



# The Court of Appeal for Bermuda

**CIVIL APPEAL No. 7 OF 2012**

Between:

**ONESMUS NZABABLINDA & DAVID RALPH WILSON**  
(as Trustee of the Laylash Trust)

and

**LOIS WILSON**

Appellants

-v-

**CAPCAR ENTERPRISES**

Respondent

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**Before: Zacca, President**  
**Evans, J.A.**  
**Auld, J.A.**

**Appearances:** Mr. David Kessaram, Cox, Hallett Wilknsn for the  
Appellants  
Mr. Kevin Taylor, Marshall Diel & Myers for the  
Respondent

## **JUDGMENT**

**Date of Hearing:** 23 November 2012  
**Date of Judgment:** 14 December 2012

**AULD JA:**

### **Introduction**

1. This is an appeal by Lois Wilson and her Trustees from a ruling of Kawaley CJ against her on a preliminary issue of construction of a written brokerage agreement ("the Brokerage Agreement") between her and Capcar Enterprises ("the Broker") for the sale of company shares beneficially owned by her. The issue is whether the Broker was entitled to commission under

the Brokerage Agreement on her sale of the shares during its currency. As Kawaley CJ observed, in paragraph 13 of his Ruling, the preliminary issue turned on the construction of the term “sale” in the Brokerage Agreement. The material facts of the matter are detailed in a “Statement of Agreed Facts” put before the Chief Justice, appended to this Judgement.

2. The Court summarises so far as necessary the Statement of Facts and the scheme of the Brokerage Agreement, in particular as to what it required the Broker to do and how it defined the event or events the occurrence of which entitled him to payment of commission.

3. Ms. Wilson’s shares represented one of two controlling and equal holdings in a company (“the Company”), the other being held by Mr. Carl Paiva with whom she was in dispute for control of the Company. Ms. Wilson sought to resolve the dispute by offering to sell her shares to Mr. Paiva for a named price per share. He refused her offer. Accordingly, Ms. Wilson, while contemplating litigation against him to compel his purchase of her shares, sought to avoid it by appointing the Broker, on his standard form of written agreement, as her sole agent for the sale of the shares. Clause 2 of the Brokerage Agreement required the Broker to “secure for ... [her] “a ready, willing and able buyer” for the shares “at a price acceptable to ... [her]”. Clause 8 identified the events, the occurrence of any one of which would entitle him to commission, namely:

- a) a sale made by the Broker or by Ms Wilson;
- b) a sale made by any other person acting for Ms Wilson or on her behalf;
- c) a sale within one year after termination of the Agreement to a buyer to whom the shares were introduced while the Agreement was in force or for whom the Broker was the procuring cause; or
- d) the Broker presents to her a ready buyer at a price acceptable to her.

The Brokerage Agreement contained no term qualifying those general provisions of entitlement, for example as to the circumstances giving rise to a sale or excluding Mr. Paiva or any other named buyer.

4. Three months elapsed during which the Broker did not find a buyer and the shares remained unsold. Ms. Wilson then began litigation against Mr. Paiva and the Company seeking an order to compel him to buy her shares, alternatively a winding-up of the Company. A further 15 further months elapsed, during which the parties remained at odds procedurally and as to any possible settlement price for the shares. It was only when Ms. Wilson obtained an injunction against him, restraining him from using the Company's assets to defend her claim, that Mr. Paiva agreed to compromise the matter by entering into a Deed of Agreement under which he undertook to buy her shares for a price well above that which he had previously indicated he would be prepared to offer.

5. The Broker claimed commission on the sale effected by the Deed of Agreement, maintaining that, by virtue of Clause 8 a) of the Brokerage Agreement, Ms. Wilson's sale of the shares to Mr. Paiva entitled it to commission. Ms. Wilson resisted the claim, maintaining that the transaction was not a "sale" as provided under Clause 8 because Mr. Paiva had been coerced into settling the proceedings by the injunction obtained against him; he was not, therefore, a truly willing buyer as contemplated by Clause 2.

6. Kawaley CJ, in an orthodox consideration of generally applicable principles of contractual construction, found for the Broker. In doing so, he placed reliance on the provision in Clause 8 for the Broker's entitlement to commission regardless of any services rendered by him under Clause 2. He could see no reason why the motivation of one or both parties for entering into the transaction should, as a generality or in the context of the Brokerage Agreement, prevent it from being a "sale" if, nevertheless, they were both willing parties to it. He added that the fact that the court proceedings had so weakened the bargaining position of Mr. Paiva, as to compel him to buy the

shares at the price sought by Ms. Wilson, did not remove the truly consensual nature of the transaction as reflected by the Deed of Agreement. He remarked in paragraph 23 of his Ruling:

“... the fact that the primary obligation of the Broker under paragraph 2 of the Agreement is to consummate an ordinary commercial sale of the Shares is of minimal relevance in deciding what type of sale by the Owner would trigger the Broker’s right to receive a commission.”

7. Mr. David Kessaram, for Ms. Wilson, challenged that reasoning. His primary submission was that the natural and ordinary meaning of the word “sale”, and as used in the Brokerage Agreement, did not contemplate or include the transaction here because Mr. Paiva was not a truly willing purchaser of the shares. He argued that Clause 2, in obliging the Broker to secure for Ms Wilson “a ready, willing and able buyer”, contemplated an “ordinary” arms-length, commercial transaction, not one imposed on him by litigation that might, but for the Settlement Agreement, have resulted in a court-ordered sale. He maintained that, even if “sale” in its natural and ordinary meaning may include a transfer procured by coercive legal proceedings, the Brokerage Agreement and the background facts make plain that “sale” in this context meant sale in the open market to a ready, willing and able purchaser, which Mr. Paiva was not. In short, he maintained, that the injunction granted to Ms. Wilson in the proceedings effectively disabling Mr. Paiva from defending them, rendered the sale wholly different from that envisaged by the Brokerage Agreement. He added that the fact that such imposition or coercion would not have vitiated the sale as between Ms Wilson and Mr. Paiva does not affect Ms. Wilson’s entitlement to resist the Broker’s claim under the Brokerage Agreement.

