COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2011/CLE/gen/1598

IN THE MATTER OF a banking mandate entered into between the Plaintiff and Defendants dated 2nd September, A.D. 1986

BETWEEN

BETTAS LIMITED

Plaintiff

-AND-

HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED

First Defendant

-AND-

THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED (HONGKONG BRANCH)

Second Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Macro Turnquest and Ms. Chizelle Cargill of Lennox Paton for the Plaintiff
Mrs. Tara Archer-Glasgow and Mr. Audley Hanna Jr. of Higgs & Johnson for the Defendants

Hearing Dates: 13 April 2022, 2 May 2022 (Written Submissions of both parties)

Practice – Evidence of Foreign law – Expert – Competency of experienced New York attorney to give evidence on Liberian Law – Necessary qualifications – Skill of witness

The Defendants sought to rely on the evidence of Lawrence Rutkowski (Mr. Rutkowski"), a New York attorney, on certain issues of Liberian corporate law arising in the proceedings. The Plaintiff objected to Mr. Rutkowski's evidence being admitted as expert evidence on the ground that he is a New York attorney who was not called to the Liberian Bar and lacked practical experience in Liberian law.

The evidence before the Court established that (i) Liberian corporate law had a close relationship with corporate law and practices developed in the United States, (ii) Mr. Rutkowski had been providing advice on matters of Liberian law for 43 years, (iii) his firm had been issuing hundreds of opinions on Liberian corporate law each year since he joined it in 1992, (iv) other firms in New York offered a similar service, (v) he had provided expert evidence on matters of Liberian corporate law in judicial and arbitral proceedings, (vi) he had been cited as an expert on Liberian law by *Chambers Global* on matters of Liberian shipping law and there was a strong connection between Liberian maritime law and Liberian corporate law and (v) he has been a member of an informal working group of lawyers in the United States established by the Liberian shipowners Council to advise the Liberian Ship and Corporate Registry ("LISCR"), an entity headquartered in the United States that has contracted with the Liberian Government to administer tis ship and corporate registries, and the Liberian Government, on changes to Liberian corporate and maritime law since the 1990s.

HELD: finding that the proposed expert should be deemed an expert in Liberian law for the purposes of the proceedings and awarding fixed costs to the Defendants in the amount of $5000:

1. The general rule is that opinion evidence is inadmissible. Ordinarily, witnesses are only to testify as to facts perceived by them and are not permitted to give evidence of inferences drawn from those facts. In other words, opinion evidence. However, the opinion of a properly qualified expert based on his expertise is an exception to the general rule.

2. The general standard as to whether a witness is adequately qualified to be deemed an expert is that he must be skilled in that branch of knowledge although he need not have acquired his skill in any particular way. The relevant questions are: Is he skilled? Has he an adequate knowledge? **R. v Silverlock** [1894] 2 Q.B. 766 considered.

3. The jurisdiction of the court to deem someone an expert on foreign law is set out in section 22 of the Evidence Act 1996. The only criterion that section 22 prescribes for the admissibility of opinion evidence upon a point of foreign law is that the court must consider the person to give such evidence to be expert in the subject. Therefore, it is entirely within the Court's discretion who is deemed an expert.

4. It is not necessary that the expert must be admitted to practise in a country to be deemed a qualified expert on the laws of that country. **Cross on Evidence (7th edn)**, **Dicey & Morris on The Conflict of Laws (15th edn), Cooper-King v**

Cooper-King [1900] P 65, **Brailey v Rhodesia Consolidated Limited** [1910] 2 Ch 95 and **Ajami v Comptroller of Customs** [1954] 1 WLR 1405 considered. **Concha v Murrieta. De Mora v Concha** (1889) 40 Ch. D. 543 not followed.

5. the proposed expert has sufficient knowledge of and/or experience with Liberian corporate law such that his opinion is of value in resolving the issues of Liberian law that have arisen before this Court. Mr. Rutkowski is qualified, experienced, knowledgeable and skilled to testify as an expert on Liberian law.

