

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA

IN THE HIGH COURT OF JUSTICE

HCV
CLAIM NO ANU2011/0722

BETWEEN:

TERLAN IBRAGIMOV

And

VALERIJ FEDORCOV

VLADISLOV POLEGOSHKO

HCV
CLAIM NO ANU2011/0723

BETWEEN:

TERLAN IBRAGIMOV

And

VALERIJ FEDORCOV

VLADISLOV POLEGOSHKO

Appearances:

Mr. Kelvin John, Mrs. Lisa John Weste and Loy Weste of Thomas John & Co for the
Claimant/Applicant in both Claims

Ms. Andrea Roberts and Ms. C. Kamilah Roberts for the Defendants/Respondents in both Claims

2014: November 5

JUDGMENT

[1] **HENRY, J.:** In each of the matters the Claimant seeks an Order:

1. Pursuant to Part 32 of the Civil Procedure Rules 2000, that Mr. Alvin Langlais, Document Examiner and Handwriting Expert be deemed an expert in both matters to provide this court with an expert report as to:
 - i. The authenticity of the signature purporting to be the claimant's signature on the Purchase Agreements dated the 14th day of August 2009 transferring 2500 shares in Coronel Shipping Company Limited to the first defendant and 2500 shares in Coronel Shipping Company Limited to the second defendant;
 - ii. The authenticity of the signature purporting to be the claimant's signature on the Purchase Agreement dated 14th August 2009 transferring 2500 shares in Wadden Euro Shipping Company Limited to the first defendant and 2500 shares in Waddens Euro Shipping Company Limited to the second defendant.
 - iii. the authenticity of the signature purporting to be the claimant's signature on the Coronel Shipping Company Limited Forms of Transfer dated the 14th day of August 2009, purporting to transfer the claimant's shares to the first and second defendants; and
 - iv. the authenticity of the signature purporting to be the claimant's signature on the Waddens Euro Shipping Company Limited Forms of Transfer dated the 14th day of August 2009, purporting to transfer the claimant's shares to the first and second Defendants.
2. The defendants be ordered to produce for cross examination at the trial of this matter, the persons purporting to have witnessed the claimant's signature on the aforementioned documents;
3. The said expert report to be filed and served within 30 days of the date of this order;
4. The costs associated with the provision of the expert report to be borne by the claimant;
5. The said expert witness shall make himself available for cross-examination at the date of trial;
6. The time for filing and serving the claimant's witness statements, listing questionnaire, and pre-trial Memorandum pursuant to the Order of the High Court of Justice dated the 11th day of October 2012 be extended to a date deemed suitable by this Honourable Court;
7. The claimant be granted relief from sanctions; and
8. There be no order as to costs."

[2] The defendants object strenuously to the application on several grounds.

Background

[3] The Amended Claim Form and Amended Statement of Claim were filed in Claim No 0722/2011 on 1st March 2012. The Amended Claim Form seeks several declarations and orders including a

declaration that the transfer of the claimant's shares in the Company Waddens Euro Shipping Company Limited to the first and second defendants is illegal, null, void and of no legal effect and is vitiated for fraud. The claimant also seeks an order for the first and second defendants to transfer at their expense 50% of the shares in the said company to the claimant. The claimant alleges in the Amended Statement of Claim that the first and second defendants were appointed directors of the said company together with a third named person. However, later the first and second defendant became the only directors of the company upon the resignation of the third person. In or around August 2009, the first and second defendants in breach of their fiduciary duty as directors of the company fraudulently, unlawfully and without the consent of the claimant transferred all 5000 shares issued to the claimant in the company to themselves, and thereafter fraudulently and unlawfully exercised all the rights of ownership over the said shares to the exclusion of the claimant.

