

**BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO: BVIHC (COM) 0072 of 2011

**IN THE MATTER OF THE HUGE SURPLUS TRUST
AND IN THE MATTER OF THE TRUSTEE ACT (AS AMENDED)
AND IN THE MATTER OF THE TRUSTEES' RELIEF ACT**

EQUITY TRUSTEE LIMITED

Claimant/Respondent

and

**(1) YANG HSUEH CHI SERENA
(2) MONG SIEN YEE CYNTHIA
(3) MONG TAK YUENG DAVID
(4) MONG WAI YEE VIOLA
(5) MONG TAK FUN STEPHEN
(6) MONG JO YEE JOSEPHINE**

Defendants/Applicants

Appearances: Mrs Shân Warnock-Smith QC and Mr Raymond Davern for the Defendants (other than the Joinder Applicants)
Mr David Brownbill QC and Mr Ian Mann for the Claimant Trustee
Mr Gilead Cooper QC and Ms Arabella di Iorio for the Joinder Applicants

JUDGMENT

[2011, 2, 23 November]

(Appropriate forum – BVI registered trust company as trustee of trust with BVI proper law – trustee seeking directions of the Court as to extent of its powers under the trust deed – original defendants specified beneficiaries of the trust – original defendants all resident in Hong Kong SAR – administration of trust carried out from Hong Kong SAR - underlying trust assets held through BVI registered company – underlying trust assets including businesses carried on in Hong Kong SAR – original defendants issuing claims in Hong Kong SAR seeking declarations that they are true owners of the business assets – whether BVI natural forum – whether BVI appropriate forum – whether BVI proceedings should be stayed – ss 82, 83A Trustee Ordinance considered)

- [1] **Bannister J [Ag]:** This is an application by the six original defendants in this action for declarations that this Territory is not the appropriate forum for the determination of this claim and for a consequential order staying it. The application relies upon appropriateness in the sense of suitability in the interests of all the parties and of justice, but also upon the pendency, so it is said, in the Hong Kong Special Administrative Region ('SAR') of proceedings which are claimed to raise the same issues as those which are raised in these proceedings here in the BVI.

Background

- [2] The Claimant ('the Trustee') is a BVI registered company which is the sole trustee of a settlement known as the Huge Surplus Trust ('the Trust'). The Trust was established by the late Dr William Mong ('Dr Mong') on 20 November 1989. Dr Mong was then married to the first defendant ('Madame Yang'), although she says in an affidavit sworn in support of the stay application that she was unaware that the Trust had been set up until twelve years later, in December 2001. Be that as it may, she, together with her five surviving and now adult children, who are the other original defendants to these proceedings ('the original defendants'), was named in an annexure to the Trust Deed as a specified beneficiary. In the annexure Madame Yang was credited (if that is the right word) with an entitlement to 20% of the fund (valued in early 2010 at some US\$700 million). Her children were similarly credited with specific shares of the remaining 80%. It was common ground that these percentage shares reflect the shareholdings held by the original defendants in a company called Timmerton Co. Inc., Liberia ('Timmerton'), from which, as I understand it, certain of the assets now apparently held by the Trust were (or as the original defendants would have it, were not - or at any rate not validly or effectively) transferred or derived. The assets in question comprise a 50% holding of Shun Hing Holdings Company ('Shun Hing'), which represents the product of a lifetime of exceptionally successful commercial activity on the part of Dr Mong with the assistance of Madame Yang. The Shun Hing holding, together with certain other trust property, not, as I understand it, derived from Timmerton, is indirectly held by a BVI registered company called Huge Surplus Limited ('Huge Surplus'), which is wholly owned by the Trustee.
- [3] Although the annexure appears to credit the six original defendants with fixed and exhaustive proportions of the trust fund, it goes on to provide that they may be joined by further specified

beneficiaries, declared under other provisions of the Trust Deed. So that their 100% entitlement seems, on the face of it, precarious. Notwithstanding that, it is the position of the original defendants that they have indefeasible vested interests in the corpus of the trust fund in the percentages set out in the annexure as it stood when originally executed. Since they further contend that the 50% share in Shun Hing does not form part of the corpus of the trust fund, it must be their further contention they have specific indefeasible vested interests in only those assets of the Trust other than the Shun Hing holding.

