain terminals. However, said Mr. Shchurin, no activity was carried out using the joint venture until 2015, due to the failure of the parties to

provide the necessary funding. In September 2015 two cargoes were purchased by the joint venture company concerned, with these cargoes being fully paid for by the end of October 2015. The joint venture company concerned was not used after October 2015 and the joint venture itself was discontinued at the end of 2016.

[14] Mr. Shchurin's evidence was that the Loan Agreement made no mention of the joint venture and, in any event, he had acquired the Claimant company only about a week prior to the making of the loan, whereas the joint venture had been entered into back in 2014. He further gave evidence that had the loan been made to finance the joint venture, it would not have been made to the Defendant, as a company beneficially owned by Mr. Fedoricsev, but to the joint venture company.

[15] With regard to Ms. Duller, the Claimant particularly relied on the following points which were amplified by Ms. Duller in her oral evidence:

- (1) Mr. Shchurin was the beneficial owner of the Claimant at the time the Loan Agreement was signed;
- (2) The loan has not been repaid, remains on the Claimant's books, and is outstanding in the Claimant's accounts.

[16] In cross examination (and re-examination) Ms. Duller confirmed that the loan remained outstanding in the Claimant's books. Ms. Duller's witness statement evidence was that she was a director of the company from around 7th August 2015, i.e., from shortly after the loan agreement had been entered into.

B. THE DEFENDANT'S POSITION

[17] Witness Statements were filed by both Mr. Fedoricsev and Mr. Annikov, both dated 3rd September 2021. However, when called to give evidence on the second day of the trial (and after several adjournments to allow the Defendant's Counsel to attempt to locate them) the Defendant's witnesses failed to appear to give evidence at the trial.

[18] Part 29.8 of the Civil Procedure Rules, 2000 ('CPR') provides as follows:

“29.8 (1) If a party –

- (a) has served a witness statement or summary; and
- (b) wishes to rely on the evidence of that witness;
that party must call the witness to give evidence unless the court orders otherwise.

(2) If a party –

- (a) has served a witness statement or summary; and
- (b) does not intend to call that witness at the trial;
that party must give notice to that effect to the other parties not less than 28 days before the trial.”

[19] As such, the Defendant is barred from relying upon any witness statement evidence in defence of the claim.

[20] Nonetheless, the Defendant, through its Counsel, maintained its case that the Loan Agreement, or ‘Purported Agreement’ as he referred to it, was a sham. The Defendant’s Counsel submitted the following:

- (1) Whilst the Defendant accepts that the funds were paid by the Claimant to the Defendant, it is clear, even on the evidence as it stands, that the Purported Agreement does not evidence the making of a loan and it follows, submitted Counsel for the Defendant, that that document is a sham document.
- (2) The following matters are material to the Defendant’s position. The Purported Agreement is woefully inadequate if it indeed reflected a standalone loan agreement between the Claimant and Defendant and has all the hallmarks of a document intended to paper a transfer of monies for convenience, in particular:
 - (i) The interest rate and default interest rate purportedly charged are exceptionally low for a short-term loan made on commercial terms;
 - (ii) Although the Purported Agreement expresses itself to be governed by a ‘Commercial Code’, the Claimant is unable to explain what ‘Commercial Code’ is expressed to govern it; certainly it is not the Commercial Code of the Ukraine. It is telling that a purported loan agreement for such a substantial sum would not appear to contain an effective governing law clause; and
 - (iii) It is by no means clear that the individual who signed the loan agreement on behalf of the Claimant, a Mr. Vitalii Shevchenko, was in fact properly authorised to enter into the Purported Agreement for the Claimant.

