
CANADA / JUDGMENT

Tang v. Cheng

2020 BCSC 908

COURT

Supreme Court of British Columbia

DECIDED

26 May 2020

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2020 BCSC 908 Tang v. Cheng

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tang v. Cheng,

2020 BCSC 908

Date: 20200526

Docket: E193003

Registry: Vancouver

Between:

Bin Bin Tang

Claimant

And

Wei Cheng

Respondent

Before: The Honourable Madam Justice Fleming

Oral Reasons for Judgment

(via teleconference)

Counsel for Claimant:

J. Kang

Counsel for Respondent:

R.W. Evans

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 25, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 26, 2020

- [1] THE COURT: The claimant, Bin Bin Tang, applies for an order "declaring" this Court will exercise jurisdiction over all issues in this family law proceeding, relying on Rule 18-2 of the Supreme Court Family Rules, and with reference to s. 106 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] and s. 11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA].
- [2] Ms. Tang's notice of family claim includes claims for spousal support and an unequal division of family property and debt with respect to a real property located on Andover Place in West Vancouver and all worldwide assets held by the respondent, Wei Cheng, except for property that has been dealt with in a Chinese divorce proceeding.
- [3] Mr. Cheng asks that this family law proceeding be stayed, taking the position this Court should decline to exercise its jurisdiction in favour of China.
- [4] Ms. Tang's application is brought pursuant to the request for urgent hearings process established in response to the reduction in the court's regular operations due to COVID-19. The application was approved for urgent hearing based on Ms. Tang's assertion she had an urgent need for spousal support.
- [5] The application was heard by telephone based on an application record that includes in the main, four affidavits of Ms. Tang, the most recent made May 5, 2020, and also including her Form F8 financial statement made December 9, 2019, an affidavit of law from Chinese lawyer Yukang Lai, the affidavit of a legal assistant attaching a partial translation of the judgment of the trial court in China issued December 25, 2019, and an affidavit from Mr. Cheng made May 20, 2020.

Overview

- [6] The parties married in China on December 7, 1991, and separated in October 2015. They have one adult child, a son, born June 27, 1994.

- [7] During the marriage, they accumulated assets with an approximate value, according to Ms. Tang, of \$100 million. Mr. Cheng estimates their value at \$40 to \$48 million. Almost all of the assets are located in China, excepting the real property located on Andover Place and accounts located in Hong Kong and Canada.
- [8] Before the marriage and up to 2007, Ms. Tang worked in a senior position with what she identifies as the Ministry of Supervision of the People's Republic of China, Central Commission for Discipline Inspection of the Communist Party of China. Mr. Cheng describes her position as Deputy Chief of the Chinese Communist Party.
- [9] In 2007, Ms. Tang and their son immigrated to Canada and he completed secondary school in Vancouver. Ms. Tang became a Canadian citizen.
- [10] The parties appear to dispute where she lived from 2012 until 2014. Ms. Tang describes helping Mr. Cheng here during his visits to Vancouver, with daily living and to explore Canadian business opportunities. Mr. Cheng states that Ms. Tang returned to China in 2012 after their son left Vancouver to study in New York. Ms. Tang deposes that since around 2014, she has been living at Andover Place after overseeing the construction of a new house there from 2012 to 2014.
- [11] Ms. Tang relies upon the 2019 property assessment which shows that property has a value of \$4,605,000. In November 2019, Ms. Tang deposed to an outstanding mortgage balance of approximately \$822,000. Mr. Cheng states the 2020 property assessment, which he does not attach, shows a value of \$3,986,000, and the outstanding mortgage balance is now \$800,000.
- [12] Mr. Cheng deposes that Ms. Tang shared a residence with him in a building complex located in Nantong City, China, when they separated in 2015 and since then she has been living with her family in the same complex. Identifying their son as the source of the information, Mr. Cheng states Ms. Tang has only visited Vancouver for one or two months each year since the separation.
- [13] In her most recent affidavit, Ms. Tang deposes that she has been regularly residing in Vancouver since 2012, and she wishes to continue doing so, but she is "stranded in China" at the moment because she does not have the resources to live here unless she can obtain financial relief from Mr. Cheng.
- [14] Since 2016, the parties have been involved in litigation in China. In January 2016, Ms. Tang filed a divorce proceeding, which was dismissed because of the prospect of reconciliation.
- [15] In October 2016 she filed a second divorce proceeding seeking a divorce, and a division of property in China only.

