

HONG KONG / JUDGMENT

# RE GEOFFREY CHARLES VOS QC

## COURT

Court of Appeal

## DECIDED

16 February 2007

## CASE / FILE NUMBER

CACV425/2006

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bjbj CACV 425/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 425 OF 2006 (ON APPEAL FROM HCMP NO. 1980 OF 2006)

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BETWEEN IN THE MATTER OF an application by Geoffrey Charles VOS QC to be admitted and enrolled as a Barrister of the High Court of the Hong Kong Special Administrative Region for the purpose of a particular case and IN THE MATTER OF Section 27 of the Legal Practitioners Ordinance Cap 159

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Before: Hon Stuart-Moore VP, Chu and Cheung JJ Date of Hearing: 14 February 2007 Date of Judgment: 14 February 2007 Date of Reasons for Judgment: 16 February 2007 R E A S O N S F O R J U D G M E N T Stuart-Moore, VP (giving the reasons for judgment of the Court): This is an appeal by Mr Geoffrey C. Vos QC (the applicant) against the order made on 17 November 2006 by Rogers VP refusing his application for ad hoc admission as overseas counsel. The applicant had applied by Notice of Motion, dated 27 September 2006, for admission as a barrister under section 27(4) of the Legal Practitioners Ordinance, Cap.

159. This was to enable him to represent Mr Alan Hoo, the appellant in CACV 10/2006 (originally the plaintiff in HCA 3049/2001). The hearing of Mr Hoo s appeal is scheduled to take place in the Court of Appeal on 25 to 27 April 2007. At the conclusion of the hearing on 14 February 2007, we dismissed the appeal. We now give our reasons for so doing. The applicant, who has immense experience in chancery and commercial cases, has on many occasions appeared as leading counsel in matters concerning complex trusts. His application for admission was neither opposed by the Secretary for Justice nor the Hong Kong Bar Association. Rogers VP acknowledged these significant features which provided the background to the application. However, in the exercise of his discretion, he decided that as the facts set out in Chung J s judgment, against whose decision Mr Hoo is appealing, were not particularly complex and as the point of law which is proposed to be argued on appeal

involved reliance being placed on *Pallant v Morgan* [1953] 1 Ch 43 (which was not raised in argument before Chung J), he was unable to see any justification for granting the application. Although, as Rogers VP said, the case involved an analysis of facts and the question of whether a constructive trust exists, in his opinion the circumstances were not such as to warrant the admission of overseas counsel. Rogers VP added that although it had been indicated that this case might eventually find its way to the Court of Final Appeal, not every case heard in that court merited the admission of overseas counsel. Ms Audrey Eu SC, on the applicant's behalf, submitted that while determination of the application was ultimately in the discretion of the court, Rogers VP had erred both in law and in principle having applied the wrong test or guidelines. In particular, it was contended that Rogers VP had placed undue weight on the fact that this was, as he had expressed it: a case which can be perfectly properly handled by Hong Kong counsel and which has been perfectly competently argued up to now. In forming this view, Rogers VP would no doubt have had in mind sentiments such as those stated by Chan CJHC (as he then was) in *Re Flesch* QC and *Anor* [1999] 1 HKLRD 506 at 514, where a flexible and sensible approach was advocated for admission of overseas counsel cases. (See also, *Re McGregor* QC [2003] 3 HKLR 585). At the same time, it has to be remembered, as Chan CJHC went on to say, that: there must be appropriate safeguards, lest this would open a floodgate for overseas counsel who seek to be admitted. In the same judgment (at page 515J 516C), Chan CJHC summarised in eight paragraphs the principles and guidelines relevant to the admission of overseas counsel which he distilled from earlier authority and from the argument he had heard. Among them, paragraphs (5) and (6) stated:

- (5) It is for the court to decide whether an overseas counsel should be admitted or not under s. 27(2) [now section 27(4)]. Hence, even if an application is made by consent, the court must still be satisfied that it is in the public interest to grant the admission. The burden is on the applicant to so satisfy the court. It is therefore important that in every application for admission, all the relevant materials must be placed before the court even if there is no objection from the Department of Justice and the Bar Association;
- (6) The burden of showing why it is in the public interest for an overseas counsel to be admitted for the purpose of a particular case can also be discharged if it can be shown that: (a) the case may involve the determination, possibly by the Court of Final Appeal, of some legal principles which may have an impact on the development of local jurisprudence; and (b) the applicant is a counsel of sufficiently high quality and standing to handle that particular case; It was pointed out to us, in the written submissions presented by Ms Eu, that Ma JA (as he then was) had provided further guidance in *Re McGregor* QC (above). So far as this is relevant to the present proceedings, Ma JA said (at 589I 590B):