- (3) Notwithstanding the fact that the Claimant's case is that the funds became repayable on 13th July 2015, no demand for repayment was made until a letter of demand was sent on 4th or 5th June 2018, almost 3 years later. There were no demands or correspondence in respect of the re-payment of the Funds prior to June 2018.
- (4) The Claimant, by its reply, has suggested that Mr. Fedoricsev requested that Mr. Shchurin forebear from pressing for repayment and that Mr. Shchurin agreed in particular because he wished to conserve the commercial relationship between them. There are two main difficulties in respect of this:
- (i) There is no documentary evidence in respect of the request for forbearance or the response to the same; and
 - (ii) This does not explain the further delay after the joint venture ceased in 2016. The position was no clearer upon Mr. Shchurin giving his evidence.
- (5) In particular:
- (i) Although Mr. Shchurin explained that he did not want to compromise his relationship with Mr. Fedoricsev, given Mr. Fedoricsev's effective control of the Ukrainian grain trans-shipment industry, this did not explain why no demand was made upon him electing to exit the grain business and, indeed, it did not explain why no demand was made for some considerable time after the ownership of the Claimant changed;
 - (ii) Although Mr. Shchurin explained that there was no record of any communication with Mr. Fedoricsev because Mr. Fedoricsev did not use email, that does not explain the lack of communication with the Defendant and Mr. Annikov;
 - (iii) Nor was there any explanation by either Mr. Shchurin or Ms. Duller as to why there was no record internal to the Claimant that reflected the existence of a receivable that predated **December 2017**. This absence is telling;
 - (iv) Moreover, it became clear during the cross-examination that the question of the purported loan had only been raised with Mr. Fedoricsev within the last two years and he had not raised it independently;
 - (v) Equally, the purported receivable appears not to have been considered when Mr. Shchurin swapped his interest in the Claimant with the present beneficial owner – there is no evidence, for example, that it was included in any valuation;
 - (vi) Further, Ms. Duller had no specific recollection of when she became aware of the purported loan, even though she says she was a director at the material time. By

the same token there exists no record pre-dating December 2017. The complete lack of recall and record is striking; and

- (vii) Last, Mr. Shchurin made a cryptic reference to a prospective set-off proposed by Ms. Duller. Such a proposition is not consistent with the Claimant's case – it is, however, consistent with the Defendant's case.

(6) The Claimant has not adduced evidence from Mr. Shevchenko or Mr. Brovdi. This omission on the part of the Claimant is telling and the Court is entitled to draw an adverse inference from the same. It is perhaps also telling that Mr. Shchurin is no longer the beneficial owner of the Claimant so that these proceedings are prosecuted by the Claimant in apparently different ownership, under the control of a director who has (she says) no knowledge of the circumstances surrounding the execution of the Purported Agreement – i.e. that these proceedings appear to have been misguidedly brought by persons who are not well placed to know the facts underlying the payment of the funds to the Defendant.

(7) As, alluded to above, although the Management Accounts produced by the Claimant for the year ending March 2016 are said to show a loan receivable equivalent to the amount of the funds, expressed in Hong Kong Dollars, these were not in fact produced until 22nd December 2017. It follows that there is no record before the Court of the Claimant treating the payment of the funds to the Defendant as a loan until some 2 ½ years after the event. Apart from the Purported Agreement and the Management Accounts, there is no record of the Claimant treating the funds as a loan before the letter of demand was sent in 2018. If the funds were indeed paid to the Defendant as a loan, this paucity of documentation is acutely surprising in particular given the amount of the funds.

(8) Notwithstanding Mr. Shchurin suggesting (albeit obliquely) that he does not agree with the same, the Accounts and other records produced in the context of the joint venture reflect an accounting for the funds along the lines contended for by the Defendant, in particular:

- (i) In the handwritten notes produced at a meeting between Mr. Shchurin, Mr. Brovdi and Mr. Fedoricsev at Badrutt's Palace Hotel, St Moritz, on 16th July 2015, payment of EUR 1.7 million (i.e. the amount of the Funds) is recorded as accounted for in prospective accounting for the joint venture in the manner the Defendant contends was intended and agreed;

- (ii) The accounts later produced in the context of the joint venture reflect the deduction of the funds from the amounts paid to Fedcom (Mr. Fedoricsev's vehicle) in the context of the joint venture;
- (iii) The Defendant's position is that this accounting was agreed by each of Mr. Brovdi, Mr. Fedoricsev and Mr. Shchurin when they signed the notes prepared at St Moritz on 16th July 2015 (and Mr. Shchurin accepts he signed the same, though he points out that he did not sign the pages containing the specific calculations), in particular the calculation of the reconciled 'balance of earlier relationships' in a sum conforming to the sums calculated in the tables referred to above. This agreement is strongly indicative that the Purported Agreement is a sham document, designed for convenience to paper the transfer of the Funds.