- [16] She deposes that in 2017, she discovered Mr. Cheng had been involved in a long-term relationship with another woman with whom he had two children and he used family assets to provide her and the children with a luxurious lifestyle. In response, Ms. Tang added a claim in the second divorce proceeding seeking compensation for mental damages of \$10,000 and marital damages of \$400,000. Ms. Tang also filed a civil proceeding against Mr. Cheng.
- [17] Mr. Cheng deposes the parties attended four days of trial in January and April 2017 and July and November 2019, as well as many days of negotiations during that same period with respect to the second divorce proceeding. He acknowledges that during that proceeding he agreed the Chinese court would not deal with the non-Chinese assets. On November 4, 2019, however, he applied to set aside the agreement.
- [18] A few days earlier, on November 1, 2019, Ms. Tang obtained a Mareva injunction from a Hong Kong court with respect to Mr. Cheng's known bank accounts there.
- [19] On November 8, 2019, she filed her notice of family claim. That same day, this court granted a restraining order pursuant to s. 91 of the FLA.
- [20] In addition to claims for spousal support and property division, the notice of family claim seeks a number of orders set out in schedule 5.
- [21] The Chinese court released its trial judgment on December 25, 2019. Thirty three pages long, Ms. Tang deposes it would cost too much to translate the entire decision. She summarizes the judgment as including: the divorce is granted; within 10 days of the judgment taking effect, Mr. Cheng will pay her RMB \$30,000 (about \$6,000 Canadian) as compensation for mental distress; she is entitled to 43 properties, Mr. Cheng is entitled to four, and the balance in seven of his bank accounts, as well as chattels at his residence; with 10 days of the judgment taking effect, Ms. Tang will repay the debt owing to the Bank of China secured against the particular property in one lump sum; within 10 days of the judgment taking effect, Mr. Cheng will pay her RMB \$14.97 million (about \$3 million Canadian).
- [22] Regarding property division, Ms. Tang specifies the Chinese court divided the disclosed real properties and bank accounts 70% in her favour based on a finding Mr. Cheng had fraudulently transferred away or dissipated at least \$15.5 million and committed adultery. She also specifies that the Chinese court denied his application to deal with the West Vancouver property and Mr. Cheng's "savings" in Canada because the parties had agreed the Chinese court would not do so and it was not open to him to change his position when he did.
- [23] Ms. Tang's summary of the judgment appears to accord with the translated portions, which include the court's reasons for the unequal division.

- [24] Mr. Cheng also deposes that the Chinese court reapportioned the Chinese family property largely in favour of Ms. Tang. He states she received approximately \$42 million whereas he received less than \$1 million, estimating her share at approximately 97% of the remaining net assets.
- [25] Mr. Cheng further states that the Chinese court considered both parties financially independent in China, and the fact that she can receive a pension and salary from the family companies.
- [26] On January 8, 2020, Mr. Cheng appealed the trial judgment. He does not appear to dispute Ms. Tang's description of the grounds for appeal. In addition to challenging the trial court's refusal to set aside their agreement regarding non-Chinese assets and requiring him to compensate her, he asserts the unequal division is wrong and the joint property should be divided equally. He also asserts some findings are wrong and constitute an abuse of process, including the finding he cohabitated with a third party and concealed and dissipated joint family assets, along with other grounds.
- [27] On February 7, 2020, Mr. Cheng filed a response to family claim in this Court, disagreeing with Ms. Tang's claims and all of the orders she sought in Schedule 5 of her notice of family claim. He also filed a counterclaim for spousal support and an unequal division of family property and debt, in relation to the same properties she identified in the notice of family claim, based on the Chinese trial judgment, along with other orders.
- [28] On that same day, Mr. Cheng filed a jurisdictional response that states this Court ought not to exercise its jurisdiction over him.
- [29] In early April 2020, the parties settled the Chinese civil action, agreeing that Mr. Cheng would pay Ms. Tang \$800,000 at the end of the family proceeding in China.
- [30] Regarding their current circumstances, Ms. Tang deposes that since the trial judgment Mr. Cheng has continued to control all of their assets and the income generated by their companies and rental properties which flows into his accounts. She receives nothing, and her personal account and their joint account listed in her Form F8 are all nearly drained.
- [31] Ms. Tang describes her debts as growing, the most significant debts being outstanding legal fees and debts owed to family members. She also deposes that she paid the mortgage on Andover Place after separation and until recently when Mr. Cheng recently took over. Her mortgage agent has advised her he has successfully applied to postpone the payment for six months.
- [32] A legal assistant to Ms. Tang's counsel deposes that Ms. Tang advised her she was hospitalized on April 24, 2020, due to acute pain from displaced lumbar discs, underwent surgery and was released on May 3, 2020. Attached to the affidavit is a copy of a photograph of a hospital wristband which the legal assistant states displays Ms. Tang's name. I note that in her affidavit made March 3, 2020, Ms. Tang states that she has several medical conditions that result in daily pain in her stomach, liver, kidney and hips. She attaches an untranslated

