In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: 44

BETWEEN:-

WONG, WEN-YOUNG

Plaintiff/Applicant

- and –

(1) GRAND VIEW PRIVATE TRUST COMPANY LIMITED

(2) TRANSGLOBE PRIVATE TRUST COMPANY LIMITED

(3) VANTURA PRIVATE TRUST COMPANY LIMITED

(4) UNIVERSAL LINK PRIVATE TRUST COMPANY LIMITED

(5) THE ESTATE OF HUNG WEN-HSIUNG, DECEASED

(6) OCEAN VIEW PRIVATE TRUST COMPANY LIMITED

(7) WANG, RUEY HWA (aka "Susan Wang")

Defendants/Respondents

(8) WANG, VEN-JIAO (aka "Tony Wang")

(as joint administrator of the Bermudian estate of YT Wang)

(9) WANG, HSUEH-MIN (aka "Jennifer Wang")

(as joint administrator of the Bermudian estate of YT Wang)

Defendants

IN CHAMBERS-VIA VIDEOCONFERENCE

Date of hearing: 11 March 2021

Ruling delivered: 11 March 2021

Mr Richard Wilson QC and Mrs Fozeia Rana-Fahy MJM Limited, for the 8th Defendant ("Tony")

Mr Mark Howard QC and Mr Jonathan Adkin QC of counsel and Mr Paul Smith, Conyers Dill & Pearman, for the 1st to 4th and 6th Defendants (the "Trustees")

HEADNOTE

Application by 8th Defendant and Plaintiff to amend their pleadings to withdraw admissions about the execution of two memoranda on the eve of trial and to substitute pleas of non-admission- governing principles-Overriding Objective

EX TEMPORE RULING

Introductory

1. This is my Ruling on the controversial aspects of the two amendment Summonses.

2. The 8th Defendant, Tony, applied by Summons dated 8 March 2021 for leave to re-amend his Defence and Counterclaim and the various proposed re-amendments are set out in the supporting draft pleading. That application is supported primarily by the 23rd Molton Affidavit although reliance is also placed on the expert report of Ms Chang.

3. The Plaintiff applies by Summons dated 4 March 2021 for leave to re-amend his Statement of Claim, to re-re-re-amend his Reply to the Defence and Counterclaim of the Trustees, the 1st to 4th and 6th Defendants, to re-re-amend his Reply to the Defence of the 5th Defendant. He also consequentially seeks, as does the 8th Defendant, an Order that he be deemed to not admit the April 2001 and May 2002 Memoranda.

The applications

4. Now the 10th Poulton Affidavit supports the Plaintiff's application and it seems clear from that Affidavit that the Plaintiff seeks to ride on the 8th Defendant's coat tails and that the motivation for the controversial amendments to withdraw the previously pleaded admissions in relation to the two Memoranda, is based on the discoveries that the 8th Defendant made in the process of preparing expert evidence to challenge the Power of Attorney.

5. So the key evidence, it seems to me, in support of the application is the 23rd Molton Affidavit and that explains how the two Memoranda came to be disputed in the context of the originals of those documents being sought to be inspected by Ms Chang for the purposes of the ancillary or parallel exercise that she was already charged with carrying out in support of a positively pleaded claim of forgery.

6. Ms Chang's report is exhibited and the findings that she makes, it seems to me, can be summarised as follows.

7. Firstly, she says that she is unable to verify YT Wang's signature on either document because she has not been given sufficient samples to compare the relevant signatures against. Secondly, she says that it appears that various attachments to the documents have been printed on different printers.

8. Thirdly, she says that both of the Memoranda appear to have been stapled and re-stapled and fourthly she says that one attachment to each of the Memoranda is not referred to in the body of each document.

9. Now as regards the 8th Defendant's case, which really it appears to me is the primary case that is being advanced (and the Plaintiff's case stands or falls with that of Tony's), no positive assertion is made in the supporting evidence as to why Tony's existing case cannot be fairly advanced without these amendments being made; and no positive case is sought to be advanced at all.

Governing principles for amending pleadings to withdraw admissions

10. What are the governing principles for dealing with amendments? The application, as I understand it, is made under Order 20 rule 5, which undoubtedly gives the Court a broad discretion to grant and make such amendments as may be just. It seems to me that how that discretion is applied is very much dependent on the circumstances in which the relevant amendment application arises.