RULING

Charles Sr J:

Introduction

[1] Before the Court is an application to determine whether Lawrence Rutkowski ("Mr. Rutkowski"), an NY attorney who has been practising law in the United States since 1979 and who has been providing advice on matters of Liberian corporate law for 43 years, should be deemed an expert in Liberian law.

[2] The key objection by the Plaintiff to Mr. Rutkowski being deemed an expert in Liberian law is that he is not admitted to the Bar of the Republic of Liberia and is not sufficiently well versed in Liberian corporate law to assist the Court. According to the Plaintiff, because someone is familiar with the law of a certain jurisdiction does not make him an expert on the law of that jurisdiction.

The law

Expert evidence generally

[3] The general rule is that opinion evidence is inadmissible. Ordinarily, witnesses are only to testify as to facts perceived by them and are not permitted to give evidence of inference drawn from those facts. In other words, opinion evidence. However, the opinion of a properly qualified expert based on his expertise is an exception to the general rule.

[4] In **R. v Silverlock** [1894] 2 Q.B. 766**,** the English Court of Appeal spoke to what renders a witness adequately qualified to be deemed an expert. The standard is that he must be skilled in that branch of knowledge although he need not have

acquired his skill in any particular way. The relevant questions are: Is he skilled? Has he an adequate knowledge?

The law on deeming a witness an expert on foreign law

[5] The jurisdiction of the court to deem someone an expert on foreign law is set out in section 22 of the Evidence Act 1996 which provides:

> **"22. Where the court has to form an opinion on the identity or genuineness of handwriting, or upon a point of foreign law, or of science, art, trade, manufacture or any other subject requiring special skill or knowledge, evidence may be given of the opinion of persons who in the opinion of the court are experts in such subjects and of any facts which support or are inconsistent with such opinions."** [Emphasis added]

[6] The only criterion that section 22 prescribes for the admissibility of opinion evidence upon a point of foreign law is that the court must consider the person to give such evidence to be expert in the subject. Therefore, it is entirely within the Court's discretion who is deemed an expert.

[7] In **Cross on Evidence (7th edn)**, the learned authors state at page 714:

> **"When a case falls within the general rule requiring proof of foreign law by an expert, the witness must be properly qualified. There has never been any doubt that a judge or regular practitioner in the jurisdiction whose law is in question is properly qualified, but this was once thought to be both a sufficient and necessary condition. In *Bristow v Sequeville*, a jurisconsult, adviser to the Prussian consulate in London who had studied law in Leipzig and knew the Code Napoleon was in force in Saxony was not allowed to give evidence concerning the Code. A number of cases departed from this rigid attitude over the years, and it seems that Civil Evidence Act 1972, s 4(1) did no more than enact the common law in declaring that a person suitably qualified on account of knowledge or experience is competent to give evidence of foreign law irrespective of whether he has acted or is qualified to act as a legal practitioner in the country in question.**
>
> **This leaves open the question of what constitutes a suitable qualification. It seems that practical experience will suffice, even though gained as a businessman, banker, diplomat or Governor-General, rather than as a practitioner. A teacher of the law of the jurisdiction in question may be sufficiently qualified, though it is doubtful whether a student would be. Conversely the evidence of a**

legal practitioner may be rejected if he cannot be shown to have practical experience. There may indeed be room for argument as to what counts as practical experience. A more lenient view used to be taken of the qualifications regarded as suitable, when there were particularly few witnesses, though modern communications and relaxation of the hearsay rule should reduce the need for such leniency today.

