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 COURT-VIA VIDEOCONFERENCE

Date of Hearing: July 26-27, 2022

Draft Ruling circulated: August 1, 2022

Ruling delivered: August 5 2022

Mr Dakis Hagen QC of counsel and Mr Rod S. Attride-Stirling and Mr Sean Dunleavy, ASW Law Limited, for the Plaintiff

Mr Richard Wilson QC of counsel and Mrs Fozeia Rana-Fahy, MJM Limited, for the 8th Defendant ("D8")

Mr Stephen Midwinter QC of counsel and Ms Hannah Tildesley and Ms Luisa Olander, Appleby (Bermuda) Limited, for the 5th Defendant ("the Hung Estate")

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

Mr Scott Pearman and Mr Paul Smith, Conyers Dill & Pearman Limited, for the 7th Defendant ("Susan Wang")

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Costs- correct approach -applicability of issues-based approach-unsuccessful challenge to validity of trusts on uncertainty grounds-whether non-adversarial costs order appropriate for issue clarifying construction of trust deeds- Rules of the Supreme Court 1985, Preamble, Order 62 rule 3 (3)

RULING ON TERMS OF FINAL ORDER AND COSTS

Introductory

1. On June 22, 2022, I delivered Judgment. 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. A hearing to

determine the terms of the Final Order and costs was scheduled for July 26-27, 2022. The parties reached a significant degree of agreement on the terms of the Final Order and costs before and over the course of the two-day hearing, resulting in a significant saving of costs.

2. As regards substantive relief, the following matters required adjudication at the beginning of the hearing:

    (a) the definition of the term 'Ocean View Fund';

    (b) the terms of the account and inquiry to be given by D6 of dealings with Chindwell BVI and Vanson BVI, as regards what information should be provided, when and whether the period should include dealings between the death of YC Wang in 2008 and the transfer to the Ocean View Trust in 2013, although no claim was pleaded in relation to this period (as contemplated by this Court's Order dated April 16, 2021).

3. By the conclusion of the hearing, those issues had been resolved. As regards costs, the following issues were still undecided and required adjudication by the end of the hearing:

    (a) whether the Court should award the Plaintiff 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);

    (b) whether the Court should adopt an issues-based approach to costs (in relation to issues or points which the Plaintiff and D8 had won, principally governing law and was the Statute of Frauds part of BVI law point). This was clearly permissible under the English CPR regime, or the traditional Bermudian

approach of proportionately reducing the successful party's costs to take into account any significant costs incurred on points in relation to which they did not succeed;

(c) whether the Trustees' costs should be proportionately disallowed in respect of their unsuccessful pursuit of the Oral Mandate and Oral Assent defences against D8.

Findings: Costs of the certainty claim (Re Buckton)

Submissions

4. The Plaintiff advanced the following principal submissions on the costs of the certainty issue:

> "*41. The certainty question was an issue which arose from the terms of the Purpose Trusts themselves (and their application to the statute); it was one which was sufficiently difficult and balanced that its determination was necessary for the proper administration of the Purpose Trusts. It is beyond sensible dispute that had the PTCs themselves issued an originating summons for determination of whether the terms of the Purpose Trusts were sufficiently certain (a) they would have sought orders which bound YC Wang's and YT Wang's estates; (b) the court would have required adversarial argument (see Hellman J's finding on that topic quoted below); and (c) the costs of all parties would have been paid in equal shares from the funds of each of the Purpose Trusts.*
>
> *42. It so happened that the PTCs did not need to bring this issue to a head because P issued a writ which set the process in train, but it is an issue which they could not properly have avoided, at least not after their leading counsel was recorded as having said to the Beddoe court exercising its supervisory jurisdiction over the Purpose Trusts that the certainty issue:*

> *'raise[d] an important issue of principle regarding the application of the certainty test in the 1989 Act' and 'the Main Action will be a test case on the issue, which is likely to go the Privy Council'.'*

43. And as the judge, Hellman J, observed, 'I accept that the Court in the Main Action will require assistance from counsel on both sides of the argument to resolve the issue'.

44. Since the certainty question raised an issue which a reasonable trustee would have had to resolve at the expense of its trust funds, an adverse costs order against P constitutes a windfall to the Purpose Trusts which is unjust. The court should focus on the substance of the question before the court in connection with the certainty issue and not the form by which it fell to be determined: it was, objectively viewed, an essential question which needed to be resolved for the future administration of the Purpose Trusts. That should lead to an order that, on the certainty question, all necessary parties' costs should come from the Purpose Trusts' funds.

45. Indeed, P issued a summons in the Beddoe to the effect that he (and the PTCs) should have a pre-emptive costs order in relation to this issue. The PTCs successfully resisted that on the basis that the proper place for the granting of such an order would be in the Main Action. As to questions of timing (without explicitly denying that the certainty question was capable of being a so called Buckton Category 2 issue), the PTCs made the following written submission:

> *'In circumstances where the uncertainty claims will clearly not be stifled, the question whether Winston Wong should get his costs of those claims from the trust funds,* ***even if they are unsuccessful****, can sensibly be left to the trial Judge who will be well placed to adjudicate on that issue once those claims have been determined.' [emphasis added]*

46. It is precisely that application, as invited by the PTCs themselves, which P now makes.

Legal principles

47. The Court will be familiar with the three categories of trust proceedings identified by Kekewich J in Re Buckton [1907] 2 Ch 406 at 414–415:

> *47.1 Proceedings brought by the trustee seeking the court's guidance as to the construction of the trust instrument, or a question arising in the administration of the trusts. The costs of all parties are necessarily incurred for the benefit of the trust and ordered to be paid out of it.*
>
> *47.2 Proceedings brought by someone other than the trustee, but which raise the same kind of point as in the first category and would have justified an application by the trustee. The treatment of costs is the same as in the first category, because 'the application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole' (at 415).*
>
> *47.3 Proceedings brought by someone other than the trustee which have the character of hostile litigation. The unsuccessful party will usually bear its own costs and be ordered to pay the other parties' costs, although whether he is ordered to pay the trustee's costs 'is sometimes open to question'.*

48. Re Buckton referred to 'beneficiaries', but it is plain the reasoning extends to third parties who are properly joined or who bring applications: see the Beddoe costs judgment at [13] … per Hellman J 'These authorities speak about the costs of trustees and beneficiaries. However in my judgment all parties who have been properly joined to a Beddoe application or analogous trustees' application for directions should, absent disqualifying conduct on their part, normally be paid out of the trust fund, even if they are not trustees or beneficiaries'…; In re Savile [2015] BPIR 450, [2014] EWCA Civ 1632. It follows that if P could be treated as a proper party capable of having his costs

in Buckton 1 proceedings affecting the Purpose Trusts, he must have been capable of launching his own Buckton 2 proceedings in connection with the same Purpose Trusts.

49. The categorisation of proceedings is a question of law, not an exercise of discretion. Although distinguishing between categories 2 and 3 can in some cases be difficult, the following principles are clear from the authorities.

50. ***First,*** *when categorising proceedings as Buckton 2 or 3, the focus must be on whether, if the beneficiary or third party had not brought proceedings, the trustee would have been justified in doing so for the benefit of the fund. As Nugee JA (as he then was) observed in the Jersey Court of Appeal in Re JP Morgan 1998 Employee Trust (2013) 2 JLR 239 at [42]–[43]:*

> *'**Where I think the question of benefit to the trust is potentially relevant is in deciding what order should be made in respect of the beneficiary's [or third party's] liability for costs**. Where a trustee brings a claim (a Buckton category 1 case), it is usually because the trustee is facing some difficulty of construction or administration which needs resolution. The trustee may need to know on what trusts he holds the fund, or what is the scope of his powers or duties, or whether some proposed action is a proper course to take, or require some other guidance from the Court. In all such cases, the reason that the proceedings are regarded as for the benefit of the trust (and hence 'the costs of all parties are necessarily incurred for the benefit of the estate' as Kekewich, J says ([1907] 2 Ch. at 415)) is that there is a question which needs to be resolved in order for the trust to be properly administered. ... It is, in general better if there is a real doubt arising in the course of the administration of a trust that it is put before the Court than that decisions of doubtful validity are taken which might have to be argued over later; and the Court therefore encourages trustees faced with difficulties to apply for directions rather than proceed on a basis which might turn out to be mistaken.*

> *Where, however, it is not trustees who bring proceedings but a beneficiary [or anyone else], it by no means follows that the proceedings were necessary (and hence for the benefit of the fund) in this sense.* ***If it is a point which needs to be resolved sooner or later, then it does not matter that it is the beneficiary who starts the proceedings: this is Buckton category 2. Buckton itself was a case of that type: the will contained a difficulty of construction that would have had to be resolved eventually, at the latest on the plaintiff's death, and if the plaintiff had not brought the proceedings when he did, the trustees would no doubt have felt compelled to do so at that point****... But in other cases when a beneficiary brings a claim, it is not necessary in this sense at all. If the beneficiary brings a claim for his own purposes and it fails, the court may well take the view that the proceedings would never have been brought unless the beneficiary wrongly conceived that he had some claim: this is ordinary hostile litigation in Buckton category 3, and the beneficiary who has brought the proceedings unnecessarily could not in such a case normally expect to recover his costs out of the fund.' [emphasis added]*

51. It is apparent from the foregoing that the question is whether a reasonable trustee would have brought the application which the beneficiary or third party brought, not whether the particular trustee subjectively would have done so. If a trustee unreasonably brings an application (for example in respect of an unarguable point of construction) they may be disallowed their costs of doing so (Re Buckton at 414), and so if their beneficiary brings the same application the fact that the particular trustee would have otherwise done so would not justify a Buckton 2 categorisation; it follows that the fact a particular trustee claims that, subjectively, it would not have brought the application cannot prevent the application from being Buckton 2 if a reasonable trustee would have done so.

