

HONG KONG / JUDGMENT

C v. T

COURT

Family Court

DECIDED

22 September 2017

CASE / FILE NUMBER

FCMC9144/2015

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FCMC 9144/2015

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NUMBER 9144 OF 2015

BETWEEN

C

Petitioner

and

T

Respondent

Coram : Deputy District Judge D. David Cheung in Chambers (not open to public)

Date of hearing : 14th September 2017

Date of handing down decision : 22nd September 2017

DECISION

(Prohibition Order)

Introduction

On 7th September 2017, the Petitioner (hereinafter called “the wife”) pursuant to Order 44A Rule 2 of the Rules of the High Court Cap.4A made an ex parte application to the Family Court for an order that the Respondent (hereinafter called “the husband”) be prohibited from removing from the jurisdiction of Hong Kong subject to conditions as the Court thinks fit (hereinafter called “the said application”).

In support of the said application, the wife had filed her 6th Affirmation on 8th September 2017 (hereinafter called “the 6th affirmation”). The said application was refused on 13th September 2017.

On 13th September 2017, despite the said application had been refused, the wife’s solicitors wrote to this Court to request to fix an urgent hearing so that they can address to the Court further if there were any concerns from this Court in granting a Prohibition Order.

As a result, a hearing was fixed on 14th September 2017 for the wife’s solicitors to address some of the issues raised by this Court. One of the issues raised by this Court at the hearing arose from the contents of the 6th Affirmation of the wife, and the issue calls for my concern in the said application was whether the husband was domiciled in Hong Kong. If he was not domiciled in Hong Kong on the date of the Divorce Petition, this Court simply has no jurisdiction in these proceedings.

Background

On 17th July 2015, the Petition (based on Behaviour) (hereinafter called “the Petition”) in the present proceedings was issued. In the Petition, the wife relied on the fact that the husband is domiciled in Hong Kong.

In the Petition, the wife had stated that the husband had one address in Hong Kong and one address in China. The wife’s solicitors had sent the Petition together with all the other relevant documents to the husband by post to the aforesaid Hong Kong and China addresses.

It was stated in the wife’s affirmation dated 4th September 2015 that on 19th August 2015 the husband told her that he had not received the Petition and that the husband used to stay in the office in China.

It was further stated in the said affirmation that messages were sent to the husband to enquire whether he had received the Petition and the other relevant documents and that the husband had replied that the same were received by him in Hong Kong on 26th August 2015.

It was further stated in the wife’s affirmation dated 5th January 2016 that she was informed by her solicitors that the husband sent a letter to the Family Court acknowledged that he had received the Petition and other documents.

The letter of the husband dated 20th September 2015 (hereinafter called “the Answer”) was also confirmed by the husband to be treated as Answer in the present proceedings in a subsequent letter received by this Court on 31st December 2015.

On 4th August 2016, upon the application made by the wife, the Court had ordered that the service was deemed to have been duly effected. Throughout the proceedings and up to the present, the husband had never filed any Form 4 save and except of the filing of the Answer. In the Answer, the husband had made it clear that he intended to challenge the jurisdiction.

On 20th July 2016, the wife also made an ex parte application to the Family Court for injunctive relief pursuant to Section 17(1)(a) of the Matrimonial Proceeding and Property Ordinance (Cap.192)(hereinafter called “the MPPO”). In support of this application, the wife had filed her affirmation dated 19th July 2016 (hereinafter called “the affirmation for injunction”).

After hearing the said application, I granted an injunction order (hereinafter called “the injunction order”) against the husband from disposing of his assets up to the value of HK\$31,454,611.71 and also included other landed properties in China and Hong Kong and 2 bank accounts in Hong Kong and adjourned the matter to a return date on 3rd August 2016 for inter parte hearing.

In the affirmation for injunction, the wife stated the background of the Family. She stated that she was born in the PRC in 1968. However, she acquired Australian citizenship in 2008 and then she lost her PRC nationality permanently, and she did not have the PRC household registration.

She also stated that the husband was also born in the PRC in 1962. He came to Hong Kong in around 1989 and acquired his Hong Kong permanent resident status after living here for 7 years, and the husband also lost his PRC nationality permanently ever since. Nor did he have the PRC household registration, and the husband was residing in Guangzhou, on the strength of a home return permit.

She further stated that they got married in Hong Kong on 10th September 2011. Since then, they had basically been residing in the PRC for convenience as the husband was carrying on his business in Guangzhou, and she had been cohabiting with him in Guangzhou until she left the former matrimonial home on 30th June 2015 after she had found that the husband had extra-martial affairs.