C. THE LAW

Contract – the Loan Agreement

- [21] The Claimant submitted that the law is clear. The Claimant submitted that in simple terms a contract was agreed, consideration passed between the parties and there was clearly an intent on both sides of the Loan Agreement to enter into legal relations. The Defendant failed to comply with the terms of the agreement and is in breach of the terms of Loan Agreement. The Loan Agreement remains outstanding and unpaid.

Alleged Sham Agreement

- [22] The Claimant contended further that the position advanced by the Defendant in its opening written submissions¹ is that the Loan Agreement was never intended to be loan. In other words, the Defendant's case is that the Loan Agreement was a sham. It is well established, submitted the Claimant, that the burden of proof on a party alleging a sham is a heavy one. Since the Court places great weight on the existence and provisions of a formally signed agreement, there is a strong and natural presumption against holding a document a

¹ See paragraphs 7-9 of the Defendant's Written Submissions dated 20 January 2022 ('D's Opening Submissions').

sham (**National Westminster Bank plc v Jones**).² It is not disputed between the parties that it is for the Defendant to establish that a purported agreement is a sham document.³ But, says the Claimant, the Defendant has failed to demonstrate that the Loan Agreement was a sham agreement or anything other than a *bona fides* loan agreement entered into between the parties.

- [23] The Claimant submitted that the test for a sham is set out in **Snook v London & West Riding Investments Ltd**⁴ where Diplock LJ said at page 528H:

“As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a “sham,” it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.”

- [24] The Claimant further submitted that in **Alpha Telecom Turkey Ltd v Teliasonera Finland OYJ**⁵ at paragraph [17], the Court of Appeal confirmed that the test was that as laid down in **Snook**. The Learned Judge quoted from Lord Diplock in **Snook** at 528I as follows:

“...for acts or documents to be a “sham”, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating”.

- [25] Finally, the Claimant observes that in the recent case of **Global 100 Limited v Maria Laleva**,⁶ the English Court of Appeal at paragraphs 49 – 50 confirmed that **Snook** is still good law.

- [26] Furthermore, says the Claimant, even if the Loan Agreement is not to be treated as an authentic agreement (which the Claimant denies), there is no evidence before the Court that (a) the Claimant would have had any knowledge of this; or (b) that the Claimant company was a

² [2000] EWHC 1565 (Ch) at paragraph 59.

³ See paragraph 9(a) of D's Opening Submissions.

⁴ [1967] 1 ALL ER 518.

⁵ HCVAP 2008/0012 (unreported, delivered 28th September 2009) (George-Creque, JA).

⁶ [2021] EWCA Civ 1835.

party to another agreement between Mr. Fedoricsev, Mr. Brovdi and Mr. Shchurin. This is particularly the case where the Loan Agreement states at part vii paragraph (1) that any modification to the agreement must be in writing and upon mutual agreement. In those circumstances, any such other agreement cannot be relied upon against the Claimant (**Yates (A Bankrupt)**)⁷ as set out in **Yates** by Charles J where the learned judge stated:

“as against an innocent third party it cannot lie in the mouths of the pretenders to assert to the disadvantage of that innocent third party that the transaction is a sham, or pretence, and thus of no effect.”

[27] In conclusion, the Claimant submits that judgment should be entered in its favour as follows:

- (1) Payment of US\$1,873,400 being the principal sum loaned to the Defendant by the Claimant pursuant to the Loan Agreement;
- (2) Contractual interest on the above sum at 1% from 6th July 2015 to 13th July 2015 totalling US\$359.31.
- (3) Contractual interest on the above sum at 1.002% from 14th July 2015 to 4th February 2022 totalling US\$123,226.28 and continuing at a daily rate of US\$51.43; and
- (4) Costs, including the sum of US\$17,500.00 ordered to be paid by the Defendant to the Claimant arising from a Consent Order dated 29th December 2021.

[28] Finally, submitted the Claimant in relation to the issue of costs, the reprehensible conduct of the Defendant and its witnesses, absent any reasonable excuse for such conduct, should be taken into account when considering any Order for costs.

[29] The Defendant does not disagree with the Claimant in respect of the legal principles to be applied. The Defendant's disagreement concerns the facts.

⁷ B.P.I.R. 476 at paragraph 219(f)(ii).