*52. **Second,** proceedings brought by a beneficiary or third party will not automatically be Buckton 3 simply because the beneficiary or third party is financially interested in their outcome. If that were the case, Buckton 2 would not exist as a category at all, as most individuals do not make claims unless there is some benefit to them in doing so. As Nugee JA observed in JP Morgan at [44]:*

> *'I would only add that it should not be assumed that simply because a beneficiary has an interest in an issue being resolved in a particular way it necessarily takes the case out of category 2 and into category 3. As the Bailiff said in In re Dunlop Settlement (7) ([2013] JRC 123, at para. 27), it will often, and probably usually, be the case that a beneficiary puts forward a stance that he considers will be to his benefit; this does not of itself take the matter outside category 2, as indeed Buckton itself illustrates.'*

*53. **Third,** the fact the beneficiary or third party presents the case robustly will not take it out of Buckton 2. That is apparent from:*

> *53.1 Hellman J's observation in the Beddoe costs judgment … at [20], equating as he did P with a beneficiary for the purposes of the Buckton analysis, that 'even strong opposition by the beneficiary does not in itself amount to acting unreasonably';*
>
> *53.2 The recent observations of the Jersey Royal Court in Re Erinvale PTC Ltd [2022] JRC 076 at [34]: 'I agree that Advocate Sinel put forward the Second Respondent's case in an aggressive manner, consistent it might be felt with his style of advocacy, and certainly at times the proceedings felt hostile, but that does not justify my placing Erinvale's Representation into category (3) of Buckton. He was putting forward views that were genuine and passionately held by the Second Respondent'.*

This case

The certainty claims are Buckton 2 matters

54. P submits that the certainty claims (and the PTCs' corresponding counterclaims) fall squarely within Buckton 2. This is not one of the difficult cases of which Kekewich J spoke. The logic of P's position is further reflected in this Court's characterisation of the issue, which it regarded as 'novel' – Judgment paras 787–788 …:

> *'It seemed clear having reviewed the respective written submissions and heard the Plaintiff's oral closing submissions, that the merits of the certainty point depended substantially (if not entirely) on how the express statutory test under section 12A (2) (a) ('sufficiently certain to allow the trust to be carried out') should be applied. To what extent, if any, did the restrictive elements of the common law test for the certainty of discretionary trusts or charitable trusts apply?'*

55. There can be no doubt such a question of law is capable of falling within Buckton 2 – as Lewin explains at [48–034]:

> *'Not all cases in which the issue in proceedings commenced by trustees turns upon a question of law rather than a question of construction fall outside Buckton category (1). For example, the meaning of the trust instrument might be quite free from doubt, and yet a question might arise as to the application as a matter of law of the rules concerning perpetuity or* ***certainty of objects*** *of the trusts, and such cases would, we consider, normally fall within Buckton category (1). Many cases involve mixed questions of law and construction and generally fall within Buckton category (1).' [emphasis added]*

The certainty claims justified an application by the PTCs

56. If P had not raised the point, not only would the PTCs have been justified in bringing an application themselves, but any reasonable trustees would have done given:

56.1 the fact that the issue arose on the face of the trust instruments when placed against the statute;

56.2 the fact that reasonable trustees would have been anxious to know the true terms of the trusts on which they were holding the trust assets;

56.3 the absence of any case law on the statutory certainty test;

56.4 the fact that the costs of resolving the issue were unlikely to be disproportionate given the enormous value of the assets whose ownership turned on the question;

*56.5 the latent risk that any one of the Founders' many heirs (or their creditors, or the tax authorities) might have later successfully contended that the Purpose Trusts were void for uncertainty. No reasonable trustee could have dismissed the risk of such a claim being made and succeeding as specious: as early as the preliminary issue judgment, this Court observed that the point was 'arguable and therefore may well be resolved in the Plaintiff's favour'. In its Judgment, the Court acknowledged, 'there was support in the legislative history for the proposition that the common law certainty test was embraced' (at [780]) and applying that 'restrictive test', 'the purposes of the China Trust in particular seemed vulnerable to attack' (**para 787**…); 'it seemed arguable that some of the purposes, if properly characterised as such, lacked the requisite certainty' (**para 765**…); and 'clause 3.5 ('To implement and accomplish the Founders' Vision') would probably be uncertain' (at **para 844** …), albeit the court found that it was not a freestanding purpose. The difficulty of the issue is clear from its occupying 64 pages of the judgment, despite being a pure point of law,*

*arising from the terms of the Purpose Trusts, to which the Court found no evidence was relevant (**paras 817–818**…).*

57. As mentioned above, the question of whether the certainty question is one which would have had to be determined by Originating Summons is an objective one. But it is instructive that these PTCs did not say during the Beddoe proceedings that the certainty issue fell outside Buckton Category 2 merely because it was being advanced by writ in what was generally hostile litigation. Their position was more nuanced, with the PTCs' counsel submitting, in response to the point that it was an issue 'which would have to be sorted out by the trustees anyway, even if [Dr Wong] hadn't brought his claims', that it was something upon which 'the merits of that issue [are] relevant. I don't propose to trespass on them here but I do want your Lordship to note the point'. P was ultimately unsuccessful on the point at trial, but in the light of the court's reasoning, it cannot now sensibly be suggested that the merits were objectively ever so obviously in favour of the PTCs that, had P abandoned his writ, they could have thereafter reasonably taken their chances and not gripped the point and sought its resolution. That resolution, as Hellman J found, would have required adversarial argument from someone (an amicus could have been appointed as a last resort) and all parties' costs would have been paid from the Purpose Trusts' funds.

58. Given these matters, any reasonable trustee would have had to apply to Court: the authors of Lewin observe that 'trustees will not be able to distribute safely on their own authority once they have notice of a claim, or of circumstances which could give rise to a claim, unless they are able to take the view that the claim is indisputably a bad one' (at [24–028]– [24–032]) [emphasis added].

P's interest in the certainty claim does not disqualify the proceedings from being Buckton 2

59. Although an applicant's interest in an application does not prevent it from being Buckton 2 in any event (see paragraph 52 above), P was not motivated wholly or even mainly by self-interest. Indeed in many Buckton category 1 or 2 cases there is a party acting in his own interest:

> *59.1 As Hellman J found in the Beddoe costs judgment at para 45…, 'he was consciously acting in the best interests of YC Wang's heirs or at least some of them (those in the second family) as well as his own best interests';*
>
> *59.2 As this Court astutely observed in the Judgment at para 950…: 'It seemed obvious to me that the Plaintiff has pursued the present proceedings to a material extent because of a deep-seated sense that, beyond the narrow confines of his formal legal claims, serious 'moral' wrongs have occurred which must be redressed. The notion that these proceedings are solely motivated by unvarnished greed appeared to me to be an overly simplistic analysis of a complex and clearly principled man whose personal charitable contributions to Britain have been honoured by the Queen. He made the following surprising pronouncement under re-examination about what he would do with his share of any assets recovered in the present litigation: 'After compensation for all my legal fees, which are very clearly documented, I would give it all to charity in public.''*

60. Similarly, given the Court's finding that there was no financial incentive for the PTCs' directors to resist the certainty claims, it follows that the PTCs' opposition was for the benefit of the Purpose Trusts. The certainty claims were therefore very different from the archetypal Buckton 3 proceedings where the claimant and defendant proceed for their own personal benefit (see Lewin at [48–033])."

5. The Trustees submitted:

"*33. Winston and Tony contend that the Sufficiently Certain Issue was one which was necessary for the Trustees themselves to have resolved in the administration of their trusts and required adversarial argument. On that basis, Winston and Tony claim that their costs of that issue (and the Trustees' consequential counterclaims) should be paid out of the trust funds on the indemnity basis: see green paragraph 14.1 of the draft Order. They do so by relying on Re Buckton [1907] 2 Ch 406. Their contention is misconceived.*

34. In Re Buckton Kekewich J, whilst noting that 'costs are so largely in the discretion of the judge that … it is well nigh impossible to lay down any general rules which can be depended on to meet the ever changing circumstances of particular cases', gave guidance as to the sorts of situation in which the principle applicable to trustees under Order 62 Rule 6(2) … (i.e., that trustees are ordinarily entitled to be paid their costs out of the trust fund, win or lose) is to be extended by analogy to other parties to litigation involving trusts. He identified three broad categories of trust proceedings as follows:

> *34.1. 'Category 1': proceedings brought by trustees to have the guidance of the Court as to the construction of the trust instrument or some question arising in the course of the administration of the trust. In such cases the costs of all parties would usually be treated as necessarily incurred for the benefit of the estate and ordered to be paid out of the fund.*
>
> *34.2. 'Category 2': cases in which the application is made by someone other than the trustees that raises the same kind of point as the first category and would have justified an application by the trustees. As Kekewich J explained*
>
> > *'…although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by*

> *reason of some difficulty of construction, or administration,* ***which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient.*** *To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is* ***necessary for the administration of the trust****' [emphasis added].*

This category is treated in the same way as the first.