She stressed that despite the fact that the husband had lived in Guangzhou, the husband had never sought to regain his PRC nationality or household registration, and that he still retained his Hong Kong permanent residence status and enjoyed the social benefits in Hong Kong. The husband also regularly came to Hong Kong every 3 months to receive out-patient treatments in public hospital for his diabetes.

The husband also owns a landed property in Hong Kong and worth about HK\$4,000,000, and the husband also has 2 bank accounts in Hong Kong which she believed that there was a balance of about HK\$4,000,000.

The wife estimated that value of the husband's assets in China is around HK\$56,000,000.

In the 6th affirmation, in addition to what she had stated in the affirmation for injunction, she stated that the husband came to Hong Kong in around 1989 and acquired his Hong Kong resident status after living in Hong Kong for 7 years. After he acquired the Hong Kong permanent resident status in 1996, he has been living in Guangzhou and had opened a record company.

She further stated that they met on the internet in January 2011 and upon the request of the husband, she later quitted her job in Australia and relocated to Guangzhou to live with the husband since June 2011. On 10th September 2011, they got married in Hong Kong and since then, they had been residing in Guangzhou as the husband was operating his record company business.

She left the former matrimonial home on 30th June 2015 after she found out that the husband had extra-martial affairs and she then moved to Shanghai. She also stressed that despite the fact that the husband had been living in Guangzhou, he still retained his Hong Kong permanent residence status and still enjoyed the social benefits in Hong Kong. He came to Hong Kong every three months to receive out-patient treatments for his diabetes.

At paragraph 31 of the 6th affirmation, she stated that she understood that the husband will come to Hong Kong on 14th September 2017 for the out-patient treatment for his diabetes, and every time he comes to Hong Kong, he will only stay in Hong Kong for a couple of hours and then goes back to Guangzhou on the same day and she believed that after this trip to Hong Kong in September 2017, he will not come to Hong Kong until three months later when he needs to receive the out-patient treatments again.

At paragraph 37 of the 6th affirmation, she stated that the husband has been living in Guangzhou and running a record company since 1996. As far as she understood, all his family (including his son from his previous marriage, two illegitimate children, and his current girlfriend) and friends are in the PRC. His home and roots are in Guangzhou. He came to Hong Kong every three months only for the out-patient treatments for his diabetes. Given his strong financial position, instead of coming to Hong Kong every 3 months, he is financially capable of paying his medical treatment in the PRC as well. He had 20 landed properties in the PRC which are worth HK\$56 million, and he only has assets worth about few million including a landed property in Hong Kong.

It was submitted that Order 44A derives its force from s 21B of High Court Ordinance (hereinafter called "HCO"), and the duplicate section of s 21B of HCO can be found in s 52E of District Court Ordinance.

It was further submitted by the wife's solicitors in their letter dated 14th September 2017 that the wife had satisfied the requirements under Order 44A/2/4, therefore the Prohibition Order should be granted.

Applicable legal principles

The said application is a pre-judgment application for a Prohibition Order granted against the husband, and the Court shall not make an order unless it is satisfied that there is probable cause for believing that :-

there is a good cause of action;

the person against whom the order is sought :-

incurred the alleged liability, which is the subject of the claim, in Hong Kong while he was present in Hong Kong; or

carries on business in Hong Kong; or

is ordinarily resident in Hong Kong;

that person is about to leave Hong Kong; and

by reason of paragraph (c), any judgment that may be given against that person is likely to be obstructed or delayed.

Discussion

It was submitted that the current divorce proceedings is the good cause of action. To satisfy this court that there is probable cause for believing that there is a good cause of action, my concern is that based on what the wife had stated in her various affirmations, is she able to satisfy the Court that the husband is domiciled in Hong Kong so that the Court has jurisdiction over these proceedings.

In the 6th affirmation, the additional facts revealed by the wife raised my concern of whether the husband was domiciled in Hong Kong as at the date of the Petition i.e. 17th July 2015.

Section 3 Matrimonial Causes Ordinance, Cap 179 ("MCO") provides that the divorce jurisdiction is based on the following grounds:

"(a)

Either of the parties to the marriage was domiciled in Hong Kong at the date of the petition or application;

(b)

Either of the parties to the marriage was habitually resident in Hong Kong throughout the period of three years immediately preceding the date of the petition or application; or

(c)

Either of the parties to the marriage had a substantial connection with Hong Kong at the date of the petition or application." (my emphasis)

The statutory provisions on domicile are contained in the Domicile Ordinance, Cap 596 ("DO"). Section 3 provides that:

“(1)

Every individual has a domicile.