- [4] Included under the heading Particulars of Breach of Fiduciary Duty and Fraud, is the assertion that the defendants forged the signature of the claimant on the share transfers dated August 14, 2009 so as to fraudulently transfer the shares held by the claimant to them.
- [5] The Amended Claim Form and Amended Statement of Claim in Claim No. 0723/2011 seek the same relief and make the same assertions except that the company shares, alleged to have been fraudulently transferred by the defendants, are in a company named Coronel Shipping Company Limited.
- [6] In their defence in both claims, the defendants denied that any fraudulent or unlawful actions were used against the claimant or that the first and second defendant fraudulently or unlawfully exercised rights of ownership over the shares to the exclusion of the claimant. The first and second defendants stated that the claimant had voluntarily transferred his shares in both companies to them.
- [7] Case management was held in both matters on the 11th of October 2012. The case management orders required, among other things, that the parties file and serve witness statements by the 18th January 2013 and that the parties may apply for further directions by 15th February 2013. Pre-trial review was fixed for 15th March 2013. On the 15th March 2013, there was non-compliance on both sides. Both parties had not filed witness statements, listing questionnaire and pre-trial memorandum. Both parties were ordered to comply by the 19th April 2013 and the pre-trial review was adjourned to 24th May 2013.
- [8] On the 19th April 2013, the defendants in both claims filed their witness statements. Their list of Documents had been previously filed on 8th November 2012 in compliance with the case management order.
- [9] On 24th May 2013 the date of the adjourned pretrial conference, the claimant had still not filed witness statements, nor complied with the other directions of the case management order. Also, the defendants had failed to file their listing questionnaire and pretrial memorandum. Both parties

were ordered to comply with the case management order by the 28th June 2013. Pre-trial review was again adjourned to 19th July 2013. Up to this point, no application for the appointment of an expert witness was made either at the case management conference or at the adjourned pretrial review dates.

[10] The court did not sit on 19th July 2013 and the matters were adjourned. On 13th December 2013, the instant applications were filed.

[11] The claimant now seeks various orders including the appointment of a Document Examiner and Handwriting Expert and that the time for filing and serving the claimant's witness statements, listing questionnaire and pre-trial memorandum be extended to a date deemed suitable by the court.

[12] The grounds of the application are:

- (1) The claimant's claim alleges that the first and second defendants fraudulently obtained the said shares by forging or causing his signature to be forged on transfer instruments; as such, pursuant to Part 32 of the CPR 2000 and the overriding objective, the court should appoint an expert witness to prepare an expert report and give evidence in these proceedings, since his expertise will be crucial and reasonably required to assist the court in resolving the technical issues of the authenticity of the signature in a just manner.
- (2) The claimant has good cause for making this application at the stage of pretrial review, since the application can only be made now, after the claimant has had an opportunity to review the defendants' documents. It is the essence of the claimant's case that he has not signed the documents and therefore the transfer of shares is fraudulent and should be nullified.
- (3) It is in the interest of justice and for the just disposal of the case that the said expert witness, with immense experience and qualifications, should be appointed to make findings as to the key issues in the case, matters which are outside of the normal expertise and knowledge of the parties of this case.
- (4) The defendants to the suit will not be prejudiced if the application is granted since the justice of the matter requires that the authenticity of the signatures on the transfer documents be verified before this court.
- (5) With respect to the request for an extension of time to file the witness statements, there is a good explanation for the claimant's failure to comply with the court's order: after receiving the defendants' documents, Counsel informed the claimant that it would be necessary to prove before the court that the signatures were not the claimant's. The claimant was instructed to obtain the services of a handwriting expert, but due to the language barrier, the claimant did not fully comprehend the instructions. The claimant subsequently sought to have the documents examined by a handwriting expert in the United Kingdom, but was unsuccessful in his bid to do so. Counsel then made efforts to secure a handwriting expert from within the jurisdiction. Finally, he was able to secure the

availability of Mr. Alvin Langlais, but by that time the deadline set by the court had already passed.

- (6) As such, the witness statements could not be concluded until such time as the report is made available as this goes to the crux of the issue.
- (7) No prejudice has been or will be caused to the other party in this matter if the application herein is granted with respect to the filing and serving of the witness statements and the agreed list of documents since both parties are in non-compliance. The granting of the extension is necessary in the interest of the administration of justice and for the just disposal of this case.
- (8) The matter can only be disposed of justly by this court if all the relevant evidence and witnesses are made available for the trial, therefore the granting of the extension is necessary in the interest of the administration of justice and for the just disposal of this case.
- (9) There is a real likelihood that the claimant will succeed with his claim. He therefore prays that the court will grant the order sought with relief from sanctions.

[13] The application is supported by an affidavit by Liddell Jonas, a clerk in the chambers of counsel for the claimant, together with certain exhibits to which the court will refer later.

[14] The defendants oppose the application on various grounds. The affidavit and submissions filed in opposition to the application request the dismissal of the application with costs.

Relief from Sanctions

[15] The claimant, in essence, seeks relief in regard to two areas of non-compliance: (1) the failure to apply for permission to call an expert witness at the case management conference, in accordance with rule 32.6 and (2) the failure to file witness statements in accordance with the order of the court.