34.3. 'Category 3': cases in which a beneficiary is making a hostile claim against the trustees or another beneficiary. Kekewich J explained that

> *'In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes,* ***but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs.****'*

In other words, this category of cases is treated in the same way as ordinary common law litigation and costs usually follow the event.

35. Further guidance on the third category of cases is set out in Lewin on Trusts (20th edn, 2020) at paragraph 48-033:

> *'Proceedings in which the application is made by someone other than the trustee, but differ in substance from the second category, and in substance as well as form from the first category, in that* ***they have the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund.*** *The distinction, though one not easy to draw in practice, between this kind of litigation and litigation within the first two categories, is that* ***the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant, and is resisted for a similar reason.*** *' [emphasis added]*

36. The learned authors of Underhill & Hayton, The Law of Trusts and Trustees (20th edn, 2022) also explain at paragraph 89.1(3) that

> *'[w]here the claim concerns rival claims to the trust fund or it is, in substance, hostile litigation, the court will normally order the unsuccessful party to pay the costs of the successful party'.*

37. This case is one plainly falling within Re Buckton 'Category 3' where costs should follow the event, and not within 'Category 2' where costs should be paid from the trust funds. There are a number of reasons for this:

38. ***First,*** *Re Buckton 'Category 2' cases are narrowly defined and are limited to situations where the application was necessary for the administration of the trust. This is not such a case:*

> *38.1. Winston's and Tony's claims in respect of the Sufficiently Certain Issue were not necessary for the administration of any of the Trusts. Until Winston amended his Statement of Claim in the 2013 Action in October 2013, no one had ever suggested to the Trustees that there was any difficulty regarding the purposes of the Trusts in relation to which the guidance of Court was needed. This is hardly surprising. As the*

Court noted in its Judgment, Winston himself acknowledged in cross examination that he had no difficulty at all in understanding the almost identical purposes set out in the Wang Chang Gung PIT: paragraph 50 of the Judgment …. The claims brought by Winston (and then Tony) were therefore not simply a more convenient way of bringing an application which the Trustees needed to make anyway. They were entirely hostile claims designed to destroy the trusts, a fact also noted in the Judgment.

38.2. The history of the way in which the Sufficiently Certain Issue was brought is revealing. When Winston first formally intimated that he would bring claims against the First Four Trustees in Bermuda (by way of a letter before of action dated 6 February 2013 to which a draft Writ was enclosed …, he made no reference to any difficulty with the administration of the Trusts (notwithstanding the fact that Winston had obtained the declarations of trust on 10 January 2009 at the meeting with Mr Hung and Mr Jao and had, since then, obtained the benefit of legal advice). It was only well after he had issued his Writ, and as an afterthought, that he sought to amend his Writ to raise the Sufficiently Certain Issue… In itself, this makes the contention that the Sufficiently Certain Issue was one which it was necessary to raise for the administration of the trust unsustainable.

39. ***Second,*** *it is absolutely clear that the real reason why the Sufficiently Certain Issue was raised was that this was viewed by Winston as providing a further way in which to achieve the same result as his other factual claims against the Trustees – namely, to destroy the Trusts. Indeed, that is what would have been accomplished had the Sufficiently Certain Issue been resolved in Winston's and Tony's favour. As to this:*

39.1. That is precisely how ASW, on behalf of Winston, characterised matters in their letter to Conyers dated 23 July 2013…: 'The result is that the property comprised in the Trusts results to the estate of the

original beneficial owner…That of course is in practical terms the same main relief as was sought in the original Writ and Statement of Claim.'

39.2. In truth, Winston and Tony have mounted a relentless hostile attack on the Trusts, using any available argument, however technical, meritless or baseless. Some were not even seriously pursued at trial (see, for example, the undue influence claim, for which, as the Court noted, 'there was no evidential basis' (paragraph 11 of the Judgment…). Some were maintained even though it was obvious that they were absurd. For example, 'the forgery case, like the briefing recording in the original television version of 'Mission Impossible' seemed to self-destruct, albeit in far longer than 5 seconds' (paragraph 647 of the Judgment…).

39.3. The Court (entirely correctly) characterised Winston's attacks on the Trusts as 'legal assault weapons' to which Tony 'joined arms' (paragraph 4 of the Judgment… That is as clear a description of hostile litigation as there can be, with the two effective plaintiffs raising every conceivable argument available to them to destroy the Trusts.

39.4. The Court also made some observations as to Winston's (paragraphs 948 – 951 of the Judgment…) and Tony's (paragraphs 650 – 654 of the Judgment…) motivations in bringing the claims. Although various possible motives were identified, there is no suggestion that any of the claims (let alone the Sufficiently Certain Issue) were brought by Winston or Tony in order to assist with the administration of the Trusts.

40. ***Third,*** *the case law also makes clear that it is inappropriate to try to isolate a part of the overall litigation which could, if conducted separately, have been a Re Buckton 'Category 1' or 'Category 2' case: the litigation should be viewed as a whole. In McDonald v Horn [1995] 1 All ER 961 at 972b - 972e members of an occupational pension scheme had brought an action against their employers, the pension fund trustees and others concerning the administration*

of the scheme. Hoffmann LJ (with whom Hirst and Balcombe LJJ agreed) explained:

> *'If one applies these principles [i.e the Buckton principles] to the present case, they do not in my judgment assist the plaintiffs.* ***The issues likely to give rise to almost the whole of the discovery, and take up most of the time at the trial, are allegations of dishonest breach of trust against the trustees and others. This is hostile litigation if ever there was. If the questions of construction stood alone, the judge at the trial might regard the proceedings as coming within Kekewich J's second category. Even then I could not be sure.*** *In Re Vauxhall Motors Pension Fund, Bullard v Randall [1989] PLR 31, in which members of a pension fund brought proceedings raising a question of construction of the trust deed, Browne-Wilkinson V-C held that they were wrong and ordered them to pay the costs.* ***Taken together with the other allegations, however, I do not think it likely that if this were ordinary trust litigation and the plaintiffs are unsuccessful, the judge would order their costs to come out of the fund.*** *They cannot therefore rely upon Ord 62, r 6(2) as extended to beneficiaries by the principles in Re Buckton.' [emphasis added]*

41. There is a clear parallel between the facts in McDonald v Horn and the present case: all of the discovery, and most of the time at trial, was taken up with Winston's and Tony's factual allegations of mistake, lack of authority, lack of capacity, forgery and their other unsuccessful legal and technical claims (Statute of Frauds and 'mixed purposes'). The 'certainty' issue cannot be viewed in isolation. For precisely the same reasons as those identified by Hoffmann LJ in McDonald v Horn, the present case cannot therefore be a Re Buckton 'Category 2' case.

42. ***Fourth,*** *the Sufficiently Certain Issue was not remotely conducted in the way Re Buckton 'Category 1' or 'Category 2' cases normally would be. It was conducted by Winston and Tony as thoroughly hostile litigation like the rest of*

their claims. For example, in order better to understand Winston's case on the Sufficiently Certain Issue, the Trustees made a request for further and better particulars dated 26 September 2019 … in which they made the following entirely reasonable request:

> *'19. In relation to the allegations that the purposes of each Trust fail to satisfy the 'Certainty Test' (as defined in paragraph 34 of the ASoC) and the 'Certainty Requirement' (as defined in paragraph 33 of the ASoC):*
>
> *19.1. Please set out precisely and separately, in relation to each Trust:*
>
> > *19.1.1. each of the purposes of that Trust which will be challenged as being uncertain under the test identified in the second sentence of paragraph 34 of the ASoC (the Plaintiff's suggested 'Certainty Test'); and*
> >
> > *19.1.2. how it is said that each such purpose fails to meet that test.*
>
> *19.2. In so far as that challenge is also made by reference to an alternative legal test concerning the 'Certainty Requirement' of the sort referred to in the penultimate sentence of paragraph 34:*
>
> > *19.2.1. please define precisely what each such alternative test requires;*
> >
> > *19.2.2. please set out precisely and separately, in relation to each Trust, each of the purposes of that Trust which will be challenged as being uncertain under each such alternative test; and*

19.2.3. please set out precisely and separately, in relation to each Trust, how it is said that each such purpose fails to meet each such alternative test.'

43. Winston's response (provided almost six months later, on 9 March 2020) was singularly unhelpful: 'Not entitled. These are requests of points of law.' … This is precisely the approach that one would expect from a highly hostile litigant. It is not the approach that someone who is genuinely interested in the administration of the Trusts would take.

