In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011: No. 197

BETWEEN:

CAPCAR ENTERPRISES LTD

Plaintiff

-v-

ONESMUS NZABALINDA AND DAVID RANDOLPH WILSON

(as Trustees of the Laylash Trust)

1st Defendants

-and-

LOIS WILSON

2nd Defendant

JUDGMENT

(on the trial of a Preliminary Issue)

(In Court)

Date of Trial: May 4, 2012
Date of Judgment: May 11, 2012

Mr. Kevin Taylor, Marshall Diel & Myers, for the Plaintiff
Mr. David Kessaram, Cox Hallett Wilkinson, for the Defendants

Introductory

1. On June 24, 2011, the Plaintiff issued a Specially Indorsed Writ claiming $45,900 by way a 10% commission on the sale by the Defendants of 30,600 shares in C Holdings Ltd. ("the Shares").

2. The claim was based on a February 9, 2009 brokerage agreement between the parties[1] ("the Brokerage Agreement") which was at all material times in force. The Shares were sold by the Defendants pursuant to a July 2, 2010 '*Deed of Agreement*' which compromised proceedings brought by the 2nd Defendant ("Wilson") by way of a section 111 of the Companies Act 1981 Petition presented on May 12, 2009 against, *inter alia*, C Holdings Ltd. and a Mr. Carl Paiva ("Paiva"), the said company's other major shareholder (also through a trust) ("the Petition").

3. On February 27, 2012, the Court ordered that the following issue should be tried as a preliminary issue based on an Agreed Statement of Facts and certain Agreed Documents:

> "*Whether a transfer of the 30,600 shares of C Holdings Ltd. ('the company') of the Owner (as defined in the agreement) as part of a full and final settlement of litigation commenced by the Owner under s.111 of the Companies Act 1981 against another shareholder of the company and the company to compel such other shareholder and/or the company to purchase the Owner's shares constitutes a 'sale' within the meaning of that term as used in the Agreement.*"

4. The narrow dispute centred on whether, because the Shares were sold by the Defendants in the context of compromising proceedings in which the purchaser (Paiva) might potentially have been compelled to purchase the Shares, the transfer for value which occurred did not fall within the species of "sale" contemplated by the Brokerage Agreement.

The background to the agreements

5. In November, 2008 a dispute arose between Wilson and Paiva who each beneficially owned 30,600 shares in C Holdings Ltd. On or about February 2, 2009, Wilson made an offer to Paiva for the sale of the Shares.

6. The Brokerage Agreement was signed on February 6, 2009, four days later at which time Wilson was contemplating minority shareholder petition proceedings in relation to which

[1] The 1st Defendants are successors to the Trustees who signed the Brokerage Agreement.

she had taken legal advice. A week later on February 13, 2009, Paiva rejected Wilson's offer to sell the Shares.

7. The Plaintiff was unable to find a purchaser for the Shares before the Petition was presented on May 12, 2009. By the Petition, Wilson sought primarily (1) that the Respondents (or any of them) be ordered to purchase her shares, alternatively (2) an Order that the company be wound-up.

8. On June 11, 2010, Wilson obtained an order restraining the company from expending its resources in defence of the Petition on the grounds that the real dispute was one between shareholders. Whilst the injunction application was pending, settlement discussions commenced but did not reach any conclusion. On July 2, 2010, the Deed of Agreement was executed settling the Petition proceedings and transferring the Shares from Wilson to Paiva for the stated consideration of $15 per share.

9. On or about April 23, 2009, Wilson told the Plaintiff's principal Barry Capuano that she was proposing to present the Petition "*to have company formally wound-up*". Mr. Capuano requested her to hold off so he could try to sell the Shares. After presenting the Petition, however, Wilson on June 17, 2009 requested the Plaintiff to write a letter to bankers in Florida confirming that the Plaintiff was currently acting as broker in relation to the sale of, *inter alia*, the Shares.