medical report that apparently sets out several medical diagnoses. According to Ms. Tang, those diagnoses include lumbar disk herniation.

- [33] In the same affidavit, Ms. Tang states that she is too old to qualify for jobs, especially in China, where the mandatory retirement age is 50. Stating she is 52, she also asserts she has been out of the workforce for three decades, despite her other evidence she worked until 2007.
- [34] Mr. Cheng denies that Ms. Tang is in urgent need because her family is wealthy and well-connected. He asserts she receives a salary from the family business, as does he, of RMB \$10,000 per month plus benefits that include health coverage. He also states that he understands Ms. Tang may apply to the Chinese court for immediate financial relief if needed, which is hearsay evidence not based on information and belief. Noting Ms. Tang did not claim economic hardship during the trial, he deposes she has enjoyed a comfortable life in China.
- [35] The affidavit of Chinese lawyer Mr. Lai includes opinion evidence about Chinese law that addresses four questions or issues:
- 1) Does the Chinese trial judgment have effect now while the appeal is going on?
 - 2) A rough estimate of how long the appeal will take.;
 - 3) How likely is it that the Chinese appeal court will decide to take jurisdiction over the Vancouver property and other overseas properties, such as funds in Hong Kong?
 - 4) Is Ms. Tang entitled to apply for spousal support?
- [36] I summarize his evidence as follows:
- 1) In general the judgment of first instance does not take effect if one of the parties appeals within the appeal period of 15 days. Here the appeal was brought more than 15 days after the trial judgment was made, but Mr. Lai indicates he is not sure when Mr. Cheng received the judgment. He also sets out legal provisions that speak to the right to appeal within 15 days of being served with a written judgment, and there is no indication the appeal court is not proceeding with the appeal.
 - 2) Mr. Lai states it is hard to predict how long the appeal will last, since "foreign elements" are involved. For example, Ms. Tang is a Canadian citizen and some documents may require translation. He also writes that it is common for appeal decisions to take one year or longer.
 - 3) Mr. Lai expresses the view the appeal court will not decide on overseas properties (non-Chinese) unless the parties were to agree, but even when litigants do agree, the courts are usually unwilling to divide overseas properties for a range of practical reasons.
 - 4) Mr. Lai writes that Ms. Tang is not entitled to apply for spousal support under Chinese law. He explains that spouses have a duty to support each other during marriage and if at the time of divorce a spouse is having difficulty supporting his or herself, the other is required to

render "appropriate help." Generally, appropriate help means assistance that guarantees the most basic survival. Noting Ms. Tang did not ask for appropriate help, he adds this kind of help is not based on the spouses' sacrifices, and it is not compensation. Mr. Lai identifies one exception that does not apply in this case. He also explains the court will divide assets in favour of the children and wife, although the objective is to ensure the basic living standard, instead of the marital standard of living. Finally, he writes the party not at fault is entitled to claim compensation for material damages and mental damages, both of which Ms. Tang sought, but only mental damages were awarded.

Issue

[37] Mr. Cheng does not dispute that this Court has jurisdiction or territorial competence over any aspect of the family law proceeding brought by Ms. Tang. Instead, his jurisdictional response requires me to determine whether I should decline to exercise that jurisdiction. In doing so, I must decide whether there is a more appropriate forum, which involves what is sometimes referred to as the forum non conveniens analysis. There is no dispute the burden rests on Mr. Cheng as the party asserting China is the more appropriate forum.

Legal Framework

[38] Mr. Cheng argues Ms. Tang's property division claim is subject to the jurisdictional provisions found in Part 6 of the FLA, which include in relevant part:

106 (1) This section applies if an order respecting property division, respecting the same spouses, may be made in more than one jurisdiction.

