

HONG KONG / JUDGMENT

C v. K

COURT

Court of Appeal

DECIDED

14 March 2007

CASE / FILE NUMBER

CACV187/2006

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bjbj CACV 187/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 187 OF 2006 (ON APPEAL FROM FCMC NO. 6299 OF 2000)

BETWEEN Petitioner Respondent

Before: Hon Tang VP, Cheung JA and Chu J in Court Dates of Hearing: 8 March 2007 Date of Judgment: 14 March 2007

J U D G M E N T

Hon Tang VP (giving the judgment of the Court): The petitioner (the wife) is a qualified solicitor who now lives in Canada. The petitioner and the respondent (the husband) have a son and a daughter, born in 1988 and 1991 respectively, who are receiving education in Canada. The petitioner works as a consultant for a business centre and earns about CAD\$40,000 a year. Under the maintenance order which was made on 27 November 2000 upon the parties divorce, the respondent was ordered by consent to pay periodical payments for the maintenance of the children at \$5,000 a child per month until the child's 18th birthday or cessation of full-time education whichever is the later. In the case of the petitioner, it was ordered by consent that she should be paid a nominal payment of \$1 per annum. It was further ordered by consent that the petitioner should transfer her interest as joint tenant in the property known as Flat H, 3/F, Block 3, City Garden, Hong Kong (the City Garden Property), to the respondent, for his own use and benefit absolutely, and that the respondent should do likewise, in relation to the property at Felicity Garden, Shau Kei Wan (the Felicity Garden Property). The Felicity Garden Property was purchased in 1992 for \$2.72 million, and used as the matrimonial home. At the time of the parties marriage, the respondent was an insurance agent with AIA, the petitioner was then a secondary

school student. Shortly after the marriage, the respondent was promoted to be a team leader as a result of which in addition to the usual commissions earned from business originated by himself, he was also entitled to overriding commissions on each new insurance policy sold by the agents working under him. For this reason, the petitioner became a team member by opening an agent account with AIA, and that the respondent put his new business under her account so as to earn additional commissions. That was a practice which was said to be quite common for married couples in insurance industry at the time. That is so, notwithstanding that the petitioner was really only an agent in name and was rarely involved in the business. In 1994, the petitioner enrolled into the University of Hong Kong to study law on a full-time basis. She became a trainee solicitor in about 1999. In about June 1997, the parties decided that they needed a bigger home and therefore put their Felicity Garden Property for sale and agreed to buy the City Garden Property for \$6.75 million. The purchase of the City Garden Property was to be completed three months later in September 1997. The parties hoped that they could sell the Felicity Garden Property in the meantime and use the proceeds of sale to fund the purchase of the City Garden Property. By that time the original mortgage on the Felicity Garden Property had been paid off. Unfortunately the property market began to fall and the parties were still unable to sell their Felicity Garden Property by September 1997. They then decided to mortgage it to Bank of East Asia for a loan of \$3.99 million. The respondent and the petitioner were joint mortgagors to the Bank of East Asia. In addition they borrowed the balance of the purchase price by a mortgage on the City Garden Property to AIA at a low interest staff rate. The monthly payment to AIA was \$31,500. The parties started to live apart in 1999, when the petitioner discovered that the respondent was having an affair with one of his agents called Sandy, which eventually led to the divorce proceedings in July 2000. The respondent married Sandy on 18 September 2005. However, the petitioner found herself unable to keep up with the mortgage payments on the Felicity Garden Property and the petitioner approached the Bank of East Asia in late August 2002 with the proposal to sell the property, which she hoped, for about \$3 million, and to pay the balance of the mortgage by instalments. That proposal, however, was not accepted by the bank. Eventually, the property was sold after the outbreak of SARS in August 2003 at the much lower price of \$1.58 million. The petitioner blamed the respondent for his initial refusal to cooperate with the bank, which led to the late sale of this property. The respondent in turn blamed the petitioner for her delay in respect of the City Garden Property. In any event, because the respondent was jointly liable under the mortgage, as the judge has noted, the respondent eventually ended up being solely responsible for the repayment to the Bank of East Asia. Prior to the Settlement Agreement with the Bank of East Asia referred to in para. REF_Ref161135573 \r \h * MERGEFORMAT below the respondent was paying \$10,000 per month to the bank in respect of the Felicity Garden Property mortgage. In February 2004, the petitioner left Hong Kong with the children for Canada. The present proceedings were commenced by the petitioner on 21 March 2005. It is the petitioner's claim that the regular expenditure of the family was more than CAD\$8,000 per month. The son was then 17 and the daughter about 15, and that the maintenance for the children were wholly inadequate. According to the petitioner, the respondent is an experienced insurance manager with almost 30 years of working experience, and was earning more than \$1 million a year, and was therefore able to increase his maintenance for the children without any difficulty. The