Principal terms of the Brokerage Agreement and the Deed of Agreement

10. The Brokerage Agreement was expressed to commence on February 6, 2009 for an "Initial Term" expiring on May 6, 2009 (paragraph 4). Thereafter it automatically renewed for 60 day periods subject to the right of either party to terminate upon 14 days notice before the beginning of the next renewal period (paragraph 5). The Agreement included the following key provisions:

> "*1. Subject to paragraph 5, the Owner hereby irrevocably grants to the Broker the sole right to sell 30,600 shares of C-Holdings Ltd. (hereinafter called the 'Business').*
>
> *2. The Broker shall use its best endeavours to secure for the Owner a ready, willing and able buyer or buyers for the Business at a price acceptable to the Owner.*
>
> *3. The Owner shall not during the period of this agreement appoint any other agent for the sale of the Business….*

8. The Broker shall have the right to receive its Commission upon any of the following events:

a) a sale is made by the Broker or by the Owner;

b) a sale is made by any other person acting for the Owner or on the Owner's behalf;

c)the Business is sold within one year after the termination of this agreement to a buyer or buyers to whom it was introduced while this agreement was in force or for whom the Broker was the procuring cause (this clause shall survive termination of this agreement); or

d) the Broker presents to the Owner a ready buyer or buyers at a price acceptable to the Owner (the asking price is deemed acceptable)." [emphasis added]

11. The Brokerage Agreement was printed on the Plaintiff's letterhead and it was common ground that the document was prepared by the Plaintiff. It is self-evident that the Agreement is drafted in a way which favours the Broker to the extent that it provides for entitlement to the commission in four specified instances other than where the sale is actually made by the Broker itself on the Owner's behalf. Paragraph 9 also entitles the Broker to claim reimbursement of expenses incurred prior to a lawful termination of the Agreement.

12. The Deed of Agreement makes it clear that its purpose entails "*settling the proceedings begun by petition*" (recital (C) and Clause 7 ("*RELEASE AND DISCHARGE*")). Although it also provides for Wilson to purchase certain other shares from Paiva for the nominal sum of $1, the only significant sum referred to in the Agreement appears in clause 1 which provides as follows:

"**1. SALE AND PURCHASE OF CH SHARES**

1.1 Westport [Wilson] *with full title guarantee shall sell and Paragon* [Paiva] *shall purchase the CH Shares on the terms and conditions set out in this Agreement. The CH Shares shall be transferred to Paragon free from all claims, liens, charges, equities, options and encumbrances whatsoever ('Encumbrances')and together with all rights now or hereafter attaching to the CH Shares.*

1.2 Westport represents and warrants to Paragon that it has good and marketable title to the CH Shares free from Encumbrances, and Westport will indemnify and save harmless Paragon from and against any competing legal claims to the CH Shares.

1.3 The consideration for the sale of the CA Shares shall be BD$15.00 per share…"

13. There was no real controversy on the construction of the terms of the Deed of Agreement which on their face made provision for the sale of the Shares. The preliminary issue in dispute turned on the construction of the term "sale" in the Brokerage Agreement, which the Defendant contended in its contractual context did not embrace a sale entered into under the "compulsion" of legal proceedings which might have concluded with an order compelling such sale.

Principles of construction

14. The generally applicable principles of contractual interpretation were not in dispute. Mr. Kessaram placed *Investors Compensation Scheme Ltd.-v- West Bromich Building Society et al*[1998] 1 All ER 98 and Chitty on Contracts, 30th edition, paragraphs 12-041-12-066 before the Court.