44. ***Fifth,*** *the reasons that have been given for why Winston and Tony should not only avoid paying the First Four Trustees' costs but in addition should obtain an indemnity from the trust funds in respect of their costs of the Sufficiently Certain Issue are unconvincing. In a letter dated 10 July 2022 …, ASW has sought to rely on a submission made on behalf of the First Four Trustees in the Beddoe proceedings, and recorded at paragraph 122 of Hellman J's Ruling dated 15 May 2015 …, that the Sufficiently Certain Issue raised an important issue of principle which was likely to be appealed to the Privy Council in support of Winston's contention that the Sufficiently Certain Issue should be treated as a Re Buckton 'Category 2' case. This mischaracterises and misunderstands the First Four Trustee's submission in the Beddoe proceedings:*

44.1. The submission was made in the context of the unsuccessful argument by Winston in the Beddoe proceedings that the claims against the First Four Trustees should go undefended because the First Four Trustees were not entitled to Beddoe relief. This was part of Winston's opportunistic attempt to create a situation in which nobody defended his claims. What Hellman J held was that there ought to be someone to oppose Winston in his argument that the Trusts were invalid. It is for that reason that Hellman J noted at paragraph 122 of his Ruling … that '…I accept that the Court in the Main Action will require assistance from counsel on both sides of the argument to resolve the issue. Were I not minded to grant an indemnity in the terms sought, I should have

granted the Trustees an indemnity for the limited purposes of arguing this particular issue'.

44.2. At no stage did the Trustees ever submit that Winston's claim in respect of the Sufficiently Certain Issue was necessary for the administration of the Trusts. All that was being said was that Winston had raised a legal point which had not previously been considered and which ought to be fully argued by both sides. In order to enable that to happen, the First Four Trustees needed to be able to pay their own costs from the trust funds, something Winston resisted vigorously. Hellman J denied Winston's efforts to prevent the First Four Trustees from defending the action. It was they who Hellman J enabled to put the other side of the argument – not Winston.

44.3. All the litigants are private parties, and none of them has a responsibility to fund litigation to clarify the law in the public interest, so the ordinary costs rules should apply without adaptation.

45. In short, Winston's and Tony's claims in respect of the Sufficiently Certain Issue were brought for their benefit as but one of a blizzard of different arguments designed to destroy the trusts in the context of rival claims to the trust funds in exceptionally hostile litigation. There is no basis whatsoever for them not only to avoid paying the costs of the Sufficiently Certain Issue but, in addition, to obtain an indemnity from the trust funds in respect of their own costs of the Sufficiently Certain Issue (and the Trustees' corresponding counterclaims)."

6. 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.

Legal principles

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.

8. In *Singapore Airlines-v-Buck Consultants Ltd* [2011] EWCA Civ 1542 upon which Mr Hagen QC relied in oral argument, Arden LJ summarised the principles as follows:

> "*67. The principles as to the award of costs of proceedings as between trustee and beneficiary were established in Re Buckton [1907] 2 Ch 406 at 414, and are conveniently summarised in Lewin on Trusts (18 ed) at paras. 21–79, which reads in material part as follows:*
>
> > *'Conventionally [proceedings for the construction of a trust instrument] are treated as being divisible into three categories following the classification in the leading case Re Buckton [1907] 2 Ch 406 at 413 to 417:*
> >
> > *(1) Proceedings brought by the trustee to have the guidance of the court as to the construction of the trust instrument or some*

other question of law arising in the administration of the trust or in relation to the trusts on which the trust property is held. In such cases, the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it….

(2) Proceedings in which the application is made by someone other than the trustee, but raises the same kind of point as in the first category and would have justified an application by the trustee. Such proceedings differ in form but not in substance from the first category and similar considerations apply as to costs.

(3) Proceedings in which the application is made by someone other than the trustee, but differ in substance from the second category, and in substance as well as form from the first category, in that they have the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund. The distinction, though one not easy to draw in practice, between this kind of litigation and litigation within the first two categories, is that the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant, and is resisted for a similar reason. … Here the general principles as to costs of hostile litigation apply between the claimant and the party against whom the claim is directed, and so the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to the general qualifications which apply in ordinary hostile litigation."

9. Mr Adkin QC relied on that passage as summarising the governing principles accurately. Mr Hagen QC relied in particular on the following later passages:

"*71. In my judgment, in determining whether category (2) in Re Buckton applies, regard has to be had to the substance as well as the form of the application. This indeed was the basis on which the litigation initiated by the beneficiary against the trustee in Re Buckton was placed in category (2) although it appeared from its form to be within category (3). In this case, when the question of substance is confronted, it immediately becomes apparent that BC had a direct financial benefit in the outcome of the preliminary issue. In my judgment, contrary to the conclusion of the judge, that factor takes this case outside category (2). The issues arising on the preliminary issue were designed to bring to an end the allegations (or some of them) of professional negligence made against it. Moreover, BC's interest in the litigation was antipathetic to the Scheme because BC was contending that it was not liable for damages for negligence to the Trustee and SA.*

72. Category (3) is also not applicable because the preliminary issue resolved questions of interpretation of the 1981 rules for the benefit of Members, as well as deciding issues for the benefit of BC. The fact that the preliminary issue stood to benefit BC should in my judgment to that extent place the preliminary issue, as regards the liability of the Scheme assets for the costs of the preliminary issue, on the same footing as litigation adverse to the interests of the trust, even though serendipitously the resolution of the Issues will in fact also benefit the Members.

73. In these circumstances, in my judgment, the judge was in error in his conclusion that in substance this preliminary issue was purely a dispute between the Members and the Trustee as to the true construction of the 1981 rules and that this case fell purely within category (2). The hearing before him was no doubt conducted in the objective way that very many construction summonses brought by beneficiaries or trustees are conducted, but this was far from being an ordinary case as between beneficiary and trustee because it was being conducted in the course of contested negligence proceedings brought by SA against BC. In a case such as this the judge's conclusion as to the

appropriate category is not a finding of fact. The question of determining into which category a particular case falls is at the end of the day one of law and I have approached this issue on that basis. (Moreover, on that point, Mr Newman fairly accepted that this court is in as good a position as the judge to determine the appropriate category.)…

76. In my judgment, therefore, where a claimant acts in a dual capacity in bringing proceedings against the trustee for the determination of a question as to the true construction of a trust instrument, the case falls outside the three categories to be found in Re Buckton . In my judgment, the principled approach in such a situation requires a sharing of the costs between the parties. The beneficiary should receive an indemnity out of the trust fund for his share but the third party should bear his or her share without any such indemnity, just as he would have done if he or she had brought proceedings without joining a beneficiary as co-claimant. After all, his or her separate interests are not shared by the beneficiaries.

77. It is, of course, difficult to find any basis other than equality for a sharing of costs, but this is not one of those situations in which the court cannot act because of a lack of clarity about the appropriate shares. I would therefore order that the burden of the costs over and above those recovered on a standard basis should be borne equally by BC and the Scheme members. Accordingly there should in my judgment be a payment out of the Scheme assets for only one half of the difference between standard and actual costs."

10. Accordingly I accept that it does not necessarily follow that where a 'beneficiary' or similar party raises a *Buckton* Category 2 issue as part of wider adversarial litigation that the Court is bound to regard the issue as falling into Category 3. The issue may be assessed on its merits as a discrete issue. But what interests the adverse litigant is advancing is a highly material consideration when deciding how to categorize the issue in *Buckton* terms.

Findings: should the Plaintiff and D8 be indemnified in respect of their costs of pursuing the certainty point on the grounds that it was a Buckton Category 2 issue?

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 fathers' estates, depended on the assumption that the Trusts were invalidly created.

12. It is true that in raising the point unsuccessfully, the Plaintiff and D8 have indirectly ensured that the Trustees have received the benefit of this Court's findings as to the Trusts' validity and certainty. That in my judgment is not enough to bring the point wholly or partly within *Buckton* Category 2, particularly in light of the overall way in which the attack on the certainty of the purposes was advanced. As Mr Adkin QC rightly urged, the Court should be reluctant to adopt an approach to costs which rewards hostile litigants for seeking to invalidate purpose trusts. The position would be different if the certainty point was raised by a philanthropic body which was concerned about its ability to properly receive donations from one or more of the Trusts. Such a litigant would clearly have an interest in the due administration of the Trusts.

13. For these reasons I find that the Plaintiff and D8 should not be indemnified from the assets of the relevant Trusts for raising the certainty issue. To the extent that I have any residual

discretion to compensate parties who raise points of statutory interest, the adjudication of which benefits the public, I do not consider it appropriate to exercise any such discretion in the context of the present quintessentially private law commercial case.

