



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

Date of Hearing: On the Papers

Date of Ruling: September 2, 2022

ASW Law Limited, for the Plaintiff

MJM Limited, for the 8th Defendant (“D8”)

RULING ON EX PARTE LEAVE TO APPEAL APPLICATIONS

The impugned decision

1. On June 22, 2022, I delivered Judgment. On August 5, 2022 I delivered a Costs Ruling. Save for the Plaintiff’s successful claim in respect of the transfer of his father’s share of the assets transferred by D5 to D6 (as Trustee of the Ocean View Trust) and his successful defence of D6’s Powers of Appointment Counterclaim, all claims asserted by the Plaintiff and D8 were dismissed. One controversial issue was whether the Court should award the Petitioner and D8 their costs of arguing the certainty point on the grounds that the point needed to be determined in the interests of the Trusts in any event (whether the issue fell into *Re Buckton* [1907] 2 Ch 406 Category 2). I summarised the legal principles as follows:

“7. Where a point of construction arises in relation to the administration or validity of a trust which a trustee is entitled to invite the Court to determine, the trustee may apply to the Court to be indemnified for its costs of the application from the trust fund. Any beneficiary (or other party) who assists the Court to determine such an issue on the application of the trustee (the resolution of which is beneficial to the due administration of the trust) is also ordinarily entitled to be indemnified for their costs as well. Such a case is known as a Buckton Category 1 case. A Buckton Category 2 case is in substance similar to the first category of case in all but form. Here, the beneficiary has instigated the determination by the Court of an issue which would otherwise have had to be determined on the trustee’s application. What is in substance hostile litigation against a trust (or similar fund) engages the usual costs rules applicable to adversarial litigation, and is usually placed in Buckton Category 3.”

2. In paragraph 6 of that Costs Ruling I stated: “...*My provisional view was that it required a very artificial and almost tortuous analysis of the way in which the certainty point was raised and adjudicated to conclude that the parties who were seeking to undermine the validity of the Trusts should be awarded their costs on the hypothesis that they were seeking to assist the Trustees to duly administer the Trusts. Nonetheless, I declined to accept Mr Adkin QC’s submission that it was “blindingly obvious” that the costs rule invoked by his opponents did not apply*”.
3. I then concluded:

“11. In my judgment it is ultimately clear that the certainty point advanced by the Plaintiff and D8, whether looked at as a discrete issue or viewed in the context of the wider litigation was not to any material extent advanced in furtherance of the due administration of the Trusts. The following factors are pertinent:

- (a) there is no sound basis for finding that the Trustees would have had to seek directions from the Court in any event;*
- (b) there is no reasonable basis for inferring that the certainty point was raised in part to invalidate the Trusts and in part to assist the Trustees to resolve doubts about their validity; and*
- (c) the only interest the Plaintiff and D8 had in the Trust assets, as representatives of their late father’s estates, depended on the assumption that the Trusts were invalidly created.”*

The Plaintiff’s and D8’s ex parte applications for leave to appeal

4. By Ex Parte Notices of Motion dated August 17 and August 19, 2022, respectively, the Plaintiff and D8 sought leave to appeal on the following grounds:

“...that the Grounds of Appeal set out in paragraph 2 of the draft Notice are genuinely arguable and have a real prospect of success, and it is in the public interest for the Court of Appeal to examine and clarify the issues raised therein.”

5. Paragraph 2-3 of the Plaintiff’s draft Notice of Appeal provide as follows:

“2. *The Grounds of Appeal relevant to paragraph 1 above are as follows:*

a. the learned judge erred in failing to find that the Appellant's claims relating to the Certainty Issue were matters falling into the second category of case identified in the line of authority associated with Re Buckton [1907] 2 Ch 406 ('the Second Buckton Category'), with the costs consequences which follow from that; and

b. the learned judge erred in failing to find that the counterclaims of the Respondents ('the Trustees') relating to the Certainty Issue were matters falling into the first category of case identified in the line of authority associated with Re Buckton [1907] 2 Ch 406 ('the First Buckton Category'), with the costs consequences which follow from that.

