

aj/is CICA

*9/7/04
Henderson
done*

IN THE CAYMAN ISLANDS COURT OF APPEAL

CIVIL APPEAL NO. 9 of 2004

(GCCCI No. 75 OF 2004)

BETWEEN:

- (1) Kazakhstan Asset Management Limited
- (2) OJSC Central Asia Cement

Appellants (Plaintiffs)

- (1) Kazakhstan Investment Fund, Ltd
- (2) Cement Engineering Consultancy Ltd
- (3) VISOR Investment Solutions OJSC
- (4) Howard I. Golden
- (5) John D. Chapman
- (6) Eurosyst Consulting LLP
- (7) Kauzhar LLP
- (8) ATF Bank JSC



Respondents (Defendants)

RULING DELIVERED BY The Honourable MR. JUSTICE

HENDERSON on the 9th day of July 2004, in

George Town, Grand Cayman.

APPEARANCES :

MR. E. SIMPSON	For the Appellant Plaintiffs
MR. C. YOUNG	For the 1st, 4th and 5th Defendants

1 Friday, July 9, 2004

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RULING

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The plaintiff appellants seek, first, a stay of the order of Madam Justice Levers of June 11th, 2004, which was a refusal to continue certain injunctions the plaintiffs had obtained *ex parte* against Kazakhstan Investment Fund (a Cayman Islands company); and, second, continuation of those same injunctions.

The injunctions expired at the time Levers, J., refused to continue them. That is why the plaintiffs need, not only a stay, but a continuation of the *ex parte* injunctions. I am being asked, as a single judge of the Court of Appeal, not merely to stay the order appealed from but to grant injunctions. The requested injunctions are to be worldwide in scope.

To succeed before Madam Justice Levers, the plaintiffs had to demonstrate a good arguable case. To succeed now before me they must demonstrate that they have a good arguable appeal, a somewhat higher threshold. This point was made with clarity in *Ketchum PLC vs.*

1 *Group Public Relations Ltd.* [1997] WLR 4. In
2 *Ketchum*, the Court of Appeal said:

3 "Moreover, I cannot see any
4 reason in principle why the
5 considerations which are
6 applicable when the Court is
7 considering the grant of a
8 *Mareva* injunction should not be
9 applied in favour of a
10 plaintiff, even if he has lost
11 in the court below, though the
12 question will not be "Does he
13 have a good arguable case?" but
14 "Does he have a good arguable
15 appeal?" This is likely to be a
16 more difficult test to satisfy,
17 and, if the case turns upon
18 questions of fact which the
19 judge has resolved against the
20 complainant, may well be
21 insuperable. This threshold
22 must be at least as high as that
23 which has to be satisfied when
24 the court considers whether or
25 not to grant leave to appeal

1 where that is required."

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3 The facts and issues are described in
4 brief in the decision under appeal. I will not
5 repeat them here.

6 These plaintiffs seek a determination that
7 a certain transfer of shares by the defendant
8 KIF to the defendant Visor was in breach of a
9 preemption right in a shareholders' agreement.
10 They ask for specific performance or,
11 alternatively, damages for breach of contract.
12 They also allege a conspiracy between six of
13 the defendants and seek damages for that.

14 Lying at the heart of these allegations is
15 the shareholders' agreement. There were three
16 parties to it: the defendant KIF, described in
17 the agreement as "the fund"; the defendant CEC,
18 described in the agreement as the "management
19 company"; and the plaintiff CAC, whose shares
20 were the subject of the agreement and which is
21 described in the agreement as "the company".

22 The critical clause is clause 3.2, which
23 reads:

24 "Each of the Fund and the
25 Management Company shall have

1 the right to sell, transfer, or
2 otherwise alienate part, or all,
3 of its interest in the equity of
4 the Company after providing the
5 other party the right of first
6 refusal upon the terms presented
7 by the JSCL. The Fund may
8 require that the Company take
9 all steps reasonably necessary
10 to secure the listing for
11 trading of its share [sic] on a
12 stock exchange acceptable to the
13 Fund."

14
15 The first plaintiff, KAM, was not a party
16 to that agreement. Clause 8.8 prohibits an
17 assignment of rights under the agreement by any
18 party without the consent of the other parties.
19 There is no suggestion here that KAM has
20 obtained an assignment with the consent of the
21 other parties. In my view, KAM is highly
22 unlikely to succeed in establishing at trial
23 its standing to invoke the provisions of this
24 shareholders' agreement.

25 CAC, the second plaintiff, was a party to

1 the agreement, but for a limited purpose. Its
2 shares were the subject of that agreement. As
3 one would expect, the preemption right provided
4 for in clause 3.2 is for the benefit of the
5 other two parties to the agreement - the
6 shareholders. CAC derives no legal entitlement
7 from that clause. There is an argument, which
8 will apparently be advanced at trial, that KAM
9 derives *locus standi* from its status as the
10 beneficiary of a constructive trust imposed
11 upon the trustee, CEC, by Malaysian law. The
12 argument is speculative at best.

13 I am not able to see in any of this a good
14 arguable case that either plaintiff has
15 standing to claim the benefit of the
16 shareholders' agreement.

17 The plaintiffs, perhaps in recognition of
18 their difficulty, applied to Levers, J. to
19 restructure the action. They wanted to remove
20 CEC as a defendant and add it as a plaintiff.
21 That request was refused. Had it been allowed,
22 CEC's new-found status as a plaintiff might
23 well have cured the standing issue at trial.
24 It would not, however, have altered the
25 decision of Levers, J. regarding the

1 continuation of these injunctions. They were
2 obtained by KAM and by CAC and must stand or
3 fall on the basis (*inter alia*) of KAM and CAC's
4 standing to initiate the underlying action.
5 CEC had no application before Madam Justice
6 Levers and is not an appellant here today.

7 The conspiracy claim is at least partly
8 dependent upon the allegations of breach of the
9 shareholders' agreement. It can fairly be said
10 to be ancillary to the claim for breach of
11 contract. In addition, it appears to allege
12 overt acts which took place largely in
13 Kazakhstan. There was uncontroverted evidence
14 before Levers, J., that there is no concept of
15 conspiracy in the law of that jurisdiction. It
16 seems likely that the law of Kazakhstan would
17 be the applicable law.

18 For these reasons, the plaintiffs have
19 failed to establish a good arguable case at
20 first instance, and have certainly failed to
21 establish a good arguable appeal. The
22 application is therefore dismissed.

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Henderson, J.

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The Honourable Mr. Justice Henderson