Findings: issues-based costs

Submissions

14. The second main costs-related issue was whether or not the Court ought to adopt an issues-based approach to the costs of certain issues which the Trustees had pursued unsuccessfully despite defeating the claims overall. The Plaintiff's Skeleton advanced the following central thesis:

> "*88. Ord 62 r 3(3) provides 'If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs'.*
>
> *89. It is clear that r 3(3) permits issues-based costs orders:*
>
> > *89.1 In 2009, the Bermuda Court of Appeal held in First Atlantic Commerce v Bank of Bermuda Ltd [2009] Bda LR 18 at [66] that the award of costs to a successful party is subject to the principle in In re Elgindata Ltd (No 2) [1992] 1 WLR 1207, namely 'the successful party'srecoverable costs can be proportionately reduced when superfluous issues were raised unnecessarily, or for other good reason'.*
> >
> > *89.2 In Elgindata, Nourse LJ had held (at 1214B): '(i) Costs are in the discretion of the court, (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made, (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails,* ***but where that has caused a significant increase in***

the length or cost of the proceedings he may be deprived of the whole or a part of his costs, *(iv) Where the successful party raises issues or makes allegations improperly or unreasonably,* ***the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs****' (emphasis added).*

89.3 In 2012, Kawaley J followed the 2009 Bank of Bermuda decision and held in Binns v Burrows [2012] Bda LR 3 at [6] that the Court's duty in awarding costs will generally be to determine which party has in common sense or 'real life' terms succeeded, award that party its costs, and consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the rule that costs follow the event. Kawaley J cited Seepersad v Persad [2004] UKPC 19 (a Trinidad and Tobago case) at [24] per Lord Carswell: 'The general rule which should be observed unless there is sufficient reason to the contrary is that costs will follow the event. Where the party who has been successful overall has failed on one or more issues, particularly where consideration of those issues ***has occupied a material amount of hearing time or otherwise led to the incurring of significant expense,*** *the court may in its discretion order a reduction in the award of costs to him, either by a separate assessment of costs attributable to that issue or, as is now preferred, making a percentage reduction in the award of costs: see, eg, In re Elgindata […]' (****emphasis*** *added).*

89.4 In 2021, in Tucker v Public Service Commission [2021] Bda LR 67, the Court of Appeal quoted an observation that 'the courts in England and Wales are now entirely free to make a different order and are encouraged to make precise orders to reflect the outcome of different issues', and commented: 'While the rules have indeed so evolved in England and Wales, ***we see from the case law that the Courts in Bermuda*** *(and indeed elsewhere in the Commonwealth where the 'old*

rule' still applies), ***that the undoubted discretion is sufficiently broad to have allowed for the development of the law on costs to adopt and reflect the developments under the CPR****' (****emphasis*** *added).*

90. There are good policy reasons for permitting issues-based costs orders: if litigants know they will recover all of their costs so long as they are successful overall, this discourages them from being selective as to the points they take and unnecessarily increases the length and cost of litigation. There is also the fundamental principle that costs are compensatory. A party who receives his costs for advancing a completely discrete point on which he lost is not being compensated; he is receiving a windfall.

91. Issues-based costs orders under the RSC are not limited to disallowing the generally successful party the costs of the issue in question, but extend to awarding the generally unsuccessful party their costs of that issue: see Elgindata above and Blank v Footman, Pretty & Co (1888) 39 Ch D 678. In Blank, the defendants wholly defeated the plaintiff's claim, but one of their defences failed and the plaintiff was awarded the costs of that specific issue, with Kekewich J finding (at 686):

'it is a useful rule that where there is a distinct issue on which the generally successful party has failed and that issue has really no immediate connection with those upon which the party has succeeded, then he ought not to have the costs of that issue which presumptively ought never to have been raised.'"

15. The general drift of these submissions, which began in familiar Bermudian legal terrain before soaring over the English post-CPR and pre-CPR landscape, appeared to be that there was no fundamental distinction between the Court's jurisdiction to make issues-based costs orders under the pre- and post-CPR regimes. Putting to one side the question of what theoretical jurisdictional competence this Court might possess, it seemed untenable to contend the established practice on issues-based costs under the CPR and the Bermudian

Rules was essentially the same. The Trustees in their Skeleton described the position most pertinently as follows:

> "*46. … Winston and Tony seek issue-based costs orders in respect of the Trustees' argument that Winston's and Tony's Avoidance Claims were governed by Taiwanese law and also in respect of the question whether the Statute of Frauds forms part of the law of the British Virgin Islands: see green paragraphs 14.8 and 14.9 of the draft Order.*
>
> *47. This approach is wrong in principle. There has been a consistent line of authority for over a decade in Bermuda in which the Courts have repeatedly eschewed the making of issue-based costs orders of the type sought by Winston and Tony.*
>
> *48. In Binns v Burrows [2012] Bda LR 3, Kawaley J undertook a detailed analysis of the relevant authorities and summarised the Court's approach at [6] and [7]:*
>
> > *'6. The above authorities suggest that, unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to:*
> >
> > *i. determine which party has in common sense or 'real life' terms succeeded;*
> >
> > *ii. award the successful party its/his costs; and*
> >
> > *iii. consider whether those costs should be proportionately reduced because eg they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event.*

7. The Bermudian legal position, absent a directions order identifying discrete issues for determination at trial, requires reference (in terms of persuasive English authority) to the old pre-CPR principles governing the award of costs. These principles were described as follows by Warren J1 in Actavis v Merck & Co Inc [2007] EWHC 1625 (Pat):

> *'12 ... costs at the discretion of the court; follow the event, except where it appears that some other order should be made; the general rule does not cease to apply because the successful party raises issues which he fails on, but where that has caused a significant increase in the length of the proceedings, he may be deprived of the whole or part of his costs; where the successful party raises an issue improperly, he cannot only be deprived of his costs but be ordered to pay his opponent's costs.''*

49. Kawaley J's exposition has since been consistently adopted by the Bermudian Courts. See for example:

49.1. Kentucky Fried Chicken v Minister of the Economy [2013] Bda LR 34 (Kawaley CJ). In that case, Kawaley CJ summarised the Court of Appeal for Bermuda and the Supreme Court's jurisprudence. He referred to Binns v Burrows as summarising the relevant Bermudian costs principles.

49.2. Re Sturgeon Central Asia Balanced Fund Ltd [2017] Bda LR 96 (Kawaley CJ). In that case, Kawaley CJ stated (at [3]):

> *'But the leading case which has been followed by the Bermuda Court of Appeal and this Court on a number of occasions is In re Elgindata Ltd (No.2)[1992] 1 WLR 1207. Both counsel referred me to the following passage at page 1219 A-B in the judgment of Nourse LJ, where he said this:*

'The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs.''

49.3. Ivanishvili v Credit Suisse [2020] SC (Bda) 55 Civ (Hargun CJ). In that case, Hargun CJ noted (at [74]) that '[t]he Court of Appeal in Bermuda has cautioned against adopting the issue-based approach to costs and has reaffirmed that the basic principle remains that costs follow the event and that success should be measured in practical terms'. Hargun CJ then stated that the current position was summarised in the decision of Kawaley CJ in the Kentucky Fried Chicken case."

16. This was an accurate and straightforward summary of the well-established Bermudian law costs position. Although Mr Wilson QC for D8 supported the Plaintiff's submissions, his Skeleton Argument primarily adopted an orthodox summary of the legal position and merely invited the Court to disallow some of the Trustees' costs because they had been unreasonably incurred. For instance, it was submitted:

"*9. The relevant passage of Nourse LJ's judgment in In re Elgindata (No.2) [1992] 1 WLR 1207 (referred to above) reads as follows (at 1214):*

'The general rule [that costs follow the event] does not cease to apply simply because the successful party raises issues or makes allegations

on which he fails, but where that has caused a significant increase in the length or costs of proceedings he may be deprived of the whole or a part of his costs… Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs' (emphasis added)

10. The above principles and authorities have been expressly endorsed in Bermudian case law. In First Atlantic Commerce v. Bank of Bermuda Ltd [2009] Bda LR 18, Sir Anthony Evans JA (giving the leading judgment) stated that, whilst the starting point is that the successful party should receive its costs (at §67):

'… it does not follow that he shall recover the whole of those costs. The award remains subject to the principle recognised in In re Elgindata Ltd (No 2) [1992] 1 WLR 1207: in short, the successful party's recoverable costs can be proportionately reduced when superfluous issues were raised unnecessarily, or for other good reason. The question here, in our judgment, is whether the principle applies in the present case'. (emphasis added)"

Findings: Legal principles

17. I am bound to find that there is a fundamental distinction between the standard approach to issues-based costs under the English CPR and under the Rules of the Supreme Court 1985, Order 62. That said, taking a high level view, I would broadly adopt and endorse Mr Wilson QC's submissions on what the legal policy ought to be under Bermuda law:

"*6. Costs are in the discretion of the Court. Whilst the starting point is that costs follow the event, the authorities across common law jurisdictions recognise that it is appropriate to depart from that starting point where an otherwise successful litigant has been responsible for generating unnecessary costs. The policy arguments behind this approach have obvious force. Those arguments,*

in the context of issue-based costs orders are helpfully summarised in the notes to English Civil Procedure at 44.2.10:

> *'There are two aspects to the policy objectives underlying the development of the issue-based approach to costs. First, in the Access to Justice Interim Report (June 1995), it was stated that, as the new approach to case management (subsequently introduced by the CPR) involves 'breaking down the issues which make up the litigation', the court has to be prepared 'to make different orders for costs in relation to different issues to support the new approach to case management' (Section V Ch.25 para.22). Secondly, in the Access to Justice Final Report (July 1996) criticism was made of the fact that the English courts 'are wedded to the dual concept that costs should be treated as a whole and that costs should follow the event' and it was recommended that the courts should use to the full their very wide statutory discretion over costs to support the conduct of litigation in a proportionate manner and to discourage excess' (Section II Ch.7 paras 8 and 9). In AEI Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 W.L.R. 1507, CA, in elaborating on that criticism, Lord Woolf MR explained that too robust application of the dual concept (a) discourages parties from being selective 'as to the points they take', and (b) by enabling them to proceed on the safe assumption that, if they are successful overall they can expect to recover costs on all issues (including those on which they fail), increases costs and adds to delays. (Put shortly and colloquially, the policy objective is to discourage by costs risks a 'kitchen sink' approach to litigation.)' (emphasis added)*

7. It is submitted that the modern approach to civil procedure as set out above applies (or, at least, ought to apply) in Bermuda as much as in any other common law jurisdiction: any other conclusion would encourage litigants to adopt the 'kitchen sink' approach deprecated by Lord Woolf above. It would also run counter to the importance rightly attached by the Courts on litigation being conducted proportionately and reasonably by all parties (whether

successful or otherwise) so that: (i) Court resources are used efficiently; and (ii) litigants (particularly where there is an imbalance in resources) are not encouraged to cause their opponents to waste costs on fighting issues which ought not to have been pursued."