(2)

No individual, has at the same time and for the same purpose, more than one domicile.

(3)

Where the domicile of an individual is in issue before any court in Hong Kong, that court shall determine the issue in accordance with the law of Hong Kong.”

Section 12 states that the standard of proof of any fact which needs to be proved is a balance of probabilities.

In *Re Ip Pui Man Nina* [2011] 3 HKLRD 299, Au J cited the judgment of Deputy Judge L. Chan (as he then was) in *Re Ku Chu Keung* (a debtor) [2007] 2 HKLRD 292 (English translation version unreported, HCB 3394/2005, 12 June 2006) and succinctly summarised the legal principles on domicile at para 10 as follows:

“(1)

‘Domicile’ is a legal concept distinct from ‘permanent home’. The requirements of domicile go beyond those of permanent home. A person who desires to acquire a domicile in a country must intend to reside in it permanently or indefinitely (para 24).

(2)

An independent person can acquire a domicile of a place by, and only by, residing there with the intention to reside there permanently or indefinitely (para 29).

(3)

In determining whether a person has the intention to reside permanently or indefinitely in a country, the court must have regard to the motive for which he has taken up residence there. To acquire a domicile in a country, a person must freely choose to reside there and must not reside there because he is prescribed or dictated by external factors such as the duties of office, the demands of creditors or the need to seek medical treatment. If a person has a special purpose for going to and staying in a country and he will leave that country once the purpose is achieved, then he lacks the intention to stay in that country as required by law and hence cannot acquire a domicile in that country (para 33).

(4)

The existing domicile of a person is deemed to continue until it is proved that he has acquired a new domicile; and he who asserts a change of domicile bears the burden of proving the truth of the assertion (para 37).

(5)

An abandonment or change of domicile is a very serious issue and satisfactory evidence is needed to prove an intention to change a domicile (para 40, citing the House of Lords decision in *Marchioness of Huntly and Anor v. Gaskell and Ors* [1906] AC 56, at 66-67).” (my emphasis)

Although *Re Ip Pui Man Nina* (supra) is a case on bankruptcy, I beg to say that his Lordship’s above summary of the legal principles should have a general application to the family law.

As to an individual’s intention whether to make a home in a particular place, *Chu DJ* (as she then was) has conveniently set out a list of factors in her judgment of *Y v W*, FCMC 1847/2011. The list was approved by the Court of Appeal in *W v C* (supra). They are:

“(i)

Length of residence;

(ii)

Condition of residence: Purchased property? Leased property? Furnished lodgings? Hotels?

(iii)

Marriage with a local partner;

(iv)

Whereabouts of the family;

(v)

Business interest;

(vi)

Whereabouts of personal belongings;

(vii)

Whereabouts of the person’s property and investments;

(viii)

The fact of naturalisation;

(ix)

Decision made as to the nationality of the children;

(x)

Education of the children;

(xi)

Memberships of clubs or religious associations;

(xii)

Place of work;

(xiii)

Relation between a man and his family.”

In the wife’s solicitors’ submission, it was submitted that when the husband moved to Hong Kong in 1989, he made Hong Kong his domicile. He abandoned his domicile in the PRC by abandoning his PRC citizenship and becoming naturalised in Hong Kong, acquiring permanent residency here and obtaining a HKID card and a HKSAR passport, and the husband’s only status in the PRC is his permission to enter the PRC by virtue of his HKSAR Re-entry Permit. The husband has one child from a previous marriage and a child born out of wedlock, both of whom are Hong Kong permanent residents with HKID cards.

It was submitted that the husband has taken up residence in the PRC, however, the residence is not of a permanent nature. The husband runs a record company in Guangzhou, and it was submitted that this is the “special purpose” of the husband’s residence in the PRC and did not mean that he had changed his domicile to the PRC.

My view is that the following facts show that the husband is domicile in the PRC. The husband has been living in Guangzhou and running a record company since 1996 and the length of residence in Guangzhou is a continuous residence of 21 years and there is no evidence suggesting that he is going to reside in Hong Kong and close his company in the near future.

On the contrary, the reason given by the wife as to why the husband comes to Hong Kong is just to enjoy the out-patient treatments for his diabetes every 3 months, and this is the only purpose he comes to Hong Kong. Each time he visits Hong Kong, he will only stay for a few hours and once the purpose is achieved, he will leave Hong Kong immediately. The period of his stay is extremely short, and serve no other purpose but for the medical treatment which can be dispensed with.