15. The starting point is to remind oneself that the "*object of all construction of the terms of a written agreement is to discover therefrom the common intention of the parties to the agreement*" (Chitty, paragraph 12-042). One must next bear in mind that the modern approach to contractual interpretation is essentially[2] to "*assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded*": Lord Hoffman in *Investors Compensation Scheme Ltd.-v- West Bromich Building Society et al*[1998] 1 All ER 98 at 114f-g. Accordingly, as Lord Hoffman went on to opine later in the same speech:

> "*…the meaning of the document is what the parties using those words against the relevant background would reasonably have… understood them to mean…The rule that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background*

[2] The important exception is the policy rule that the content of the parties' negotiations and subjective declarations of intent are not admissible.

that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had…"[3]

16. Mr. Taylor, for the Plaintiff, did not dissent from the proposition advanced by the Defendant's counsel that as the Brokerage Agreement was prepared by the Plaintiff, any ambiguities must be resolved in the Defendants' favour under the *contra proferentem* rule.

Findings: was the sale of the Shares under the Deed of Agreement a "sale" for the purposes of the Brokerage Agreement?

17. The sale of the Shares under the Deed of Agreement was plainly a "sale" having regard to the natural and ordinary meaning of that word. Is it obvious from the contractual context that this type of sale was not intended to be caught by the Brokerage Agreement? Or, alternatively, is their sufficient doubt about the question so as to engage the *contra proferentem* rule, requiring the Court to resolve any doubts against the Plaintiff?

18. The Defendants' case is that the Brokerage Agreement only contemplated an 'ordinary' sale uncomplicated by being linked to legal proceedings which might have resulted in a court-ordered sale. Mr. Kessaram sought to demonstrate this in three main ways.

19. Firstly, he referred to wording in the Agreement which suggested an ordinary arms length sale. Clause 2 referred to the Broker's obligation to find "*a ready, willing and able buyer or buyers for the Business at a price acceptable to the Owner.*" The sale relied upon by the Plaintiff did not constitute such a sale.

20. Secondly it was submitted that, by reference to the definition of "sale" in section 2 of the Sale of Goods Act 1978 (by way of analogy), the sale relied upon was not a sale because the price agreed was not the only consideration.

21. Thirdly, reference was made to the nature of minority shareholder oppression proceedings and the Court's powers to order the purchase of the petitioner's shares. A sale made by way of settlement of such proceedings, after Wilson obtained an injunction restraining the company from defending the Petition, was said to be wholly different in character to the type of sale envisaged by the Brokerage Agreement.

22. Mr. Taylor argued that the position was far less elaborate. The Brokerage Agreement gave the Plaintiff the sole right to sell the Shares; it was entirely consistent with this that

[3] At page 115a-d.

the Agreement not only provided that the Broker was entitled to its commission if the Owner sold the Shares directly (paragraph 8 (a)). The Broker was also entitled to its commission if the Shares were sold by any third party on behalf of the Owner. Accordingly any sale by the Defendants triggered the entitlement of the Plaintiff to its commission.

23. In my judgment 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. The crucial provisions are paragraph 8 of the Agreement as read with paragraphs 1 and 3. The latter provisions emphasise the sole agency status of the Broker; the former buttress that status by providing that the Owner cannot avoid paying the commission:

    (a) by selling herself;

    (b) by selling through a third party; and/or

    (c) by selling within a year after the Agreement has been terminated to a buyer who was introduced by the Broker.

24. There is no suggestion that the Brokerage Agreement required the Defendants to deposit the relevant share certificates with the Broker so that the Plaintiff would have had control of any sale. Although these provisions appear to be heavily weighted in favour of the Plaintiff/Broker, on closer analysis of the commercial context, they were quite reasonable. The provisions were designed to counteract the considerable scope the Defendants would have had to sell the Shares without the Broker's knowledge. And because the Owner was given very liberal termination rights after the three month long Initial Term, paragraph 9 of the Agreement entitled the Broker to claim expenses following lawful termination.

25. In this contractual context, it seems almost bizarre and certainly illogical to infer that the meaning of "sale" for the purposes of paragraph 8(a) was intended by the parties to bear a restrictive meaning which reduced rather than increased the range of circumstances in which the Broker would be entitled to its commission. The clause was explicitly designed to protect the position of the Broker. Having regard to the plain and obvious dominant purpose of paragraph 8 generally, and paragraph 8(a) in particular, why should the parties be deemed to have intended that:

(a) the Broker would be entitled to its commission if the Owners sold the Shares to a quasi-partner in an arms-length sale; but

(b) the Broker would not be entitled to its commission if the Owners sold the Shares to a quasi-partner having commenced proceedings under section 111 of the Companies Act through the mechanism of a settlement of those proceedings?

