

IN EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
TERRITORY OF THE VIRGIN ISLANDS

CLAIM NO.: BVIHCV2007/0157

BETWEEN:

Zamorin Vadim Konstantinovich

Claimant

and

[1] Interland Finance Holding Limited

[2] Overseas Management Company Trust (BVI) Ltd.

[3] Fingeco Lux S.A.

Defendants

Before:

The Hon. Mr. Anthony Ross, QC

Appearances:

Mr. Christopher Young for the Claimant

Mr. Scott Cruickshank for the First Defendant

Ms. Benedicta Samuels for the Second Defendant

Mr. John Carrington for the Third Defendant

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2008: March 12;
April 30.
.....

DECISION

[1] **ROSS J. [AG]:** This is an application, brought by the Third Defendant, Fingeco Lux S.A. (hereinafter “**Fingeco**”) seeking to set aside service of the Claim Form and supporting documents on it in Luxembourg pursuant to the Order of Master Lanns dated October 4, 2007. The evidence in support of the application is by way of affidavits of Mishka Jacobs filed on December 20, 2007 and Edgar

Bisenius filed on 2nd January, 2008. In opposition, is the unsworn affidavit of Zamorin Vadim Konstantinovich filed on February 15, 2008.

- [2] On June 27, 2007, the Claimant, Zamorin Vadim Konstantinovich sued Interland Financial Holdings Ltd. ("**Interland**") and Overseas Management Company Trust (BVI) Limited ("**Overseas**") seeking a declaration of ownership of Interland and rectification of the share register of Interland to show him, the Claimant, as owner of all shares. Both named Defendants filed defences against the claims.
- [3] On October 2, 2007, the Claimant amended its Claim Form and Statement of Claim to add Fingeco as a Third Defendant in this action. The claim against Fingeco is as agent of record for the holder of Bearer Share Certificates 1 and 2. Also on October 2, 2007, the Claimant filed an application returnable before the Master in Chambers on October 4, 2007 seeking permission, pursuant to the CPR 7.3(2)(a) to serve the Amended Claim Form and Amended Statement of Claim on the Third Defendant out of jurisdiction. The underpinning ground cited by the Claimant is that "[t]here exists as between the Claimant and the First and Second Defendants real issues which it is reasonable for the Court to try and that the Third Defendant is a necessary and proper party to that Claim." In support of that application to serve documents out of jurisdiction, the Claimant filed the affidavit of Emma Jane Sparshott, a solicitor in the firm of Harney Westwood & Riegels, solicitors for the Claimant, in which she deposed that she made that "affidavit from information within [her] own knowledge" and produced as an exhibit thereto, an unsworn affidavit of Zamorin Vadim Konstantinovich (the Claimant herein) with Exhibit "ZVK1" and further swore that "the sworn copy will be filed in due course in the form exhibited." As at the date of this hearing, March 12, 2008 no sworn affidavit of Zamorin Vadim Konstantinovich has been filed. The documents in support of the Claimant's application to serve the Amended Claim Form and Statement of Claim out of jurisdiction invite the Court to accept the following as facts:

- [3:1] On January 2, 2002, Interland was incorporated in BVI; *copies of the Memorandum and Articles form part of Exhibit "ZVK1" and appear on pages 22 to 53, inclusive.*
- [3:2] On that same date, Overseas, a company providing business and related corporate services to a number of international clients was appointed Registered Agent for Interland and granted a Power of Attorney to one Oleg Zamorin; *the terms and particulars of the Power of Attorney were not put before the Court.*
- [3:3] On January 13, 2002, Interland issued Bearer Share Certificates Numbered 1 and 2, on the face of which read, *inter alia*; ". . . THE BEARER is the registered holder of . . . shares . . . subject to the Memorandum and Articles of Association of the said company."
- [3:4] By Directors' Resolution of January 31, 2002, Fingeco, (the Third Defendant herein) a company apparently incorporated in Luxembourg and doing business between Luxembourg and Russia was purported to hold Share Certificates 1 and 2; *the first page of what is purported to be the First Directors' minutes of the meeting held on January 31, 2002 is produced at page 4 of Exhibit "ZVK1". Page 5 is missing. There is nothing on page 4 embracing the direction as to the holding of Certificates 1 and 2.*
- [3:5] On February 27, 2002, Overseas invoiced Fingeco for Incorporation fees for the company; *the invoice was not put before the Court.*
- [3:6] On May 29, 2002, the First Directors of Interland resigned and were replaced by "Edgar Bisenius", "Peter Blinov" and "Oleg Zamorine"; *the Directors' Resolution is set out between pages 6 and 8 of "ZVK1", the powers of the Directors of Interland.*
- [3:7] On August 19, 2002, the Directors, Edgar Bisenius and Oleg K. Zamorine signed Protocol # 1 and also an Agency Contract.