- [4] Dr Mong and Madame Yang were divorced on 28 January 2002 and a financial settlement was reached which was embodied in an order of the High Court of the Hong Kong SAR dated 27 September 2002. In 2005 Dr Mong married a lady called Wong Pui Fan, who has been described throughout the proceedings as Helen. I shall refer to her, without intending any disrespect, in the same way. Dr Wong and Helen had a child, Perlie, who is now aged seventeen. I shall call her Perlie. At the outset of this hearing an application was made by Helen and Perlie to be joined as defendants. There being no objection of substance, I made an order directing that they be joined as seventh and eighth defendants and they took part in the hearing through Mr Gilead Cooper QC. There may be difficulties as things proceed over which of the documents in the case they may be permitted to see, the proceedings being bedeviled not only by concerns about secrecy which seem to worry trust lawyers regardless of the nature or value of the information concerned but also by the fact that some of the documents which the parties claim to wish to refer to were disclosed in the Hong Kong divorce proceedings and are thus presently embargoed. I am told that the original defendants are seeking to have that embargo lifted in Hong Kong. Efforts by Helen and Perlie to the same end have, I am also told, been blocked by the original defendants themselves. The result is that mysterious blanks and expungings appear in the hearing bundles,¹ and certain documents, although placed in the bundles, could not be looked at or even mentioned, except in the most oblique terms, for fear, real or imagined, of prejudicing the position of one party or another. I should make clear that, while they may cause problems in the future, these alarms did not interfere with the ability of the Court to reach a conclusion on the merits of the forum issues.

¹ even, astonishingly, in the body of an affidavit

- [5] On 12 April 2001 the Trustee executed a so-called deed of deletion, the purported effect of which was to remove Madame Yang as a beneficiary of the Trust and to delete the percentage references against the names of the other specified beneficiaries listed in the annexure which I have mentioned in paragraph [2] above.
- [6] On 18 May 2009 Dr Mong met with representatives of the Trustee. A minute of that meeting is exhibited to Madame Yang's affidavit and shows that it was the wish of Dr Mong, expressed at that meeting, that the assets of the fund represented by its 50% holding in Shun Hing should be held as to 50% for the second, fourth, fifth and sixth original defendants (the adult female children of Dr Mong and Madame Yang) and as to the other half for Helen (30%) and Perlie (20%).
- [7] Dr Mong died on 21 July 2010.
- [8] On 19 October 2010 Madam Yang, the other five original defendants (her children) and Timmerton issued out of the Registry of the High Court of the Hong Kong SAR a writ marked 'Not for Service out of the Jurisdiction'. The defendants named in the writ were the Trustee and Huge Surplus. The writ has not been served. The time for validity of the writ² has elapsed, but an extension has been granted until 18 April 2012. The writ has no statement of claim endorsed or attached. It states that

'The Plaintiffs' claims as against the 1st and 2nd Defendants relate to assets the subject of trusts held by the 1st and 2nd Defendants in their respective capacities as trustee and representative of The Huge Surplus Trust and/or held by the 1st and 2nd Defendants upon resulting or constructive trusts arising from acts by virtue of which such assets were transferred to the 1st and 2nd Defendants.'

and goes on to claim: (1) declarations as to the beneficial entitlements of the plaintiffs to the Huge Surplus Trust or its assets; (2) accounts and inquiries; (3) delivery up of the assets of the Huge Surplus Trust; (4) all necessary injunctive relief; (5) alternatively damages; and (6), (7) and (8) further or other relief, interest and costs. This anodyne document was sent to Baker & McKenzie in Hong Kong. They had no instructions to accept service. On 25 March 2011 the Trustee issued proceedings here in the BVI seeking directions whether to accept service or whether, if service was

² 12 months

effected, to apply to have it set aside. That claim has been rather left on one side for the moment because on 17 June 2011 the present claim raising the question whether the Trustee had power to make the alterations to the interests of the original defendants under the Trust Deed to which I have referred above was issued. The original defendants voluntarily accepted service, reserving the right to raise the forum question which I now have to decide.

