

HONG KONG / JUDGMENT

C v. J

COURT

Court of Appeal

DECIDED

15 November 2007

CASE / FILE NUMBER

CACV92/2007

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bjbj cacv 92/2007 in the high court of the hong kong special administrative region court of appeal civil appeal no. 92 of 2007 (on appeal from FCMC NO. 1976 of 1998) BETWEEN C Petitioner Respondent Before: Hon Rogers VP and Le Pichon JA in Court Date of Hearing: 15 November 2007 Date of Judgment: 15 November 2007 J U D G M E N T Hon Rogers VP: This is an appeal from a judgment of Deputy District Judge Kot given on 8 January 2007. The matter before the judge was an application for ancillary relief. The judge held that leave was required by the Applicant, who was the Respondent to the divorce petition, to bring the application, and she refused leave. The brief circumstances are that the parties were married in May

1981. The marriage had had its difficulties and this Court was told this morning by the Respondent, who was the husband, that essentially, there was little communication from 1997 onwards. Whatever else happened, from about 1999, the husband left Hong Kong and went to Germany. He says he was looking after his ill mother who has, unfortunately, died, but so be it. The first question which needs to be decided on this application is whether leave was required to bring the application for ancillary relief. If it was required, the next question is whether leave should have been given. That was a matter of discretion for the judge below. It would be a question as to whether the appropriate circumstances existed where this Court could exercise the discretion in place of the judge on the basis that it had been wrongly exercised. Quite simply, the point that is made is that, under section 25(2) of the Matrimonial Proceedings and Property Ordinance, Cap. 192, it is provided that applications for ancillary relief shall be made in the petition, in the joint application, or in the answer, and that under subsection
- (b) of that provision, applications for ancillary relief which are not so made, or not made until after the expiration of such period following the presentation of a petition making the joint application or filing of the answer as may be prescribed, they shall only be made with leave of the court. Then the rules under the Matrimonial Causes Rules, Cap. 179 come into play. Under Rule 68, it is provided that any application by a petitioner or respondent spouse who files an answer claiming relief can be made for various different types of orders. Under subparagraph

- (2) of that rule, notwithstanding anything in paragraph 1, an application for ancillary relief which should have been made in the petition or answer may be made subsequently, (a) by leave of the court, either by notice in Form 8 or at the trial, or (b) where the parties are agreed upon the terms of the proposed order without leave by notice in Form 8. In my view, it is clear - and indeed, the Respondent husband has today not seriously challenged that - leave is required. This Court's attention was drawn to the case of *Chaterjee v Chaterjee*, [1976] Family Reports 199. Nothing said in that case appears to me to demonstrate that leave is not required. What the case highlights are the various factors which the court might take into account when it considers whether to grant that relief. It has to be said that the judge found as a fact that the Respondent husband knew at the time of the petition and knew, at least by 2002, that a decree of divorce had been granted. Those findings of fact were made after hearing evidence from the parties and the judge had disbelieved the Respondent husband on that. Indeed, some of the things which have been said by the Respondent husband today have led to the conclusion that the judge was clearly right. At one stage, the Respondent husband said that he was expecting a follow-up to be sent to him in Germany, a follow-up, presumably, from the divorce proceedings. Whatever else happened, when the husband did come to Hong Kong in the intervening time before 2005, he went to the extent of instructing solicitors who filed an appearance in the divorce proceedings, after the divorce had been granted, and it is quite clear that they must have known that a decree of divorce had indeed been filed. So events then come to 2005, when the husband filed the present application. As has already been indicated, this Court is in a position where it cannot overrule the judge's exercise of the discretion unless it is satisfied that the judge approached the matter on wrong principles, or was clearly wrong, or failed to take into account important evidence. The main submissions by the husband this morning were that the judge overlooked the contributions which he had made to the business in the course of the marriage. It is said that she failed to take into account his contribution in bringing business to the wife's firm, which was in the garment industry, and failed to take into account the initial contributions which were made and so forth. The husband points to the fact that the business must have been successful because the parties moved from very humble circumstances to living in a house on the Peak. But the question arises as to what the situation was when the marriage came to an end, which I take to be, at the latest, 1999. The judge found as a fact that the husband had transferred all the shares in the business and the company which owned the house on the Peak to the wife's father. That is despite the fact that the husband accused the wife of forging the various documents. The judge examined the accounts of the various companies. It is quite clear in looking at them that, as of 1999, there was a very substantial deficit in the net assets of the companies. That deficit was brought through from 1998 when there was a deficit of nearly \$33 million. It gradually reduced over the years and, by the year 2005, the debts had been paid off and the net assets or liabilities of the companies had been reduced to \$13 million. The judge took all this into account. She took into account the fact that the husband had had ample opportunity in the period from 1999 until 2005 to make any application, but he had not done so. The question then arises, what was behind that? One would not need to look very far other than to

appreciate that there was singularly little point in asking for any contribution from the wife in respect of the assets of the business, including the house, if all that time there was negative equity. As the judge found, this application was made after the wife had worked hard for some seven years in the business and had paid off the debt. It has to be said that, over the period of years, one of the matters which is particularly apparent is that, from 1999, the husband appears to have been far more interested in what he was doing in Germany. In 1999, there appears to have been assets in the form of a house which was in the name of his mother, and in the form of what appears to have been an expensive car. He does not appear to have contributed, certainly after that time, to any of the expenses of his children, of his two daughters, and he appears to have looked after himself and himself only. It is only now that he comes back, pleading poverty, and seeking to gain some contribution from the assets which he can now see that his wife has built up. In my view, the judge approached the matter on an entirely correct basis. She took into account all the relevant facts. The matters which the husband has sought to raise today are irrelevant in the most part. The situation which the judge saw in 1999 and thereafter appears to be the correct situation to be considered and I see no ground whatever for disturbing the exercise of the discretion in refusing leave to bring these proceedings. In those circumstances, I can see no alternative but to dismiss this appeal. Hon Le Pichon JA: I agree. (Anthony Rogers) Vice-President (Doreen Le Pichon) Justice of Appeal Ms Frances Irving, instructed by Messrs Lee Chan Cheng, for the Petitioner/Respondent The Respondent/Appellant, in person PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk 2QX[2QX[2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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