- [3:8] On September 13, 2002, Oleg Zamorin resigned as a Director of Interland. He died on February 21, 2004; *neither the letter of resignation nor a Death Certificate was produced.*
- [3:9] Pursuant to Certificate of September 14, 2004 the Claimant claims to be sole beneficiary of the Estate of Zamorin Oleg Konstantinovich by virtue of a Certificate of Right of Inheritance produced at page 3 of ZVK1.
- [4] Against the background of alleged facts as pleaded and referred to in the unsworn affidavit herein, stemming from January 2, 2002 to September 2, 2004, the Claimant apparently wrote to Mr. Bisenius of Fingeco on November 1, 2004 requesting confirmation that Mr. Zamorin Oleg was indeed the owner of Interland and seeking advice on the procedure of his "entering into possession of this heritage." It appears that Edgar Bisenius, Director of Interland wrote back to him on November 23, 2004 advising that his brother (presumably Zamorin Oleg or some variation including spelling) was never mentioned in the register nor was he mentioned as a beneficial owner.
- [5] On January 12, 2007, the Claimant further wrote to Overseas as registered agent requesting that his name be entered on the Share Register of Interland. The enclosure to that letter referenced a Death Certificate, presumably of Zamorin Oleg Konstantinovich. On March 6, 2007, one Sandra Vasquez, an employee of Overseas, wrote back to the Claimant advising that the client of record prohibited the disclosure of such information. - *Neither the Death Certificate nor the Vasquez letter was put before the Court.*
- [6] By Order of October 4, 2007, referencing the affidavit of Emma Jane Sparshott the Master granted "permission to serve the Amended Claim Form and Amended Statement of Claim, as well as a copy of this application, the Affidavit of Emma

Jane Sparshott, the supporting documents and a copy of this order, on the Third Defendant out of the jurisdiction.”

- [7] On December 6, 2007, Fingeco filed an Acknowledgement of Service confirming service in Luxembourg on November 12, 2007. The time lapse between service of the Amended Claim and the filing of the Acknowledgement of Service calculates to 24 days. These calculations and those in the next paragraph are mentioned merely to confirm that the filings on behalf of Fingeco were within the times as set by the Rules and further directed in the Order permitting service out of jurisdiction.
- [8] By application of December 20, 2007, thirty-eight (38) days after service, Fingeco sought, pursuant to Rules 7.7 and 9.7 and the inherent jurisdiction of the Court, to set aside the service of the Claim Form, Statement of Claim and accompanying documents on Fingeco, or in the alternative, stay or dismiss the proceedings as against Fingeco and further, that the Court should not exercise jurisdiction with respect to the Claim against Fingeco. The primary ground is that the Claim does not give rise to any real issue between the Claimant and the First and Second named Defendants that is reasonable for this Court to try and Fingeco is not therefore a necessary and proper party to the Claim.
- [9] For the hearing of this matter, on March 12, 2008, only the Claimant and the Third Defendant filed material, and at the hearing, the Court was advised by counsel for Interland and Overseas, the First and Second Defendants, that they took no position on the application. But for a passing reference in paragraph 5 of the Affidavit of Edgar Bisenius, the applicant did not take issue with respect to the factual underpinning of the application to serve out of jurisdiction as set out in the Claimant's documents. However, it would, in my view, be improper for this Court to presume a series of alleged facts which could, and should have been supported by documents, at least for the purpose of this application. In excess of 5 months had elapsed between October 2, 2007, the date of the swearing and filing of the Emma Jane Sparshott Affidavit in which, as one of the solicitors for the Claimant,