- (2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:
 - (a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;
 - (b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;
 - (c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;
 - (d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.
- (3) For the purposes of subsection (2) (d), a real and substantial connection is presumed to exist if one or more of the following apply:
 - (a) property that is the subject of the proceeding is located in British Columbia;
 - (b) the most recent common habitual residence of the spouses was in British Columbia;

- (c) a notice of family claim with respect to the spouses has been issued under the Divorce Act (Canada) in British Columbia.
 - (4) Despite subsection (2), a court may decline to make an order under this Part if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.
 - (5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:
 - (a) [Repealed 2014-9-15.]
 - (b) the relative convenience and expense for the spouses and their witnesses;
 - (c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;
 - (d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;
 - (e) the extent to which an order respecting property or debt
 - (i) made in another jurisdiction would be enforceable in British Columbia, and
 - (ii) made in British Columbia would be enforceable in another jurisdiction;
 - (f) the fair and efficient working of the Canadian legal system as a whole;
 - (g) any other circumstances the court considers relevant.
 - (6) A determination of authority under subsection (2) or of whether to decline jurisdiction under subsection (4) is to be made solely by reference to this section.
- [39] Also relevant are the choice of law rules found in ss. 107 and 108 of the FLA. As Justice Hunter observed in *Jiang v. Shi*, 2017 BCCA 276, their relationship to s. 106(5), which requires the court to consider what law applies to determining whether to decline jurisdiction, is somewhat circuitous.
- [40] If s. 106 applies, the court must consider whether s. 108 applies, and if so, how.
- [41] Section 108 contains three choice of law rules. The second and third require the court to consider whether the spouses' first habitual residence was in a jurisdiction where a regime of common property applies. If so, property division must be made based on that regime. If not, the substantive rights of the parties must be decided according to the proper law of the relationship, which is defined in s. 107.
- [42] The rules defining the proper law of the relationship in s. 107 include:
- (a) the internal law of the jurisdiction in which the spouses had their most recent common habitual residence, and

- (c) if the spouses did not have a common habitual residence, the internal law of the jurisdiction in which the spouse making an application for an order under this Part was most recently habitually resident.

[43] Ms. Tang's claim for spousal support is brought pursuant to Part 7 of the FLA and the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). For the purposes of this application, she appears to rely upon the FLA. Unlike Part 5 of the FLA, Part 7 does not contain any provisions dealing with jurisdiction or its exercise. A claim for spousal support, therefore, is subject to s. 11 of the CJPTA which :

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

- (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
- (b) the law to be applied to issues in the proceeding,
- (c) the desirability of avoiding multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and
- (f) the fair and efficient working of the Canadian legal system as a whole.

[44] The factors to be considered pursuant to s. 11(2) are essentially the same as those set out in s. 106(5) of the FLA; however, the CJPTA contains no provision dealing with how to determine the law to be applied. The parties offered no legal submissions on this point apart from Mr. Cheng's initial suggestion that ss. 107 and 108 would also govern the claim for spousal support, which I reject given the silence of Part 7, the language in s. 106(1) and s. 107 of FLA generally, their location in Part 5, and finally s. 12 of CJPTA.

[45] I also note in *D.L. v. M.Y.*, 2019 BCSC 881 Justice Sharma observed that with respect to spousal support, there does not appear to be any issue of applying foreign law (para. 89).

[46] In deciding Ms. Tang's application, I am also bound by *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17. At paras. 108 and 109, the Supreme Court of Canada discussed the burden on the party asking the court to decline to exercise its jurisdiction:

[108] Regarding the burden imposed on a party asking for a stay on the basis of forum non conveniens, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It

was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the CJPTA or any of the statutes based on the CJPTA, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art. 3135 of the Civil Code of Québec, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: "it may exceptionally and on an application by a party, decline jurisdiction".

