

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

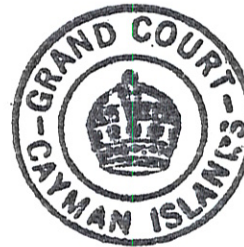
14/11/2007
Henderson
Civil

CAUSE NO. 453 OF 2004

BETWEEN: **HSBC INTERNATIONAL TRUSTEE LIMITED**

AND:

- (1) WONG KIT WAN
- (2) FUNG MEI LIN
- (3) FUNG MEI YEE
- (4) FUNG KWOK KEUNG
- (5) FUNG HON KEUNG
- (6) FUNG KWONG FAT



Defendants

Appearances: Ms. Ziva Robertson of Maples and Calder for the Plaintiff/Trustee
Mr. Carlos de Serpa Pimentel of Appleby for the First, Third and Fourth Defendants
Ms. Cherry Bridges of Ritch & Conolly for the Second Defendant
Mr. George Giglioli of Giglioli & Company for the Fifth Defendant

Before: Hon. Justice Henderson, sitting as a Single Judge of the Court of Appeal

Heard: November 14, 2007

RULING

All of the defendant beneficiaries seek a pre-emptive costs order which would result in payments now from the trust fund to each beneficiary to pay in advance the costs of certain appeals.

The second defendant obtained from Sanderson J. of this court on June 8th, 2007 a direction that the main assets of the trust, the operating companies, be sold. The trustee agrees with and accepts this advice. The first, third and fourth defendants have commenced an appeal from that order which is to be heard next month. If that appeal succeeds, the second defendant will then proceed to appeal an order of the Grand Court that she be removed as a director of those companies and to

appeal a ruling that the sixth defendant, the protector, is entitled to receive remuneration for working as a general manager.

The trust is worth USD 40 - 50 million. Over USD 5 million has already been spent on legal proceedings in the Grand Court.

At least in theory, these are non-hostile proceedings. Pre-emptive costs orders in favour of all parties have been made to cover a number of Grand Court applications.

I start with the proposition, which must be self-evident, that a party's litigation costs may only be reimbursed from a trust if the judge who decides the application is satisfied those costs were incurred for the benefit of the trust itself see: *In Re Beddoe* [1892] B 596. Litigation which may fairly be characterised as "hostile" will not satisfy that test: *Buckton v. Buckton*, [1906] B 1879.

Cases which amount, in substance if not in form, to a dispute over the beneficial ownership of trust property are likely to be treated for costs purposes as hostile litigation: *McDonald v. Horn* [1995] 1 All E.R. 961, C.A.

Indemnification for costs, particularly where the applicant is a beneficiary but not a trustee, is ordinarily ruled upon after the matters in issue have been decided. It is at that juncture that the court is best placed to determine the questions mentioned above. Exceptionally, the Grand Court will make a pre-emptive costs order but only where the court is "sufficiently confident that the case is clearly within the first or second category" of the *Buckton* criteria: See *McDonald v Horn, supra*, at 971 and see *Barclay's Private Bank and Trust v. McLaughlin, et al*, [1998] CILR 313.

When a trust beneficiary who was unsuccessful in the Grand Court seeks a pre-emptive costs order for an appeal in circumstances where the trustee itself does not see the need for one, his burden is formidable indeed. He must satisfy the court that the litigation remains a non-hostile proceeding falling within the *Buckton* first or second category. He must show that obtaining the guidance of the Court of Appeal is in the best interest of the trust and that this is so despite the opinion of the trustee to the contrary. Finally, because he wants a pre-emptive order, he must show a high probability that the panel hearing the appeal would, at the end of the day, come to these same conclusions. (See, generally, *Lewin on Trusts, 17th edition*, paragraph 21-75 and First Supplement thereto.)

I find I cannot grant the requested orders. I am far from satisfied that an appeal in these circumstances is in the best interest of the trust. I have not forgotten that all parties except the trustee have agreed upon a draft order which would provide an award of pre-emptive costs to each party. That cannot displace the obligation of this court to decide this application on established principles, particularly where the trust deed gives the trustee the power to add beneficiaries at its absolute discretion, as it does here. I harbour growing suspicions that this litigation is hostile in substance although not in form. It is impossible to conclude that the panel which hears this appeal will award any of these appellants their costs from the trust on an indemnity basis. My order is that no appellant or prospective appellant is entitled to a pre-emptive costs order.

Somewhat different considerations apply to respondents on appeals and to the trustee itself. The trustee would ordinarily be entitled to its costs from the trust of an appeal upon which it appears as

a respondent. If it requests a pre-emptive costs order in order to seek to uphold the orders under appeal (or even to assist the court in a neutral fashion on the appeal) I expect it would encounter no resistance from this court.

As for the beneficiary respondents, I am not prepared to make any pre-emptive costs orders in their favour today. If the appeal or appeals proceed and if the trustee chooses to seek to uphold the orders under appeal, I think it unlikely that the beneficiaries would receive their costs on a pre-emptive basis. If the trustee does not choose to do that, an application by the respondents for pre-emptive costs may succeed.

The trustee and the respondents shall each have liberty to apply.

Dated this 14th day of November, 2007

Henderson, J.

Henderson, J.
Judge of the Grand Court