All the husband’s family members (including his son from his previous marriage, two illegitimate children, and his current girlfriend) and friends are in the PRC. His family tie is not in Hong Kong whereas he has a very strong family tie in the PRC all along. The former matrimonial home of the wife and the husband is also in the PRC.

Most of his investment is in the PRC. The wife knew that the husband had 20 landed properties in the PRC which are worth about HK\$56 million, and he has his own record company in the PRC. The wife is not able to tell how much cash he has in the PRC.

The size and the value of the assets of the husband in the PRC is much more substantial than those in Hong Kong where he only has a landed property and a few million dollars in the bank accounts.

The wife said that the husband's domicile is in Hong Kong mainly because:

He holds a Hong Kong identity card and passport;

He had abandoned his PRC citizenship;

He had not sought to become re-naturalised in the PRC;

PRC does not recognise dual nationality.

Although the husband holds a Hong Kong identity card and passport, they are one of the factors to be considered. My view is that a Hong Kong identity card only gives the husband a right of abode and the passport is only a kind of a travel document. Without more, it does not mean that he was domiciled in Hong Kong as at the date of the Petition.

The fact that he had not sought to become re-naturalised in the PRC is another factor to be considered but not a conclusive factor.

In fact, the affirmation evidence shows that the husband and the wife have never lived in Hong Kong, though the husband may have visited Hong Kong from time to time for specific purpose, i.e. for medical treatment.

I am of the view that Guangzhou has been the husband primary living place since 1996, and my view is that paragraph 37 of the 6th affirmation does not sit well together with the wife's allegation on the husband's domicile in Hong Kong. It is the wife's burden to prove the correctness of the grounds relied upon to support the Petition.

It was also submitted that the husband had not challenged the jurisdiction and had not made any application in that regard, and that the husband had submitted to the jurisdiction of the Hong Kong Court by writing letters to the Judge to excuse his absence of the hearing, by way of letters to Court dated 31st December 2014, 15th April 2016, 12th July 2016 and 3rd June 2017.

I am of the view that if the wife is not able to satisfy the Court that the husband was domiciled in Hong Kong as at the date of the Petition, this Court simply has no jurisdiction in these proceedings. Under those circumstances, there would not be any issue of whether the husband had submitted to the jurisdiction of the Hong Kong Court.

By reason of the aforesaid, I am not satisfied that there is probable cause for believing that there is a good cause of action after considering the combined effect of all the above factors to determine whether the husband was domiciled in Hong Kong as at the date of the Petition.

Nevertheless, even if I am wrong in finding the above, the wife still needs to establish that the husband incurred the alleged liability, which is the subject of the claim, in Hong Kong while he was present in Hong Kong; or carries on business in Hong Kong; or is ordinarily resident in Hong Kong.

It was submitted that given the current divorce proceedings and the fact that the husband has the majority of the family assets in his hands, he has incurred a liability when he was present in Hong Kong when the wife filed the Petition dated 15th July 2015 and filed the Notice of Application for Ancillary Relief on 11th December 2015. I disagree.

The requirement of either carries on business in Hong Kong or is ordinarily resident in Hong Kong was not relied on by the wife and in any event it cannot be established based on the information provided by the wife.

The wife's solicitors submitted that because the husband has the majority of the family assets in his hands and he holds the HKSAR passport and Hong Kong Permanent ID card, the husband therefore has incurred a liability when he was present in Hong Kong. This argument must fail as at the date of the Petition or the Notice of Application for Ancillary Relief, there is no evidence suggesting that the husband was present in Hong Kong.

On the contrary, the circumstance showed that it is more likely than not that the husband was in Guangzhou all along. The fact that he holds the HKSAR passport and Hong Kong Permanent ID card is quite different from the requirement of his presence in Hong Kong and surely it is not sufficient to satisfy the requirement of incurring the alleged liability while he was present in Hong Kong.

My view is that the husband incurred the alleged liability when the Petition was filed because the wife had prayed for ancillary relief in the Petition, and even taking the date for the Notice of Application for Ancillary Relief on 11th December 2015 as suggested, I am still not satisfied that there is probable cause for believing that the person against whom the order is sought i.e. the husband incurred the alleged liability while he was present in Hong Kong.

Accordingly, I will make the following order:

The Ex parte application filed on 6th September 2017 be dismissed;

There be no order as to costs.

David C. W. Cheung

Deputy District Judge

Representation:

Ms. P Liu of Messrs. Haldanes for the Petitioner

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