The decision whether the proposed witness is properly qualified is made by the judge as a condition precedent to the admission of the evidence…" [Emphasis added]

[8] In **Dicey & Morris on The Conflict of Laws (15th edn)**, the learned editors express the position in similar terms, at page 324:

"No precise or comprehensive answer can be given to the question who, for this purpose, is a competent expert. A judge or legal practitioner from the foreign country is always competent. But in civil proceedings there is no longer any rule (if indeed there ever was) that the expert witness must have practised, or at least be entitled to practise, in the foreign country. For s.4(1) of the civil Evidence Act 1972 provides that 'it is hereby declared that in civil proceedings a person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert evidence as to [foreign law] irrespective of whether he has acted or is entitled to act as a legal practitioner [in the foreign country].' Under these principles, which are probably declaratory of the law, a former practitioner in the foreign country may be competent, as may be a person who is entitled to practise in the foreign country but who has not done so, a person who although he has neither practised nor been entitled to practise in the foreign country, has practised in a second foreign country whose law is the same as the first, and a person who although having no knowledge or experience of the foreign law based on study or practice has nevertheless become conversant with a point of foreign law through work involving contact with that foreign law. There can be no doubt also, that an academic lawyer who has specialised in the law of the foreign country is competent and it is common for such persons to supply expert evidence. In principle, a witness may be competent although he is not a lawyer of any kind providing that, by virtue of his profession or calling, he has acquired a practical knowledge of a foreign law, though such persons will, of course, only be regarded as experts in that part of the foreign law with which they are bound, by virtue of their profession or calling, to be familiar. In practice, however, there will be few cases in the modern law where it will be necessary to rely on the expert evidence of such persons: for it is safe to assume that, almost invariably, such evidence will be obtained from a legal practitioner or an academic lawyer with the relevant expertise. It is, of course, a truism that a person who has no special knowledge of foreign law is not competent. And it is equally a

> **truism that just because a witness is technically competent, his lack of plausibility or independence may severely weaken the credibility of the evidence which he purports to give."** [Emphasis added]

Submissions, Analysis and Conclusion

[9] The Plaintiff argued that Mr. Rutkowski is not qualified to opine on Liberian law because (a) he is a New York Attorney who is not called to the Liberian Bar and (b) he has not practical experience in Liberian law and should not be deemed an expert in Liberian law.

[10] The Defendants submitted that the Plaintiff's objection is inconsistent with the fact that:

(i) Mr. Rutkowski's Expert Witness Statement filed on 25 February 2022 was included under the rubric "Expert Reports" in the Trial Bundle prepared by the Plaintiff;

(ii) the Plaintiff concurred in a joint meeting of Liberian Law Experts between Mr. Rutkowski and the Plaintiff's expert, Betty Lamin-Blamo ("Ms. Lamin-Blamo"); and

(iii) there has been produced a Joint Expert Report (presumably on the Plaintiff's instructions) filed on 18 March 2022,

all of which indicated an acceptance by the Plaintiff of Mr. Rutkowski's expertise on the matters of Liberian law. I agree.

[11] The Defendants further argued that the Plaintiff's objection is misconceived as a matter of law as section 22 of the Evidence Act is the proper starting point which gives the Court wide discretion to determine whether a witness has the expertise, skill and experience to be deemed an expert in the law of a foreign country. In my opinion, the Plaintiff has misconceived the applicable legal principles in asserting that the expert whose evidence is proffered should at least be admitted to the bar of the country of which he or she is purporting to give evidence. The Plaintiff

referred to the case of **Concha v Murrieta. De Mora v Concha** (1889) 40 Ch. D. 543 where Cotton LJ stated that "in this country *foreign law is a matter of fact to be decided on evidence, and the proper evidence is that of experts, that is to say, of advocates practising in the Courts of the country whose law our courts want to ascertain"*.

[12] Cotton LJ's dicta may not hold good today given the fact that the world is changing and I see no reason why a professor of law who chooses a career path in academia and who has written widely is precluded from giving evidence in that field (Liberian law) but a lawyer admitted to the Bar of Liberia can.

[13] Section 4(1) of the Civil Evidence Act, 1972 (UK) has more or less codified the common law principles to broaden the category of skilled persons who may be considered "an expert" on foreign based on his knowledge, experience and skill.

