

CG/LAB

1 IN CHAMBERS

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3 IN THE GRAND COURT OF THE CAYMAN ISLANDS

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CAUSE NO: 75 OF 2004

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11-06-04

8 BETWEEN:

9

1. KAZAKHSTAN ASSET MANAGEMENT LTD.

10

2. OJSC CENTRAL ASIA CEMENT

11

Plaintiffs

12

13 AND:

14

1. KAZAKHSTAN INVESTMENT FUND, LTD.

15

2. CEMENT ENGINEERING CONSULTANCY LTD.

16

3. VISOR INVESTMENT SOLUTIONS OJSC

17

4. HOWARD I. GOLDEN

18

5. JOHN D. CHAMPMAN

19

6. EUROSYS CONSULTING LLP

20

7. KAUZHAR LLP

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8. ATF BANK JSC

22

Defendants

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24 Before: The Hon. Madame Justice Levers

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26 Appearance:

27 Counsel for the Plaintiffs: Mr. Eliot Simpson of Ogier & Boxalls

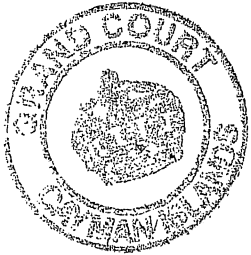
28 Counsel for the Defendants: Mr. Christopher Young of Applby

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30 Heard: 31 May, 2 & 4 June, 2004

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JUDGMENT



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33 Levers, J

34

35 There are two summonses before the Court, one in which the Plaintiffs asks

36 for an Order that the Order of Madame Justice Levers dated 9 February 2004

1 as extended by Justice Henderson on 16 February 2004 and by Madame
2 Justice Levers on 16 April 2004 and the Orders herein of Madame Justice
3 Levers dated 1 April 2004 and 14 April 2004 be varied to extend the
4 duration of the injunctions granted by those Orders until trial or further
5 Order; Further and other reliefs and costs.

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7 The Second Summons before this Court is for an Order that the Plaintiffs do
8 have leave to re-amend their Writ of Summons herein in the terms of the
9 draft Re-Amended Writ of Summons annexed hereto, including leave to
10 remove the Second Defendant, Central Engineering Consultancy Ltd as a
11 Defendant and to add CEC as the Third Plaintiff; and the costs of the
12 application to be costs in the Cause.

13

14 The Orders referred to as granted by Madame Justice Levers and extended
15 by the Honourable Justice Henderson were all ex-parte orders. They were
16 for injunctions against the First Defendant disposing of its assets and the
17 First and Third Defendants from enforcing a Promissory Note, with the
18 Plaintiffs giving the usual undertaking as to damages.

19

20

1 **Background:**

2

3 The action concerns ownership and control of a cement plant in Karaganda,
4 Kazakhstan owned and operated by the Second Plaintiff, Central Asia
5 Cement (“CAC”). Prior to 15 January, 2004 the shares in CAC were held by
6 the First Defendant, Kazakstan Investment Fund (“KIF”) 49% and the
7 Second Defendant, Cement Engineering Consultancy (“CEC”) 51 %. On 15
8 January 2004, KIF’s director and former director purported to transfer the
9 shares and this was recorded in the register of CAC (kept by a public
10 registrar not by CAC itself) as a transfer to a nominee holding for the Third
11 Defendant, VISOR Investment Solutions (“VISOR”). At about the same
12 time, the directors transferred to the Sixth Defendant, Eurosyst Consulting, a
13 Promissory Note given by CAC to KIF. On 23 February 2004, VISOR
14 transferred half of its purported holdings to the Seventh Defendant, Kauzhar.
15 On 2 April 2004, CEC transferred its shares in CAC to the First Plaintiff,
16 Kazakhstan Asset Management (“KAM”), save for one share which it
17 transferred to Javier del Ser Perez. The transfer by CEC to KAM was
18 pursuant to security in a Loan Agreement between KAM and CEC and
19 pursuant to an Order of the High Court in Malaysia.

20

1 The action is brought by KAM and CAC, to challenge the transfer of shares
2 by KIF to VISOR (1) as a breach of preemption right in a Shareholders'
3 Agreement between CEC, KIF and CAC and (2) as part of a conspiracy
4 between KIF, Golden, Chapman, VISOR, Kauzhar and the Eighth
5 Defendant, ATF Bank (which financed the acquisition). KAM, CAC, (and
6 CEC) seek (1) specific performance of the preemption rights in favour of
7 KAM and CEC and/or (2) damages for breach of contract and/or conspiracy
8 and (3) injunctions against KIF, VISOR, Eurosyst Consulting, Kauzhar and
9 ATF.

10

11 For purposes of the application for the injunction to be extended, this Court
12 intends to consider this matter de novo, as the ex parte injunctions were
13 extended as long as they were extended because of the unavailability of
14 counsel and dates. The evidence is now so much more substantial that the
15 Court has to consider the granting of the injunction de novo. In order to
16 obtain an injunction preserving the Defendants assets pending trial as well as
17 establishing the risk that if no order is made the assets will become
18 unavailable to satisfy the claim, the Plaintiffs must show that they have a
19 good arguable case on the main issue of liability. The Court is both entitled

1 and bound to consider the strength or weakness of the Plaintiffs and the
2 Defendants cases.

3

4 The case essentially against KIF is that it was in breach of a clause under the
5 shareholders agreement between CAC, CEC and KIF and a Promissory Note
6 for the money loaned by KIF to CAC. The Plaintiffs allege breach of
7 contract. The case against the directors is a claim for personally inducing a
8 breach of contract and a claim for conspiracy. It is alleged by the Plaintiff
9 that Golden and Chapman conspired to use CAC funds extensively to payoff
10 part of the debt under the Promissory Note. However, these funds were used
11 by Golden and Chapman to pay CEC to payoff its debts to CAM. They
12 allege this was a fraud on CAC and a breach of the duties owed by Golden
13 and Chapman to KIF. The case against “Kazakhstan Defendants”, is that
14 they were a party to the conspiracy to enter into a transaction and breach of
15 the preemption rights at an under value involving breaches of duty by the
16 directors of KIF and intending to use the shareholding and debt acquired
17 either to bankrupt CAC and take the assets at a reduced or no price or to take
18 over control of CAC and dilute the holdings of KAM and CEC. The
19 allegation is that the Kazakhstan Defendants also induced a breach of
20 contract. The Court reminds itself that at this stage the Court must conclude

1 that there is a good arguable case on behalf of the Plaintiffs. The evidence is
2 not to be adjudicated upon on its merits. Mr. Young on behalf of the First
3 Defendant, KIF claims the following:

- 4
- 5 1. That the present Plaintiffs not being parties to the shareholders
6 agreement have no standing to bring the action;
 - 7 2. That the claim that the transfers were invalid and ineffective by reason
8 that they were allegedly in breach of the Shareholders Agreement and
9 that there should be an order that the Shares and Note be transferred to
10 KAM or CEC is untenable. He submits, that the ownership of the
11 Shares is governed by the law of the place of incorporation of CAC or
12 the lex situs of the Shares or possibly by the law of the place where
13 the share register is kept. In any case, he submits that that is
14 Kazakhstan;
 - 15 3. The Promissory Note, he submits is assignable by KIF and governed
16 by New York Law; and
 - 17 4. The allegation that Golden lacks authority from KIF to join with
18 Chapman in the transfers which is based on alleged statements from a
19 witness does not afford any cause of action to the Plaintiffs. He

1 submits, that this is a non-point as it could only be an issue for the
2 parties to the transfers.

3 5. He submits that it is inappropriate for this Court to make orders
4 concerning the regulation of internal affairs of a Kazakhstan company
5 or to make orders in vain. He submits that there were proceedings on
6 foot in Kazakhstan in relation to the affairs of CAC. Therefore any
7 injunction which in substance amount to an anti-suit injunction should
8 not be continued and he relies on the case of *Airbus Industrie G.I.E v*
9 *Patel* [1993] 1 AC 119 at 139.

10

11 The Plaintiffs are seeking an equitable remedy and they must come with
12 clean hands to Court. There are several factors that are pursued by Mr.
13 Young in his submission that the Plaintiff have not come with clean
14 hands. 1) there was non disclosure by the directors. 2) there was no
15 explanation given to the Court as to why CEC was merely a nominee of
16 theirs. 3) He says, that the investment manager acted as a director of the
17 other company and actively concealed the extent of his interests.

18

19 The basic and fundamental requirement must be that the Plaintiffs must
20 be the correct Plaintiffs and must have an entitlement to enforce the

1 shareholders agreement. That is the initial question this Court has to
2 answer. The First Plaintiff KAM was not even a party to the
3 shareholders agreement and therefore cannot claim to enforce this claim,
4 not even as an assignee of CEC. Mr. Young makes a point and I agree
5 that clause 8.8 of the Shareholders Agreement prohibits assignments
6 without consent of the other parties which was not obtained in this case.
7 Accordingly, the claim by the First Plaintiff to be entitled to enforce the
8 shareholders agreement is hopeless. Indeed, it could be said on the
9 evidence that the only party that could enforce the shareholders
10 agreement would be CEC. Secondly, it cannot be said that the transfer of
11 shares can be governed by any other law but Kazakhstan Law. Thirdly,
12 the Promissory Note is governed by New York Law. And forthly, the
13 conspiracy claim must depend on whether there was a breach of the
14 shareholders agreement and if there is a good arguable case on that. The
15 Plaintiffs rely on clauses 1.1 and 3.2 and the breach by the Defendants.
16 If the Shareholders Agreement prevents transfer of shares in an open
17 joint stock company by some documents it may well be that the Court
18 shall review with care the legality of such an action. In view of all the
19 evidence before this Court, the Court must also examine the most suitable
20 forum for the trial of this action. The Kazakhstan Defendants are not

1 submitting to this jurisdiction. These injunctions in substance may
2 amount to anti-suit injunctions preventing the Kazakhstan Defendants
3 from taking action in Kazakhstan and the Court now has to look at
4 whether in all the circumstances these injunctions are sustainable. The
5 purpose of an injunction is to prevent the injustice of a defendant's assets
6 been salted away, so as to deprive the fruits of any judgment that may be
7 obtained. It has always been recognized that such orders are draconian
8 and they would only be granted if a number of strict conditions are
9 fulfilled. In this instance, the Court does not have to go too far beyond,
10 whether there is there a good arguable case. The minimum threshold for
11 the exercise of the Courts discretion is the establishment of a good
12 arguable case. (Kerr L.J in *Ninemia Maritime Corporation v Trave*
13 *Schiffahrtsgesellschaft mbH & Co. KG* [1983] W.L.R. 1412). The
14 expression means 'a case which is more than barely capable of serious
15 argument, and yet not necessarily one which the judge believes to have a
16 better than 50 per cent chance of success'. In its discretion the Court can
17 refuse an injunction even if the usual requirements are made out.

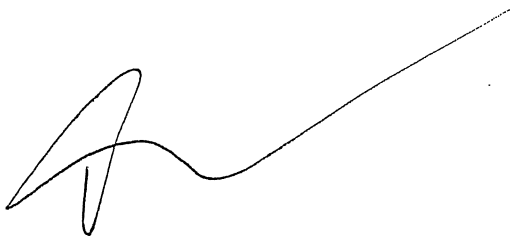
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19 In view of the (1) inability of the present Plaintiffs to enforce the
20 shareholders agreement; (2) and the Court's finding that Kazakhstan Law

1 governs the Shareholders Agreement; (3) the lack of cleanliness of the
2 Defendants conduct, the injunctions as requested are refused. The
3 Summons is dismissed.

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5 I now turn to the question of the amendment. I agree with the
6 Defendants entirely that in view of the evidence before this Court it is
7 difficult to see how CEC can be now added as a co-plaintiff in view of
8 the evidence as it stands. The evidence contains allegations of
9 conspiratorial conduct against CEC but, the Plaintiff now wishes to join
10 CEC as a Co-Plaintiff. I refuse this application. As a result of the
11 discharge of the injunctions I order an enquiry into damages to be
12 conducted. Costs of the application to discharge the injunction to the
13 First Defendant to be agreed or taxed. Costs of the amendment
14 application to the First, Fourth and Fifth Defendant to be agreed or taxed.

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16 Dated this 11th day of June 2004

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20 Levers J.
21 Judge of the Grand Court