11. Mr Wilson QC relied very heavily on the standard liberal approach to amendments, which was applied by Mrs Justice Subair Williams in *Mexico Infrastructure* Finance *LLC-v-The Corporation of Hamilton* [2020] SC (Bda) 3 Com. The principles she articulated I wholeheartedly endorse as a matter of general principle, but what Subair Williams J was dealing with was what I would call a standard application for leave to amend. And it is the

usual rule that all amendments should be granted which will allow the issues, the real issues in controversy, to be determined by the Court.

12. I also accept that amendments are often only refused in circumstances where the relevant proposed pleas are liable to be struck out because they are bound to fail or otherwise unsustainable.

13. However, in the present context, Mr Howard QC appropriately relied on the decision of *Braybrook v Basildon Thurrock University NHS Trust* [2004] EWHC 3352 QB and the analysis of principles set out by Justice Sumner at paragraph 45 of his judgment in that case. And counsel went on (in his skeleton argument) to indicate that those principles are, in fact, based on "*earlier cases*" which I infer applied pre-CPR principles and are therefore not to be disregarded because the present English CPR regime has a *sui generis* approach to withdrawing admissions[1].

Application of principles to the present case

14. The factors that Sumner J identified which I consider to be most pertinent in the present case may be summarised as follows. Firstly, the reasons and justification for the application to withdraw an admission; secondly, the prospects of success of any issue arising; thirdly and most significantly, the overriding objective and the fact that the nearer to trial one is, the less chance of success for the application to withdraw the admission, even if the applicant is able to show clear prejudice from the application being refused.

15. In the present case, I find that the reasons and justification for the application are unconvincing. The Applicants do not seek to advance a positive case and it seems to me that they are viewing the Court as being akin to a restaurant where a litigant can come before the Court and say: "I feel like this particular remedy today, please give it to me!".

16. I find, coming to the consideration of prospects for success, that it is difficult to see what realistic prospects there are of the Court being persuaded that the documents were not executed in circumstances where (a) no positive contrary case is being advanced and (b) the Trustees are merely being asked to strictly prove something that has been uncontroversial for some time.

17. The Overriding Objective clearly mitigates against granting relief at this stage because in reality the Applicants have not shown any material prejudice that they would suffer through not being allowed to withdraw the admissions.

18. It is common ground that evidence is not admissible in support of a non-admission, and that the principle finds support in *Bullen & Leak & Jacob* 19th edition, volume 1 at paragraph 1-37.

[1] See *Braybrook* at paragraphs 31 to 45.

19. In his reply, Mr Wilson QC, with his typical persuasion, sought to undermine the provisional views that I had expressed in the course of argument and amongst other things submitted that, in fact, because the Applicants were only seeking to withdraw admissions, the prejudice to the Trustees would not be that great. They would probably have to adduce some further evidence but this would be far less burdensome than being required to respond to a positive case.

20. I reiterate the view that I expressed in the course of argument that in my judgment it will often, if not always, be easier to persuade a court, certainly on the eve of trial, to permit a litigant to withdraw an admission where the litigant, the applicant, is seeking to advance a positive case. Because in those circumstances the applicant is likely to be able to show more prejudice if their application is refused.

21. Mr Wilson QC also sought to persuade me that, in effect, the application to withdraw the admissions that had been made about the two Memoranda were really being made with a view to avoiding disputes at trial about the permitted scope of cross-examination about the circumstances of the execution of these significant documents.

22. In my view, there is a clear distinction between cross-examination about whether documents were executed and cross-examination about the circumstances surrounding the execution/ The present proposed amendments are not needed to permit the Applicants to properly pursue their presently pleaded cases, which centre on seeking to challenge the proposition that the founders, YC and YT Wang, intended to express the views that these Memoranda purport to articulate.

23. In these circumstances, in my judgment, although the extent of disruption to the trial may have been slightly overstated by Mr Howard QC, there will be disruption in the sense that resources will have to be deployed towards putting in further evidence; the scope of cross-examination will be expanded rather than narrowed and, most importantly of all, there simply is no coherent justification advanced, having regard to the interests of justice and the fair trial rights of the Applicants, for granting this application at this stage. And so for those reasons the applications to amend in these specific respects are refused.

Costs

[After hearing counsel]

24. This has been a controversial application which I have held was one which lacked merit and it seems to me that the proper order should be that the eighth Defendant pays the Trustees' costs and that no order is made as to the Plaintiff's costs.

[After hearing counsel further]

25. Yes, I think in light of your objections the Plaintiff and the 8th Defendant shall pay the Trustees' costs of their respective amendment Summonses which have been dismissed. I hope that at the taxation stage common sense will be brought to bear.

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IAN RC KAWALEY
ASSISTANT JUSTICE