Part 26.8 (1) and (2) set out the principles that ought to guide a court on an application for relief from sanction. It provides:

- 26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be-
 - (a) made promptly; and
 - (b) supported by evidence on affidavit.
- (2) The court may grant relief only if it is satisfied that-
 - (a) the failure to comply was not intentional;
 - (b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions, order and directions

Permission to call an expert witness

[16] The defendants make several objections to the claimant's request to have Mr. Alvin Langlais deemed an expert witness under Part 32. They are:

1. That the application ought to have been made at the case management stage and not at the pretrial review and the claimant has presented no cogent reasons for his failure to do so;
2. That Mr. Langlais does not qualify as an expert witness "to help the court impartially on the matters relevant to his or her expertise pursuant to Rule 32.3;
3. That the claimant has laid no proper foundation in his statement of case for the necessity to call an expert witness.
4. The affidavit in support is inadequate and the exhibits attached do not support the relief sought.
5. Lastly, the defendants complain that the claimant by his own evidence is engaging in expert shopping

Expert Evidence - Part 32 of the CPR

[17] Section 32.2 restricts expert evidence to that which is reasonably required to resolve the proceedings justly. Accordingly, the court has the power to restrict expert evidence. Section 32.6 sets out the extent of the power. It provides:

- 32.6 (1) A party may not call an expert witness or put in the report of an expert witness without the court's permission.
- (2) The general rule is that the court's permission is to be given at a case management conference.
- (3) When a party applies for permission under this rule –
- (a) that party must name the expert witness and identify the nature of his or her expertise; and
- (b) any permission granted shall be in relation to that expert witness only.
- (4) The oral or written expert witness' evidence may not be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give.
- (5) The court must direct by what date the report must be served.
- (6) The court may direct that part only of an expert witness' report be disclosed.

[18] The affidavit in support of the application states that the proposed expert, Mr. Alvin Langlais is a handwriting identification technician. He is the holder of a diploma in scientific crime detection from the Institute of Applied Science in Chicago, Illinois, USA. He has also attended an overseas course in England in the fundamentals of Handwriting Identification. In terms of his experience, the

affidavit states that he has been engaged in this field since 1972, during which time he was a member of the local constabulary where he practiced his profession. It is also stated that he has testified in numerous court matters in the High Court in this jurisdiction and abroad on handwriting matters such as this.

- [19] According to the claimant, it is in the interest of justice and for the just disposal of the case that this expert witness, with immense experience and qualifications should be appointed to make findings as to the key issues in the case. These are matters, it is stressed which are outside of the normal expertise and knowledge of the parties.

The Need for Expert Evidence

- [20] The Amended Statement of Claim in each matter alleges the unlawful and fraudulent transfer of the claimant's shares to the defendants. In the Particulars of fraud, the claimant avers that the signature of the claimant was forged on the share transfers dated August 14th 2009. The defendants assert that no proper foundation has been laid in the statements of case for the necessity to call an expert witness. They point out that no signature of the claimant has been put before the court. The claimant, they say, did not sign the statement of truth in relation to the claim form or Amended Claim Form nor any other document before the court. Further the claimant has presented no facts or evidence to support his allegation in a witness statement. They therefore conclude that making the application for permission before the claimant's evidence has been put before the court and served on the defendants is a case of putting the cart before the horse.
- [21] There is no requirement in the CPR that a party's witness statement must be filed before the court's permission is sought. The fact that the general rule is for the application to be made at the case management conference would suggest otherwise. The need for the expert evidence in this case is indicated in the pleadings - the claim based on fraud and forgery and a defence which asserts a voluntary transfer. There is little doubt that, in a case of this nature, expert evidence is reasonably required to resolve one of the main causes of action..
- [22] No real issue has been taken with the qualifications of Mr. Alvin Langlais. Although the defendants question the manner in which the information regarding his education and qualification were presented to the court, this by itself would not prevent leave from being granted. While it is usual for this information to be presented in a resume or curriculum vitae, this information is also required to be included in the expert's report.
- [23] The defendants also complain that the claimant's own evidence illustrates an attempt to find a witness who would support the allegation of fraud rather than an independent objective witness. That their difficulties in finding an expert witness stems from this approach in selecting the expert. Under the rules, the expert evidence presented to the court must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the demands of the litigation. It is the duty of the expert to provide independent assistance to the court.