3. *By way of particulars of both grounds of appeal:*

a. The learned judge misdirected himself in holding that there was no sound basis for finding that the Trustees would have to seek determination of the Certainty Issue themselves had the Appellant not raised it (Ruling, paragraph 11 (a)). The Certainty Issue was an objectively difficult question on which there was no prior case law and which objectively each of the Trustees needed to resolve for the future administration of its Purpose Trust, including the making of distributions.

b. The learned judge misdirected himself in dismissing the Appellant's case that his claims relating to the Certainty Issue fell within the Second Buckton Category because the Appellant did not advance the Certainty Issue 'in furtherance of the due administration of the Trusts' or 'in part to assist the Trustees to resolve doubts about their validity' (Ruling, paragraphs 11 and 11 (b)). A plaintiff's subjective motivation in bringing proceedings is immaterial to questions of Buckton categorisation.

c. The learned judge misdirected himself in holding that, because the Appellant's only interest in the Purpose Trusts' assets depended on the Purpose Trusts being invalid, his claims in relation to the Certainty Issue did not fall within the Second Buckton Category, whereas they would have so fallen had they been advanced by a 'litigant [with] an interest in the due administration of the Trusts' (Ruling, paragraphs 11(c) and 12). The learned judge erred in failing to find that it was sufficient for the Appellant's claims to fall within the Second Buckton Category that the Appellant, as YC Wang's administrator, was a necessary or proper party to any determination of the Certainty Issue.

d. The learned judge misdirected himself in holding, or implicitly holding, in paragraph 12 of the Ruling, that:

i. there was anything in the ‘overall way which the attack on the certainty of the purposes was advanced’ that should inform the dismissal of the Appellant's case that his claims relating to the Certainty Issue fell within the Second Buckton Category; and

(ii) the Appellant was a ‘hostile litigant’ insofar as that amounted to a finding that (a) the Appellant's hostility to the Purpose Trusts' validity should inform the dismissal of the Appellant's case that his claims relating to the Certainty Issue fell within the Second Buckton Category; and/or (b) there was anything especially hostile in the manner by which the Appellant advanced his case on the Certainty Issue, which was addressed as a pure point of law.

e. The learned judge misdirected himself in paragraph 12 of the Ruling in holding that the court should be reluctant (insofar as that amounted to a finding that it should be more reluctant than usual) to treat a claim as falling into the Second Buckton Category if it might reward hostile litigants ‘seeking to invalidate purpose trusts’ as opposed to any other type of trust.”

6. D8’s draft grounds of appeal were in substantially the same terms. There is no complaint that the governing legal principles were improperly defined. Instead, the complaint is that the governing principles were misapplied in the sense that the factual circumstances of the certainty claim were incorrectly evaluated. It is not suggested that the conclusions I reached were perverse. In effect it is simply contended that a different view ought to have taken of the relevant facts.

The legal test for obtaining leave to appeal for the purposes of reviewing the exercise of the costs discretion vested in the trial judge

7. In *R-v-London Borough of Tower Hamlets ex parte Ogilvy* [2001] EWCA Civ 657, Mummery LJ defined the basis on which permission to appeal should be granted to challenge the exercise of a trial judge’s discretion in relation to costs as follows:

“8. In my judgment, this proposed appeal has no real prospect of succeeding...

10. As to the appeal against costs, Mr Ogilvy has the additional difficulty that costs are in the discretion of the Court. Permission to appeal against the exercise of the discretion is not normally granted, unless it can be demonstrated that the costs order was plainly wrong, in violation of legal principle, failed to take into account relevant facts or took into account irrelevant facts. In this case it is a normal order to make

after a contested inter partes hearing, that the party who has failed in his application should pay the costs...” [Emphasis added]

8. The test for granting leave to appeal against a costs order is narrower than the standard test for granting leave to appeal interlocutory decisions proposed in the Skeleton Arguments of the Plaintiff and D8.

Disposition of ex parte applications for leave to appeal

9. In my judgment the appeals have no “*real prospect of proceeding*”. The draft grounds of appeal do not appear to have any real prospect of demonstrating that the way in which I exercised my discretion in relation to the costs of the certainty point was “*plainly wrong, in violation of legal principle, failed to take into account relevant facts or took into account irrelevant facts*”. I accordingly dismiss both Notices of Motion for Leave to Appeal.

Dated this 2nd day of September 2022

IAN RC KAWALEY
ASSISTANT JUSTICE