26. According to the structure of the Brokerage Agreement, the Defendants (as long as the Agreement continued in force) were required to give the Plaintiff the sole right to sell the Shares and if they or anyone else on their behalf sold the Shares, the Broker was entitled to a commission. The Defendants had the legal right, after May 6, 2009, to terminate the Agreement; had they done so, the Plaintiff would only have been entitled to a commission if the Defendants had sold within 12 months of the termination to a buyer the Broker had introduced. They did not exercise their termination rights for reasons which are not apparent. But this further undermines the inference that the parties intended to limit in the manner the Defendants now contend the forms of sale which would trigger the Plaintiff's commission entitlement.

27. The argument that a sale which takes place as part of a litigation settlement agreement is not a sale is an interesting but ultimately unpersuasive one. Putting aside the section 111 proceedings which were actually begun (quite obviously with a view to triggering the sale which was eventually consummated), it is possible to envisage other sales which had some element of compulsion to them but which would (following the Defendant's logic) disentitle the Plaintiff to its commission. If the Defendants had entered into a private sale agreement with the same buyer and the buyer reneged on the agreement, they might have sued for specific performance of such contract. If the shares were only sold pursuant to a Court order for specific performance, would the Plaintiff be disentitled to its commission because the sale took place pursuant to a court order? Or, looked at another way, if a sale pursuant to a writ action to enforce a sale agreement the purchaser dissented from did trigger the Plaintiff's commission rights, why should the character of the proceedings which preceded the sale make a difference to the commission position?

28. The only difference between a sale to settle a minority shareholder oppression petition and a hypothetical specific performance writ action would be that in the latter case at one time (but not at the time of the actual sale) the purchaser would be or appear to be "*a ready, willing and able buyer*" who did not have to be sued to procure the sale. However, the predominant purpose of paragraph 8(a) of the Brokerage Agreement was simply to ensure that the Broker who was given a sole listing received a commission if the Shares were sold by the Owner during the currency of the Agreement- at a time when the Broker

was entitled assume that it would benefit from any sale procured by its own efforts on the Owner's part.

29. It is impossible to see why the parties would, had they applied their minds to it, reasonably have envisaged that the Defendants could, without exercising their termination rights, procure a sale of the Shares through coercive legal proceedings designed to achieve that result and thereby avoid any commission liability.

30. The sale pursuant to the Deed of Agreement may fairly be viewed as easier to achieve (in circumstances where there were no easily accessible willing purchasers) than a sale consummated pursuant to arms-length negotiations in circumstances where it is admitted the commission entitlement would indeed be triggered. It would be an unreasonable commercial result (and, more importantly, inconsistent with the terms of the Agreement read as a whole) for the Owners to be able to escape paying the Broker by pursuing steps more likely to achieve a sale and only to be obliged to pay a commission if they pursued steps less likely to achieve a sale.

31. The Defendants' construction requires a highly artificial and legalistic analysis almost completely detached from a commonsense reading of the Agreement in its contractual and wider commercial context. It is on careful analysis unambiguously clear that the sale of the Shares, which took place pursuant to the Deed of Arrangement, was a "sale" for the purposes of the Brokerage Agreement. The contractual context does not justify defining "sale" for the purposes of paragraph 8(a) of the Brokerage Agreement as being limited in any way by the means through which the Defendants obtained the sale, having regard as well to the terms of the Deed of Agreement and all the circumstances of the present case.

Summary

32. The preliminary issue is resolved in favour of the Plaintiff. I will hear counsel as to costs although there is no obvious reason why costs should not follow the event.

Dated this 11th day of May, 2012 _____

IAN R.C. KAWALEY CJ