- [24] Barrow JA in **Josephine Gabriel and Co. Ltd v Dominica Brewery and Beverages Ltd**¹ discussed the duty under the Rules. He stated:

“The over-arching importance that the rules place on the duty of the expert to assist the court and not to seek to procure a favourable outcome for the party who instructed him appears in rule 32.14, which specifies certain things that must be contained in an expert witness’ report.”

- [25] Included among the provisions set out in rule 32.14 (2) are: that the expert report must include a statement that the expert witness understands his or her duty to the court as set out in rules 32.3 and 32.4; and has complied with that duty. So despite the fact that the expert may have been selected by a party who has certain expectations, the expert’s duty is to the court. Adherence to the requirements of Section 32.14 provides some safeguards in this respect.
- [26] The gravamen of the defendants’ objection to the application for permission is the promptness of the application, in that it was not made at the case management stage.
- [27] At paragraph 4 of the affidavit in support of the application the claimant states that he has good reasons for making the application at the stage of the pretrial review. Firstly, that the application can only be made now, after the claimant has had an opportunity to review the defendants’ documents. Secondly, that after receiving copies of the defendants’ documents the claimant was informed that it would be necessary to prove that the signatures were not the claimants’. The claimant was instructed to seek and obtain the services of a handwriting expert, but due to the language barrier, (the claimant is a Lithuanian national and resides there) the claimant did not fully comprehend the instructions.
- [28] Two e-mails are exhibited in this regard. The first is dated May 2nd 2013, from “Ramune”. It is addressed to Arthur Thomas; Lisa John, Kelvin John; Loy Weste. Only 2 lines of the email have not been redacted. They read: “Furthermore, Mr. Terlan Ibragimov has not signed any documents and has not transferred his shares to the defendants, so we have asked for your legal advice what legal procedures (under your law and practice) should be taken to declare these documents forged – null and void?” The second email is dated 3rd May 2013 addressed to “Ramune” from Loy Weste. It too is heavily redacted. The parts that are not, read as follows:

“4. We note in your below correspondence that Mr. Ibragimov has not transferred his shares by executing any documents to that effect. In order to challenge the validity of the transfer by declaring the documents forged in these civil proceedings, it is necessary to instruct a Certified Handwriting Expert to examine the signature and declare same as a forgery.

5. However, we reiterate that you would first need to examine the said documents, and confirm the forgery by a Certified Handwriting Expert.

¹ (Civil Appeal No 10 of 2004) judgment delivered 2nd July 2007

With respect to the Witness Statements, it is clear that Mr. Ibragimov will need to call an expert witness on handwriting to challenge the validity of the alleged transfer."

- [29] Additionally, the affidavit on behalf of claimant sets out the difficulties he thereafter encountered in seeking to have the documents examined by a handwriting expert in the United Kingdom, but without success. Efforts were also made to secure an expert in this jurisdiction and finally he was able to obtain the services of Mr. Langlais.
- [30] Counsel for the claimant refers the court to the case of **Cornelius v Stevens and Stevens**². There the court granted an application for an expert to be appointed at the pretrial review stage. The court made the finding that the admittance of the expert evidence was likely to be of real assistance in the determination of the issues. The court elected to exercise its discretion positively having found that there were cogent reasons for the late application and having concluded that the justice of the case and the overriding objectives of the rules require that the Court deals with the matters fairly. Therefore the court rejected opposing counsel's argument that the expert should not be appointed at the pretrial review stage.
- [31] Since the general rule is that permission should be obtained at the case management conference, it is for the claimant to supply the court with bona fide and cogent reasons for his failure to comply with the general rule. The Court finds that the expressed difficulties in sourcing a handwriting expert in the United Kingdom combined with the language barrier and the other communication challenges provide cogent reasons for the delay.
- [32] Further, permission ought to be granted given the nature of the claim, the justice of the case and the overriding objectives of the rules to deal with the matter fairly. No trial window has been set, so further prejudice in terms of delay in the trial is minimal. Accordingly permission is granted for Mr. Langlais to be called as an expert witness.

The Failure to File Witness Statements

- [33] The second vigorous objection by the defendants is to the granting of a further extension for the claimant to file his witness statement.
- [34] The claimant asserts that the witness statements could not be concluded until such time as the expert's report is made available "as this goes to the crux of the issue".
- [35] The defendants, on the other hand, submit that claimant has abysmally failed to put forward a good reason explaining the delay in filing the witness statement and accordingly the delay is inexcusable. Further, that the explanation given is neither rational nor logical.
- [36] Both parties were required to file their witness statements and comply with the case management order by 28th June 2013. The defendants filed their witness statements on 19th April 2013.