8. The Court considered whether it might be argued that, in the circumstances, the Brokerage Agreement should be construed so as to have required the Broker to have introduced a purchaser other than Mr. Paiva, so that the eventual “sale” to him was not within the scope of the Agreement. However, Mr. Kessaram accepted that the agreed Statement of Facts does not

provide a basis for limiting the scope of the Brokerage Agreement in that way. He added that, in any event, he could not submit that the Broker's instructions had excluded him from approaching Mr. Paiva and other (minority) shareholders in the Company. This possible contention, therefore, was not pursued.

9. Mr. Kevin Taylor, for the Broker, put as a "preliminary" point early in his written submissions that, even if the word "sale" in the Brokerage Agreement did not include the sale to Mr. Paiva, Ms Wilson is estopped by the wording of a Recital to the Deed of Agreement from arguing that the transaction it recorded and effected lacked mutual assent, namely that, "[i]n accordance with the Settlement Agreement, ... [Ms Wilson] wishes to sell and [Mr. Paiva] wishes to purchase the ... shares". However, in his oral submissions to the Court he did not develop the point, nor seemingly had he raised it before the Chief Justice. It is doubtful whether it could add much to his other submissions, since the word "wishes" in the Deed invites the same debate as to interpretation, in the context of the Brokerage Agreement and the background facts.

10. Mr. Taylor's primary submission in the appeal was that there was nothing in the Brokerage Agreement or its context to distort the ordinary and natural meaning of the word "sale" in Clause 8 with any of the qualifications for which Mr. Kessaram contended. He stressed that the important matter in any agency commission contract is to ascertain the event on the occurrence of which commission is payable, citing well-known authorities on such contracts. As to whether the sale provided for in the Settlement Agreement here should be regarded as such an event, he referred to reasoning in two lines of cases, the first in speeches in the House of Lords in *Kirkness (Inspector of Taxes) v John Hudson & Co. Ltd* [1955] 2 All ER 345, HL, that there may be a "sale" in the natural and ordinary meaning of the word where parties to a transaction mutually assent to its terms even where there is coercion or other pressures in the background. The second set of authorities to which he referred - less relevantly to the facts of this case - were the

reasoning of the Court of Appeal in *Ridge Nominess v IRC* [1962 Ch 376, CA and its application at first instance in *Sun Alliance Insurance Ltd. v. IRC* [1971] 1 All ER 135, Ch.D, that in the context of a statutory process entitling a court to order a transfer by “sale”, such an order, though overriding the will of at least one of the parties, was nevertheless a “sale”. By the same reasoning, he argued, a transaction entered into under such compulsion could nevertheless be a “sale” in the context of the Brokerage Agreement.

11. Mr. Taylor’s second line of authority was not only irrelevant to the facts of the case -which is not one of a court-ordered sale – but adds nothing to his primary submission based on *obiter* observations in *Kirkness*. That is, that a sale prompted by some element of compulsion or other pressure bearing on one of the parties, motivating him, in a case like this, to agree to terms he would not otherwise have agreed, may be caught, as in the context here, by the natural and ordinary meaning of the word “sale”. He added that that is typical of most settlement agreements.

12. In the view of the Court, Mr. Taylor’s primary submission in support of Kawaley CJ’s Ruling should prevail. The Chief Justice, in paragraph 4 of the Ruling, correctly and neatly described the issue before him, namely whether, because the shares were sold by Ms Wilson in the context of compromising proceedings in which Mr. Paiva might potentially have been compelled to purchase them, the transfer for value that occurred fell outside the species of “sale” contemplated by the Brokerage Agreement. In paragraph 23 he rightly focused on the use of the word “sale” in clause 8 of the Brokerage Agreement, setting out each of the events in sub-clauses a), b) and c), and, in the event of a sale ensuing, d), the occurrence of which would have triggered the Broker’s right to commission.

13. In paragraph 27 of his Ruling the Chief Justice, in posing the question, “why should the character of the proceedings which preceded the sale make a difference to the commission position?”, touched on the commonplace state of mind of parties to commercial or personal transactions mutually

assenting, albeit reluctantly, to terms that one or other or both do not regard with enthusiasm. Such circumstances of compromise - whether or not transactions in the open market or at arms-length - include inequality of bargaining power, the state of the market for the commodity in question, dire economic necessity and other personal or professional constraints. As Evans J.A. pointed out during Mr. Kessaram's submissions that is the stuff of just about every settlement agreement of legal proceedings where one or other or both of the parties have to face reality and compromise to reach agreement. The fact that Mr. Paiva found himself in a weaker bargaining position than Ms. Wilson as a result of her legal action and injunctive relief against him, leaving him facing costly defeat in the litigation supports, rather than detracts from, the Broker's case that Mr. Paiva willingly purchased the shares at the price then agreed as part of the settlement he needed.

14. For those reasons the Court dismisses Ms. Wilson's appeal.

*Signed*

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Auld JA

*Signed*

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Zacca P.

*Signed*

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Evans, JA