Appropriate forum

[9] This is a BVI trust with a BVI trustee holding the trust property through shares in a BVI registered company. This jurisdiction is accordingly the natural forum for the conduct of these proceedings: see section 82 of the Trustee Act, Cap 82 ('the Act'):

'The Court has jurisdiction where

- (a) The proper law of a trust or a particular aspect of a trust is the law of the Territory;
- (b) The trustee of any trust is resident in the Territory;
- (c) In the case of a corporate trustee of any trust, it is incorporated or registered to do business in the Territory;
- (d) Any trust property is situate in the Territory but only in respect of property so situate;
- (e) The administration of any trust is carried on in the Territory;
- (f) The Court is otherwise the natural forum for the litigation;
- (g) The parties submit to the jurisdiction of the Court; or
- (h) The trust instrument contains a provision referring disputes to the jurisdiction of the Court.'

In **Pasig Ltd v RWC and ors**³ I said that section 82 was a statutory expression of the suitability or appropriateness of the BVI Court for the resolution of disputes falling within the purview of the section, thus incidentally forestalling any argument by a party that some other forum is a more suitable one. It seems to me that section 82 gives a clear steer by indicating that this jurisdiction is the natural forum for the hearing of the present claim. It does not seem to me that that is affected by the fact that section 83A of the Act makes no reference to section 82. The two sections are dealing with quite different things. Rather than decide this application upon my understanding of

³ BVIHC (COM) 24/2010 (unreported) 30 July 2010

the effect of section 82 of the Act, however, I shall proceed independently of section 82 to consider the submissions made to me by Mrs Warnock-Smith QC in support of her argument that Hong Kong is a more appropriate forum, in the sense in which that term is used in **IPOC v LV Finance Group Ltd BVICA**⁴ than the BVI.

- [10] For the original defendants, Mrs Warnock-Smith QC submitted, first, that the existing Hong Kong proceedings raise the same issue as that which is raised in the present proceedings by the Trustee (namely, whether it has power to make the alterations to the Trust Deed, or, more accurately, to the identities of those from time to time entitled under the trust deed and the proportions in which they are entitled). Therefore, she says, it is more appropriate to have that matter dealt with in Hong Kong together with, as she would put it, the issues relating to the ownership of what the Trustee says are, and the original defendants say are not, trust assets. So, she says, the Courts of the Hong Kong SAR are the appropriate forum for trial of the proceedings.
- [11] The flaw in this submission is that there are no pending Hong Kong proceedings. Proceedings are brought into being by the service, not by the mere issue, of process.⁵ It is not the case, therefore, that there are in existence in Hong Kong proceedings having, as it were, priority in terms of time and which would make it more appropriate for the matters raised in the BVI claim to be dealt with in Hong Kong.
- [12] Secondly, the issues of construction raised by the present proceedings are obviously *not* raised by the Hong Kong writ, which asserts a claim to beneficial ownership to assets of the Trust, and seeks no declaration as to the powers of its Trustee. I accept that it might be amended to include such claims, but I do not think that that possibility gets Mrs Warnock-Smith QC any further. The fact remains that there are no proceedings on foot in Hong Kong raising the questions which have been raised by the Trustee here in the BVI.