² ANUHCv2006/0234, Judgment delivered December 5, 2008, paragraph 42

However, the claimant failed to file his witness statement. Under the rules, if a witness statement or witness summary is not served within the time specified by the court, the witness may not be called unless the court permits.

- [37] The reason given by the claimant for his failure to file is that the witness statements could not be concluded until such time as the expert's report is made available. The claimant had a duty to file the witness statement in accordance with the order of the court. If upon receipt of the expert's report, the claimant's witness statement needed amendment or amplification the rules make provision for same. While counsel may have been mistaken the failure was not intentional.
- [38] Subsection (3) of Rule 26.8 requires that the court have regard to certain factors in considering whether to grant relief. They include the effect which the granting of relief or not would have on each party.
- [39] The impact on the claimant's cases would be highly prejudicial, since the claimant appears to be the only witness in each case, apart from the expert. The impact on the defendants would be minimal. Since the court has decided to grant permission for expert evidence, there would be no additional delay beyond the filing of the expert report. The interest of the administration of justice favors allowing all relevant evidence to be put before the court. The failure to comply can be remedied in a reasonably short time. There will be no disturbance of a trial date, since none has been fixed as yet. Accordingly, the court will allow a final short adjournment for the claimant to file and serve his witness statement.
- [40] Lastly, the claimant seeks an order that the defendants be ordered to produce for cross-examination at the trial, the persons purported to have witnessed the claimant's signature on the documents. The claimant does not indicate which rule he is invoking. Rule 29.1 sets out the general power of the court to control the evidence to be given at any trial. But Rule 29.1 does not empower the court to order a party to call a witness.
- [41] The provisions of Rule 29.1 are similar to the provisions of the UK rule 32.1 (1). In **Society of Lloyd's V Jaffray and others**³, one of the defendants sought an order requiring Lloyds to call the witnesses identified, so that the defendant could cross-examine them. Mr. Justice Cresswell stated that the question was whether the court might require evidence to be adduced which the party was not minded to call. The court held that in civil proceedings the trial judge had no power to dictate to a litigant what evidence he or she should tender notwithstanding the general power of the court under rule 32.1, which was a far-reaching one. Phipson on Evidence⁴ summarizes the position:

" In civil cases there is no obligation to call witnesses, even where an intention to call the witness is notified by disclosure of their evidence..."

³ (2000) The Times 3rd August 2000

⁴ 15th edition (2000), paragraph 10-09

It follows that the court has no jurisdiction to make the order sought.

[42] The court therefore makes the following order:

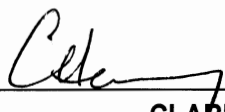
- (1) Permission is hereby granted, pursuant to Part 32 of the Civil Procedure Rules, for Mr. Alvin Langlais to be called as a Document Examiner and Handwriting Expert in both matters and to provide this court with an Expert Report in regard to the matters set out below;

In respect of Claim No. 2011/0723:

- i. The authenticity of the signature purporting to be the claimant's signature on the Coronel Shipping Company Limited Form of Transfer dated the 14th day of August 2009, purporting to transfer 2500 of the claimant's shares to the first defendant;
- ii. The authenticity of the signature purporting to be the claimant's signature on the Coronel Shipping Company Limited Form of Transfer dated the 14th day of August 2009, purporting to transfer 2500 of the claimant's shares to the second defendant

In respect of Claim No. 2011/0722:

- i. The authenticity of the signature purporting to be the claimant's signature on the Waddens Euro Shipping Company Limited Form of Transfer dated the 14th day of August 2009, purporting to transfer 2500 of the claimant's shares to the first defendant; and
 - ii. The authenticity of the signature purporting to be the claimant's signature on the Waddens Euro Shipping Company Limited Form of Transfer dated the 14th day of August 2009, purporting to transfer 2500 of the claimant's shares to the second defendant.
- (2) The Expert report in each matter is to be filed and served on or before 23rd January 2015
 - (3) The expert witness shall make himself available for cross-examination on the date of trial.
 - (4) The cost associated with the provision of the Expert Report is to be borne by the claimant;
 - (5) The time for claimant's compliance with the case management order dated 24th May 2014 is extended to 22nd December 2014;
 - (6) The claimant is granted relief from sanctions;
 - (7) Pre trial review is adjourned to 6th March 2015
 - (8) No order as to costs.


CLARE HENRY
High Court Judge
Antigua & Barbuda