[14] As the Defendants correctly contended, it is not necessary that the expert must be admitted to practise in a country to be deemed a qualified expert on the laws of that country.

[15] In **Cooper-King v Cooper-King** [1900] P 65**,** the Court gave leave to admit the expert evidence of an ex-Governor of the Colony, who was not a member of the legal profession, but deposed that he was conversant with the laws and ordinances in force in the Colony.

[16] Also, in **Brailey v Rhodesia Consolidated Limited** [1910] 2 Ch 95, an English academic expert was qualified in foreign law to give expert evidence on Rhodesian law although he had not practiced in Rhodesia.

[17] In **Ajami v Comptroller of Customs** [1954] 1 WLR 1405, the Privy Council held that a branch bank manager, engaged in banking business in Nigeria for 24 years, had to, and did, maintain a current knowledge of banknotes in use in West Africa. He was therefore regarded as an expert giving expert evidence.

[18] Applying the legal principles to the case at hand, in my judgment, Mr. Rutkowski has sufficient knowledge of and/or experience with Liberian corporate law such that his opinion is of value in resolving the issues of Liberian law that have arisen before this Court. Mr. Rutkowski is sufficiently acquainted with the relevant aspects of Liberian law at issue in this case to be accepted as an expert as regards it:

(i) these proceedings raise issues of Liberian corporate law, not Liberian real property law, Liberian criminal law or other areas of law upon which Mr. Rutkowski professes no competence or expertise. There is no dispute that Liberian law is based on corporate law and practices developed in the United States, with which Mr. Rutkowski is well-familiar. The Liberian Business Corporation Act ("BCA") was originally modelled upon the Business Corporation Law of the State of New York, where Mr. Rutkowski is admitted to practise law, and was drafted by law professors at Cornell University in the State of New York. Further, the General Construction Law of the Republic of Liberia requires Liberian courts to follow the common law of the United States and England when insufficient local precedent exists (such proposition appears to be agreed by the Plaintiff's expert, see [5] of Ms. Lamin-Blamo's expert report), and section 1.3.4 of the BCA specifically provides that the BCA shall be applied and construed to make the laws of Liberia, with respect to the subject matter thereof, uniform with the laws of the State of Delaware of the United States of America and other U.S. states with substantially similar legislative provisions. Mr. Rutkowski has explained that the Liberian Supreme Court has generally used secondary sources in the United States such as American Jurisprudence 2nd, a compendium of common law in the United States, as its principal sources of common law. This position has received judicial recognition in the United States and from the English Court of Appeal in **Multinational Gas and Petrochemical Co. v Multinational Gas and Petrochemical Services Ltd. and Others** [1983] Ch. 258 where Dillon LJ at page 287 stated: "*The plaintiff is a Liberian*

company, but such evidence of Liberian law as is before us indicates that Liberian company law is the same as English and American company law."

(ii) Mr. Rutkowski's extensive practice has included a focus on matters of maritime and corporate law, including Liberian corporate law. He has been providing advice on matters of Liberian corporate law for 43 years. Throughout this period, Mr. Rutkowski, in the course of his business, has been required to keep (and has kept) in touch with current law and practice with regards to Liberian corporate law. Mr. Rutkowski has produced a letter dated 20 April 2022 from George E. Henries, a highly regarded local practitioner admitted to practice in Liberia who has known and worked with Mr. Rutkowski for a period exceeding 30 years, in which Mr. Henries confirmed that he personally considers Mr. Rutkowski to be an expert on matters of Liberian corporate law. Mr. Rutkowski has clearly demonstrated that he has acquired by extensive practical experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the Court.

(iii) Mr. Rutkowski's firm, Seward & Kissel LLP, issues hundreds of opinions on matters of Liberian corporate law each year and has done so since he joined it in 1992. An example, albeit redacted, of one such opinion is exhibited to Mr. Rutkowski's Supplemental Witness Statement filed on 22 April 2022 and it clearly demonstrates engagement with matters of Liberian corporate law, and in particular the precise character of the issues upon which expert evidence is required in these proceedings. Mr. Rutkowski's and his firm's practice of providing advice on matters of Liberian corporate law is not unique – his evidence is that other firms in New York offer a similar service due to the existence of a relationship between Liberian and American maritime and corporate laws, and that such advice is routinely accepted and relied upon by government institutions, banks and other financial institutions (including major international banks).