- [109] The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. Forum non conveniens may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

Position of the Parties

- [47] Pointing to the undisputed evidence of Mr. Lai that the Chinese appeal court will not deal with the non-Chinese assets and Ms. Tang cannot apply for spousal support in China, as well as the trial decision itself, Ms. Tang argues Mr. Cheng has failed to establish what she identifies as a prerequisite or threshold requirement that there is an alternative forum. She argues more specifically that s. 106 and therefore ss. 107 and 108 of the FLA do not apply because Mr. Cheng has not shown that the Chinese court will or could make an order respecting property division regarding the non-Chinese assets or that she can bring a claim for spousal support there.
- [48] Consequently, Ms. Tang suggests it is unnecessary to consider the factors set out in s. 106(5) of the FLA and s. 11 of the CJPTA. In the event the court does not agree, she submits there is a two-stage analysis, s. 106 still does not apply, and determining what law that would apply to the property claim is not subject to ss. 107 and 108.
- [49] Alternatively, Ms. Tang contests Mr. Cheng's assertion that their last common residence was in China and therefore, pursuant to those provisions, Chinese law would apply.

- [50] Continuing to emphasize there is no requirement to consider the factors, Ms. Tang submits that if applied, it is clear Mr. Cheng has not met his burden, indicating her intention is to return to Vancouver to live, although the Chinese litigation and now the absence of income have prevented her from doing so; Mr. Cheng's enormous wealth and current control over all of their assets and income generated by those assets mean that he will not be inconvenienced by the requirement to litigate here; testimony by video will likely be available; there will be no multiplicity of proceedings; and consequently, there is no risk of conflicting decisions.
- [51] Without addressing Ms. Tang's argument about an alternative forum being a threshold requirement, Mr. Cheng submits that China is clearly the more appropriate forum, or alternatively it is premature for this Court to exercise its jurisdiction pending the appeal decision regarding the non-Chinese assets and property division. Absent a successful appeal, however, he does not suggest an alternative plan for the adjudication of the property claim regarding non-Chinese assets (and debt).
- [52] Regarding spousal support, Mr. Cheng argues that just because spousal support may be defined differently in China does not mean it does not exist. Although he bears the burden, he asserts there is no evidence Ms. Tang is not entitled to interim relief, and that property division, which resulted in a sizeable reapportionment of the Chinese assets by the Chinese court, is the primary means of addressing the financial circumstances of parties in divorce proceedings. Suggesting his more specific evidence regarding the parties' common residence at the time of separation and his other evidence about Ms. Tang's infrequent travel to Vancouver since then, should be preferred to her evidence, based on ss. 106 to 108 of the FLA regarding property division, Mr. Cheng also asserts that it is clear Chinese law would apply to the property claim.
- [53] Regarding the other factors listed in s. 106(5) and s. 11, Mr. Cheng submits that convenience and expense for the parties and witnesses clearly favours China, given that both parties and most witnesses reside there, Mr. Cheng does not speak English, the expense of translation, et cetera. He also suggests the court should be skeptical of Ms. Tang's evidence she wishes to and will live here. He further submits, given the complexities regarding his income, it would be difficult for this Court to determine it. With respect to avoiding multiplicity of proceedings and conflicting decisions, Mr. Cheng states Ms. Tang's claims are not separate and distinct from her claims in China. He asserts that while the Chinese decision can be enforced here, the reverse is not true, and the vast majority of the assets are in China. He suggests Ms. Tang is forum shopping given she is not ordinarily resident here, and deciding her claim in this forum, given the tremendous inconvenience, is not consistent with the efficient working of the Canadian legal system.
- [54] In support of his submissions, Mr. Cheng relies on a number of authorities that in my view are aptly distinguished by Ms. Tang's counsel.