18. Oral argument overall helped to elucidate the following principles which I find reflect the current Bermudian legal position:

(a) the standard rule is that costs follow the event (Order 62 rule 3(3));

(b) the main exception to this rule in adversarial litigation is where a party may have succeeded but has in some material respect acted unreasonably or improperly (Order 62 rule 10). In such circumstances, the successful party may either have their costs disallowed or additionally be required to pay the relevant portion of their opponent's costs: *In re Elgindata (No.2)* [1992] 1 WLR 1207 (Nourse LJ, at 1214). Order 62 rule 10 may be viewed as creating two levels of unreasonable/improper conduct, a tier 1 'offence' (costs are disallowed) and a tier 2 'offence' (costs are disallowed and an adverse costs order made);

(c) where a party has succeeded but a disproportionate amount of their costs has been incurred in relation to matters in relation to which they have lost, the Court may find that that they have been unreasonably incurred and proportionately reduce the amount of costs they are awarded. This is the usual penalty and is not a freestanding principle unsupported by any specific rule of court. The practice is properly viewed as entailing an explicit or tacit finding that the successful party has committed an Order 62 rule 10 tier 1 offence;

(d) alternatively (and exceptionally), where a party has succeeded but a disproportionate amount of their costs has been incurred in relation to matters in relation to which they have lost, the Court may find that they have been unreasonably incurred and both (1) proportionately reduce the amount of costs they are awarded and (additionally) (2) order the party who has succeeded overall to pay the costs of their opponent. Such an order is properly viewed as

entailing a finding that the successful party has committed an Order 62 rule 10 tier 2 offence;

(e) the Court's jurisdictional competence is sufficiently broad and flexible, particularly since the Overriding Objective is now found in Order 1A to modify the usual costs follow the event rule and adopt an issues-based approach to costs to achieve justice in individual cases. But the appropriate time for such modification to take place is at the pre-trial directions stage so that the parties know where they stand from the beginning of the litigation rather than being 'bushwhacked', or ambushed, by a changing of the costs ground rules at the end of the case: *Binns v Burrows* [2012] Bda LR 3 (at paragraph 7);

(f) the parties have a positive duty to "*help the court to further the overriding objective*" (Order 1A/3). The Court must "*seek to give effect to the overriding objective*" (Order 1A/2) when it exercises any power conferred by a rule and interprets any rule (e.g. Order 62 rule 3(3) and Order 62 rule 10). The overriding objective's purposes include saving expense and conducting litigation in a proportionate manner. Accordingly, the threshold for establishing that a successful party should have their costs disallowed or have their costs disallowed and be required to pay their opponent's costs under Order 62 rule 10 is probably somewhat lower today than it was in the pre-Order 1A era (i.e. pre-2006) in Bermuda and the pre-CPR era in England. Because throughout the litigation the parties have been subject to an explicit continuing obligation to litigate in a proportionate and costs-efficient manner by virtue of the operation of the Overriding Objective, Order 1A adds a gloss to Order 62 rules 3(3) and (10) without altering the core content of the relevant rules;

(g) the impact of the Overriding Objective on the present application is probably marginal, because it is clear from cases such as In re *Elgindata Ltd (No 2)* [1992] 1 WLR 1207, that it was already recognised in the pre-CPR era that a winning party who causes a disproportionate amount of time to be spent on superfluous issues is often, in the requisite legal sense, found to entail acting unreasonably

and, accordingly, is liable to have a commensurate proportion of their costs disallowed. Order 1A has perhaps merely provided more explicit formal support for how Order 62 rule 10 was already being applied and construed and created a clearer conceptual framework for the application and interpretation of that costs rule;

(h) whether a disproportionate amount of costs have been expended on a "superfluous" issue or issues requires some evaluation and does not automatically follow from the mere fact that substantial costs were expended on an issue found to be unmeritorious. The Court must ultimately adjudge that it was not reasonably necessary for the successful party to pursue the point in order to achieve their overall success. And, even under the pre-CPR dispensation, this Court has (and the English courts had) a duty to discourage litigants from adopting a 'kitchen sink' approach to the issues which they raise, in other words a duty to encourage proportionate litigation. In *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 W.L.R. 1507, Lord Woolf (MR, as he was then) observed (having referred to *Re Elgindata*):

> "*The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so*." [Emphasis added];

(i) nevertheless, there is a fundamental distinction between an issues-based approach to costs which effectively applies the costs follow the event rules to issues from the outset and the standard Bermudian practice pursuant to which the costs follow the event rule is primarily applied only to claims: "*the basic*

> *principle remains that costs follow the event and that success should be measured in practical terms*" (*Ivanishvili v Credit Suisse* [2020] SC (Bda) 55 Civ (Hargun CJ)). That "*basic principle*" is only departed from at the end of the case where the overall winner has in some respect (in the final analysis) litigated unreasonably or improperly to some extent. Issues-based costs orders are designed to fully compensate the party who succeeds on a relevant issue. The costs follow the event rule is primarily designed fully compensate the overall winner, unless there are (exceptionally) grounds for disallowing some of those costs and (more exceptionally still) grounds for also requiring the overall winner to pay some of an opponent's costs.

19. The Plaintiff's (and D8's) request for a 'full-blown' issues-based cost award in respect of the governing law issues must ultimately be refused on the grounds of the legal principles summarised above. They ultimately sought to recover compensation for their own costs without being able to demonstrate the high level of unreasonable procedural conduct which is required to be established to justify such an award. As regards the Statute of Frauds sub-issue on which the Plaintiff and D8 prevailed, I also ultimately find no grounds for depriving the Trustees of their costs of this part of a claim upon which they prevailed overall. It is correct that no order as to costs was sought and not a 'full-blown' issues-based cost award, so that a lower threshold of unreasonableness was engaged. However, in all the circumstances I find no rational basis for concluding that the Trustees should be penalised for electing to contest such an exceptionally uncertain legal issue, namely whether the Statute of Frauds had (some 300 or more years ago) been received into BVI law as a matter of common law[1].

20. It remains to consider their alternative (and really their primary substantive position) and the question of whether the Trustees should be deprived of some of their costs (and if so what percentage) in relation to three issues on the grounds that a disproportionate amount of time was unreasonably spent on them (having regard to the fact that they lost the issues or points).

[1] I am grateful to counsel for clarifying the distinction between the two forms of costs award sought in respect of these two issues when commenting on a draft of this Judgment.

Findings: should a proportion of the Trustees' costs of pursuing the application of Taiwanese law be disallowed?

21. My provisional view was that there were good grounds for disallowing the Trustees' costs in relation to Taiwanese law. The Plaintiff submitted:

> "92. *The PTCs were wholly unsuccessful in contending (i) that s 10(2) of the Trusts (Special Provisions) Act 1989 in the form in force when the action was issued did not apply to the proceedings at all because the 2020 amendment had retrospective effect, (ii) that even if s 10(2) did apply, it was irrelevant, meaning Bermuda's common law choice of law rules determined the law governing P's claims and D8's counterclaims; (iii) that Bermuda's common law choice of law rules meant that Taiwan law (and, by way of a late amendment, BVI law) governed; and (iv) that this meant that both Taiwanese and BVI limitation periods applied. These wrong contentions required the parties to:*
>
> > *92.1 Make extensive written and oral submissions on applicable law, including on when amending legislation will have retrospective effect, the proper construction of the 'old' s 10(2), whether Bermuda's common law choice of law rules pointed to BVI, Bermudian or Taiwanese law or some combination thereof, and the proper construction of s 34A of the Limitation Act 1984; and*
> >
> > *92.2 Plead Taiwanese law cases and call and cross-examine expert evidence on the content of Taiwan law.*
>
> *93. Both of these steps were rendered entirely redundant by the Court's finding that Bermudian law applied, and would have been entirely avoided had the PTCs accepted the cases of P and D8 on this point. The PTCs' failure to do so materially increased the cost and length of the proceedings:*

93.1 In total, both experts filed 416 pages of expert reports, accompanied by 2,551 pages of exhibits, all of which had to be translated into English (a further c.2,500 pages).