⁴ Civ App 20/2003 and 1/2004, 19 Sep 2005

⁵ Dicey, Morris & Collins, *The Conflict of Laws*, 14th Ed at para 11-003

- [13] In my judgment, therefore, the suggestion that there are proceedings in Hong Kong raising or capable of being amended to raise the issues raised by the Trustee in these proceedings in the BVI fails on the facts.
- [14] On the question of natural forum, Mrs Warnock-Smith QC relies upon the fact that the Trust is, as a matter of geography, administered out of Hong Kong, where the Trustee's minute book is kept. She relies strongly upon the fact that the Trust Deed contains no choice of forum clause and that the next of kin are defined for its purposes by reference to Hong Kong laws of succession. All those interested in the Trust are resident in Hong Kong. I do not think that these undoubted facts point to Hong Kong being either a more natural or a more appropriate forum than the BVI. Issues about the construction of a BVI trust deed, like issues about the construction of a BVI company's Memorandum and Articles of Association are most naturally and most appropriately dealt with by the BVI Court, just as issues about the construction of an English trust deed or about the Memorandum and Articles of Association of an English registered company are most appropriately dealt with in the High Court in England and Wales. The fact that the beneficiaries of such a trust or the members of such a company may be resident elsewhere than in the BVI or, as the case may be, in England and Wales is, of itself, irrelevant. The fact that the actual administration of this Trust is carried out in Hong Kong seems to me to add nothing. An English trust company, being trustee of an English trust, may delegate day to day administration to its office, or to the office of an associated company, in Jersey. That would not make the English High Court a less appropriate forum than the Royal Court. Nor would the fact that some or even all of the beneficiaries were resident in Monaco make the Courts of the Principality a more appropriate forum in which to resolve questions of the construction of the deed of trust than the English High Court.
- [15] The absence of a choice of forum clause seems to me to be entirely neutral. The *absence* of a choice of forum clause cannot derogate from the fact that the BVI is plainly the natural and appropriate forum for the determination of the questions raised in these proceedings.
- [16] Next, Mrs Warnock-Smith QC says that persons resident in Hong King may need to give evidence as to the factual background against which the Trust was set up as an aid to its construction and that it would be more convenient for such evidence to be taken in the Courts of the Hong Kong

SAR. Accepting, as I think I must, that evidence of factual matrix is admissible as an aid to the construction of the provisions of a trust deed, I cannot see what evidence might throw any light upon the issues which fall to be determined in the present proceedings. They raise questions of construction of the Trustee's powers, not about the identity of the corpus of the trust or of the persons beneficially entitled – topics upon which I can see that evidence about the circumstances surrounding the setting up of a trust might throw light.

[17] In case I am wrong about that, I must go on and consider Mrs Warnock-Smith's submissions about the availability of Madame Yang as a witness. Madame Yang is now aged seventy nine and housebound. She is plainly unable to come to the BVI to give evidence. This fact might have force if there was any reason (on the evidence which has been put before the Court) to think that Madame Yang is in a position to give relevant evidence bearing upon the questions which the Trustee asks the Court to decide. Not only was she unaware, on her own account, of the existence of the Trust until some twelve years after it was created, but in the course of a twenty four page affirmation, written in impeccable English and ranging over (among other things) the principles of agency and of remedial and proprietary estoppel, she says nothing which could conceivably be of assistance in resolving *the issues raised in these proceedings*. That is not, of course, a criticism of Madame Yang (or of anyone else). It is merely that there is nothing to support a submission that she has any relevant evidential contribution to make to the forthcoming debate *in this action*. A defendant who makes a forum challenge relying upon difficulties in the way of attending a trial in the jurisdiction the subject of the challenge⁶ must, in my judgment, show why he or she will be prejudiced if she or he cannot attend. That has not been done in this case. Madame Yang's difficulties with travel, which I accept are real ones, are not, therefore, material to the present application.

[18] Mr Chow might, I suppose, have some contribution to make, although no one has so far identified it. There is, however, no suggestion that he would be unable or unwilling to travel to the BVI or, if necessary, to give whatever relevant evidence he may have on the construction points by videolink. There is no suggestion that any of Madame Yang's now adult children has any evidence

⁶ this is different from the argument often raised in forum challenges that the preponderance of witnesses in some other jurisdiction makes that other jurisdiction the natural forum

that would assist in determining the extent of the Trustee's powers under the Trust Deed to vary beneficial entitlements or that they would face travel difficulties if they did have any.

Conclusion

[19] It is self evident that the Trust has strong links with and connections to the Hong Kong SAR. The question for the Court, however, is whether that makes Hong Kong the natural and more appropriate forum for the trial of issues of the construction of a trust deed governed by BVI law and whose trustee is domiciled in the BVI. In my judgment, despite the persuasive submissions of Mrs Warnock-Smith QC, it does not, for the reasons which I have attempted to set out above. In my view the Courts of the BVI are both the natural and appropriate forum in which to resolve questions about trusts which fall within their supervisory jurisdiction and no good reason has been given, either in the availability of pending alternative proceedings or otherwise, which goes anywhere near justifying staying the present proceedings and making the Trustee start all over again in Hong Kong.

[20] This application is accordingly dismissed.

Commercial Court Judge
23 November 2011