Discussion

- [55] Based on the evidence, I accept for the purposes of this application that China cannot or does not offer an alternative forum for the division of the non-Chinese assets which are the subject of Ms. Tang's property claim and Mr. Cheng's counterclaim, or her claim for spousal support in this proceeding. I agree with Ms. Tang that the absence of an alternative forum makes it unnecessary if not nonsensical to consider the factors enumerated in s. 106(5) and s. 11, which clearly presuppose an alternative forum.
- [56] In other words, having failed to demonstrate China provides an alternative forum, it is simply not possible for Mr. Cheng to establish that China is in a better position to dispose of the litigation fairly and more efficiently as discussed in *Van Breda*. It follows that ss. 106 to 108 do not apply to Ms. Tang's property claim.
- [57] Although Mr. Cheng's appeal from the Chinese trial judgment is as of right, the evidence of Mr. Lai satisfies me there is simply no merit in his appeal as it relates to any non-Chinese property. I accept that even in the face of an agreement, the prospect of a Chinese court deciding such a claim is remote. Absent the speculative possibility of a different decision by the Chinese appeal court, it is necessary to litigate Ms. Tang's and Mr. Cheng's competing property claims related to non-Chinese property in this jurisdiction. Similarly, based on Mr. Lai's evidence, I accept that Ms. Tang cannot apply for spousal support in China at this stage. The reality that the appeal decision regarding the division of the Chinese assets will have a bearing on the claims for both property division and final spousal support here, does not undermine this result. There is nothing inconsistent in deciding this Court should not decline to exercise its jurisdiction and also recognizing that a trial or final resolution of the parties' claims should await the outcome of the appeal in China.
- [58] The urgency of this application is driven by Ms. Tang's assertion she has an urgent need for spousal support. Accepting Mr. Lai's evidence that the outstanding appeal prevents the trial judgment from coming into effect, and bearing in mind the legal principles that govern interim applications for spousal support, I see no barrier to an interim application proceeding.
- [59] Finally, in the event I am wrong in my findings and conclusions and the factors enumerated in s. 106(5) and s. 11 must be considered, based on those factors and the interests of the parties and the ends of justice, I would conclude that China is not the more appropriate forum.
- [60] Mr. Cheng has not disputed that pending the appeal, the assets subject to the Chinese judgment remain under his control. Despite the dispute regarding his income, given the magnitude of the assets, I am satisfied he would not be financially inconvenienced by the requirement to litigate in this forum, even with the need for interpretation and translation of what I accept is likely a sizeable document record. Testifying by video may well be available for witnesses, reducing the inconvenience to them. I see no reason to disbelieve Ms. Tang's evidence that she intends and wishes to return to Vancouver. Once the appeal in

China is decided, I expect there will be no other proceedings, the parties having settled the civil proceeding. There is no risk of a conflicting decision. A decision regarding property division made in this forum can be enforced against the Canadian assets for certain. I have received no submissions regarding the Hong Kong assets, and so cannot assess that factor. Certainly, interim spousal support can also be enforced against the Canadian assets. The same is true of final support assuming the non-Chinese assets are not entirely reapportioned to Ms. Tang.

- [61] Not concerned that Ms. Tang is forum shopping, I do not regard proceeding in this forum as contrary to the fair and efficient working of the Canadian legal system as a whole.
- [62] The parties have not suggested what law would apply to the property claim in the event that ss. 106 to 108 do not apply. Assuming those provisions did apply and Mr. Cheng had accurately identified their last common residence as in China, Chinese law would apply to the property claim. This consideration is not a barrier to proceeding in this forum, nor does it change my overall assessment of the interests of the parties and the ends of justice.
- [63] Accordingly, I have determined that this Court should not decline to exercise its jurisdiction over any of the claims in this family law proceeding.
- [64] Turning to the form of order, I note that Rule 18-2 does not contemplate an application by anyone other than the disputing party, and I would invite the submissions of counsel on the correct form of order.
- [65] MR. KANG: My Lady, could you please repeat that.
- [66] THE COURT: Normally these applications are brought by the party that is disputing jurisdiction, and I notice that you sought a declaration in your notice of application. I was not sure if it was the correct form of order.
- [67] MR. KANG: I would propose that in these unique circumstances where the application is brought by us rather than the usual case of the respondent, we can simply come to terms as to how it is drafted. So I would like to listen to Mr. Evans' submissions on this.
- [68] MR. EVANS: I think that's agreeable, Mr. Kang. If you would like to prepare a draft, I would be happy to look at that.
- [69] MR. KANG: I will simply do a declaration, if it is okay with Your Ladyship and with my friend.
- [70] MR. EVANS: Yes. Just so I understand it, it's a declaration that the court is not declining to exercise its jurisdiction, but there is no findings with respect to the law that applies or any further terms that need to be added?
- [71] THE COURT: No. That is right. I am not making a declaration that we have jurisdiction, because that is not in dispute.

[72] MR. EVANS: Yes.

[73] MR. KANG: Yes. So I will do that. I'm not sure if you have given a thought to costs.

[SUBMISSIONS RE COSTS]

[74] THE COURT: I will order costs to Ms. Tang for the application based on the tariff payable forthwith.

[75] MR. EVANS: That's a half day, My Lady?

[76] THE COURT: Yes. The other thing is I thought it might be helpful to give you some direction about the interim spousal support application.