93.2 Cross-examination of the Taiwan law experts occupied 9 of the 80 days of trial time, and submissions on applicable law and the content of Taiwan law occupied approximately 550 pages of the transcript – i.e. approximately 10% of the total time spent on submissions and the equivalent of 2.5 days. Applicable law and Taiwan law therefore consumed approximately 15% of the trial time, and that is without taking account of the cross-examination of factual witnesses directed at whether Mr Hung held the BVI Holding Companies pursuant to Taiwanese or BVI law arrangements.

93.3 In total, the parties made 486 pages of written submissions on applicable law and Taiwanese law. Strikingly, applicable law and Taiwan law occupied approximately 23% of each of P's and D8's closings, 15% of the PTCs' closings and 20% of D5's closings (being 21% of the total written closings).

93.4 Applicable law (61 pages) and the content of Taiwanese law (35 pages) accounted for approximately 20% of the Judgment.

93.5 It is obvious from the foregoing that a very considerable amount of both legal teams' preparation time was spent on applicable law and the content of Taiwan law. It is equally plain from both the complexity of those issues and the volume of written evidence and submissions that they occupied even more preparation time than the time spent on them orally at trial might indicate.

94. It is no answer that some of this time could have been saved had P and D8 maintained their primary position that Bermudian law governed but admitted the PTCs' pleaded case on the content of Taiwan law. That is because the Court

found the PTCs' pleaded case on the content of Taiwan law was wrong in material respects…

95. In P's and D8's submission, the PTCs' stance on applicable law was, objectively speaking, unreasonable:

> *95.1 It violated the obvious policy imperatives of s. 10(2) of the 1989 Act which were designed to stop international trust litigation of this nature in Bermuda being diverted into wasteful mini-trials on foreign law. When a litigant insists on the doing the very thing which the legislature has told him not to, surely he must answer in costs. Indeed, these kinds of issues were explicitly raised by P in his closing submissions: 'The vigorous arguments and satellite litigation in this case about which foreign law is applied (and what that foreign law says, consuming days of court time) further underscore what the legislature in 1989 was seeking to avoid by creating a simplified statutory scheme which aligns the approach of the Hague Convention to the governing law of the trust with the law governing dispositions of property into trust, subject to narrow and appropriate derogations…' [emphasis added]. The stance of the PTCs was particularly surprising given it was they (objectively speaking) who stood before the court as Bermudian corporate trustees seeking to uphold trusts governed by Bermuda law, the parties who normally are the first to say that Bermudian law applies; instead they contended that everything, save the invalidity claims, was about Taiwan.*
>
> *95.2 Many aspects of the PTCs' case on governing law were always bound to fail, for example:*
>
> > *(a) Their case that the 2020 amendment had retrospective effect: as the Court found at para 343 …, 'I regard it as trite law that legal proceedings are not impacted by changes in the law unless it is clear that Parliament intends the legislation to have such an*

effect. I accordingly reject the Trustees' following analysis in their Closing Submissions which effectively advances the heretical proposition that Parliament should be presumed to have intended the 2020 Act to have retrospective effect […]'. Likely recognising this, at trial the PTCs did not advance the argument 'with much conviction': at para 341 …, although P and D8 nevertheless had to prepare thoroughly and advance submissions on this point.

(b) Their case that the old s 10(2) only dealt with capacity in the narrow sense (so did not apply to P's and D8's claims): as the Court found at para 334 …, s 10(2)'s own sub-paragraphs 'make it clear' that s 10(2)) applies 'to questions relating to dispositions to trusts governed by Bermuda law'.

(c) The governing law issues were straightforward even at common law because BVI law applied. The PTCs' case that the lex situs namely BVI law did not govern the wrongful transfer claims was contrary to the 'accepted legal view', as the Court observed at paras 355–359…

(d) The PTCs also changed their case on this topic shortly prior to trial: having previously contended that Taiwan law alone governed the wrongful transfer claims, on 11 March 2021 they amended to plead that Taiwan and BVI law governed: see e.g. para 158…

(e) Their case that the limitation periods of two foreign legal systems, namely BVI and Taiwan, applied: s 34A of the Limitation Act 1984, on its face and in terms, plainly only provides for the limitation periods of two systems of law to apply exceptionally, where one of those systems is Bermudian law - Judgment para 682…"

22. D8 submitted essentially:

> "*22. In summary, the Taiwanese Law Case was a wholly unnecessary and wasteful diversion at trial which should never have been pursued. Dealing with that case, and the satellite issues which it generated, consumed very substantial resources from both the parties and the Court. In all the circumstances, Tony submits that it is clearly appropriate for the Court to order that his costs of and caused by dealing with the Taiwanese Law Case be paid by the PTCs. Alternatively, the Court is invited to reduce overall costs awarded to the PTCs (and the other defendants who relied upon the same case): in all the circumstances, Tony submits that a reduction of 20% of his costs liability to the PTCs would be a fair and appropriate outcome.*"

23. The Trustees most significantly submitted as follows:

> "*50. There is simply no basis for the adoption of an issue-based approach to costs orders on the facts of this case which could result in the payment of Winston's and Tony's costs, or the non-recovery by the First Four Trustees of their costs, in relation to those issues. Neither the issue of whether Winston's and Tony's claims were governed by Taiwanese law nor the question of whether the Statute of Frauds forms part of the law of the British Virgin Islands were unreasonably or improperly raised by the Trustees.*
>
> *51. On the question of governing law, this was ultimately, in the Court's eyes, a finely balanced issue. For example:*
>
> > *51.1. In relation to section 10(1) of the 1989 Act (as amended), the Court noted that 'it was initially swayed by but ultimately decline to accept' the Trustees' construction (paragraph 326 of the Judgment…*

51.2. In relation to section 10(2), the Court took the view that 'both sides were wrong to the extent that they posited an either/or construction analysis' (paragraph 332(c) of the Judgment…

51.3. The Court took the view that '[i]f the relevant choice of law issue at common law was required to be characterised as an issue relating to the relationship between Mr Hung and the Founders, rather than a question relating to the validity of the transfer of the BVI shares from the legal titleholders to the Trustees, I would accept that Taiwanese law applies as the law most closely connected with that trust or sub-nomineeship relationship' (paragraph 362 of the Judgment…)."

24. It is clear that:

(a) the Trustees' applicable laws arguments were not ultimately essential to their defence of the want of authority claims in that, even though their case on applicable laws was rejected, they succeeded based on my primary findings on factual grounds despite the application of Bermuda or BVI law;

(b) although the construction of section 10 of the 1989 Act was not entirely straightforward, the factual basis for the mistake claims was always weighted in the Trustees' favour because there was no direct evidence that the Founders were mistaken in a material sense. The Trustees' position that, in effect, the validity of the Trusts should be determined by the application of a foreign law seemed counterintuitive having regard to the policy underpinning section 10 of the 1989 Act and the entirely orthodox interpretation accepted by the Court in light of similar clauses in other jurisdictions. The governing law issue does at first blush seem to represent a case of leaving "no stone unturned" because, admittedly with the benefit of hindsight, the Trustees' case on governing law was rejected but they still won overall (and even where they lost I found that Taiwanese law would have made no difference);

(c) the main tactical advantage offered by Taiwanese law was shorter limitation periods and (as regards the Hung Arrangement), the non-recognition of beneficial interests under Taiwanese law, but these advantages would only have been impactful if the Trustees' on-paper-stronger factual case had been rejected;

(d) a significant amount of time and costs were expended by the Trustees on an issue upon which they lost, perhaps between 10-15% of the Trustees' total costs but not as much as 20%, the high point which the Plaintiff and D8 contended for. I accept Mr Adkin QC's submission that a significant amount of costs would likely be attributable to discovery and proofing factual witnesses so that the percentage of time spent on Taiwanese law at trial is likely to be far larger than the percentage of pre-trial costs and, accordingly, the Trustees' costs overall. Nonetheless, the trial was significantly lengthened as a result;

(e) in a large case where it is obvious (without formal evidence) that a small percentage of time on an issue has generated a substantial amount of costs, greater weight may be given to the quantum of costs involved even though the percentage is small;

(f) the above considerations should also be viewed in the wider context of the fact that the litigation generally was conducted on a "leave no stone unturned" basis, influenced quite obviously by the fact that the underlying dispute was a family one and the Trustees' human instructing agents were understandably very emotionally invested in fulfilling the Founders' wishes as they understood them to be. The Trusts are purpose trusts, lacking the usual litigation costs constraining imperative of preserving the trust fund for discretionary beneficiaries. The Trustees' case was not being advanced by independent professional trustees but entities controlled by partisan relatives in a family dispute. There is no basis for assuming that a careful appraisal of the proportionality of pursuing the point was ever carried out although there is no reason to doubt that an assessment of how arguable was the point was carried out.

25. On balance, I find that the Trustees' costs in relation to the applicable laws issue and Taiwanese law should be disallowed on the grounds that the issue was (objectively viewed) unnecessarily pursued and that "*consideration of those issues has occupied a material amount of hearing time*" and has "*led to the incurring of significant expense*": *Seepersad v Persad* [2004] UKPC 19 (per Lord Carswell). Doing rough and ready justice with a view to avoiding the costs of taxation on this issue, I would estimate a just percentage discount at 10% of the Trustees' total costs, appreciating that I am probably to some extent erring in favour of the Plaintiff and D8.