[19] As the Defendants correctly stated, while there is no requirement for an expert to have ever previously given expert testimony and the mere fact that a person has previously given evidence as an expert on a subject does not automatically make their evidence admissible as expert evidence, Mr. Rutkowski has provided expert evidence on matters of Liberian corporate law in judicial and arbitral proceedings in the United States, the United Kingdom and elsewhere. Mr. Rutkowski has highlighted that he gave evidence on Liberian law in 2010 in the **The Fiona Trust & Holding Corporation ORS v. Privalov ORS** litigation before the English High Court. Mr. Rutkowski has affirmed that, while oral testimony was not required of him, he was retained as an expert witness on matters of Liberian corporate law in that action and no challenge was made to his evidence. Mr. Rutkowski has also confirmed that, in 2017, he provided written reports on Liberian law in arbitrations conducted under the Rules of the London Maritime Arbitration Association involving disputes as to share ownership and the propriety of certain elections of directors. Mr. Rutkowski has also produced a letter dated 20 April, 2022 from Mr. Nicholas C. Dean, the principal of Monte Carlo Maritime Services S.a.r.l, which confirms Mr. Rutkowski's role as an expert in that context and that Mr. Dean has sought advice from Mr. Rutkowski on matters of Liberian law and recommended to clients that Mr. Rutkowski be retained as an expert witness on Liberian law.

[20] It is also not in dispute that Mr. Rutkowski has been cited as an expert on Liberian law by *Chambers Global* on matters of shipping law. There is a strong connection between Liberian maritime law and Liberian corporate law. In his Supplemental Witness Statement, Mr. Rutkowski states:

> **"Counsel for the Plaintiff has previously noted that the Chambers Global ranking is on matters of shipping law but what plaintiff's counsel understandably has not noted is the strong connection between Liberian maritime and corporate law. Section 51 of the Liberian Maritime Law provides that every seagoing Liberian registered vessel of 500 gross tons or more must be owned by a Liberian citizen or national. Section 29 provides in part that "[t]he term 'citizen' or 'national', as used throughout this Title, shall, unless the context shall otherwise require, include corporations, trusts, foundations, partnerships, limited partnerships, limited liability companies and other entities of Liberia having legal personality and**

> **the capacity to own a ship." (Emphasis added.). Similar to Section 1.3.4 of the BCA, Section 30 of the Liberian Maritime Law provides "[i]nsofar as it does not conflict with any other provisions of this Title, the non-statutory General Maritime Law of the United States of America is hereby declared to be and is hereby adopted as the General Maritime Law of the Republic of Liberia. Thus, the connection between expert knowledge on Liberian maritime law is made clear – one cannot be an expert on Liberian maritime law without also being an expert on corporate law. (N.B. – the BCA is contained within the larger Liberian Associations law which includes the provisions for other legal entities.)."**

[21] In addition, Mr. Rutkowski has been a member of an informal working group of lawyers in the United States established by the Liberian Shipowners Council to advise the Liberian Ship and Corporate Registry ("LISCR"), an entity headquartered in the United States that has contracted with the Liberian Government to administer its ship and corporate registries, and the Liberian Government, on changes to Liberian corporate and maritime law since the 1990s.

[22] Succinctly put, Mr. Rutkowski is qualified, experienced, knowledgeable and skilled to testify as an expert on Liberian law. In the exercise of my discretion, I will deem Mr. Rutkowski an expert in Liberian law.

[23] In the circumstances, the Plaintiff's application is dismissed with costs of $5,000 to the Defendants.

Dated this 12th day of May 2022

Indra H. Charles
Senior Justice