[77] THE COURT: Firstly, Mr. Cheng has not done a Form F8 financial statement, I assume.

[78] MR. KANG: No.

[79] THE COURT: That is necessary, and I also think that Ms. Tang needs to update her's. She has attached her Canadian tax returns. I do not know whether she has filed tax returns in China. She is supposed to report her worldwide income in Canada. I do not know that she has done that. She is now claiming she essentially has no income, but I think there needs to be a more fulsome explanation of her income.

[80] MR. KANG: Understood.

[81] MR. EVANS: My Lady, in terms of a timeline, I might suggest - normally I would say 30 days. There is a little bit of a delay in terms of the time difference and the translations required. Now that spousal support applies, the size of the F8 is likely much larger than if this was just a division of property issue.

[82] MR. EVANS: So I would ask for 45 days. I also understand that there is a finding that there is urgency in this case. Mr. Cheng has indicated in his affidavit a willingness to sell the property in Shanghai. I'm hopeful that we can make that happen and relieve the urgency or the need to make this [indiscernible] now that it has been found to exist. That way, if we have 45 days, we'll get it done, and that gives us enough time to alleviate this finding of need. Well, I shouldn't say a finding of need.

[83] THE COURT: Well, she has asserted there is urgency, and this application proceeded on that basis. It remains open to the judge hearing the interim spousal support application, assuming that we are still under this current regime to decide it is not urgent. Actually, by the time this is heard we may be back to normal operations. But firstly I need to find out how long it would take for Ms. Tang to provide an updated Form F8.

[84] MR. KANG: I'm confident that it would be provided within two weeks or four weeks maximum. Three weeks.

- [85] THE COURT: I direct she is to file and serve an updated Form F8 within 21 days, and Mr. Cheng must file and serve his within 45 days?
- [86] MR. KANG: My Lady, I would humbly suggest that 45 days is a bit too long given the urgency of this, and my friend relies on Mr. Cheng's purported intention to provide some interim relief, maybe by selling some properties. This is not something that we can rely on, and even if he agrees and proceeds with great speed, there is just no telling when we can get actual proceeds. There are many technical difficulties. And he was served with our client's application for materials for the spousal support at least 10 days before he got the jurisdictional challenge materials, so I would submit to you early May. So he's already got, like, 26 days at least, so he doesn't need another 45 days.
- [87] THE COURT: Mr. Evans.
- [88] MR. EVANS: Well, My Lady, 30 days should be enough. I just don't want to be in a situation where we're trying to track down assessments for all of these properties. There's so many.
- [89] MR. EVANS: As I understand, most of the income is generated through the companies by rent, and there is argument that this income should be imputed based on loans that he has taken. His argument, as I understand it, were that those loans be repaid so they are not income. I understand it may be easy for the court to come to a rough estimate, but it's going to be difficult for me to really determine what this should be. Simply put another way, it's one of the more complicated F8s I have ever attempted to draft. So that's my position, My Lady. If it is 30 days, I will make it happen. I would ask for 45. I'll leave it in your hands, My Lady.
- [90] MR. KANG: My Lady, I'll be fine with 30 days.
- [91] THE COURT: I will direct 30 days, but it is on the understanding that Mr. Evans will do his best and it may be shortly after that.
- [92] MR. KANG: I appreciate it, My Lady.
- [93] THE COURT: You then have leave to schedule the actual hearing, but I do not know if you have talked to scheduling about a date or if you have discussed how much time an interim spousal support application would take.
- [94] MR. EVANS: Initially, My Lady, my friend and I were trying to set this down, I believe, for two days in April, but of course that could not happen. Now that we've settled the jurisdiction issue, maybe one day would be appropriate. So I'm hoping we can get a full day.
- [95] THE COURT: I will direct is that you schedule it for one full day as soon as possible, bearing in mind the deadlines for the filing and serving of the Form F8. I am not going to seize myself of it because I may not be around, and I imagine there will be a much more fulsome record with respect to the financial circumstances in any event.

[96] THE COURT: I direct that this be scheduled for a day as soon as possible following the filing of the respondent's Form F8. I will set the deadline for the hearing at July 10th.

[97] THE CLERK: Just to double check, the deadline for the Form F8s for both parties, what is that?

[98] THE COURT: It is 21 days for the claimant, and 30 days for the respondent.

[99] THE COURT: Thank you, counsel.

"Fleming J."

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