Findings: should a proportion of the Trustees' costs of disputing the application of Statute of Frauds as part of BVI law be disallowed?

26. The Statute of Frauds point can be dealt with more shortly. Here, the issue was whether certain dispositions not evidenced in writing were void for failing to comply with the Statute of Frauds. Two sub-issues were (a) whether the Statute of Frauds applied at all (whether the Statute was received into BVI law at common law based on expert historical evidence) and (b) if it was received into BVI law, whether the transfer of the Founders' ultimate beneficial ownership interest to the First Four Purpose Trusts had to be in writing at all. The Trustees won the main issue, winning sub-issue (b) while losing sub-issue (a). My provisional view was that there was no basis for concluding that the Trustees ought not to have contested such an esoteric and obscure point as to whether the Statute of Frauds had been received into BVI law at common law, even though the costs of deciding that issue were far greater than the comparatively short point of law which was decisive in the final analysis. After all, it was the Plaintiff and D8, not the Trustees, who raised a point which depended upon their establishing sub-issue (a) through expert historical evidence. Absent that evidence, there was no clear jurisprudential basis for establishing this crucial limb of the Statute of Frauds claim.

27. In a perfect litigation world, the Plaintiff and D8 might have invited the Trustees to concede the application of the Statute of Frauds point on the grounds that the costs of litigating it would be disproportionate and to simply determine the case on the basis of the point of law alone. Had such an invitation been made and refused it would have laid a stronger foundation for disallowing the Trustees' costs. However it would have been a somewhat odd invitation for the Plaintiff and D8 to make in circumstances where it would have been

obvious that the costs in relation to BVI history would have been a very small percentage of the costs overall and there were no clear merits grounds for suggesting that the Plaintiff and D8 would prevail. Mr Adkin QC in oral argument rightly queried whether what is obviously a sub-issue was a separate question at all in the requisite sense. He further pointed out that the BVI history experts occupied one day and the topic took up some 3% of the transcript.

28. Mr Hagen QC raised the interesting argument that if the issue had been referred to the BVI Court to determine, the costs would clearly be treated as attributable to a freestanding issue. Assuming that point to be correct, it still does not justify ignoring the more important point that it is incumbent upon the Plaintiff and D8 to show that it was unreasonable in the requisite Order 62 rule 10 sense for the costs of that issue to be disallowed in circumstances where the Trustees succeeded on the claim overall. No grounds justifying arriving at the conclusion that the Trustees ought to have conceded this point have been (or could credibly be) advanced. Further and in any event, I find that the costs have not to a sufficiently material extent been expended on this obscure point which the Plaintiff and D8 in the event won.

Findings: should the Trustees' costs in relation to the Oral Mandate and Oral Assent be disallowed?

29. D8's counsel submitted:

> "***The Oral Mandate and the Oral Assent***
>
> *23. It is convenient to deal with these issues together as they are effectively analogous. The Court will recall that, pursuant to their Amended Defence and Counterclaim, the PTCs introduced – through what appeared to be something of an afterthought as part of a very late amendment – two alternative and free-standing bases for upholding the validity of the transfers of the assets into the Ocean View Trust (at §133.3 of their Amended Defence and Counterclaim): the alleged oral approval of the transfers by YT 'in 2011' (the alleged Oral Assent) and an alleged oral mandate given by YT to William 'in or around October 2010'.*

24. Both of those issues were entirely discrete from the other issues in the case and generated their own factual enquiries, resulting in significant evidence being produced and a considerable amount of Court time being taken up with submissions in relation to them. This is illustrated by the following:

a. Substantial (discrete) sections of the PTCs' and Tony's written closing submissions were exclusively devoted to these issues: see pages 247-285 of Tony's written closing submissions; and pages 310-328 of the PTCs' written closing submissions.

b. A significant amount of time was taken up in cross-examining, in particular, Wilfred, Sarah and Mr Jao in relation to these issues. In addition, these issues generated a further significant substantive issue of law in respect of the (in)admissibility of second-hand hearsay – on which the PTCs' case substantially depended – as a matter of Bermudian law.

c. Some 15 pages of the Judgment were occupied with these issues.

25. In the event, the Oral Assent Case and the Oral Mandate Case were comprehensively rejected by the Court. In respect of the former, the Judgment stated (at §571): 'I find that there is no credible evidence that YT gave Mr Hung sufficient oral authority in 2011 to validly transfer the shares in Chindwell BVI and Vanson BVI to the yet to be created Ocean View Trust' (emphasis added). In respect of the former, the Judgment concluded (at §563) that the PTCs' case depended on a 'strained interpretation' of the Note of the Oral Mandate and (at §564-565) that the PTCs' case was 'inherently improbable' on several levels. The Judgment also observed that both cases 'seemed to provide very feeble freestanding support for the Trustees' authority defence' and characterised as 'bold' the PTCs' pursuit of that case (at §558). The Judgment further concluded that the Oral Assent Case and the Oral Mandate Case were contradicted by the PTCs' evidence and case on other issue (at §571). Moreover, the Judgment

concluded that the PTCs' own evidence in respect of the alleged Oral Assent 'does not remotely sound like authority to carry out a specific transfer at all' (at §573).

26. In summary, the Oral Assent Case and the Oral Mandate Case were always fundamentally flawed and were apparently thrown into the mix by the PTCs at a late stage either to muddy the waters or to bolster what the PTCs perceived to be a vulnerability in their case. The effect (if not the intention) was to divert a significant portion of Tony's legal resources towards dealing with those issues. This is a classic case for which an issue-based costs order against the Sixth Defendant is appropriate. Alternatively, Tony respectfully invites the Court to apply a 10% reduction to the PTCs' costs of the Ocean View Claims for which Tony would otherwise be liable."

30. The Trustees' counsel most significantly responded as follows:

"*64. Ocean View PTC's case on those two issues was entirely reasonable and did not materially add to the length of the trial.*

65. Further and in any event, the two issues in respect of which Tony seeks his costs were in fact found by the Court to be relevant to Ocean View PTC's successful case that YT Wang had capacity when he executed the Power of Attorney in October 2012."

31. My provisional view was that the late raising of these marginally arguable defences was somewhat unreasonable but that this did not materially add to the costs burden in any event. However, on reflection, the alternative point advanced by the Trustees significantly mitigates any unreasonableness in relying on the Oral Mandate and Oral Assent as freestanding bases of authority for the transfer of YT's share of the assets transferred to the Ocean View Trust as Mr Adkin QC argued. The attention given to these issues at trial (which surely would not amount to more than 2% of the Trustees' costs overall) was not wasted altogether as my analysis of the contents of and circumstances in which the Oral

Mandate and Oral Assent were given supported the conclusions I reached in relation to the capacity issue in relation to the Power of Attorney.

32. I accordingly find there is no basis to disallow any proportion of the Trustees' costs in this respect.

Costs: guidance to the Taxing Master: the Plaintiff's costs and overlapping issues

33. Mr Hagen QC argued that it was necessary for the Plaintiff to explore the hinterland behind the Plaintiff's successful Ocean View Trust claim and invited the Court to confirm for the benefit of the Registrar and Taxing Master that the following issues were common issues straddling the successful Ocean View Trust claim and the unsuccessful want of authority claims against the First Four Purpose Trusts (D1-4):

    (a) "*the nature and proper law of the arrangement between YC Wang, YT Wang and Mr Hung in respect of the shares transferred into the Purpose Trusts, including upon the death of one of YC Wang or YT Wang*";

    (b) "*the governing law of P's cause of action and associated expert evidence on the law of Taiwan*";

    (c) "*the control of the administration of the Purpose Trusts*".

34. I declined in the course of the hearing to give the requested guidance, in large part because I was not satisfied that this was a comprehensive list of issues. Mr Adkin QC objected to any attempt by the Plaintiff to recover all of his costs on these issues in relation to which he had primarily lost. As I indicated in the course of the hearing, the most guidance I am prepared to give to the Taxing Master is that as a matter of principle the Plaintiff is entitled to recover a proportional share of the costs incurred in relation to any issues which were common to the Plaintiff's want of authority claims advanced against both D1-4 (unsuccessfully) and D6 (successfully). It is common ground that the Plaintiff should be awarded his costs of his successful claim, and there is no discernible basis for disallowing

any portion of those costs altogether because the relevant expense was not solely and exclusively related to his successful claim.

35. Without seeking in any way to fetter the discretion of the Taxing Master, a logical starting assumption would be that as regards any expenditure incurred in relation to advancing the Plaintiff's claims against all five Defendants on the same legal and evidential basis (i.e. common issues), 20% of each common costs item should be attributable to the Plaintiff's successful claim.

Summary

36. For the above reasons the contentious costs issues are resolved as follows:

(a) the Plaintiff and D8's application to be indemnified for the costs of the certainty point under Buckton category 2 is refused;

(b) the Plaintiff and D8's application for issues-based costs orders are refused, save that the Trustees' costs of the applicable laws issues and Taiwanese law are disallowed in the amount of 10% of their total costs. All other applications for deductions are refused.

Dated this 5th day of August 2022

_____

IAN RC KAWALEY

ASSISTANT JUSTICE