DISCUSSION

- [30] The key questions before the Court is whether it is more probable than not, on a balance of probabilities, that the Loan Agreement was what it purported to be, a loan, as the Claimant alleged was the case and whether the monies had been repaid.
- [31] The Defendant denied that it was a loan. It contended that the loan agreement was a 'sham' that covered working capital investments into the joint venture which had in fact been repaid through profit-sharing distributions.
- [32] The Defendant, however, did not adduce oral evidence in support of its case. The Court is completely satisfied that the Defendant had every opportunity to do so. The Court concludes that the Defendant took the deliberate decision not to adduce oral evidence.
- [33] The difficulties with the Defendant's position include the following:
- (1) As a starting point, it warrants observation that both sides, including the Defendant, executed an agreement which stated that it was a loan agreement and spelled out terms for a short-term loan;
 - (2) Having thus agreed to bind itself, it should not surprise the Defendant if the Court holds the Defendant to the description and terms of the agreement that the Defendant had put its name to. Parties to such an agreement cannot expect the Court to assume that, as a matter of routine or as a starting point, parties to a 'loan agreement' really meant to be bound by some other arrangement that, for some reason, they had not wanted to, or had been unable to, articulate. Rather, it is for the Defendant, here, to bring persuasive evidence to show that the version of events the Defendant itself had espoused by way of an ostensible loan agreement that it itself had executed was not true;
 - (3) The notes dated 16th July 2015, on a St. Moritz hotel notepaper, on which the Defendant relies to say that the loan payment was part of the joint venture, are not themselves clear in this regard. They ***might*** indeed reflect this, but they do not speak for themselves. They require interpretation, by way of further evidence. Such evidence could be documentary or oral evidence. The Defendant purported to rely upon tables of other figures, but these too do not speak for themselves. The Defendant's documentary evidence required oral evidence to explain, interpret and support. But the Defendant deliberately withheld such evidence;

- (4) The Claimant's evidence that these notes did not reflect inclusion of this 'loan' payment as part of the joint venture was thus not contradicted by oral evidence for the Defendant. The Defendant could do no more than point out features of the Loan Agreement, the way it was accounted for within the books and records of the Claimant, and other circumstances, to suggest it might not have been a genuine loan;
- (5) Importantly also, there is no reasonably clear documentary evidence that the loan or investment, if it was not a loan, had been repaid or otherwise compensated for.

[34] I accept that the loan agreement itself was an amateurish and superficial document. The meaningless reference to an unidentified 'Commercial Code' and lack of a governing law clause are examples of this. These features suggest that the parties were not taking this loan seriously. But this does not necessarily mean that it was not intended to be a loan. It could simply mean that the sum of money to be lent by the Claimant to the Defendant was, at that time, not an important sum of money for the Claimant, particularly if it expected the Defendant to repay it after a few days.

[35] Equally, I place little weight upon the way the loan was recorded in the Claimant company's books and records. All it reflects is that the company extended a loan and that there is no record of it being repaid. This could be correct, but equally, unless those charged with preparing the accounts are provided with information that reflects a bigger picture, then that bigger picture would not be reflected. In this regard, Ms. Duller's evidence did not take matters further. She is a 'professional' director and, with no disrespect intended, clearly a creature of instructions.

[36] Mr. Shchurin, on the other hand, clearly had first-hand knowledge of the commercial background underlying the loan agreement. Mr. Shchurin came across as a direct and candid individual. He gave the Court no grounds for suspecting dishonesty on his part. The Court thus accepts his evidence as true.

[37] This is a case where the facts do not emerge decisively from the underlying documentation. The Court would have required to see and hear the witnesses for both sides, in order to obtain a fuller picture. The Defendant decided not to allow its version of events to be tested through cross-examination. Thus, the picture which the Court was left with is that advanced by the Claimant. The Court is persuaded that the evidence given on behalf of the Claimant, when

taken in its totality, and on a balance of probabilities, is true. The features of the matter which the Defendant's Counsel identified which engender misgivings about the Claimant's version of events were, in themselves, insufficient to tip the balance of probabilities against the Claimant's case. More was needed to achieve that, in the shape, here, of oral evidence for the Defendant. The Defendant decided not to avail itself of the opportunity.

DISPOSITION

- [38] For these reasons, the Claimant's case succeeds in full. Since costs follow the event, the Claimants are also awarded their costs of these proceedings against the Defendant.
- [39] I take this opportunity to thank both sides' learned counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar