

IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

ACTION NO. 20/06

BETWEEN:

ARLINGTON MUSGOVE

Plaintiff

-and-

BAKERSVILLE LTD.

First Defendant

-and-

JACA TCI LTD

Second Defendant

IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

ACTION NO. 40/06

BETWEEN:

ELLER INVESTMENTS LTD.

(suing as the sole shareholder in Fourth Defendant other than
the First, Second and Third Defendants)

Plaintiff

-and-

- (1) PANALEX CORP. LTD
- (2) BINTREL OVERSEAS LTD.
- (3) JEFFREY FRY
- (4) BAKERSVILLE LTD.
- (5) ARLINGTON MUSGROVE
- (6) JACA TCI LTD.

Defendants

Mr. Conrad Griffiths QC, for Arlington Musgrove, Bintrel Overseas Ltd
and Jeffrey Fry

Mr. Timothy Prudhoe for Eller Investments Ltd.

Hearing: 11 August 2006
17 August 2006

JUDGMENT

1. By Action 20/06 Mr. Arlington Musgrove (Musgrove) seeks specific performance of a share purchase agreement entered into between himself, as the 51 % shareholder in JACA TCI Ltd. (JACA), and Bakersville Ltd. (Bakersville) which owns 49% of the shares. By a summons filed on 5 July 2006 he seeks summary judgment.

2. This provoked Eller Investments Ltd. (Eller), which represents the interests of the minority shareholders in Bakersville, namely Jaime and Alberto Cabrera who are the beneficial owners of Eller, to file Action 40/06, by which in essence it seeks to have a Buy/ Sell notice, served pursuant to the JACA Shareholders Agreement by Musgrove on Bakersville, declared invalid. As this is a derivative action Eller seeks leave to continue its proceedings, as required by Order 15 r.12A (2) Civil Rules 2000. If leave is granted counsel accept that summary judgment proceedings in Action 20/06 are inappropriate, and that the Musgrove action and the Eller action, limited to the declaratory relief sought in its Amended Statement of Claim, should be consolidated, and determined at a full hearing. If leave is not granted, then there would be nothing to prevent those summary proceedings succeeding.

3. Mr. Timothy Prudhoe, counsel for Eller, submits, in my view correctly, that for the purposes of obtaining leave, he only has to establish a prima facie case that either of the matters that he raises are arguable, and that this is a low threshold, and in this hearing the Court must not embark on a mini trial.

4. The decision as to whether he should be given leave involves consideration of four documents, all signed/executed on the same day, namely 22 November 2004, and interpretation of the former, namely:

- (1) JACA Shareholders Agreement (page 26 of exhibit AM1 to Musgrove's First Affidavit).
- (2) The Deed of Adherence supplemental to that Agreement (page 50: AM 1)
- (3) Bakersville Shareholders Agreement (page 1 of exhibit JMCP 1 of Jaime Cabrera's First Affidavit)
- (4) The Deed of Adherence supplemental to that Agreement (page 16: JMCP 1).

5. From the various Affidavits filed it is clear that JACA TCI Ltd. was incorporated as the JACA name is well known in the construction industry, particularly in Mexico, where various companies that have JACA in their name have been run by the Cabrerias. The use of this name would assist Musgrove, who was involved in heavy construction in the TCI, to get contracts. Therefore Musgrove was the Belonger shareholder, and the other investors were all off Island. They comprised the two Cabrerias, who brought the JACA name with them, Patrick Greene, Eduardo Frias and Jeffrey Fry, who incorporated Bakersville as a vehicle for their investment, each having a 20% shareholding. The shareholdings of the various personae have been helpfully set out in an organogram.

6. By Clause 4.1 of that Bakersville Agreement, the sale of the Company's assets required the consent of 75% of its Management Committee, which comprised all five shareholders, who signed the Bakersville Shareholders Agreement together with the director of Bakersville (see pages 1 and 15 of JMCP1). The shareholders by their nominees also executed a Deed of Adherence by which they covenanted to be bound by the terms of the JACA Shareholders Agreement, including but not limited to its restrictive covenants (page 16 of JMCP1).
7. The JACA Shareholders Agreement was signed by Musgrove on behalf of himself and JACA, of which he is the sole director, and M&S Secretaries Ltd as the director of Bakersville (page 40 of AM1). It has annexed to it, as Schedule B, a similar Deed of Adherence, executed by all five shareholders in Bakersville personally, in which they covenant to be bound by all of the terms of the JACA Shareholders Agreement (page 51 of AM1).
8. By clause 9.1 of the JACA Shareholders Agreement either shareholder, that is Musgrove or Bakersville, who desires to terminate the association with the other, may give the other a Buy-Sell Notice offering to purchase all the shares of the other at a stipulated price per share, and offering to sell all of the offeror's shares to the offeree at that price.
9. By September 2005 the working relationship between Musgrove and particularly the Cabreras had deteriorated, so that on 23 December 2005 Musgrove served on

Bakersville a Buy-Sell Notice (page 53 of AM1), and deposited 10% of the purchase price with the Company's attorneys as required by clause 9.2 of the JACA Shareholders Agreement which states:

“The Buy-Sell Notice shall stipulate a price per share for each class of shares to be purchased and shall contain such other terms and conditions as are necessary or appropriate in connection with the transactions contemplated therein, provided that none of such terms and conditions shall conflict in any way with the provisions of this Agreement. [Notwithstanding any other provision contained herein, it is agreed that the terms of payment of the purchase price contained in the Buy-Sell Notice shall provide for a payment in cash or by certified cheque of at least TEN (10)% of the total purchase price (including the deposit to be credited towards the purchase price) at the time of completion of the transaction and the balance of such purchase price shall be payable over a period of not more than ONE (1) year from the date of closing of the said purchase transaction in equal consecutive monthly installments of principal together with interest at a rate of not less than 8% per annum of the outstanding balance from time to time, provided that the balance of the purchase price shall be fully open as to additional payments of principal at any time or times without notice or bonus, and provided further that in the event of any default in payment, which default continues for a period of FOURTEEN [14]days after written notice thereof, the entire balance shall immediately become fully due and payable.]”

10. Clause 9.3 gives the offeree 10 days from the receipt of the Notice to accept the Purchase offer or accept the Sale offer. Failure to do either in the 10 days is deemed to be an acceptance of the Purchase offer.

11. Without the words in square brackets in clause 9.2 the Buy-Sell clause is unworkable, as there would be no mechanism for payment. Mr. Prudhoe argues that the existence of the square brackets is explained by the fact that the Company's attorney had used a precedent which enabled those adopting it to include or adopt the words in square brackets. For such words to be included the brackets have to be removed. If the brackets are not removed the words within them do not form part of the Agreement. He did not seek to make a similar submission in respect of round brackets, and therefore contended that the use of square brackets had the distinct and specific effect of excluding anything within them.

12. In support of this bold submission, in respect of which he accepted there was no authority, he referred to the Oxford English Dictionary (tab 9 of his authorities), which refers to enclosing in brackets as "parenthetical, spurious, etc." and square bracket "of the form [or]", and to Wikipedia's reference to square brackets being used to enclose explanatory or missing material.

13. Despite his valiant efforts, I am quite unable to accept Mr. Prudhoe's submission that the presence of square brackets should be interpreted as evincing an intention

on the part of the contracting parties that any words within such brackets should be excluded. If that was the effect of their use there would be clear authority for this proposition, and I am unaware of such an argument ever having been advanced, let alone decided. If it had been the intention that such words should be excluded, this would have been achieved either by removing the words or striking or lining them through. Had this been done, the Buy-Sell provisions in the Agreement would have been rendered unworkable, and the whole of clause 9 might just have well have been removed in its entirety, including clause 9.7 where the single word "thirty" appears in square brackets, which word is again essential to the validity of that clause. The hearsay assertion in paragraph 19 of the Affidavit of Greene that Mr. O'Sullivan had told him that they were not removed through inadvertence in my view makes no difference to my interpretation of the parties' intention. It is to be noted that the Bakersville Agreement also contains, at clause 10.2, a precisely similar clause, including the presence of the square brackets.

14. I accordingly find Mr. Prudhoe's first submission to be unarguable.

15. Bakersville has no functioning board of directors but, following receipt of the Notice, the Companies' attorney, Mr. O'Sullivan, e-mailed the five shareholders informing them of its existence on 23 December 2005 (page 17 of PG1 annexed to Patrick Greene's Affidavit). It is not disputed that they all received these on 23 December (paragraph 24 of Jamie Cabrera's First Affidavit). As he had not heard

from anyone he e-mailed them again on 28 December (page 16 of PG1). None responded within the 10 days, which expired on 4 January 2006. However e-mails sent on 9 January by Greene, Frias and Fry (see pages 20/21 of PG1) show that they were in agreement with the sale to Musgrove. No response was received from the Cabrerias. They did not take any measure to attempt to prevent a sale, for example by calling a meeting of the Bakersville shareholders with a view to persuading them to make a purchase offer. In fact Bakersville had no assets other than its 49% holding in JACA, and therefore any purchase would have involved them in borrowing funds.

16. Mr. Prudhoe submits that such failures on the part of the Cabrerias are irrelevant. He relies on clause 4.1 of the Bakersville Shareholders Agreement whereby a sale of its assets is not possible without the consent of 75% of the Management Committee comprising the five shareholders, and without the Cabrerias this could not be achieved. Further, he pointed out that it was not just the five shareholders who signed this Agreement, but the director of Bakersville signed it on behalf of Bakersville Ltd. Therefore, the Company itself was bound by its terms, and its director is obliged to prevent a sale that would breach the terms of the Bakersville Shareholders Agreement. Therefore a sale was not possible, whether in response to the Buy-Sell Notice or in any other way without that 75% consent. He also argued that there was no evidence, as there could easily have been from Mr. O'Sullivan, as to the sequence in which these Agreements and Deeds of Adherence were entered into, and therefore it was not possible to say that clause

4.1 had been, as he put it, trumped by them. Here there was prima facie inconsistency between the two Agreements and Eller should be allowed to argue as to the effect of that inconsistency at a full hearing.

17. Mr. Conrad Griffiths, Queen's Counsel for Musgrove, made the simple submission that the terms of the JACA Shareholders Agreement cannot be subject to the terms of the Bakersville Shareholders Agreement, or any terms therein as to its internal management. Bakersville executed the JACA Shareholders Agreement by its corporate director under seal (page 40 of AM1) and is bound by it. Further 100% of the Bakersville Management Committee covenanted by a Deed of Adherence which formed a Schedule to the JACA Shareholders Agreement to be bound by the JACA Shareholders Agreement (pages 50/51 of AM1 and paragraph 3 of Musgrove's first Affidavit) of which they clearly had knowledge. Therefore the sequence in which they were signed on the same day has no relevance. The JACA Shareholders Agreement contained a valid Buy-Sell clause by which, Musgrove having served a valid Buy-Sell Notice, the Company of Bakersville Ltd. is deemed to have accepted his offer to buy its 49% shareholding in JACA to him, and the director of Bakersville is therefore obliged to transfer those shares to him, irrespective of the wishes of the shareholders. Whether, by so doing, the corporate director breaches Bakersville's own agreement with its shareholders is immaterial vis-à-vis Musgrove, who was not a party to the Bakersville Shareholders Agreement. Therefore any remedy of the shareholders would have to be internal within Bakersville. He submitted that Eller's submission equated to

arguing that a shareholder who agreed to sell his shares could then resile from that agreement by reason of a private agreement he had entered into with his wife not to sell the shares.

18. He also pointed out that the existence of the Deeds of Adherence, by which all the shareholders in Bakersville and Eller itself covenanted to be bound by the terms of the JACA Shareholders Agreement, could only have had as its rationale the intention to defeat any argument being advanced such as that now being advanced by Eller. Further he pointed out that there is no evidence before the Court that the Cabreras ever wished to buy Musgrove's shares, and there is no pleaded case that they wished or had the means to do so. As a derivative action is for equitable relief, there is therefore no basis for the giving of leave to continue.

19. Having found that it cannot be argued that the Buy-Sell clause in the JACA Shareholders Agreement is invalid, as the terms of that clause have been complied with, I am unable to find that it is possible to advance a prima facie argument that Bakersville is not contractually bound by it by reason of a potentially inconsistent term in the Bakersville Shareholders Agreement. Musgrove's right under the JACA Shareholders Agreement was to serve the Buy-Sell Notice on the legal entity Bakersville Ltd., and I do not accept that it can be argued that any agreement that the Bakersville shareholders had made between themselves, or that had been made between Bakersville Ltd. and its shareholders, can impinge upon

or negate that right. I believe that this is the position irrespective of the Deeds of Adherence. However, those Deeds can, I believe, only be interpreted as evincing an intention that, where there is any conflict, the terms of the JACA Shareholders Agreement are to prevail.

20. I am, therefore, unable to find that Eller is able to satisfy the low threshold and I refuse it leave to continue its derivative action under action 40/06, and dismiss its summons to intervene in the Musgrove Action, and I award Musgrove his costs in respect thereof, including the costs of the hearing on 17 August 2006, against Eller.
21. It follows that Musgrove succeeds on his Order 14 summons against Bakersville Ltd. in Action 20/06 for specific performance of the share purchase agreement and I Order Bakersville Ltd. to transfer to Musgrove within 28 days from the date of this Judgment all of the issued shares in JACA TCI Ltd. held in the name of Bakersfield Ltd. upon payment by Musgrove of the price specified in the Buy-Sell Notice in the manner set out therein. I give liberty to apply for further Orders in the event of non compliance. It is therefore not necessary for me to make an Order on the summons to strike out parts of the Eller Amended Statement of Claim.
22. Mr. Prudhoe, although accepting that he has no status in 20/06, submitted, as he was in fact representing the interests of two of the shareholders in Bakersville, that it would not be just that Musgrove be awarded as against Bakersville his costs

of the 11 August hearing, in respect of which there was clearly not going to be enough time to hear the Order 14 summons, as it was obvious that his application for leave to continue would have to be heard prior thereto. Further it was known that he, Mr. Prudhoe, was off Island, and it was impractical/undesirable for the matter to be argued by telephone on 11 August. Mr. Griffiths pointed out that the matter was listed not before 12pm. although it was known that I was in the middle of a Jury trial, and there was no guarantee as to when he would be reached. I have to say that I have some sympathy with Mr. Prudhoe's submission, albeit made de bene esse. The award of costs is essentially a matter for my discretion in which I have to do justice between the parties. To this end I award Musgrove his costs against Bakersville Ltd. in Action 20/06 save that in respect of the hearing on 11 August I make no order as to costs.

Christopher Gardner QC

Chief Justice

4 September 2006