11. It is unnecessary to go through all the relevant principles governing the exercise of the court's approach in such applications. They are on the whole contained in cases like *Re Flesch QC* [1999] 1 HKLRD 506 (which updated to the modern context *Re Coles QC* [1985] HKLR 480 and *Re Goldblatt QC* [1985] HKLR 484). I do not intend to repeat the various aspects of the court's approach as set out in that case and other cases but would emphasise the following:
- (1) In analysing the issues in the relevant case for which the admission of overseas counsel is sought, the court must ask itself the question whether the determination of such issues would also involve the determination of principles which might impact substantially on the development of Hong Kong law. This is of course not the sole question but it is an important one. If the case is one where the ventilation of arguments on important legal principles is likely to end up in the Court of Final Appeal, this is a very powerful factor in favour of admission. In *Re Flesch QC*, Chan CJHC at p.514A used the phrase likely to go all the way up to the Court of Final Appeal for a determination of some principles of law. I do not disagree with this but wish to make it clear that it is merely illustrative of the exercise carried out by the court that I have just referred to, namely, the identification of cases involving the determination of legal principles which might substantially impact on Hong Kong law. Later (at 591I-592A) Ma JA said:
- (4) The court must be prepared to adopt a flexible approach to admissions and not treat what is said in *Re Flesch QC* and other cases as anything more than guidelines. The applicability (or inapplicability) in any given case of the guidelines enumerated in these cases, while obviously a matter of significant (and in some cases, decisive) weight, is nevertheless subject to the court's overall discretion in looking at the whole of the circumstances and may involve a balancing exercise between sometimes conflicting factors. Such flexibility must be the right approach where the court is required to consider as the paramount consideration, the public interest. Ms Eu argued that the *Pallant v Morgan* equity or constructive trust point, which is now hoped to be raised as an additional and alternative ground on behalf of Mr Hoo at his forthcoming appeal, concerned difficult and complex issues. Their resolution, she submitted, would involve determination of principles which might impact substantially on the development of Hong Kong law, and she contended that this was where the specialist overseas counsel can add a significant dimension to a very complex or difficult case. Ms Eu submitted that the very fact that experienced and competent local counsel who had acted for Mr Hoo at trial had not spotted the point, and hence had failed to put Mr Hoo's case on that additional and alternative footing, demonstrated the contribution that a specialist London silk such as the applicant could make to local jurisprudence in the upcoming appeal. We do not know why counsel did not run the trust point in the court below and we do not propose to speculate. Whether the point can at this late stage be run on appeal is not for this court to say. However, we take the view that the particular type of constructive trust envisaged by the decision in *Pallant v Morgan* (above) and in *Banner Homes Group Plc v Luff Developments Limited* [2000] Ch 372 is only applicable to factual situations falling within a very narrow compass. This explains why, in our view, cases to which the proposed trust argument will apply, or will be potentially applicable, are rare and why the point, being

one which is relatively obscure, could be missed. Furthermore, it does not necessarily follow that, after the point s (potential) significance in a particular case has been noticed, its application to the facts will be difficult. The relevant principles of law involved in establishing the trust are clearly set out in Chadwick LJ s judgment in the Banner Homes case (above) at pp 397F/G to 399D. Ms Eu did not submit that those principles were controversial or difficult to apply. She merely stated that the categories of cases falling within the trust were not closed although she did not tell us how the present case would or even might involve the creation of a new category or the expansion of an existing one. In any event, on the materials before us, it would appear that any difficulty that might be encountered in the appeal will probably arise from the factual matrix of the case rather than from any complex principles of law. The decision to which Rogers VP came is one that was within his discretion to make. We can see no ground for disturbing the way he exercised his discretion. We were indebted to Mr Edward Chan SC for the Hong Kong Bar Association and to Mr Louie Wong on behalf of the Secretary for Justice for their most helpful contributions to the argument. We should add, in this regard, that we did not consider this to be an appropriate case in which to provide, as Mr Chan had requested, further guidelines as to the admission of overseas counsel even assuming that such are necessary. For the reasons we have given, the appeal was dismissed. (M. Stuart-Moore) Vice-President (Carlye Chu) Judge of the Court of First Instance (A. Cheung) Judge of the Court of First Instance Ms Audrey Eu, SC and Mr Jeremy S K Chan, instructed by Messrs J Chan, Yip, So & Partners, for the Applicant. Mr Edward Chan SC and Mr Bernard Mak, instructed by Messrs T S Tong & Co., for the Hong Kong Bar Association. Mr Louie Wong, SGC, of the Department of Justice, for the Secretary for Justice. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk "0 "0 i\$&`G Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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