petitioner wanted the monthly maintenance for the children to be increased to \$17,563 per months for each child, making a total of \$35,126. And that the respondent's income be attached because of the respondent's frequent defaults in the past. Indeed, at the time of her application on 21 March 2005, he was in arrears of maintenance for three months. After a four-day hearing followed by a one-day submission, District Judge Bruno Chan varied the maintenance order in favour of the children by raising it to \$10,000 a month from the original \$5,000. However, he refused the petitioner's application for the attachment of the income of the petitioner. The petitioner was dissatisfied with the decision, and appealed to us. The parties were unrepresented before the judge. On appeal, however, the petitioner was represented until just a few days before the hearing of the appeal. The respondent was represented by counsel before us. The judge was of the view that the respondent's income was about \$84,000 a month or \$1 million a year. That is supported by the documents produced by the respondent. The petitioner's case, however, is that the respondent had put much of his new business into Sandy's account in order to earn additional commissions. The judge, in his careful judgment, came to the conclusion, that he was not satisfied that that was so. The judge was of the view that the respondent's monthly income was about \$84,000, and that his expenditure at the time exceeded his income substantially. However, at that time such expenditure included, for example, monthly payment of \$31,500 to AIA in respect of the City Garden Property and \$10,000 a month to Bank of East Asia. It is clear from the evidence which was accepted by the judge that much of the difficulty of the respondent stemmed from the petitioner's default on the Felicity Garden Property mortgage, as a result of which the Bank of East Asia had petitioned for the bankruptcy of the respondent. It is probable that had the petitioner not left Hong Kong, there would have been a petition of bankruptcy against her as well. The respondent succeeded in avoiding bankruptcy by entering into the Settlement Agreement dated 16 December 2005 with the Bank of East Asia, under which, the City Garden Property was to be sold and the net proceeds of sale paid to Bank of East Asia. Thereafter, the deficit should be paid by the respondent to the Bank of East Asia at \$25,000 per month. We were told by Mr Jason Wong, counsel for the respondent, that even after the sale of the City Garden Property, the debt owing to the Bank of East Asia was about \$3,000,000 and that interest at judgment rate was payable on that sum. One of the petitioner's complaints is that the respondent should not have agreed to pay the bank as much as \$25,000 per month, and that he only did so in order to reduce his ability to maintain his children. We see no reason to believe that the Settlement Agreement was not made at arms length. Nor do we accept the petitioner's submission that the respondent did not have to pay as much as \$25,000 per month. As we have noted, even after the sale of City Garden Property, the remaining indebtedness to the Bank of East Asia was about \$3 million. That means it would take 10 years or more, even at \$25,000 per month, for the entire indebtedness to be paid off. We see no reason why the Bank of East Asia should have agreed to a lesser payment. It is true as the petitioner has submitted, that upon sale of the City Garden Property, the respondent would no longer be liable to make the monthly payment to AIA in respect of the mortgage over the City Garden. But even so, having regard to the respondent's other expenditure, we do not believe that the judge could be faulted for making the order that he did. Nor are we entitled to interfere with the judge's decision unless he was plainly wrong. The crux of the petitioner's case is based on her allegation that Sandy's income or part of

it properly belonged to his respondent. The evidence shows that Sandy has an income in excess of \$1 million a year. The petitioner claimed that is because her income was derived from business originated by the respondent but only put into her account in order to take advantage of the dual commission system. Grounds 2 to 8 of the grounds of appeal are concerned with the so-called diversion of business to Sandy. The judge however held he was unable so to conclude on the evidence. We see no reason why we should differ from the judge. The petitioner's case is circumstantial. Her strongest argument is that that was what the respondent did during their marriage. But, then, as the judge noted, the petitioner was never truly an agent, whereas on the evidence, it is clear that Sandy was an agent in her own right. She attempted to demonstrate to us by reference to exhibit R4 that the respondent must have transferred at least some of his business to Sandy. However, we were told that the respondent was not cross-examined to that effect. As we explained in para. REF _Ref161135491 \r \h * MERGEFORMAT in this judgment we do not believe the petitioner was rushed by the judge and that she had no opportunity to do so. In any event, we are unable to conclude on the basis of Exhibit R4, which is a summary of the respondent's income for the period ended November 2005 that the petitioner's allegation is made out. The petitioner further submitted that the respondent had failed to make discovery in relation to the income or account of Sandy. But, if further documents were needed, whether by way of discovery against the respondent or by subpoena, they should have been sought at the hearing below. The petitioner complained that she had been misled by the judge into not seeking discovery. She claimed she thought that the judge would have ordered production. But the passages in the transcript relied on by the petitioner, T-06/9/H or T-06/36F to J do not bear that out. Indeed, from our reading of the transcript and on the basis of the petitioner's conduct of the appeal as well as her written reply to the respondent's submission, we have no doubt that she was fully aware of what was going on and there is no question of her having been misled by the judge. Nor do we believe that the petitioner had been rushed by the judge. The transcript of the proceedings is about 300 pages long. They showed that the petitioner had ample opportunity to present her case, and to put questions to the respondent. Anyway, the income of Sandy was known, what was not known is whether customers of the respondent had been transferred to her. The petitioner submitted that the respondent has admitted that he had indeed transferred business into the account of Sandy. The evidence does not support that. Indeed the judge recorded in para. 36 of his judgment that:

36. The Husband of course denies having put any of his clients in Sandy's account, This is what the judge said in his judgment at page 37:
37. I have to admit that I find the Wife's evidence that the Husband might have diverted some of his clients or income into Sandy's account at best circumstantial and speculative, and in the absence of any direct or documentary evidence, I am unable to conclude in her favour. We see no reason to disagree with the judge, much less than he was plainly wrong. The judge then went on to say: 37. Even if I were to draw any adverse inference against the Husband on this issue, there is no evidence at all to indicate exactly how much of his income has actually gone into Sandy's account, or how much of Sandy's income should form part of the Husband's, as her situation is different from that of the Wife during the marriage since she does work

as an insurance agent for AIA and would have formed her own clientele, whereas the Wife never actually worked as an agent during the marriage and hence all the commissions paid into her account could be said to have come from the Husband. It is therefore not possible, in the absence of any further evidence, to say how much of the \$1 million annual income that Sandy earned last year actually came from the Husband's clients, if any, and hence should be treated as part of his income. This latter passage became the subject of severe criticism by the petitioner. Even if the petitioner's criticism of this part of the judgment is correct, it does not matter. We are of the view that the judge was right in his earlier conclusion, that the petitioner has failed to prove that the respondent had diverted his income to Sandy. As for ground 1, apart from the question of whether and if so how much of Sandy's income should be regarded as the respondent's income which we have dealt with above, the petitioner submitted that the judge had failed to take into account Sandy's contribution to the household expenditure, or that since Sandy and the respondent were working together, the respondent should not have to incur travelling expenses of \$2,000 a month. As for the criticism of the expenditure of the respondent, for example, the household expenses at \$2,500, transport at \$2,000, business entertainment at \$5,000, rent of \$7,500, we do not believe that these figures are so improbable that the judge should have rejected them. Nor that he should hold that Sandy would have contributed substantially to them. So far as the insurance premiums of \$11,000 per month is concerned, the judge dealt with that in para. 49 of his judgment. It is said that the respondent's major expenditure of \$31,500 per month, in repayment of mortgage loan to AIA ceased upon the sale of the property. That is of course correct. But the respondent would have to pay the Bank of East Asia \$25,000 a month instead of \$10,000 a month. The judge has dealt with the many points raised by the petitioner on the extent and nature of the respondent's expenditure in para. 47 to 49 of his judgment, especially with regard to the sharing of expenditure with Sandy. We see no reason to disagree with the judge's conclusion in para. 49 that he should be able to cut down on some of his expenditure, and at an average income of \$84,000 per month, he should be able to increase his maintenance for his children, albeit not at the rate sought by the Wife. He then decided that the children's maintenance should be adjusted to \$10,000 each per month. So far as ground 12 is concerned, it is said that the respondent has failed to have regard to all the circumstances of the case as required by section 11(7) of the Matrimonial Proceedings and Property Ordinance, Cap.

192. In particular, it is said that the judge has overlooked or given insufficient consideration to the needs of the children. We do not believe that the criticism is justified. In what must be regarded as a careful and sympathetic judgment, it is clear the judge has had regard to all the circumstances of the case. As for the expenditure of the children, it cannot be said that a child in Canada who enjoys a monthly income of or equivalent to HK\$10,000 could be said to be, as described by the petitioner, in difficult and desperate situations. We note from para. 13 of the petitioner's 1st affidavit that the son has a monthly expenditure of \$2,707 and the daughter \$2,697, which included a one-third share in the rent of \$400 and electricity at \$20, as well as clothing and shoes at \$300 per month for the son and \$400 per month for the

daughter, and expensive recreational lessons and private tuition. The judge was aware of all that. No doubt the judge approached the matter with common sense. We cannot agree that the judge could be said to be so neglectful of the needs of the children, that we can say he was wrong in his decision. As the petitioner accepts, the welfare of the children was to be given first consideration, but was not the overriding consideration. The lifestyle which the children can enjoy must depend to an extent on the means of the parents. Grounds 10 and 13 deal with the attachment order. The judge in the exercise of his discretion refused an attachment order. In para. 54 of his judgment, he said: 54. I agree that the Husband had been in defaults in the past, all of which he has subsequently made good, but I am prepared to accept his explanation that it was partly caused by the financial problems in relation to the Filicity Garden Property, and on his assurance that it would not happen again, knowing that the Wife can bring the application should he default again when the Court may not be as generous next time, and therefore will not make the attachment order against him on this occasion. The approach of the judge cannot be faulted. We endorse the judge's observation that should the respondent default again the court may not be as generous. For the above reasons, the appeal is dismissed. Since the appeal is about the maintenance of the children, in all the circumstances of this case, we are of the opinion that, so far, the conduct of the petitioner has not been such as to show that she was more interested in trying to harass the respondent than to assist the children, so the order on the costs of the appeal is that each party pays its own costs. (Robert Tang) Vice-President (Peter Cheung) Justice of Appeal (Carlye Chu) Judge of the Court of First Instance The Petitioner, in person, present. Mr Jason Wong, instructed by Messrs Jimmie K S Wong & Partners, for the Respondent. 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 1udk 1udk Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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