she advised the Court that the sworn Affidavit of Zamorin Vadim Konstantinovich “will be filed in due course in the form exhibited” and the hearing date. The reality is that the document relied upon by the Claimant and against which permission was granted to serve documents on the Third Defendant out of jurisdiction did not conform to the provisions of the Affidavit Rule, CPR 2000, Part 30. There was in fact no evidence to support the application to serve out of jurisdiction. In my view, the Claimant’s position at the hearing on March 12, 2008, although not curable, could have been ameliorated by the pre-hearing filing of a properly sworn affidavit of the Claimant and Zamorin Vadim Konstantinovich. Proper evidence could have been introduced in support of the Claimant’s position. It is not for the Court to “shore up” and accept as evidence, statements that would, in the absence of source or certified copies of documents be ruled to be hearsay. Bad evidence does not become good evidence by virtue of the fact that it is not objected to.

[10] In **“The Background”** as set out in the Statement of Claim, the Claimant appears to start from a position of entitlement to Share Certificates 1 and 2, and against such presumed entitlement, to make demands on the company and its registered agent. In paragraph 6, the Claimant expresses certain beliefs as to the shareholder of the company, who did not pay for the shares and who may or may not have paid for the incorporation of the company. In paragraph 9, there is no claim of entitlement to the company or the shares, but an invited inference that Fingeco gave instructions to Overseas for the incorporation of Interland.

[11] As to **“The Basis for the Claim”** as set out in the Statement of Claim, in paragraph 15, the Claimant refers to being “in possession of true copies of Share Certificates No. 1 and No. 2,” and goes on to claim in paragraph 17 that “Regrettably, the Claimant has been unable to ascertain where the original bearer shares certificates are located and whom they may be held by” and further, that “there is no evidence to suggest that original share certificates are still in existence and are being held by the Third Defendant as the purported agent and possibly the Second Defendant’s client of record for the Company.”

- [12] In paragraph 18, the Claimant, after expressing an opinion as to the conduct of some business after September, 2002, speculates that “the only basis upon which the various banking institutions and the purported agent for the Company accepted Oleg Zamorin’s instructions was in his capacity as the ultimate beneficial owner.”
- [13] In paragraph 19, the Claimant expressed the concern that “[t]here is a very real danger that Blinov could seek to dispose of all of the Company’s assets.” This is some sixty-one (61) months after the September 13, 2002 resignation of Oleg Zamorin and forty-four (44) months after his death on February 21, 2004.
- [14] Throughout the Claimant’s pleading, no claim of ownership of the shares is made against either Interland or Overseas, the First and Second Defendants in these proceedings. Had these claims not been defended, it is doubtful that an application for the declaratory judgment as sought could have been properly ordered, and even if so given, any realistic consequence. In fact, as pleaded, the claim is supported, at best, upon speculation and the exploring of possibilities. Not even probabilities, much less serious allegations of fact.
- [15] For the reasons as set out above, I find that the Claimant has not pleaded any triable issue(s) as against the First and Second Defendants. That these Defendants chose to enter defences rather than apply to strike out the claims are neither here nor there. The court cannot presume to know the instructions against which the pleadings were drafted. The fact is that the standing necessary to make demands of the company and/or its registered agent is to be founded upon ownership or some authority and entitlement based upon ownership to support such demands.
- [16] For the above reasons, I fully agree with the first ground for the application by the Third Defendant, Fingeco. I cannot find, on the material before me, that there

exists as between the Claimant and the First and Second Defendants any real issues which it is reasonable for this Court to try and that the Third Defendant is a necessary and proper party to that claim. I therefore allow the Third Defendant's application with costs to be assessed within six (6) weeks of this decision, if not agreed to.

- [17] Having come to the conclusions documented herein, it is not necessary that I make decisions with respect to the Part 7.7(2) and 9.7 arguments as advanced by the Applicant. This application allows for the employment of the inherent jurisdiction of the Court to alter the Order of the Master, permitting service out of jurisdiction, most probably permitted based upon the statement of counsel for the Claimant that referring to the Affidavit of Zamorin Vadim Konstantinovich "the sworn copy will be filed in due course in the form exhibited."



E. Anthony Ross, QC
High Court Judge